

TITLE: FEDERAL REGISTER.

REEL NO: 9 of 9

VOLUME: 53

Issues: 248-251

Pages: 52,111-53,376

DATE: DECEMBER 27 - DECEMBER 30, 1988

PUBLICATION NO: 2575

NOTES: Includes:

OCTOBER-DECEMBER 1988 LSA

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12-27-88  
Vol. 53 No. 248

Tuesday  
December 27, 1988

# federal register

United States  
Government  
Printing Office  
SUPERINTENDENT  
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SECOND CLASS NEWSPAPER

Postage and Fees Paid  
U.S. Government Printing Office  
(ISSN 0097-6326)

12-27-88  
Vol. 53 No. 248  
Pages 52111-52396

# federal register

Tuesday  
December 27, 1988

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- FOR:** Any person who uses the Federal Register and Code of Federal Regulations.
- WHO:** The Office of the Federal Register.
- WHAT:** Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
  2. The relationship between the Federal Register and Code of Federal Regulations.
  3. The important elements of typical Federal Register documents.
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- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

#### WASHINGTON, DC

**WHEN:** January 28, at 9:00 a.m.  
**WHERE:** Office of the Federal Register,  
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**RESERVATIONS:** 202-523-5240

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**WHERE:** Room 8544,  
 Federal Building,  
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**RESERVATIONS:** Call the Federal Information Center.  
 Los Angeles 213-894-3800

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# Rules and Regulations

Federal Register

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Part 303

**Applications, Requests, Submittals, Delegations of Authority, and Notices of Acquisition of Control; Procedures Regarding Publication of Notices Filed Under the Change in Bank Control Act**

**AGENCY:** Federal Deposit Insurance Corporation ("FDIC").

**ACTION:** Final rule.

**SUMMARY:** After publishing a proposed rule, the FDIC is amending Part 303 of Title 12, Code of Federal Regulations ("CFR"), primarily to implement certain amendments to the Change in Bank Control Act ("CBCA") made by section 1360 of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570. Under the rule, the FDIC may waive the newspaper publication or comment solicitation requirements of 12 CFR 303.4(b)(2)(ii) or may act on a proposed change in control prior to the expiration of the public comment period only if the FDIC makes a written finding that newspaper publication or comment solicitation would seriously threaten the safety or soundness of the bank to be acquired. In other circumstances, the FDIC may, for good cause, shorten the public comment period to a period of not less than ten days. The rule also provides for publication and solicitation of comment in situations in which notice has not been filed pursuant to the CBCA.

**EFFECTIVE DATE:** December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Katharine H. Haygood, Senior Attorney, (202) 898-3732, Claude A. Rollin, Attorney, (202) 898-3985, Legal Division; or Karl Krichbaum, Section Chief, Applications Section, (202) 898-6758, Division of Bank Supervision, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

## SUPPLEMENTARY INFORMATION:

### Paperwork Reduction Act

The rule does not create any new reporting or recordkeeping requirements, nor would it modify any existing reporting or recordkeeping requirements.

### Discussion

On October 27, 1986, the President signed into law the Anti-Drug Abuse Act of 1986, Pub. L. 99-570. Section 1360 of this Act (hereinafter the "statutory amendment") makes several amendments to the CBCA which require a revision of the FDIC's implementing regulations. On September 22, 1988, the FDIC published a proposed rule (53 FR 36464) recommending changes to its existing publication requirements. Only two comments on that proposed rule were received (both approving of the proposed changes), and the amendments are being enacted substantially as proposed.

Prior to the statutory amendment, the CBCA did not require notice to, or solicitation of comments from, the public in connection with a change in bank control notice filed under the CBCA. The FDIC's regulation, at 12 CFR 303.4(b)(2)(i) did, however, require persons seeking to acquire a bank to publish an announcement and, as part of that announcement, to solicit public comment on the proposed acquisition.

The statutory amendment provides that the appropriate federal banking agency shall, within a reasonable period, publish notice of, and solicit comments on, a proposed acquisition. As stated in the proposed rule, the FDIC believes that its pre-existing regulation, requiring acquiring persons to publish notice of, and solicit comments on, the proposed acquisition within specified time periods (generally within twenty days of acceptance of the notice by the FDIC), satisfies the basic publication requirements of the statutory amendment. The FDIC is, consequently, not changing the existing basic requirements for publication or solicitation of comments regarding the proposed acquisition.

The statutory amendment also provides that the FDIC may waive the required publication and solicitation of comments only if the FDIC determines in writing that such publication or solicitation would seriously threaten the

safety or soundness of the bank to be acquired. The FDIC is amending its regulation, which currently allows discretion both for waiving and shortening the comment period, to bring it into conformance with the statutory standard. The amended regulation allows waiver of publication or comment solicitation, as well as FDIC action on a proposed acquisition prior to the expiration of the comment period, only if the FDIC determines in writing that publication or comment solicitation would seriously threaten the safety or soundness of the bank to be acquired. One such situation in which publication or comment solicitation could seriously threaten the safety or soundness of the bank to be acquired is when the FDIC must act immediately in order to prevent the probable failure of the bank to be acquired. The new regulation provides the FDIC with limited discretion to shorten the public comment period in circumstances not affecting the safety or soundness of the bank to be acquired. The FDIC may shorten the public comment period, to not less than ten days, if there is good cause for such action; good cause will exist only if FDIC determines that circumstances beyond the control of the acquiring persons warrant such action.

In the proposal, the FDIC requested comment on whether to amend the provision requiring that publication be made only after acceptance of the notice of acquisition. Comment was requested on whether to permit publication, with FDIC permission, up to ten days prior to the filing of the notice of acquisition, but no later than ten days after acceptance by the appropriate FDIC regional office. The FDIC has determined not to make such an amendment, since it believes that such a provision would have limited utility and that the ability to shorten the time period to ten days for good cause will likely accommodate most cases needing such a provision.

Changes are also being made in regard to acquisitions which do not comply with the CBCA, for example, in a situation when notice of an acquisition is filed subsequent to the acquisition. The new regulation specifies procedures where the FDIC deems such publication and comment to be advisable.

Since the regulation is procedural in nature and since it allows for a shorter publication period in some cases, the Board has determined that, rather than



applying a thirty-day delayed effective date, there is good cause to make the regulation effective on publication in the Federal Register.

#### Regulatory Flexibility Act

In the proposed rule, the Board of Directors of the FDIC certified that the amendments would not, if promulgated, have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In light of the above-noted certification, the Regulatory Flexibility Act requirement of 5 U.S.C. 604 that a final regulatory flexibility analysis be prepared does not apply.

#### List of Subjects in 12 CFR Part 303

Administrative practice and procedure, Authority delegation, Bank deposit insurance, Banks, banking, Federal Deposit Insurance Corporation.

For the reasons stated in this notice, and pursuant to the FDIC's authority under section 13 of the Change in Bank Control Act (12 U.S.C. 1817(j)(13)), the FDIC amends 12 CFR Part 303 as follows:

#### PART 303—APPLICATIONS, REQUESTS, SUBMITTALS, DELEGATIONS OF AUTHORITY, AND NOTICES OF ACQUISITION OF CONTROL

1. The authority citation for Part 303 is revised to read as follows:

Authority: 12 U.S.C. 378, 1813, 1815, 1816, 1817(j), 1818, 1819 ("Seventh" and "Tenth"), 1828, 1829; 15 U.S.C. 1607.

2. Section 303.4 is amended by revising paragraph (b)(3) and adding paragraph (b)(6) to read as follows:

#### § 303.4 Change in bank control.

(b) . . .

(3)(i) In acting upon a proposed change in control, the FDIC shall consider all public comments received within twenty days following the required newspaper publication. At the FDIC's option, comments received after this twenty-day period may be, but need not be, considered.

(ii) If the FDIC determines in writing that the newspaper publication or comment solicitation requirements of this paragraph would seriously threaten the safety or soundness of the bank to be acquired, including situations where the FDIC must act immediately in order to prevent the probable failure of the bank to be acquired, then the FDIC may:

(A) Waive the publication requirement,

(B) Waive the public comment solicitation requirement, or

(C) Act on the proposed change in control prior to the expiration of the public comment period.

(iii) In other circumstances, for good cause, the FDIC may shorten the public comment period to a period of not less than ten days. Such good cause will exist only if the FDIC determines that circumstances beyond the control of the acquiring person or persons warrant a shorter period.

(6)(i) Whenever a notice of a proposed acquisition of control is not filed in accordance with the Change in Bank Control Act of 1978 and these regulations, the acquiring person(s) shall, within ten days of being so directed by the FDIC, publish an announcement of the acquisition of control in the business section of a newspaper having general circulation in the community in which the home office of the bank involved is located. In a community in which there is no daily or weekly community newspaper, the required newspaper announcement may be published in a county-wide newspaper (in the county in which the bank's home office is located) or, if there is no county-wide newspaper, in a state-wide newspaper.

(ii) The newspaper announcement shall contain the name(s) of the acquirer(s), the name of the bank involved, and the date of the acquisition of the stock. The announcement shall also contain a statement indicating that the FDIC is currently reviewing the acquisition of control. The announcement shall also state that any person wishing to comment on the change in control may do so by submitting written comments to the Regional Director of the FDIC at (give address of the regional office) within twenty days following the required newspaper publication.

By Order of the Board of Directors.  
Dated at Washington, DC this 13th day of December, 1988.

Federal Deposit Insurance Corporation.  
Hoyle L. Robinson,  
Executive Secretary.  
[FR Doc. 88-29569 Filed 12-23-88; 8:45 am]  
BILLING CODE 6714-01-M

#### SMALL BUSINESS ADMINISTRATION

##### 13 CFR Part 123

##### Disaster Loans

AGENCY: Small Business Administration (SBA).

#### ACTION: Emergency final rule.

**SUMMARY:** This rule implements Pub. L. 100-590, which authorizes SBA to extend economic injury disaster assistance to counties contiguous to those counties determined to be disaster areas by the President, the Secretary of Agriculture or the SBA Administrator. The rule also authorizes physical disaster assistance to contiguous counties.

**DATES:** Effective December 27, 1988. Comments are due on or before February 27, 1989.

**ADDRESS:** Written comments may be sent to Bernard Kulik, Deputy Associate Administrator for Disaster Assistance, Small Business Administration, 1441 L Street NW., Room 820, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Bernard Kulik, Deputy Associate Administrator for Disaster Assistance, (202) 653-6879.

**SUPPLEMENTARY INFORMATION:** Section 123.2(b) of Title 13, Code of Federal Regulations (CFR) serves notice that the emergency nature of the disaster program may occasionally require the promulgation of an emergency final rule. Such an emergency has now arisen.

On November 4, 1988, the President approved Pub. L. 100-590 (effective as to disaster loans on August 1, 1988, per section 137) which, among other things, defines the term "an area affected by a disaster" in section 7(b)(2) of the Small Business Act (15 U.S.C. 636(b)(2)) to include not only the counties declared (determined) by the President, the Secretary of Agriculture or the Administrator of SBA as disaster areas, but also "the counties contiguous thereto" (Pub. L. 100-590, section 119).

Because this legislation extends the benefits of the disaster assistance program to those areas which were previously ineligible, it would be inappropriate to withhold this assistance during the current disaster season for the length of time required to follow the usual procedure of publishing a notice of proposed rulemaking, followed by a comment period, and eventually a final rule. Moreover, any further disasters occurring during this period would require a wasteful duplication of effort, to extend the disaster assistance to the areas newly added by Pub. L. 100-590. As an emergency final regulation, any problems that arise from this regulation in the near future can be corrected before the regulation is published in final form.

The current regulatory definition of "Disaster Area" (13 CFR 123.3) does not distinguish between disaster areas declared (or determined) by SBA, the Secretary of Agriculture or the President. The new law, however, requires SBA to make a distinction between major disasters declared by the President, and disasters declared by the Secretary of Agriculture or the Administrator of SBA. For major disasters declared by the President, the disaster areas as determined by the Federal Emergency Management Agency (FEMA) constitute the disaster area for purposes of physical disaster assistance under the Small Business Act, section 7(b)(1), 15 U.S.C. 636(b)(1), *i.e.*, loans to repair or replace disaster-damaged property. SBA cannot, by regulation, enlarge on FEMA's determination under its authority. However, for purposes of Economic Injury Disaster Loans (EIDLs) in such Presidentially declared disasters, SBA's new statute includes in the relevant disaster areas the FEMA-determined counties as well as the counties (or other political subdivisions) contiguous thereto.

Accordingly, the definition promulgated here defines disaster areas in Presidentially declared disasters twofold: for physical disaster assistance the FEMA-determined counties (or other political subdivisions), and for EIDLs, in additional counties (or other political subdivisions) contiguous thereto.

No such bifurcation is required for disasters declared or designated by SBA or by the Secretary of Agriculture. At a Governor's request, SBA will publish a disaster declaration for both physical injury and EIDL assistance in both declared and contiguous counties if the requisite minimum damage is found. If the damage is insufficient to warrant a disaster declaration, and the Governor certifies to substantial economic injury to small business concerns, warranting Federal subsidy loans pursuant to section 7(b)(2)(D) of the Act (15 U.S.C. 636(b)(2)(D)), SBA will publish a notice of disaster designation in the Federal Register (13 CFR 123.23). Thereafter, SBA will make EIDLs available in declared and contiguous counties to qualifying small concerns and agricultural cooperatives without credit available elsewhere. When the Secretary of Agriculture designates a disaster area pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. 1961, SBA will make EIDLs available pursuant to section 7(b)(2)(B) of the Small Business Act to qualifying small concerns and agricultural cooperatives located in

designated counties as well as named adjacent counties.

The term "contiguous" has variously been construed by the courts as touching, in actual contact, physically joined as a single unit, adjacent, bordering on each other, abutting, etc., depending sometimes on the context. Construing a statute authorizing creation of an airport authority by "any two or more contiguous counties," the Supreme Court of Appeals of West Virginia interpreted "contiguous counties" to mean a "compact territorial unit (within an unbroken boundary) wherein at least one territorially bounded [sic] one other such county." (*State v. Brown*, 151 W.Va. 887, 157 S.E. 2d 850, 1967.) SBA adopts a similar definition, but permits contiguous counties to be separated by a body of water measuring not more than one mile between such counties.

SBA has determined that this proposed rule is not a major rule for purposes of Executive Order 12291 because it would not have an annual impact on the national economy of \$100 million or more. In this regard, SBA estimates that in Fiscal Year '89 the Agency will make, in contiguous counties, between 22 and 50 EIDLs for a total of between \$1.3 and \$1.6 million, and between 10 and 30 physical injury assistance loans for a total of between \$275,000 and \$550,000.

The rule will not result in an increase in costs for consumers, individual industries, geographic regions, Federal, State or local government agencies (other than possible losses to SBA from these additional loans). Further, the rule will not have an adverse effect on competition, employment, investment, productivity, innovation or international competitiveness of U.S. based businesses.

For the purpose of compliance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, this rule may have a significant economic impact on a substantial number of small entities. As indicated above, we estimate for FY '89 an increase in disaster loans of 22 to 50 EIDLs, representing between 5 and 10% of the estimated total and an additional 10 to 30 physical injury assistance loans out of an estimated total of 13,000. Since SBA approves about 25% of all EIDL applications, and about 75% of physical injury assistance applications, the total number of applications under the expanded definition could be as high as 100-250. The following analysis of this definition is provided within the context of the review prescribed by the Regulatory Flexibility Act (5 U.S.C. 604).

1. The emergency rule is required to make the benefits of the new law available to disaster victims as soon as possible. Its objective is to extend SBA disaster loan assistance available in declared (designated) counties, to the counties contiguous thereto.

2. Because of the emergency character of this final rule, no notice of proposed rule making was published. However, comments are invited as indicated above, and will be considered when this rule is republished in final form, together with other regulations required to implement SBA's new authority.

3. As explained above, the word "contiguous" is capable of several definitions (or has several synonyms). Among them, SBA has chosen one that most closely carries out the intent expressed in the relevant conference report (H. Rept. 100-1029 on H.R. 4174; Oct. 3, 1988):

\* \* \* to provide disaster assistance to victims of the disaster who are in counties adjacent to disaster declared areas even if the damage was not so large as to warrant a declaration or designation in their county \* \* \*

Accordingly, SBA's definition includes as contiguous counties that are separated by a minor body of water (not exceeding one mile of separation), while counties separated by wider expanses of water, such as the Great Lakes or Chesapeake Bay, are not considered adjacent, irrespective of boundaries touching under water.

SBA hereby certifies that this rule does not have federalism implications warranting the preparation of a Federal Assessment in accordance with Executive Order 12612.

#### Paperwork Reduction Act

For purposes of the Paperwork Reduction Act, Pub. L. 98-511, 44 U.S.C. Ch. 35, SBA certifies that this regulation will not impose any reporting or recordkeeping requirements.

#### List of Subjects in 13 CFR Part 123

Disaster assistance, Loan programs/business, Small businesses.

Accordingly, pursuant to section 5(b)(6) of the Small Business Act, 15 U.S.C. 634(b)(6), Title 13, CFR, is hereby amended as follows:

1. The authority citation for Part 123 is revised to read as follows:

Authority: Sections 5(b)(6), 7 (b), (c), (f) of the Small Business Act, 15 U.S.C. §§ 634(b)(6), 636 (b), (c), (f); Pub. L. 100-590.



**§ 123.3 [Amended]**

2. Section 123.3 *Definitions* is amended by revising the definition of "Disaster Area" to read as follows:

**Disaster Area:** (a) Except as provided in paragraph (b) below, an area which has been declared or designated as such by the Administrator of SBA, because of damage suffered as a result of a physical disaster, or by the Secretary of Agriculture in accordance with section 7(b)(2)(B) of the small Business Act (15 U.S.C. 636(b)(2)(B)), and the counties or other political subdivisions contiguous thereto.

(b) For major disasters declared by the President, the disaster area as determined by the Federal Emergency Management Agency constitutes the disaster area for purposes of SBA physical disaster assistance pursuant to Subpart B of this part. However, for purposes of Economic Injury Disaster Assistance in such disasters pursuant to Subpart C of this part, the disaster area also includes counties or other smaller political subdivisions contiguous thereto.

(c) For purposes of this definition, contiguous counties or other political subdivisions are those whose land areas abut the land area of the declared county without geographic separation other than by a minor body of water, not to exceed one mile between such counties.

(Catalog of Federal Domestic Assistance Programs Nos. 59.002 and 59.008.)

James Abdnor,  
Administrator

Date: November 30, 1988.

[FR Doc. 88-29667 Filed 12-23-88; 8:45 am]

BILLING CODE 8025-01-M

**DEPARTMENT OF COMMERCE****International Trade Administration****15 CFR Parts 315 and 615**

[Docket No. 81255-8255]

**Determination of Bona Fide Motor-Vehicle Manufacturer**

**AGENCY:** International Trade Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** The regulations currently codified at Part 615 of Chapter VI of Title 15 of the Code of Federal Regulations (CFR) are redesignated, nomenclature changes are made, and Chapter VI is vacated to reflect the transfer to the International Trade

Administration of the responsibility for the implementation of the Agreement Concerning Automotive Products between the United States and Canada and certification of qualified applicants as bona fide motor vehicle manufacturers. The authority to promulgate regulations, formerly delegated to the Director of the Bureau of Industrial Economics, was delegated by the Secretary of Commerce to the Under Secretary for International Trade as a result of the abolishment of the Bureau of Industrial Economics and a realignment of the Department of Commerce's industry-related functions. This redesignation simply conforms the codification of the regulations in the CFR to existing Department of Commerce organization and functions.

**EFFECTIVE DATE:** December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Jean D. Leslie, Management Analyst, Management Services Division, Office of Organization and Management Support, Room 4001, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, (202) 377-3265.

**SUPPLEMENTARY INFORMATION:** The responsibilities of the Secretary of Commerce relating to the development, maintenance and publication of a list of bona fide motor-vehicle manufacturers and the authority to promulgate rules and regulations pertaining thereto have been delegated to the Under Secretary for International Trade, pursuant to Amendment 9, effective January 22, 1984, of Department of Commerce Organization Order 10-3, as amended, effective February 16, 1982, with power of redelegation. Amendment 8, dated January 22, 1984, of Department Organization Order 40-1 of February 16, 1982 reflects the transfer to the International Trade Administration of responsibility relating to implementation of the Agreement Concerning Automotive Products between the United States and Canada and certification of qualified applicants as bona fide motor vehicle manufacturers. On January 22, 1984, (49 FR 4538) the Assistant Secretary for Administration revoked Department Organization Orders 35-5A of January 2, 1980, as amended and 35-5B of December 6, 1982, and 35-8 and 35-10, both dated April 22, 1982, abolishing the Bureau of Industrial Economics.

By these rules and subsequent issuance of these rules (e.g. Department Organization Order 10-3, as amended, effective June 7, 1988, and Department Organization Order 40-1, of June 7, 1988), the Under Secretary for International Trade is redesignating

final regulations which are identical in substance to and supersede the regulations at 15 CFR part 615.

Regulations on Determination of Bona Fide Motor-Vehicle Manufacturer will be published in Chapter III, Part 315, of 15 CFR. This final rule is consistent with the authority delegated in Department Organization and Function Order 10-3 to the Under Secretary for International Trade under Headnote 2, subpart B, part 6, schedule 6 of the Tariff Schedules of the United States (19 U.S.C. 1202) and authority to promulgate rules and regulations pertaining thereto under Section 501(2) of Title V of the Automotive Products Trade Act of 1965 (19 U.S.C. 2031). This authority formerly delegated to the Director of the Bureau of Industrial Economics was delegated by the Secretary of Commerce to the Under Secretary for International Trade as a result of the abolishment of the Bureau of Industrial Economics and a realignment of the Department of Commerce's industry-related functions.

Because this rulemaking document concerns agency organization and management, it is not a rule or regulation within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no preliminary or final regulatory impact analysis has to be or will be prepared.

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553), or by any other law, no regulatory flexibility analysis has to be or will be prepared for purposes of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)).

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12812. This rule does not contain collections of information for purposes of the Paperwork Reduction Act.

**List of Subjects in 15 CFR Parts 315 and 615**

Canada, Imports, Motor vehicles.

Date: December 20, 1988.

Joan M. McEntee,  
Deputy Under Secretary for International Trade.

Date: December 20, 1988.

Robert Ortner,  
Under Secretary for Economic Affairs.

Accordingly, for the reasons set out in the preamble, Title 15 of the Code of Federal Regulations is amended as follows:

1. Part 615 of Chapter VI is redesignated as Part 315 of Subchapter A of Chapter III and amended and Chapter VI is vacated as follows:

**CHAPTER VI—[REMOVED]****PART 615—[REDESIGNATED AS PART 315]****PART 315—[REDESIGNATED FROM PART 615 AND AMENDED]**

2. The authority citation for Part 315 is revised to read as follows:

Authority: Headnote 2, subpart B, part 6, schedule 6, Tariff Schedules of the United States (19 U.S.C. 1202); sec. 501(2) of Title V, Automotive Products Trade Act of 1965 (19 U.S.C. 2031).

**§ 315.1 [Amended]**

3. In the last sentence of § 315.1 "Director, Bureau of Industrial Economics" is removed and the following is added in its place: "Under Secretary for International Trade" and the words "Department of Commerce Organization Order 35-5A of January 3, 1980 (45 FR 6146)" is removed and the following is added in its place: "Department of Commerce Organization Order 40-1, Amendment 9 of January 22, 1984 (49 FR 4538)."

4. Paragraph (b) of § 315.2 is revised to read as follows:

**§ 315.2 Definitions**

(b) "Under Secretary" means Under Secretary for International Trade of the Department of Commerce, or such official as may be designated by the Under Secretary to act in his or her behalf.

5. In paragraph (d) of § 315.2 the word "Director" is changed to read "Under Secretary" wherever it appears.

**§ 315.3 [Amended]**

6. In § 315.2 the word "Director" is changed to read "Under Secretary" wherever it appears and the address at the end of the section is revised to read as follows: U.S. Department of Commerce, International Trade Administration, Office of Automotive Industry Affairs—APTA, 14th & Constitution Avenue, NW., Room 4036, Washington, DC 20230.

**§ 315.4 [Amended]**

7. In paragraphs (a), (b), and (c) of § 315.4 the word "Director" is changed to read "Under Secretary" wherever it appears.

**§ 315.5 [Amended]**

8. In § 315.5 the word "Director" is changed to read "Under Secretary."

[FR Doc. 88-29587 Filed 12-23-88; 8:45 am]

BILLING CODE 3510-M

**FEDERAL TRADE COMMISSION****16 CFR Part 305****Using Energy Cost and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act; Publication of New Appendix K Containing Sample Labels**

**AGENCY:** Federal Trade Commission.  
**ACTION:** Final rule.

**SUMMARY:** The Federal Trade Commission amends its Appliance Labeling Rule by publishing prototype labels and sample labels for each category of covered products.

In response to a directive in section 324(c)(2) of the Energy Policy and Conservation Act, the Commission has published sample labels for each of the product categories covered by the rule, together with prototype labels showing the print size, type face and layout to be used for each basic type of label. These labels were inadvertently deleted from the 1988 version of the rule published in the Code of Federal Regulations.<sup>1</sup> Today's action is to remedy that deletion by adding Appendix K, which consists of sample labels for each category of covered products and prototypes for each type of label.

**EFFECTIVE DATE:** December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** James Mills, Attorney, 202-326-3035, Division of Enforcement, Federal Trade Commission, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** On November 19, 1979, pursuant to section 324 of the Energy Policy and Conservation Act of 1975 (EPCA),<sup>2</sup> the

<sup>1</sup> 16 CFR Part 305 (1988).

<sup>2</sup> Pub. L. 94-163, 89 Stat. 671, 42 U.S.C. 6291 (Dec. 22, 1975).

Commission issued a final rule<sup>3</sup> covering a number of appliance categories. The rule requires that energy costs and related information be disclosed on labels and in retail sales catalogs for all covered products. The rule included sample labels for each of the appliance categories covered by the rule, as well as prototype labels that set out the type face, letter size, spacing and layout that was required to produce the labels in compliance with the label specifications in the rule.

At the end of 1987, the sample and prototype labels were inadvertently omitted from the rule, so the version of the rule that appeared in the 1988 edition of the Code of Federal Regulations did not contain them. The purpose of today's action is to correct the omission and reinsert the labels into the rule.

In consideration of the foregoing, the Commission amends its Appliance Labeling Rule by adding Appendix K, which contains the sample labels for each category of covered products and the prototypes for each of the different types of labels.

**List of Subjects in 16 CFR Part 305**

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

Accordingly, 16 CFR Part 305 is amended as follows:

**PART 305—[AMENDED]**

1. The authority citation for Part 305 is revised to read as follows:

Authority: Sec. 324 of the Energy Policy and Conservation Act (Pub. L. 94-163) (1975), as amended by the National Energy Conservation Policy Act (Pub. L. 95-619) (1978), the National Appliance Energy Conservation Act (Pub. L. 100-12) (1987), and the National Appliance Energy Conservation Amendments of 1988 (Pub. L. 100-357) (1988), 42 U.S.C. 6294; sec. 553 of the Administrative Procedure Act, 5 U.S.C. 553.

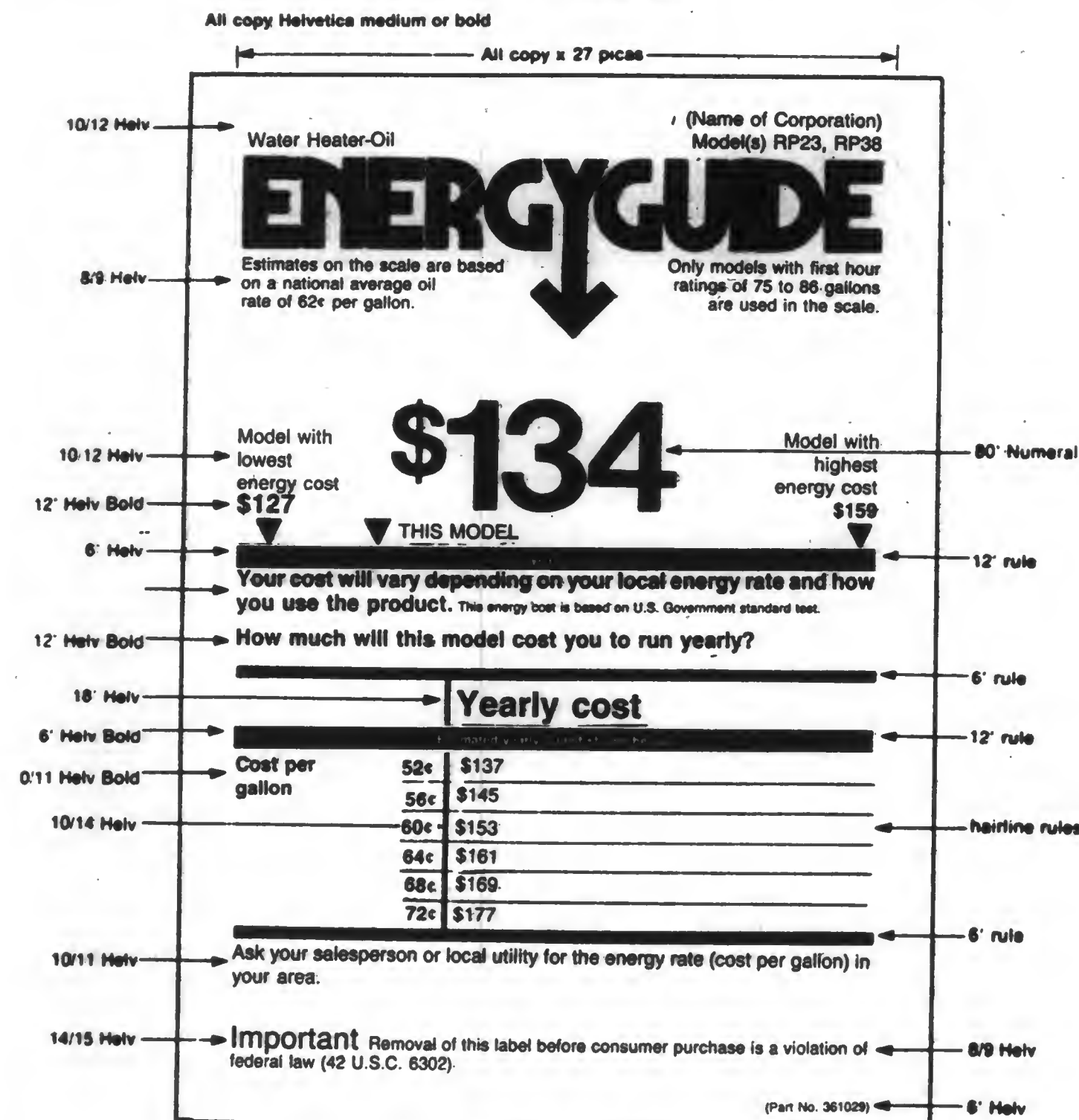
2. The Appendices to Part 305 are amended by the addition of Appendix K, to read as follows:

BILLING CODE 6750-01-M

<sup>3</sup> 44 FR 66466, 16 CFR 305.



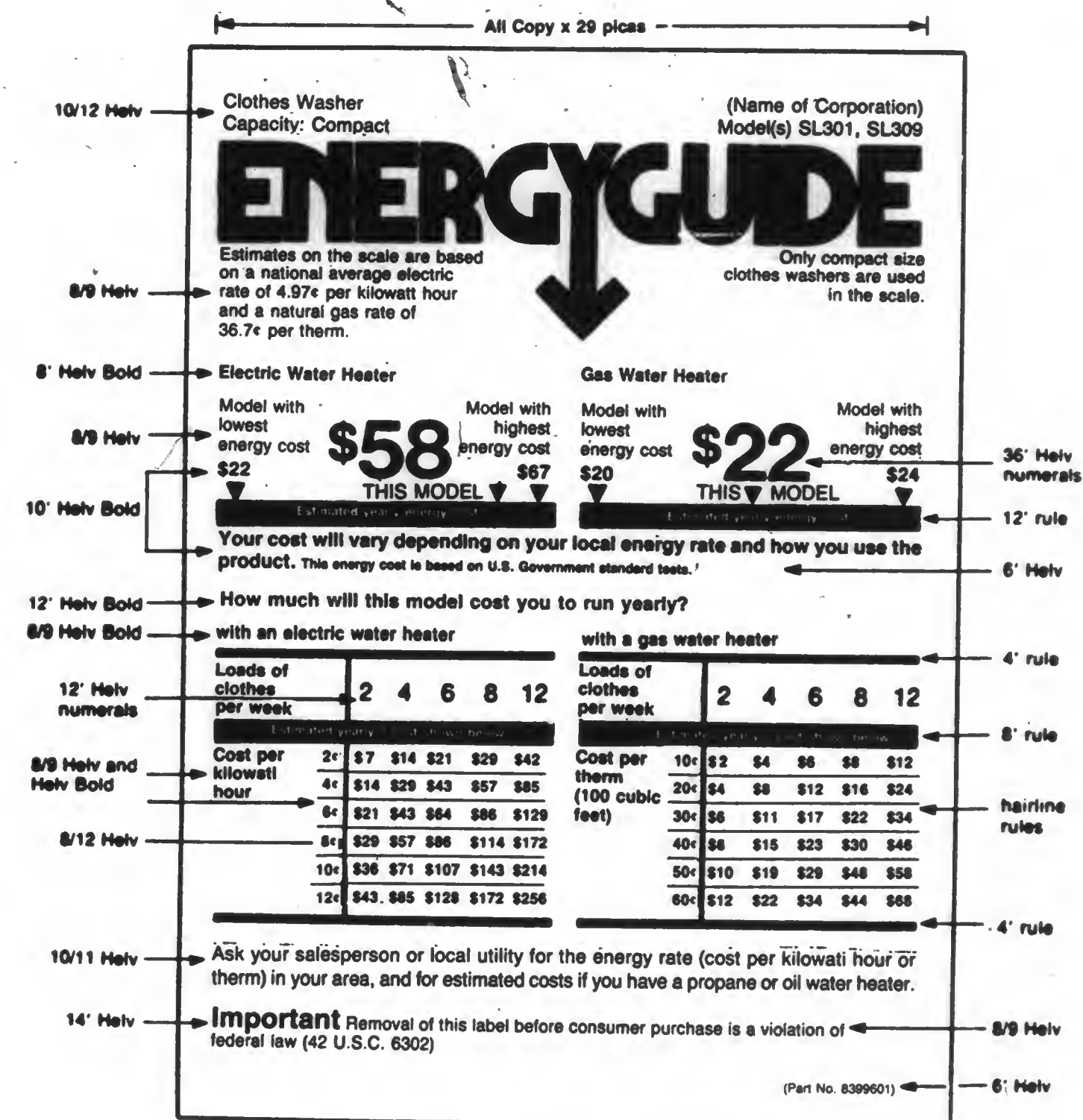
## Appendix K—Sample Labels



SAMPLE LABEL

Figure 1

All copy Helvetica medium or bold



SAMPLE LABEL

Figure 2

All copy Helvetica medium or bold

All Copy x 27 picas

10/12 Helv → (For Furnaces)

# ENERGYGUIDE

12/13 Helv → You can save substantially on home heating and cooling energy cost by following the simple steps outlined below:

1. Weatherproof your house
2. Assure energy efficient heating and cooling equipment selection and installation
3. Operate and maintain your system to conserve energy.

10/11 Helv with 18' numerals →

12/13 Helv → Help conserve energy. Compare the energy efficiency rating and cost information for this model with others. Check the figures and spend less on energy.

12 Helv Bold → Your contractor has the energy fact sheets. Ask for them.

14/15 Helv → **Important** Removal of this label before consumer purchase is a violation of federal law  
 8/9 Helv → (42 U.S.C. 6302)

SAMPLE LABEL  
Figure 3

All copy Helvetica medium or bold

All copy x 27 picas

10/12 Helv → Central Air Conditioner (cooling only)

# ENERGYGUIDE

8/9 Helv → Models with the most efficient energy rating number use less energy and cost less to operate

10/12 Helv → Low efficiency model

12' Helv bold → 6

6' Helv → THIS MODEL

80' Helv → High efficiency model 12

10.7

Energy Efficiency Rating (EER)

This energy rating is based on U.S. Government standard test.

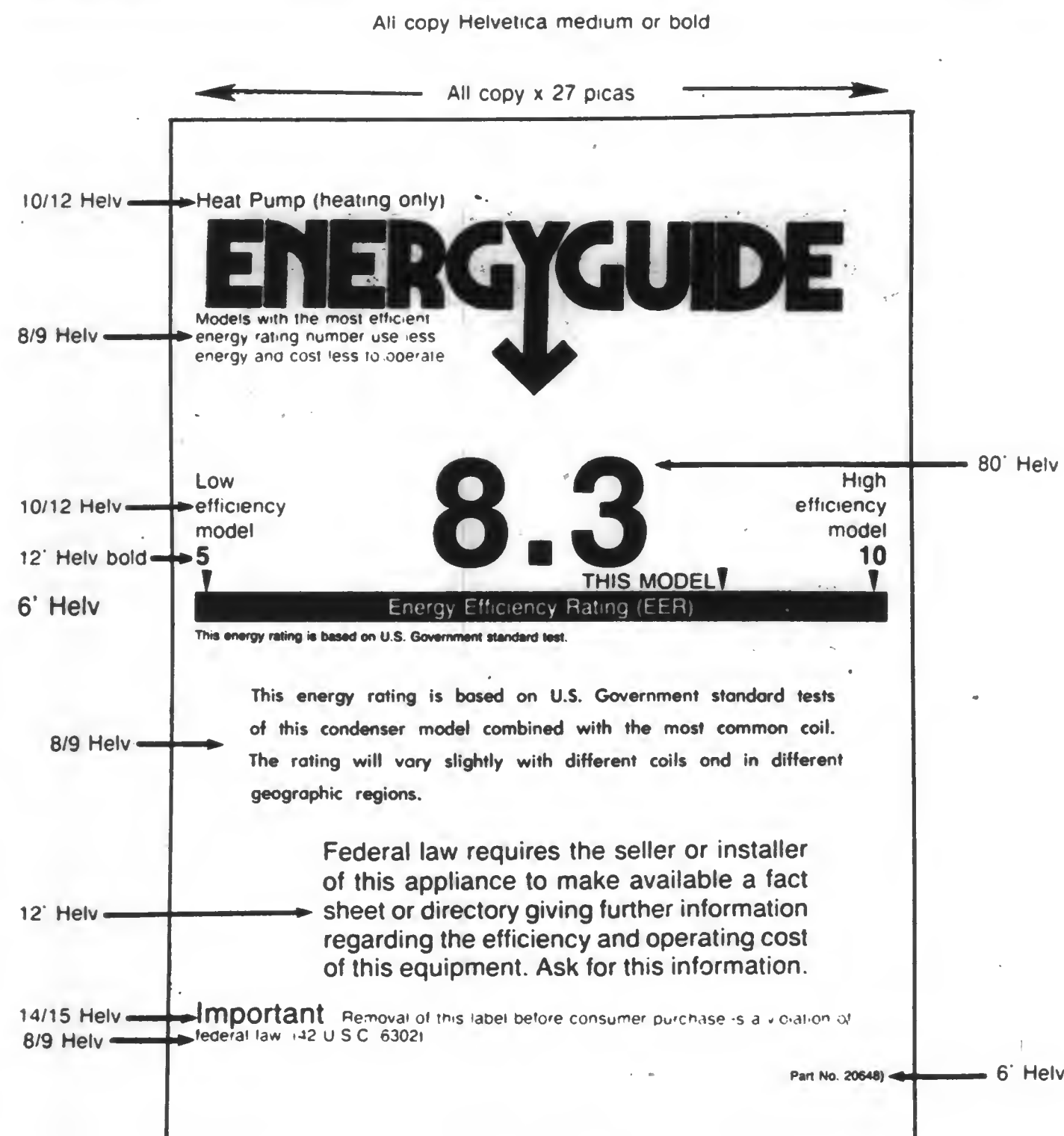
8/9 Helv → This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating may vary slightly with different coils.

12' Helv → Federal law requires the seller or installer of this appliance to make available a fact sheet or directory giving further information regarding the efficiency and operating cost of this equipment. Ask for this information.

14/15 Helv → **Important** Removal of this label before consumer purchase is a violation of  
 8/9 Helv → federal law 142 U.S.C. 6302

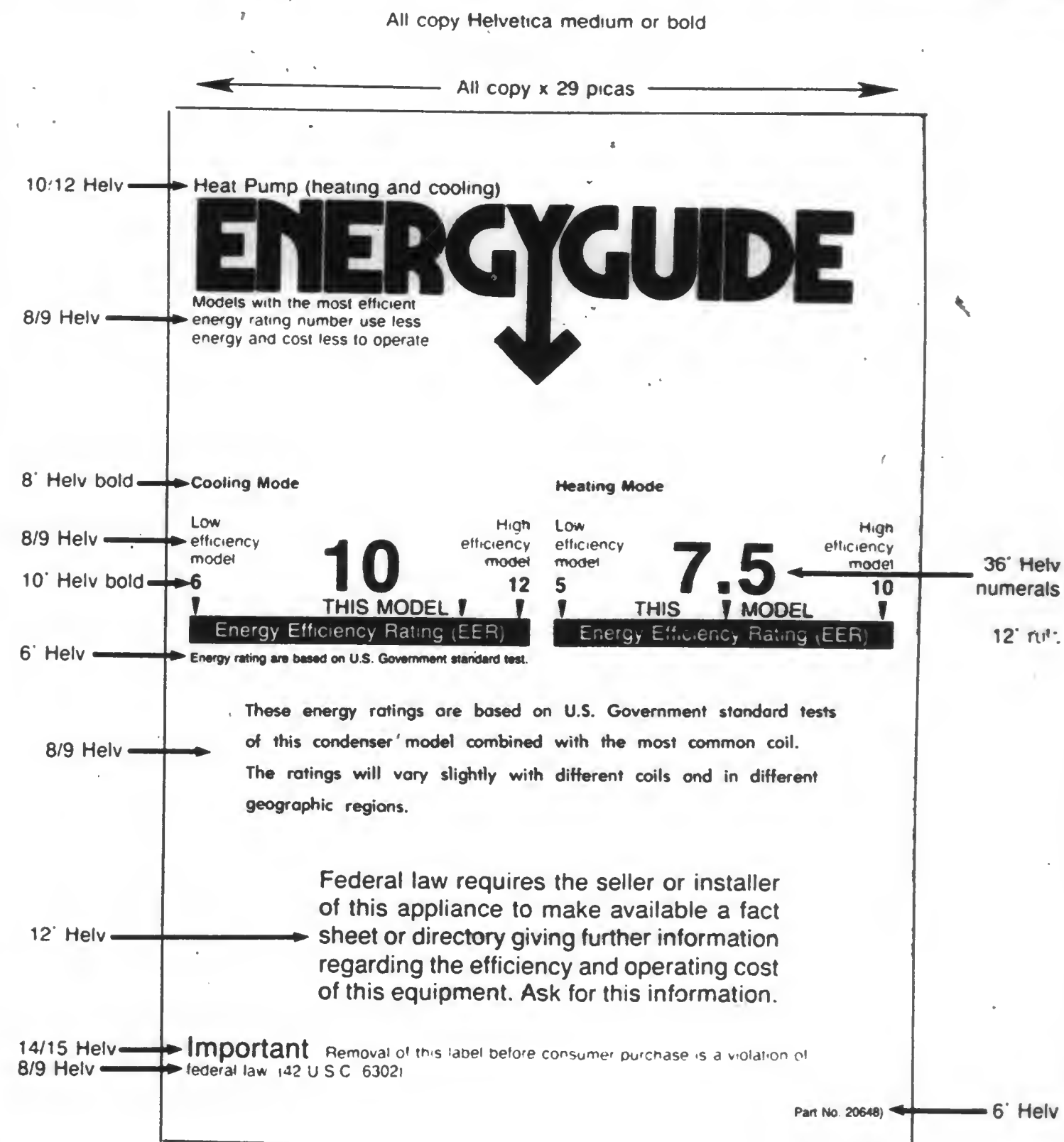
Part No. 20648 → 6' Helv

SAMPLE LABEL  
Figure 4



SAMPLE LABEL

Figure 5



SAMPLE LABEL

Figure 6



Refrigerator-Freezer  
Capacity: 23 Cubic Feet

(Name of Corporation)  
Model(s) AH503, AH504, AH507  
Type of Defrost: Full Automatic

# ENERGYGUIDE

Estimates on the scale are based  
on a national average electric  
rate of 4.97¢ per kilowatt hour

Only models with 22.5 to 24.4  
cubic feet are compared  
in the scale

Model with  
lowest  
energy cost  
\$68

**\$91**

Model with  
highest  
energy cost  
\$132

THIS ▼ MODEL

Estimated yearly energy cost

Your cost will vary depending on your local energy rate and how  
you use the product. This energy cost is based on U.S. Government standard tests

How much will this model cost you to run yearly?

Yearly cost	
Estimated yearly \$ cost shown below	
Cost per kilowatt hour	2¢ \$44
	4¢ \$88
	6¢ \$132
	8¢ \$176
	10¢ \$220
	12¢ \$264

Ask your salesperson or local utility for the energy rate (cost per kilowatt hour) in your area.

**Important** Removal of this label before consumer purchase is a violation of federal law (42 U.S.C. 6302)

SAMPLE LABEL

(Part No. 3710261)

Freezer  
Capacity: 26 Cubic Feet

(Name of Corporation)  
Model(s) SH405, SH413  
Type of Defrost: Manual

# ENERGYGUIDE

Estimates on the scale are based  
on a national average electric  
rate of 4.97¢ per kilowatt hour

Only models with 25.5 to 27.4  
cubic feet are compared  
in the scale

Model with  
lowest  
energy cost  
\$95

**\$120**

Model with  
highest  
energy cost  
\$140

THIS ▼ MODEL

Estimated yearly energy cost

Your cost will vary depending on your local energy rate and how  
you use the product. This energy cost is based on U.S. Government standard tests

How much will this model cost you to run yearly?

Yearly cost	
Estimated yearly \$ cost shown below	
Cost per kilowatt hour	2¢ \$64
	4¢ \$128
	6¢ \$190
	8¢ \$252
	10¢ \$317
	12¢ \$380

Ask your salesperson or local utility for the energy rate (cost per kilowatt hour) in your area.

**Important** Removal of this label before consumer purchase is a violation of federal law (42 U.S.C. 6302)

SAMPLE LABEL

(Part No. 143321)

BEST COPY AVAILABLE

Dishwasher  
Capacity: Standard(Name of Corporation)  
Model(s) MR328, XL12, NA83

# ENERGYGUIDE

Estimates on the scale are based on a national average electric rate of 4.97¢ per kilowatt hour and a natural gas rate of 36.7¢ per therm.

Only standard size dishwashers are used in the scale.

**Electric Water Heater****Gas Water Heater**

Model with lowest energy cost \$50	<b>\$60</b>	Model with highest energy cost \$84	Model with lowest energy cost \$19	<b>\$27</b>	Model with highest energy cost \$42
THIS MODEL		THIS MODEL		THIS MODEL	
Estimated yearly energy cost		Estimated yearly energy cost		Estimated yearly energy cost	

Your cost will vary depending on your local energy rate and how you use the product. This energy cost is based on U.S. Government standard tests.

**How much will this model cost you to run yearly?****with an electric water heater**

Loads of dishes per week		2	4	6	8	12
Estimated yearly \$ cost shown below						
Cost per kilowatt hour	2¢	\$8	\$15	\$23	\$31	\$47
	4¢	\$15	\$31	\$46	\$62	\$92
	6¢	\$23	\$46	\$69	\$92	\$139
	8¢	\$31	\$62	\$92	\$123	\$185
	10¢	\$39	\$77	\$116	\$154	\$231
	12¢	\$47	\$92	\$139	\$185	\$278

**with a gas water heater**

Loads of dishes per week	2      4      6      8      12					
	Estimated yearly \$ cost shown below					
Cost per therm (100 cubic feet)	10¢	\$2	\$5	\$7	\$9	\$14
	20¢	\$5	\$11	\$16	\$22	\$33
	30¢	\$7	\$14	\$21	\$27	\$41
	40¢	\$9	\$19	\$28	\$36	\$55
	50¢	\$12	\$23	\$35	\$45	\$68
	60¢	\$19	\$28	\$42	\$54	\$82

Ask your salesperson or local utility for the energy rate (cost per kilowatt hour or therm) in your area, and for estimated costs if you have a propane or oil water heater.

**Important** Removal of this label before consumer purchase is a violation of federal law (42 U.S.C. 6302)

SAMPLE LABEL

(Part No. 73906)

Clothes Washer  
Capacity: Compact(Name of Corporation)  
Model(s) SL301, SL309

# ENERGYGUIDE

Estimates on the scale are based on a national average electric rate of 4.97¢ per kilowatt hour and a natural gas rate of 36.7¢ per therm.

Only compact size clothes washers are used in the scale.

**Electric Water Heater****Gas Water Heater**

Model with lowest energy cost \$22	<b>\$58</b>	Model with highest energy cost \$67	Model with lowest energy cost \$20	<b>\$22</b>	Model with highest energy cost \$24
THIS MODEL		THIS MODEL		THIS MODEL	
Estimated yearly energy cost		Estimated yearly energy cost		Estimated yearly energy cost	

Your cost will vary depending on your local energy rate and how you use the product. This energy cost is based on U.S. Government standard tests.

**How much will this model cost you to run yearly?****with an electric water heater**

Loads of clothes per week		2	4	6	8	12
	Estimated yearly \$ cost shown below					
Cost per kilowatt hour	2¢	\$7	\$14	\$21	\$29	\$42
	4¢	\$14	\$29	\$43	\$57	\$85
	6¢	\$21	\$43	\$64	\$86	\$129
	8¢	\$29	\$57	\$86	\$114	\$172
	10¢	\$36	\$71	\$107	\$143	\$214
	12¢	\$43	\$85	\$128	\$172	\$256

**with a gas water heater**

Loads of clothes per week		2	4	6	8	12
	Estimated yearly \$ cost shown below					
Cost per therm (100 cubic feet)	10¢	\$2	\$4	\$6	\$8	\$12
	20¢	\$4	\$8	\$12	\$16	\$24
	30¢	\$6	\$11	\$17	\$22	\$34
	40¢	\$8	\$15	\$23	\$30	\$46
	50¢	\$10	\$19	\$29	\$48	\$58
	60¢	\$12	\$22	\$34	\$44	\$68

Ask your salesperson or local utility for the energy rate (cost per kilowatt hour or therm) in your area, and for estimated costs if you have a propane or oil water heater.

**Important** Removal of this label before consumer purchase is a violation of federal law (42 U.S.C. 6302)

SAMPLE LABEL

(Part No. 8399601)

Water Heater-Oil

(Name of Corporation)  
Model(s) RP23, RP38**ENERGYGUIDE**Estimates on the scale are based  
on a national average oil  
rate of 62¢ per gallon.Only models with first hour  
ratings of 75 to 86 gallons  
are used in the scale.Model with  
lowest  
energy cost  
\$127**\$134**Model with  
highest  
energy cost  
\$159

THIS MODEL

Estimated yearly energy cost

Your cost will vary depending on your local energy rate and how  
you use the product. This energy cost is based on U.S. Government standard tests

How much will this model cost you to run yearly?

Yearly cost	
Estimated yearly \$ cost shown below	
Cost per gallon	
52¢	\$137
56¢	\$145
60¢	\$153
64¢	\$161
68¢	\$169
72¢	\$177

Ask your salesperson or local utility for the energy rate (cost per gallon)  
in your area.**Important** Removal of this label before consumer purchase is a violation of  
federal law (42 U.S.C. 6302)

SAMPLE LABEL

(Part No. 361029)

Room Air Conditioner  
Capacity: 8,000 BTU/hr(Name of Corporation)  
Model(s) SA 714, SA 718**ENERGYGUIDE**Models with the most efficient  
energy rating number use less  
energy and cost less to operate.Models with 7800 to  
8299 BTU's cool  
about the same space.**7.3**Least efficient  
model  
3.4Most efficient  
model  
8.5

THIS MODEL

Energy Efficiency Rating (EER)

This energy rating is based on U.S. Government standard tests

How much will this model cost you to run yearly?

Yearly hours of use	250	750	1000	2000	3000
Estimated yearly \$ cost shown below					
Cost per kilowatt hour					
2¢	\$7	\$20	\$28	\$56	\$84
4¢	\$14	\$41	\$56	\$112	\$168
6¢	\$20	\$61	\$80	\$160	\$240
8¢	\$27	\$82	\$108	\$216	\$324
10¢	\$34	\$102	\$136	\$272	\$408
12¢	\$41	\$122	\$163	\$326	\$489

Ask your salesperson or local utility for the energy rate (cost per kilowatt hour) in your area. Your cost will vary depending on your local energy rate and how you use the product.

**Important** Removal of this label before consumer purchase is a violation of  
federal law (42 U.S.C. 6302)

SAMPLE LABEL

(Part No. 20648)



(For Furnaces)

# ENERGYGUIDE



You can save substantially on home heating and cooling energy costs by following the simple steps outlined below:

1. Weatherproof your house
2. Assure energy efficient heating and cooling equipment selection and installation
3. Operate and maintain your system to conserve energy.

Help conserve energy. Compare the energy efficiency rating and cost information for this model with others. Check the figures and spend less on energy.

Your contractor has the energy fact sheets. Ask for them.

**Important** Removal of this label before consumer purchase is a violation of federal law (42 U.S.C. 6302)

SAMPLE LABEL

BILLING CODE 6750-01-C

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 88-29579 Filed 12-23-88; 8:45 am]

BILLING CODE 6750-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Parts 74 and 81

[Docket Nos. 78N-0366 and 87N-0182]

#### Listing of Color Additives Subject To Certification; D&C Red No. 36; Termination of Stay and Further Amendment

**AGENCY:** Food and Drug Administration.  
**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is terminating the stay of the provision for ingested drug use of D&C Red No. 36. Under the formal rulemaking provisions of the Federal Food, Drug, and Cosmetic Act (the act), the filing of an objection to this provision of the final rule stayed its effect while FDA evaluated and acted on the objection. The agency has now completed its evaluation of the objection and, in response, is revising 21 CFR 74.1336(c). This document also removes D&C Red No. 36 from the provisional list.

**DATES:** Effective [January 27, 1989; written objections and requests for a hearing by January 28, 1989].

**ADDRESS:** Written objections to the Docket Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Patricia J. McLaughlin, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C Street SW., Washington, DC 20204, 202-472-5740.

**SUPPLEMENTARY INFORMATION:** In the Federal Register of August 2, 1988 (53 FR 29024), FDA published a final rule permanently listing D&C Red No. 36 for general use in drugs and cosmetics, except for use in the area of the eye. The action was in response to a petition filed by the Cosmetic, Toiletry and Fragrance Association (CTFA). The rule amended 21 CFR Part 74 by adding new §§ 74.1336 and 74.2336. The rule also amended 21 CFR 81.1, 81.25, and 81.27 by removing the entries for D&C Red No. 36 from those regulations. The rule revised 21 CFR 82.1336 to require that D&C Red No. 36 conform in identity and specifications

to the requirements of § 74.1336 and to require that all lakes of the color additive be manufactured from previously certified batches of the straight color additive. FDA stated that the final rule would become effective on September 2, 1988, except for any provision stayed by the filing by September 1, 1988, of a proper objection. Under section 701(e) of the act, (21 U.S.C. 371(e)(2)), the filing of an objection to a particular provision of the final rule stays the effectiveness of that provision until FDA can rule on the objection.

FDA received a single objection to the final rule from a drug manufacturer. That objection, which is on file with the Dockets Management Branch (address above) under Docket No. 87N-0182, concerned only the provision in the final rule limiting the amount of D&C Red No. 36 in ingested drug products. Accordingly, the agency stayed the provision in the final rule concerning the use of D&C Red No. 36 in ingested drug products (that is, the first sentence in § 74.1336(c)), as well as those parts of the final rule that removed entries for D&C Red No. 36 from the provisional list (21 CFR 81.1(b)) and from the temporary tolerances (21 CFR 81.25(c)(1)). FDA published this stay in the Federal Register of October 28, 1988 (53 FR 43682). In the same document, FDA confirmed the effective date of September 2, 1988, for the remainder of the final rule. In addition, the October 28, 1988, document postponed the closing date of the provisional listing for D&C Red No. 36 to December 27, 1988.

In its petition, CTFA requested that a limit of 1.7 milligrams (mgs) of the color additive per daily dose be established for the use of D&C Red No. 36 in ingested drug products. In the August 2, 1988, final rule permanently listing D&C Red No. 36, FDA stated that the petitioner had not provided information on levels of use of the color additive in drugs. The agency had searched its files of new drug applications for data on current use levels and found that only three ingested drug products contain D&C Red No. 36, all at very low levels of use. Because this information indicated to the agency that only low levels were necessary to accomplish the intended technical effect, consistent with section 706(b)(7)(B) of the act (21 U.S.C. 376(b)(7)(B)), FDA limited the use of D&C Red No. 36 in ingested drugs to 1.0 mg per daily dose.

One drug manufacturer objected to this limitation of 1.0 mg because it manufactures an approved ingested drug that is usually prescribed at dosages that provide 0.8 mg or less of the color additive in a day. However, in extreme

cases, double doses of this drug may be prescribed, resulting in a daily intake of 1.6 mgs of the color additive. This manufacturer requested that the regulation be amended to permit the 1.7 mgs per daily dose originally sought by the petitioner and provided by the temporary tolerances in § 81.25. The objection requested a hearing if the agency did not concur.

The agency finds that the usage described in the objection is supported by the data in the petition and, for the reasons discussed in the August 2, 1988, final rule, concludes that ingestion of D&C Red No. 36 in drugs in amounts up to 1.7 mgs per day is safe for less than lifetime use. FDA finds that the objection is consistent with the agency's primary conclusion that 1.0 mg of the color additive is ordinarily sufficient to color the amount of drug ingested in 1 day. However, the agency also recognizes that higher than usual doses of a drug may be necessary in extreme cases and that the color additive regulations should be able to accommodate such situations. Accordingly, FDA is revising § 74.1336(c) to establish a limit of 1.7 mgs of D&C Red No. 36 per daily dose of an ingested drug for drugs that are not taken continuously for more than 1 year. Drugs that may be taken continuously for longer than 1 year are limited to 1.0 mg of color additive per daily dose.

Because the objection has been resolved, this document terminates the stay of 21 CFR 74.1336(c). Because the agency is providing for the usage described in the objection, a hearing is unnecessary, and therefore is denied.

When this revision of § 74.1336(c) becomes effective, continued provisional listing for ingested drug use of this color additive will no longer be appropriate or necessary. Thus, this document will also terminate the stay of those parts of the August 2, 1988, final rule that removed those parts of the regulations that pertain to the provisional listing of this color additive; i.e., §§ 81.1(b) and 81.25(c)(1).

FDA is providing an objection period of 30 days and a 31-day delayed effective date for this revision of 21 CFR 74.1336(c). Any person who will be adversely affected by this revision may at any time on or before January 28, 1989 submit to the Dockets Management Branch (address above) written objections. Such objections shall be limited to the revision of § 74.1336(c) discussed in this document. Each objection shall be separately numbered and each numbered objection shall specify with particularity the provision of § 74.1336(c) to which objection is



made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state; failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held; failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this regulation. Received objections may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. Notice of the filing of objections or lack thereof will be published in the Federal Register.

Elsewhere in this issue of the Federal Register, FDA is postponing the closing date of D&C Red No. 36 for 60 days to provide time for interested persons to submit objections to this document.

The agency has determined under 21 CFR 25.24(b)(3) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

#### List of Subjects

##### 21 CFR Part 74

Color additives, Cosmetics, Drugs.

##### 21 CFR Part 81

Color additives, Cosmetics, Drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 701, 706, 52 Stat. 1055-1056 as amended, 74 Stat. 399-407 as amended (21 U.S.C. 371, 376)) and the Transitional Provisions of the Color Additive Amendments of 1960 (Title II, Pub. L. 86-618, sec. 203, 74 Stat. 404-407 (21 U.S.C. 376, note)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10), the stay of effectiveness of the first sentence in 21 CFR 74.1336(c) is terminated, the stays on the removal of D&C Red No. 36 from 21 CFR 81.1(b) and 81.25(c)(1) are terminated, and Part 74 is amended as follows:

#### PART 74—LISTING OF COLOR ADDITIVES SUBJECT TO CERTIFICATION

1. The authority citation for 21 CFR Part 74 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055-1056 as amended, 74 Stat. 399-407 as amended (21 U.S.C. 371, 376); 21 CFR 5.10.

2. Section 74.1336 is amended by revising the first sentence in paragraph (c) to read as follows:

##### § 74.1336 D&C Red No. 36.

(c) *Uses and restrictions.* The color additive D&C Red No. 36 may be safely used for coloring ingested drugs, other than mouthwashes and dentifrices, in amounts not to exceed 1.7 milligrams per daily dose of the drug for drugs that are taken continuously only for less than 1 year. For drugs taken continuously for longer than 1 year, the color additive shall not be used in amounts to exceed 1.0 milligram per daily dose of the drug.

Dated: December 22, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-29703 Filed 12-22-88; 11:54 am]

BILLING CODE 4160-01-M

#### 21 CFR Part 81

[Docket Nos. 76N-0366 and 87N-0182]

#### Provisional Listing of D&C Red No. 36; Postponement of Closing Date

AGENCY: Food and Drug Administration.  
ACTION: Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is postponing the closing date for the provisional listing of D&C Red No. 36 for use as a color additive in drugs and cosmetics. The new closing date for the provisional listing of this color additive will be February 27, 1989. FDA has decided that this postponement is necessary to provide time for the receipt and evaluation of any objections and comments submitted in response to the final rule published in the Federal Register.

**DATE:** Effective December 27, 1988, the new closing date for D&C Red No. 36 will be February 27, 1989.

**FOR FURTHER INFORMATION CONTACT:** Gerard L. McCowin, Center for Food and Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5676.

**SUPPLEMENTARY INFORMATION:** FDA established the current closing date of December 27, 1988, for the provisional listing of D&C Red No. 36 by a regulation published in the Federal Register of October 28, 1988 (53 FR 43682).

In the Federal Register of August 2, 1988 (53 FR 29024), FDA permanently listed the drug and cosmetic uses of D&C Red No. 36. FDA received one objection in response to that final rule. Published elsewhere in this issue of the Federal Register is a final rule responding to the objection and revising the listing regulation for D&C Red No. 36. The postponement of the closing dates for the provisional listing of this color additive for 60 days by this order will provide time for receipt and evaluation of, and appropriate agency action to, objections or requests for a hearing submitted in response to the final rule. The regulation set forth below will postpone the December 27, 1988, closing date for the provision listing of this color additive until February 27, 1989.

FDA believes that it is reasonable to postpone the closing date for this color additive until February 27, 1989, to provide a short period of time for its receipt and evaluation of any comments or objections and subsequent agency action. FDA concludes that this extension is consistent with the public health and the standards set forth for continuation of the provisional listing in *McIlwain v. Hayes*, 690 F.2d 1041 (D.C. Cir. 1982).

Because of the shortness of time until the December 27, 1988, closing date, FDA concludes that notice and public procedure on this regulation are impracticable and that good cause exists for issuing the postponement as a final rule and for an effective date of December 27, 1988. This regulation will permit the uninterrupted use of this color additive until further action is taken. In accordance with 5 U.S.C. 553 (b), (d)(1), and (d)(3), this postponement is issued as a final regulation, effective December 27, 1988.

#### List of Subjects in 21 CFR Part 81

Color additives, Cosmetics, Drugs.

Therefore, under the Transitional Provisions of the Color Additive Amendments of 1960 to the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 81 is amended as follows:

#### PART 81—GENERAL SPECIFICATIONS AND GENERAL RESTRICTIONS FOR PROVISIONAL COLOR ADDITIVES FOR USE IN FOODS, DRUGS, AND COSMETICS

1. The authority citation for 21 CFR Part 81 continues to read as follows:

Authority: Secs. 701, 706, 52 Stat. 1055-1056 as amended, 74 Stat. 399-407 as amended (21 U.S.C. 371, 376); Title II, Pub. L. 86-618; sec. 203, 74 Stat. 404-407 (21 U.S.C. 376, note); 21 CFR 5.10.

##### § 81.1 [Amended]

2. Section 81.1 *Provisional lists of color additives* is amended in the table of paragraph (b) for the entry "D&C Red No. 36" by revising the closing date to read "February 27, 1989."

##### § 81.27 [Amended]

3. Section 81.27 *Conditions of provisional listing* is amended in the table, appearing in the introductory text in paragraph (d), by revising the closing date for the entry "D&C Red No. 36" to read "February 27, 1989."

Dated: December 22, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-29704 Filed 12-22-88; 11:54 am]

BILLING CODE 4160-01-M

#### 21 CFR Part 175

[Docket No. 88F-0053]

#### Indirect Food Additives; Adhesives and Components of Coatings

AGENCY: Food and Drug Administration.  
ACTION: Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of ethylene-octene-1 copolymers containing not less than 70 weight percent ethylene, as adhesives in the manufacture of multilayer structures intended to contact food. This action is in response to a petition filed by The Dow Chemical Co.

**DATES:** Effective December 27, 1988; written objections and requests for a hearing by January 28, 1989.

**ADDRESS:** Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Richard H. White, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St.

SW., Washington, DC 20204, 202-472-5690.

**SUPPLEMENTARY INFORMATION:** In a notice published in the Federal Register of March 17, 1988 (53 FR 8805), FDA announced that a food additive petition (FAP 8B4066) had been filed by The Dow Chemical Co., 1803 Bldg., Door 7, Midland, MI 48674, proposing that § 175.105 *Adhesives* (21 CFR 175.105) of the food additive regulations be amended to provide for the safe use of ethylene-octene-1 copolymers as adhesives in multilayer structures intended for use in contact with food.

FDA has evaluated data in the petition and other relevant material. The agency finds that the additive is more specifically identified as "ethylene-octene-1 copolymers containing not less than 70 weight percent ethylene." The agency further concludes that the proposed use of this food additive is safe, and that the regulations should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

Any person who will be adversely affected by this regulation may at any time on or before January 28, 1989 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state.

Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

#### List of Subjects in 21 CFR Part 175

Adhesives, Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, Part 175 is amended as follows:

#### PART 175—INDIRECT FOOD ADDITIVES: ADHESIVES AND COMPONENTS OF COATINGS

1. The authority citation for 21 CFR Part 175 continues to read as follows:

Authority: Secs. 201(e), 409, 72 Stat. 1784-1788 as amended (21 U.S.C. 321(e), 348); 21 CFR 5.10 and 5.61.

2. Section 175.105 is amended in paragraph (c)(5) by alphabetically adding a new entry in the table to read as follows:

##### § 175.105 Adhesives.

(c) \* \* \*  
(5) \* \* \*

Substances	Limitations
Ethylene-octene-1 copolymers containing not less than 70 weight percent ethylene (CAS Reg. No. 26221-73-8)	

Dated: December 15, 1988.

Fred R. Shank,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 88-29573 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-01-M



## 21 CFR Part 178

[Docket No. 87F-0321]

## Indirect Food Additives; Adjuvants, Production Aids, and Sanitizers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of 2,2'-(2,5-thiophenediyl)-bis(5-tert-butylbenzoxazole) as an optical brightener for polyoxymethylene homopolymer intended to contact food. This action responds to a petition filed by Ciba-Geigy Corp.

**DATES:** Effective December 27, 1988; written objections and requests for a hearing by January 28, 1989.

**ADDRESS:** Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Marvin D. Mack, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5690.

**SUPPLEMENTARY INFORMATION:** In a notice published in the Federal Register of November 12, 1987 (52 FR 43399), FDA announced that a food additive petition (FAP 7B4027) had been filed by Ciba-Geigy Corp., Three Skyline Dr., Hawthorne, NY 10532, proposing that § 178.3297 *Colorants for polymers* (21 CFR 178.3297) be amended to provide for the safe use of 2,2'-(2,5-thiophenediyl)-bis(5-tert-butylbenzoxazole) as an optical brightener for polyoxymethylene homopolymer intended to contact food.

FDA has evaluated data in the petition and other relevant material. The agency concludes that the proposed use of this food additive is safe, and that the regulations should be amended in 21 CFR 178.3297(e) as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of

this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. Under FDA's regulations implementing the National Environmental Policy Act (21 CFR Part 25), an action of this type would require an environmental assessment under 21 CFR 25.31a(b)(1).

Any person who will be adversely affected by this regulation may at any time on or before January 28, 1989 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

## List of Subjects in 21 CFR Part 178

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, Part 178 is amended as follows:

## PART 178—INDIRECT FOOD ADDITIVES; ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR Part 178 continues to read as follows:

**Authority:** Secs. 201(s), 409, 72 Stat. 1784-1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 178.3297 is amended in the table of paragraph (e) by adding a new entry under the heading "Limitations" for "2,2'-(2,5-Thiophenediyl)-bis(5-tert-butylbenzoxazole) (CAS Reg. No. 7128-64-5)" to read as follows:

## § 178.3297 Colorants for polymers.

(e) \* \* \*

Substances	Limitations
2,2'-(2,5-Thiophenediyl)-bis(5-tert-butylbenzoxazole) (CAS Reg. No. 7128-64-5).	For use as an optical brightener only: 4. At levels not to exceed 0.01 percent by weight of polyoxymethylene homopolymer complying with § 177.2480 of this chapter.

Dated: December 15, 1988.

Fred R. Shank,  
Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 88-29572 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-01-M

## 21 CFR Part 178

[Docket No. 87F-0183]

## Indirect Food Additives; Adjuvants, Production Aids, and Sanitizers; Antioxidants and/or Stabilizers for Polymers

AGENCY: Food and Drug Administration.

ACTION: Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to expand the permitted use of tris(2,4-di-tert-butylphenyl)phosphite as an antioxidant and stabilizer in 4-methylpentene-1 copolymers intended to contact food. This action responds to a petition filed by the Ciba-Geigy Corp.

**DATES:** Effective December 27, 1988; written objections and requests for a hearing by January 28, 1989.

**ADDRESS:** Written objections to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Andrew D. Laumbach, Center for Food Safety and Applied Nutrition (HFF-335),

Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5690.

**SUPPLEMENTARY INFORMATION:** In a notice published in the Federal Register of July 2, 1987 (52 FR 25075), FDA announced that a petition (FAP 7B3999) had been filed by the Ciba-Geigy Corp., Three Skyline Dr., Hawthorne, NY 10532, proposing that § 178.2010 *Antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) be amended to provide for the safe use of tris(2,4-di-tert-butylphenyl)phosphite as an antioxidant and thermal stabilizer for poly(methylpentene) intended to contact food. Subsequently, in an amended filing notice published in the Federal Register of November 9, 1987 (52 FR 43122), FDA announced that the petitioner was amending the petition to provide for expanded use of tris(2,4-di-tert-butylphenyl) phosphite as an antioxidant and stabilizer only in 4-methylpentene-1 copolymers complying with 21 CFR 177.1520(c), item 3.3. The amended filing notice stated that the expanded uses include an increased use level and an increased temperature of use (including microwave use).

FDA has evaluated the data in the petition and other relevant material. The agency concludes that the additive is safe for its requested use in 4-methylpentene-1 copolymers. The requested uses include an increase in the use level from 0.2 percent to 0.5 percent, deletion of the thickness limitations on the 4-methylpentene-1 copolymer, and an increase in the permitted temperature of use from the currently specified limit of room temperature use to high temperature (above 100 °C (212 °F)) heat-sterilized use.

The agency, however, is not adopting the petitioner's specific request to include microwave oven reheating use in the text of the regulation, as this use is included in use condition H, specified in the regulation. (Condition H is identified in 21 CFR 176.170(c), Table 2, as "Frozen or refrigerated storage: Ready-prepared foods intended to be reheated in the container at time of use.") The petitioner has amended its petition to withdraw the request for a specific mention of microwave reheating.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied

Nutrition by appointment with the information contact person listed above. As provided in 21 CFR 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting that finding, contained in an environmental assessment, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday. This action was considered under FDA's final rule implementing the National Environmental Policy Act (21 CFR Part 25).

Any person who will be adversely affected by this regulation may at any time on or before January 28, 1989 file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

## List of Subjects in 21 CFR Part 178

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under

authority delegated to the Commissioner of Food and Drugs and redelegated to the Director of the Center for Food Safety and Applied Nutrition, Part 178 is amended as follows:

## PART 178—INDIRECT FOOD ADDITIVES; ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR Part 178 continues to read as follows:

**Authority:** Secs. 201(s), 409, 72 Stat. 1784-1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10 and 5.61.

2. Section 178.2010 is amended in the table of paragraph (b) in the entry for "Tris(2,4-di-tert-butylphenyl)phosphite" by revising item 8 and by adding a new item 22 under the heading "Limitations" to read as follows:

## § 178.2010 Antioxidants and/or stabilizers for polymers.

(b) \* \* \*

Substances	Limitations
Tris(2,4-di-tert-butylphenyl)phosphite (CAS Reg. No. 31570-04-4).	For use only: 8. At levels not to exceed 0.2 percent by weight of olefin polymers complying with § 177.1520(c) of this chapter, item 4. The finished polymers having a thickness greater than 0.051 millimeter (0.002 inch), shall contact food only under conditions of use E, F, and G described in Table 2 of § 176.170(c) of this chapter. 22. At levels not to exceed 0.5 percent by weight of olefin copolymers complying with § 177.1520(c) of this chapter, item 3.3. The finished polymers may be used in contact with food under conditions of use A through H described in Table 2 of § 176.170(c) of this chapter.

Dated: December 15, 1988.

Fred R. Shank,  
Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 88-29574 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-01-M



## DEPARTMENT OF DEFENSE

## Office of the Secretary

## 32 CFR Part 40a

## Defense Contracting; Reporting Procedures on Defense Related Employment

AGENCY: Office of the Secretary, DoD.  
ACTION: Final Rule.

**SUMMARY:** This rule is the fiscal year 1988 revision of the section listing DoD contractors receiving contract awards of \$10 million or more. This part is published to comply with the provisions of section 1, Pub. L. 97-295, October 12, 1982; 10 U.S.C. 2397.

**EFFECTIVE DATE:** September 30, 1988.

## FOR FURTHER INFORMATION CONTACT:

Mr. J.R. Sungenis, Director for Information Operations and Reports, Washington Headquarters Services, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Telephone (202) 746-0334.

## List of Subjects in 32 CFR Part 40a

Armed Forces, Conflict of interests, Government employees, Government procurement, Reporting and recordkeeping requirements.

Accordingly, 32 CFR Part 40a is revised to read as follows:

## PART 40a—DEFENSE CONTRACTING: REPORTING PROCEDURES ON DEFENSE RELATED EMPLOYMENT

§ 40a.1 Department of Defense contractors receiving awards of \$10 million or more.

## Fiscal Year 1988

3D International, Inc.  
AAI Corp.  
AEC Corp.  
AM General Corp.  
ARE Mfg. Co., Inc.  
AT&T Information Systems  
AT&T Technologies, Inc.  
AV Technology Corp.  
AAR Brooks & Perkins Corp.  
AAR Corp.  
Abbott Laboratories  
Abex Corp.  
Accudyne Corp.  
Action Mfg. Co.  
Actus Corp.  
Acurex Corp.  
Addco Industries, Inc.  
Advanced Marine Enterprises  
Advanced Technology, Inc.  
Aerojet ElectroSystems Co.  
Aerojet Ordnance Co.  
Aerojet Solid Propulsion Co.  
Aerojet General Corp.  
Aerospace Corp., The  
Agip Petrol Spa  
Aircraft Financing & Trading USA, Inc.  
Aksarben Foods

Alabama Power Co.  
Alascom, Inc.  
Alberici, J.S. Construction Co.  
Aleman Food Service, Inc.  
Allsud Handling Spa  
All Bann Enterprises, Inc.  
Allen J.F. Co.  
Alliance Health System  
Allied Signal, Inc.  
Altama Delta Corp.  
Alvarado Construction, Inc.  
Amerada Hess Corp.  
American Airlines, Inc.  
American Apparel, Inc.  
American Coastal Industries  
American Cyanamid Co., Inc.  
American Dredging Co.  
American Electronic Laboratories  
American Fuel Cell & Coated Fabrics Co.  
American Management Systems, Inc.  
American President Lines, Ltd.  
American Satellite Co.  
American Systems Corp.  
American Systems Engineering Corp.  
American Telephone & Telegraph Co.  
American Trans Air, Inc.  
American Transport Lines, Inc.  
Amertex Enterprises Ltd.  
Ametek, Inc.  
Amex Systems, Inc.  
Amoco Corp.  
Ampex Corp.  
Amron Corp.  
Amstar Technical Products Co.  
Anadac Inc.  
Analysis & Technology, Inc.  
Analytic Sciences Corp., The  
Analytic Services, Inc.  
Analytical Systems Engineering Corp.  
Analytics, Inc.  
Andersen, Arthur & Co.  
Angelo H. & Co., Inc.  
Apex Oil Co.  
Applied Research, Inc.  
Applied Technology Associates  
Aqua Chem, Inc.  
Aral Ag  
Argo Tech Corp.  
Arinc Research Corp.  
Arkle, Inc.  
Armstrong Rubber Co., The  
Arral Industries, Inc.  
Artistic Landscape & Engineering  
Ashland Petroleum Co.  
Assurance Technology Corp.  
Astronautics Corp. of America  
Atkinson, Guy F. Co.  
Atlantic Marine, Inc.  
Atlantic Research Corp.  
Atlantic Richfield Co.  
Atlas Processing Co.  
Austin Co., The  
Automar I Corp.  
Automated Sciences Group, Inc.  
Automation Research Systems Ltd.  
Avco Corp.  
Avondale Industries, Inc.  
Aydin Corp.  
BBDO Worldwide, Inc.  
BDM Corp., The  
BDM Management Services Co.  
BP America, Inc.  
BR Communications  
Bahrain National Oil  
Baldy Brothers Constructors  
Baltimore Manufacturing Co. of Venice

Ball Corp.  
Barrett Refining Corp.  
Barton J.F. Contracting Co.  
Basil, Frank E., Inc. of Delaware  
Bath Iron Works Corp.  
Battelle Memorial Institute  
Battenfeld American, Inc.  
Bay City Marine, Inc.  
Bay Tankers, Inc.  
Bean Dredging Corp.  
Beatrice Companies, Inc.  
Bechtel National, Inc.  
Becon Services Corp.  
Beech Aerospace Services, Inc.  
Beech Aircraft Corp.  
Belcher Oil Co.  
Bell Helicopter Textron & Boeing Co., JV  
Bell Helicopter Textron, Inc.  
Belleville Shoe Mfg. Co.  
Bellsouth Government Systems, Inc.  
Bender Allen L.  
Bender Shipbuilding & Repair Co.  
Bendix Field Engineering Corp.  
Beretta USA Corp.  
Berry Petroleum Co.  
Bertucci, Anthony J. Construction Co.  
Betac Corp.  
Bethlehem Steel Corp.  
Bhandari Constructors & Co.  
Black Construction Corp.  
Black E. E. Ltd.  
Black River Constructors  
Blair Co.  
Blount Brothers Corp.  
Blue Cross & Blue Shield of Rhode Island  
Blue Cross & Blue Shield of South Carolina  
Boeing Co., The  
Bolt Beranek & Newman, Inc.  
Booz Allen & Hamilton, Inc.  
Bozell, Jacobs, Kenyon, & Eckhardt  
Bradley Construction, Inc.  
Braintree Maritime Corp.  
Braswell Shipyards, Inc.  
Brinderson Construction  
British Aerospace PLC  
Brown & Root Gersuch JV  
Brown H. H. Shoe Co., Inc.  
Brunswick Corp.  
Buckner & Moore, Inc.  
Belova Systems & Instruments Corp.  
Bundesamt fuer Wehrtechnik Und Beschaffung  
Burlington Industries, Inc.  
Burns & McDonnell, Inc.  
Burns & Roe Enterprises, Inc.  
Burnside Ott Aviation Training Center  
Butt Construction Co., Inc.  
C3, Inc.  
C Construction Co., Inc.  
CACI International, Inc.  
CAS, Inc.  
CBI Na Con, Inc.  
CDI Marine Co.  
CFM International, Inc.  
CFS Air cargo, Inc.  
CRS Sirmine Metcalf & Eddy JV  
Caddell Construction Co., Inc.  
Cadillac Gage Co.  
Calcasieu Refining Co.  
Calculon Corp.  
California Pacific Associates  
Calspan Corp.  
Camel Manufacturing Co.  
Campbells Soup Inter America, Inc.  
Cantu Services, Inc.

Carbon Hill Mfg. Co.  
Carnation Co.  
Carnegie Mellon University  
Carolina Power & Light Co.  
Carothers Construction, Inc.  
Case, J.I. Co.  
Caterpillar, Inc.  
Cates Construction, Inc.  
Cavalier Clothes, Inc.  
Celtech Corp.  
Centel Communications Co.  
Centex Construction Co.  
Central Gulf Lines, Inc.  
Central Texas College  
Centre Mfg. Co., Inc.  
Cessna Aircraft Co., Inc.  
Chamberlain Mfg. Corp.  
Chemical Waste Management  
Chesapeake & Potomac Telephone Co.  
Chevron USA, Inc.  
Chromalloy American Corp.  
Chrysler Corp.  
Cibro Petroleum Bronx, Inc.  
Cincinnati Electronics Corp.  
Cinpac, Inc.  
Clearwater Constructors, Inc.  
Cleveland Pneumatic Co.  
Coastal Eagle Point Oil Co.  
Coastal Industries, Inc.  
Coastal Refining & Marketing  
Cobro Corp.  
College of Lake County  
Collins International Service Co.  
Colonnas Shipyards, Inc.  
Colorado Springs, City of  
Colsa, Inc.  
Colt Industries, Inc.  
Columbia Research Corp.  
Columbia University  
Comarco, Inc.  
Comar Industries, Inc.  
Combustion Engineering, Inc.  
Comtek Research, Inc.  
Computer Data Systems, Inc.  
Computer Dynamics, Inc.  
Computer Engineering Associates  
Computer Sciences Corp.  
Computer Software Analysts, Inc.  
Computer Technology Associates  
Computervision Corp.  
Comstock Communications, Inc.  
Conner Brothers Construction Co.  
Connor Harben Construction Co., Inc.  
Conoco, Inc.  
Conoco, Ltd.  
Consolidated Electronics, ITT & Westinghouse, JV  
Consolidated Consulting Corp.  
Consolidated Contractors  
Construcciones Aeronauticas SA  
Contel Page Systems, Inc.  
Continental Maritime Industries  
Continental Maritime of San Diego  
Control Data Corp.  
Cornell University  
Coronado Technology, Inc.  
Cosmo Oil Co., Ltd.  
Costruzioni Aero  
Crawford Technical Services, Inc.  
Cray Research, Inc.  
Criton Technologies  
Crothall American, Inc.  
Crow William L. Construction Co.  
Crowley Maritime Corp.  
Crysen Corp.  
Cubic Corp.

Cummins Engine Co., Inc.  
D&S Manufacturing  
DBA Systems, Inc.  
DCS Corp.  
DCX, Inc.  
Daedalean, Inc.  
Daimler Benz AG  
Dartco Manufacturing, Inc.  
Data General Corp.  
Dataproducts New England, Inc.  
Day & Zimmerman, Inc.  
Dayton Power & Light Co.  
De Nardi Corp.  
Deansgate, Inc.  
Decision Information Systems  
Deere & Co.  
Deere John Technologies International  
Defense Research, Inc.  
Defense Systems Co., Inc.  
Del Jen, Inc.  
Delavan, Inc.  
Delta Dental Plan of California  
Derecktor Robert E. of Rhode Island  
Designers & Planners, Inc.  
Deutsche Bundespost  
Deval Corp.  
Diamond Shamrock Refining  
Digital Equipment Corp.  
Donohoe Companies, Inc.  
Draper, Charles Stark Laboratories  
Dresser Industries, Inc.  
Du Pont, E.I. De Nemours & Co.  
Dual & Associates, Inc.  
Dunlop Aviation, Inc.  
Dunn J.E. Construction Co.  
Dynalex, Inc.  
Dynamic Controls Corp.  
Dynamic Science, Inc.  
Dynamics Research Corp.  
Dynaspan Services Co.  
Dynacorp  
Dynetics, Inc.  
ECC International Corp.  
EC Corp.  
ECI Construction, Inc.  
EEV, Inc.  
ESL, Inc.  
EG&G, Inc.  
EG&G Washington Analytical Services Center  
E Systems, Inc.  
Eagle Technology, Inc.  
Earth Technology Corp.  
Eastman Kodak Co.  
Eaton Corp.  
Eaton Kenway, Inc.  
Ebasco Overseas Taylor Wood JV  
Ebasco Services, Inc.  
Eby Martin K. Construction Co.  
Edo Corp.  
El Paso Electric Co.  
El Paso Refining Co., Ltd.  
Elbit Computers, Ltd.  
Eldyne, Inc.  
Electro Design Manufacturing  
Electro Methods, Inc.  
Electronic Data Systems Corp.  
Electronic Warfare Associates  
Electrospac Systems, Inc.  
Emco, Inc.  
Emerald Maintenance, Inc.  
Emerson Electric Co.  
Engineered Air Systems, Inc.  
Engineering & Economics Research  
Engineering Research, Inc.  
Enginetica Corp.

Entwistle Co., Inc.  
Evaluation Research Corp.  
Evans Sutherland Computer Corp.  
Evergreen International Aviation  
Ex Cell O Corp.  
Executive Resource Associates  
Exide Electronics Group, Inc.  
Expander Transport Corp.  
Expeditor Transport Corp.  
Exporter Transport Corp.  
Expressor Transport Corp.  
Extender Transport Corp.  
Exxon Corp.  
FEL Corp.  
FL Aerospace Corp.  
FMC Corp.  
FMS Corp.  
FN Manufacturing, Inc.  
F2M, Inc.  
Fairchild Aircraft Corp.  
Fairchild Industries, Inc.  
Fairchild Weston Systems, Inc.  
Falcon Systems, Inc.  
Fansteel, Inc.  
Farrell Lines, Inc.  
Federal Computer Corp.  
Federal Data Corp.  
Federal Electric Corp.  
Federal Hoffman, Inc.  
Ferrulmatic, Inc.  
Fiber Materials, Inc.  
Figgie International, Inc.  
Fleet Supplies, Inc.  
Flight International Group, Inc.  
Flight Systems, Inc.  
Flightsafety International, Inc.  
Florida Power & Light Co.  
Fluke, John Manufacturing Co., Inc.  
Flying Tiger Line, Inc.  
Fokker BV  
Foley Co.  
Ford Aerospace Communications Corp.  
Ford Contracting Corp.  
Forstmann & Co., Inc.  
Foundation Health Corp.  
Freightliner Corp.  
Frontier Engineering, Inc.  
Frontier Oil & Refining Co.  
Fru Con Construction Corp.  
Fruit of The Loom, Inc.  
G&C Enterprises, Inc.  
GA Technologies, Inc.  
GEC Avionics Ltd.  
GLR Constructors  
GNB, Inc.  
GTE Government Systems, Inc.  
GTE Products Corp. (Delaware)  
GTE Service Corp.  
Gates Construction Corp.  
Gates Learjet Corp.  
Gay, Robert Construction Co.  
Gayston Corp.  
General Battery Corp.  
General Defense Corp.  
General Dynamics Corp.  
General Electric Co.  
General Foods Corp.  
General Instrument Corp. (Delaware)  
General Mills, Inc.  
General Motors Corp.  
General Oil Corp.  
General Research Corp.  
General Ship Corp.  
General Signal Corp.  
Genrad, Inc.



Genflex Corp.  
Geo Centers, Inc.  
George Washington University  
Georgia Institute of Technology  
Georgia Power Co.  
Gibbs & Cox, Inc.  
Global Associates, a Joint Venture  
Gonzalez, Fermin O., Inc.  
Goodrich, B.F. Co.  
Goodyear Tire & Rubber Co.  
Gould, Inc.  
Government Technology Services  
Gramtech, Inc.  
Granite Construction Co.  
Greal Lakes Dredge & Dock Co.  
Greenland Construction  
Grey Advertising, Inc.  
Grimberg, John C. Co., Inc.  
Grumman Aerospace Corp.  
Grumman Corp.  
Grumman Data Systems Corp.  
Gulf Coast Trailing Co.  
Gulfstream Aerospace Corp. (Delaware)  
Guyco Engineering Co.  
H&H Meat Products, Inc.  
HH Aerospace Design, Inc.  
HLJ Construction & Management Group  
HR Textron, Inc.  
Hagglund & Soner AB  
Halter Marine, Inc.  
Hamilton Enterprises, Inc.  
Hamilton Technology, Inc.  
Hanil Development Co., Ltd.  
Harbert International, Inc.  
Harnischfeger Corp.  
Harper Development Co., Inc.  
Harris Corp.  
Harris Magnavox Systems Co., JV  
Harsco Corp.  
Hawaiian Airlines, Inc.  
Hawaiian Electric Co., Inc.  
Hawaiian Independent Refinery  
Hawaiian Telephone Co.  
Hayes International Corp.  
Hazeltime Corp.  
Heckethorn Mfg. Co.  
Held & Francke  
Hensel Phelps Construction Co.  
Hercules Construction Corp.  
Hercules Engines, Inc.  
Hercules, Inc.  
Hermes Consolidated, Inc.  
Hewlett Packard Co.  
Hochtief AG  
Hoffman Construction Co. of Oregon  
Hoffman Corp.  
Hoffman La Roche, Inc.  
Holmes & Narver, Inc.  
Holmes & Narver Morrison Knudsen JV  
Holston Defense Corp.  
Honam Oil Refinery Co., Ltd.  
Honeywell Bull AG  
Honeywell, Inc.  
Hooks, Mike, Inc.  
Horizons Technology, Inc.  
Howell Instruments, Inc.  
Howmet Turbine Components Corp.  
Hudson Institute, Inc.  
Hughes Aircraft Co.  
Hughes, Herm & Sons, Inc.  
Hunt Building Corp.  
Hydraulics International, Inc.  
Hydroscience, Inc.  
Hyman, George Construction Co.  
Hyster Co.  
ICI Americas, Inc.

IIT Research Institute  
ILC Industries (Delaware)  
IMR Systems Corp.  
ITT & Varo, Joint Venture  
ITT Corp.  
Ibis Corp.  
Idemitsu Kosan Co., Ltd.  
Illinois Tool Works, Inc.  
Imo Delaval  
Industrial Acoustics Co.  
Information Spectrum, Inc.  
Information Systems Networks Corp.  
Infotec Development, Inc.  
Ingalls Shipbuilding, Inc.  
Ingersoll Rand Co.  
Institute for Defense Analysis  
Integrated Microcomputer Systems  
Integrated Systems Analysts  
Intelcom Group Corp.  
Inter Community Telephone Co.  
Intercontinental Equipment, Inc.  
Intercontinental Mfg. Co.  
Intergraph Corp.  
Intermetrics, Inc.  
International Business Machines Co.  
International Technology Corp.  
Interstate Airlines, Inc.  
Interstate Electronics Corp.  
Interstate Landscaping Co., Inc.  
Irvin Industries, Inc.  
Isometrics, Inc.  
Israel Aircraft Industries, Ltd.  
Israel Military Industries  
Isratex, Inc.  
Iwakuni City Water Works Bureau  
Jacksonville Shipyards, Inc.  
James, T.L. & Co., Inc.  
Japan Aircraft Mfg. Co., Ltd.  
Jay Dee Sportswear, Inc.  
Jaycor  
Jersey Central Power & Light Co.  
Johns Hopkins University  
Jonathan Corp., The  
Jones Group, Inc., The  
Jorgensen, Roy Associates, Inc.  
Kaiser Aerospace & Electronics Co.  
Kaiser Engineers & Constructors  
Kaiser Engineers, Inc.  
Kaman Aerospace Corp.  
Kaman Corp.  
Kaman Sciences Corp.  
Kansas Power & Light Co., Inc.  
Kay & Associates, Inc.  
Kaydon Corp.  
Kearney & Trecker Corp.  
Kevlavik Contractors  
Kellogg Sales Co.  
Kelsey Hayes Co.  
Kestrel Shipholding Corp.  
Key Airlines  
Kilde, Inc.  
Kimberly Clark Corp.  
Kloster Co., Inc.  
Koch Fuels, Inc.  
Koehring Cranes & Excavators  
Kollmorgen Corp.  
Korea Electric Power Corp.  
Korean Air Lines Co., Ltd.  
Kovatch Corp.  
Kurz & Root Co.  
Kuwait National Petroleum Co.  
LSC Marine, Inc.  
LSI Avionic Systems  
LTV Aerospace & Defense Co.  
Laguna Industries, Inc.  
Laketon Refining Corp.

Lally Manufacturing Corp.  
Landoll Corp.  
Lanthier, Robert J. Co., Inc.  
Lathrop, F.P. Construction Co.  
Lear Siegler, Inc.  
Lee R. E. & Associates  
Libby Corp.  
Life Cycle Engineering, Inc.  
Lifeco Services Corp.  
Light Helicopter Turbine Engine Co.  
Lilly, David B., Co., Inc.  
Lite Industries, Inc.  
Little, Arthur D., Inc.  
Litton Industries, Inc.  
Litton Systems, Inc.  
Lockheed Corp.  
Lockheed Electronics Co.  
Lockheed Missiles & Space Co.  
Lockheed Shipbuilding Co.  
Lockheed Support Systems, Inc.  
Loggins Meat Co.  
Logicon, Inc.  
Logistic Support Group  
Logistics Management Institute  
Loral Corp.  
Loral Electro Optical Systems  
Loral Hycor, Inc.  
Loral Rolm Mil Spec Computers  
Lord & Son Construction Co.  
Lot 28 Constructors  
Louisville Gas & Electric Co.  
Lucas Industries, Inc.  
Luhm Bros., Inc.  
Lull Engineering Co., Inc.  
Lykes Bros. Steamship Co., Inc.  
M&M Services, Inc.  
M/A Com Linkabit Corp.  
Magnavox Electronic Systems Co.  
Magnavox Government & Industrial Electronics Co.  
Magnavox Overseas, Ltd.  
Magnetek, Inc.  
Mandex, Inc.  
Mantech Field Engineering Corp.  
Mantech International Corp.  
Manville Corp.  
Mapco, Inc.  
Mar, Inc.  
Marable, W.M., Inc.  
Marathon Construction Corp.  
Maremont Corp.  
Marquette Marine Corp.  
Marquardt Co. The  
Martin Baker Aircraft Co., Ltd.  
Martin Electronics, Inc.  
Martin Manufacturing Co., Inc.  
Martin Marietta Corp.  
Martin Marietta, Diehl Co's., Thorn & Thompson JV  
Maryland Assemblies, Inc.  
Mason Chamberlain, Inc.  
Mason Hanger Silas Mason, Inc.  
Massachusetts Institute of Technology  
Maxwell Laboratories, Inc.  
Maya Construction Co.  
Mayer, Oscar Foods Corp.  
McDermott, Inc.  
McDonnell Douglas Astronautics  
McDonnell Douglas Bell Helicopter Textron JV  
McDonnell Douglas Corp.  
McDonnell Douglas Helicopter  
McDougal Hartmann Co.  
McLaughlin Research Corp.  
McMullen, John J. Associates, Inc.

McRae Industries, Inc.  
Merchants National Bank & Trust  
Merck & Co., Inc.  
Meridian Construction Co.  
Metal Trades, Inc.  
Metallgesellschaft, Corp.  
Metric Systems Corp.  
Metro Machine Corp.  
Metro Marine, Inc.  
Microcom Corp.  
Mid States Metal Lines, Inc.  
Midcon of New Mexico, Inc.  
Midwest Construction Co.  
Milcom Systems Corp.  
Miles Laboratories, Inc.  
Miller, F. & Sons, Inc.  
Miller Herman, Inc.  
Mills Manufacturing Corp.  
Miltope Corp.  
Mine Safety Appliances Co.  
Minnesota Mining & Mfg. Co.  
Mip Instandsetzungsbetrieb  
Misener Marine Construction  
Mission Research Corp.  
Mitre Corp.  
Mobil Oil Corp.  
Monarch Construction Co.  
Monty, Ike J., Inc.  
Moon Engineering Co., Inc.  
Morrel, John & Co., Inc. (Delaware)  
Mopprison Knudsen Co., Inc.  
Morrison Knudsen Engineers, Inc.  
Morrison Knudsen International Co.  
Mortenson, M.A. Co.  
Morton Thiokol, Inc.  
Motor Oils Hellas Corinth Refinery  
Motorola Communications & Electronics  
Motorola, Inc.  
Munro & Co., Inc.  
NCR Corp.  
Nabisco Brands, Inc.  
Nasin, J.S. Co.  
Natco Limited Partnership  
Nation, Inc.  
National Academy of Sciences  
National Airmotive Corp.  
National Business Service Enterprises, Inc.  
National Projects, Inc.  
National Steel & Shipbuilding Co.  
National Systems Management  
Navajo Refining Co.  
Navistar International Transportation Corp.  
Nec Overseas Market Development  
Needham, Inc.  
Negretti & Zambra Aviation, Ltd.  
Nero & Associates, Inc.  
Network Solutions, Inc.  
New Bedford Panoramex Corp.  
New Mexico State University  
Newberg, Gust K. Construction Co.  
Newport News Shipbuilding & Dry Dock Co.  
Niagara Mohawk Power Corp.  
Nichols Research Corp.  
Nimas Corp.  
Nomura Enterprise, Inc.  
Norden Systems, Inc.  
Norfolk Shipbuilding & Dry Dock Corp.  
North Atlantic Industries, Inc.  
Northern Telecom, Inc. (Delaware)  
Northrop Corp.  
Northrop Services, Inc.  
Northrop Worldwide Aircraft Services, Inc.  
Northwest Airlines, Inc.  
Northwest Marine Iron Works  
Nuclear Research Corp.  
ORC Industries, Inc.

ORI Inc.  
Ocean Freedom Shipping, Inc.  
Ocean Spirit Shipping, Inc.  
Ocean Star Shipping, Inc.  
Ocean Technology, Inc.  
Ocean Triumph Shipping, Inc.  
Octagon Process, Inc.  
Ohbayshi Corp.  
Okinawa Electric Power Co.  
Oklahoma Aeronautics, Inc.  
Olin Corp.  
OMI Corp.  
Oregon Freeze Dry Foods, Inc.  
Oshkosh Truck Corp.  
Outdoor Venture Corp.  
PA CMBH  
PRC Kentron  
PRC VSE & Associates JV  
Pacer Systems, Inc.  
Pacific Architects & Engineers  
Pacific Gas & Electric Co.  
Pacifica Services, Inc.  
Pan Am Support Service, Inc.  
Pan Am World Services, Inc.  
Pan American World Airways, Inc.  
Par Technology Corp.  
Parker Hannifin Corp.  
Parsons, Ralph M. Co., The  
Patrol Ofisi A S Genel Mud  
Patton Tully Transportation Co.  
Pease Leasing, Inc.  
Peat Marwick Main & Co.  
Peco Enterprises, Inc.  
Penn Metal Fabricators, Inc.  
Pennsylvania State University  
Perceptronics, Inc.  
Perini Corp.  
Perkin Elmer Corp., The  
Person System Integration, Ltd.  
Peterson Builders, Inc.  
Petrophil Corp.  
Pfalzerwerke AG  
Pfizer, Inc.  
Philadelphia Ship Maintenance Co.  
Philip Morris Companies, Inc.  
Philippine National Construction  
Phillips Cartner & Co., Inc.  
Phillips Petroleum Co.  
Phoenix Petroleum Co.  
Physics International Co.  
Picker International, Inc.  
Pine Bluff Sand & Gravel Co.  
Pitney Bowes, Inc.  
Planning Research Corp.  
Planning Systems, Inc.  
Pneumo Abex Corp.  
Potomac Electric Power Co.  
Precision Echo  
Precision Finishing, Inc.  
Precision Machining, Inc.  
Prestolite Electric, Inc.  
Preventive Health Program, Inc.  
Price Brothers Co.  
Pride Refining, Inc.  
Proctor & Gamble Distributing Co.  
Professional Service Industries  
Propper International, Inc.  
Public Service Co. of New Mexico  
Puerto Rico Sun Oil Co., Inc.  
Pum Yang Construction Co., Ltd.  
Purdue University  
Purdy Corp.  
Purvis Systems, Inc.  
Q E D Systems, Inc.  
Quaker Oats Co., The  
Questech, Inc.

Quintron Corp.  
R&D Associates  
RCA Corp.  
RCA Global Communications, Inc.  
RC&B Contractors, Inc.  
RJO Enterprises, Inc.  
RJR Nabisco, Inc.  
Racal Communications, Inc.  
Radian Corp.  
Rafael Armaments Development  
Rail Co.  
Rand Corp., The  
Raymond Engineering, Inc.  
Raytheon Co.  
Raytheon Service Co.  
Reach All, Inc.  
Recon Optical, Inc.  
Red River Shipping Corp.  
Rediffusion Simulation, Inc.  
Reeves Brothers, Inc.  
Reflectone, Inc.  
Rensselaer Polytechnic Institute  
Research Management Corp.  
Research Triangle Institute  
Resource Consultants, Inc.  
Reticon Corp.  
Rexon Technology Corp.  
Reynolds, R. J. Tobacco Co.  
Rice, James Ed  
Richardson Electronics Ltd.  
Right Away Foods Corp.  
Riverside Research Institute  
Rockwell International Corp.  
Roe Enterprises, Inc.  
Rohr Industries, Inc.  
Rolls Royce, Inc.  
Rosemount, Inc.  
Rosenblatt M. & Son, Inc.  
Ross Engineering Co., Inc.  
Royal Norwegian Naval Material  
Royal Ordnance Ammunition Ltd.  
Ryan Walsh Stevedoring Co.  
SCI Systems, Inc.  
SMS Data Products Group, Inc.  
SRI International  
SRS Technologies  
Sabreliner Corp.  
Sachs Freeman Associates, Inc.  
Sacramento Municipal Utility District  
Saft America, Inc.  
Samsung Precision Industries Co.  
San Antonio City Public Service  
San Diego Community College District  
Sanders Associates, Inc.  
Sargent Fletcher Co.  
Sargent Industries, Inc.  
Saudi Maintenance Co. Siyanco  
Scallops Corp.  
Schafer, W.J. Associates, Inc.  
Schneider, Inc.  
Science Applications International Corp.  
Scientific Atlanta, Inc.  
Scot, Inc.  
Sea Mobility, Inc.  
Sea Land Service, Inc.  
Sealift, Inc.  
Seaward Marine Services, Inc.  
Sechan Electronics, Inc.  
Selm Servizi Elettrici Montedi  
Semcor, Inc.  
Sentara First Step Corp.  
Sentinel Electronics, Inc.  
Sequa Corp.  
Serv Air, Inc.  
Service Engineering Co., Inc.



Sevenson Construction Corp.  
Shell Co. of the Islands  
Shell Oil Co.  
Shoals American Industries, Inc.  
Siemens AG  
Siemens Capital Corp.  
Sierracin Corp.  
Sikorsky Support Services, Inc.  
Silent Partner, Inc.  
Simmonds Precision Products  
Simplex Wire & Cable Co.  
Singer Co., The  
Sippican, Inc.  
Sletten Construction Co.  
Slocumb, J.T. Co.  
Smiths Industries, Inc., USA  
Softech, Inc.  
Sonalytix, Inc.  
Sonicraft, Inc.  
Sonomure Contracting Co.  
South Carolina Research Authority  
South Carolina Electric & Gas Co.  
Southern Air Transport, Inc.  
Southern California Edison Co.  
Southern Packaging & Storage Co.  
Southwest Marine San Francisco  
Southwest Marine, Inc.  
Southwest Mobile Systems Corp.  
Southwest Research Institute  
Southwestern Bell Telephone Co.  
Space Communication Co.  
Space Data Corp.  
Sparta, Inc.  
Sparton Corp.  
Sparton Electronics Florida  
Spears Associates, Inc.  
Spears, J.L., Inc.  
Specialty Plastic Products, Inc.  
Sperry Corp.  
Standard Manufacturing Co.  
Standard Oil Co.  
Standard Products Co., The  
Stanford Leland Junior University  
Stanford Telecommunications  
Star Dynamics, Inc.  
Stearns Catalytic World Corp.  
Steinberg Brothers, Inc.  
Stemaco Products, Inc.  
Sterling Federal Systems, Inc.  
Stewart Petroleum Co.  
Stevens Co.  
Stewart Warner Corp.  
Still GMBH  
Storage Technology Corp.  
Strand, Inc.  
Strong Bill Enterprises, Inc.  
Stumpf & Mueller  
Sumitomo Heavy Industries Ltd.  
Summit Technologies, Inc.  
Sun Microsystems, Inc.  
Sun Refining & Marketing Co.  
Sundstrand Corp.  
Sundstrand Data Control, Inc.  
Sunkyoung, Ltd.  
Support Systems Associates  
Supreme Beef Processors, Inc.  
Sverdrup Corp.  
Sverdrup Technology, Inc.  
Swedlow, Inc.  
Swift Eckrich, Inc.  
Syscon Corp.  
System Development Corp.  
System Planning Corp.  
Systemhouse, Inc.  
Systems Engineering Associates  
Systems Engineering & Management Co.

Systems Management American Corp.  
Systems Research & Applications  
Systems Research Laboratories, Inc.  
Systron Donner Corp.  
TGS Technology, Inc.  
TRW, Inc.  
T lida Contractors R M Kaya, JV  
Tacoma Boatbuilding Co.  
Talley Defense Systems, Inc.  
Taylor Group, Inc.  
Techdyn Systems Corp.  
Technical & Management Service  
Technology Scientific Services  
Tecalote Research, Inc.  
Tecom, Inc.  
Teer, Nello L Co.  
Tektronix, Inc.  
Teledyne, Inc.  
Teledyne Industries, Inc.  
Telephonics Corp.  
Telex Communications, Inc.  
Telos Corp.  
Temtex Products, Inc.  
Tennessee Apparel Corp.  
Tennier Industries, Inc.  
Terra Contracting Co., Inc.  
Tetra Tech, Inc.  
Teval Corp.  
Texaco, Inc.  
Texaco Refining Marketing, Inc.  
Texas Instruments, Inc.  
Texas Power & Light Co.  
Texcom, Inc.  
Textron, Inc.  
Thinking Machines Corp.  
Thomas, R.S. Construction Co.  
Thomasville Furniture Industries  
Thompson, J. Walter Co.  
Todd Pacific Shipyards Corp.  
Tohoku Denryoku K K  
Tokyo Denryoku K K  
Totinos Italian Kitchen, Inc.  
Tracor Applied Sciences, Inc.  
Tracor, Inc.  
Tracor Instruments Austin, Inc.  
Tracor Marine, Inc.  
Trak International, Inc.  
Trans World Airlines, Inc.  
Transtechology Corp.  
Trataros Industries, Ltd.  
Treadwell Corp.  
Tri Industries, Inc.  
Tricil Enuir Response, Inc.  
Turtle Mountain Manufacturing Co.  
UMC Electronics Co. (Del)  
Ultrasystems, Inc.  
Unidynamics Corp.  
Unified Industries, Inc.  
Union Carbide Corp.  
Union Corp.  
Union Explosivos Rio Tinto SA  
Union Oil Co. of California  
Union Rheinbraun Kohle U Miner  
Uniroyal, Inc.  
Unisys Corp.  
United Airlines Services Corp.  
United Engineers & Constructors  
United Technologies Corp.  
Universal Energy Systems, Inc.  
Universal Maritime Service  
Universal Propulsion Co.  
University of California  
University of California, San Diego  
University of Dayton  
University of Illinois  
University of Maryland

University of Massachusetts  
University of Michigan  
University of Southern California  
University of Texas System  
University of Washington  
Upjohn Co., The  
Utah Power & Light Co.  
Utah State University  
VSE Corp.  
Valentec International Corp.  
Valleydale Packers, Inc.  
Valmac Industries, Inc.  
Vanco Industries, Inc.  
Vance Foods Co.  
Vanguard Technologies Corp.  
Varian Associates, Inc.  
Veda, Inc.  
Velcon Filters, Inc.  
Ver Val Enterprises, Inc.  
Verac, Inc.  
Vessel Charters, Inc.  
Vickers, Inc.  
Vinnell Corp.  
Virginia Electric & Power Co.  
Virtexco Corp.  
Vitro Corp.  
Vitro Services Corp.  
Virtronics, Inc.  
Volkswagen Aktiengesellschaft  
WF Industries  
Wadman Corp.  
Walsh, William V. Construction Co., Inc.  
Walters, E. & Co., Inc.  
Wang Laboratories, Inc.  
Warehouses Service Agency  
Waterman Steamship Corp.  
Watiker & Son, Inc.  
Watkins Johnson Co.  
Wellco Enterprises, Inc.  
Western Gear Corp.  
Western Petroleum Co.  
Western Research Corp.  
Western States Construction Co.  
Western Union International, Inc.  
Westinghouse Electric Corp.  
Westminster Co., Inc.  
Westmont Industries  
Weston, Roy F., Inc.  
Whittaker Corp.  
Wick Construction Co.  
Willard Co., The  
Williams International Corp.  
Williams Steel Industries, Inc.  
Winfield Mfg. Co., Inc.  
Wisconsin Physicians Service Insurance  
Woods Hole Oceanographic Institute  
World Airways, Inc.  
Wright Schuchart, Inc.  
Wylie, C.E. Construction Co.  
Xerox Corp.  
Yonkers Contracting Co., Inc.  
Yordi Construction, Inc.  
York International Corp.  
Young & Rubicam, Inc.  
Zantop International Airlines, Inc.  
Zenith Data Systems Corp.  
Zenith Electronics Corp.  
(10 U.S.C. 2397)  
L.M. Bynum,  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.  
December 21, 1988.  
[FR Doc. 88-29663 Filed 12-23-88; 8:45 am]  
BILLING CODE 3810-01-M

## Department of the Navy

## 32 CFR Part 701

## Availability of Records and Publication of Documents Affecting the Public

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

**SUMMARY:** This rule sets forth amended regulations pertaining to the Department of the Navy Freedom of Information Act Program. The rule reflects changes in the Secretary of the Navy Instruction 5720.42 series from which it is derived.

EFFECTIVE DATE: December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Doris M. Lama (OP-09B3OP), Office of the Chief of Naval Operations, Washington, DC 20350-2000, Telephone: (202) 694-2004/2817.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority cited below, the Department of the Navy amends 32 CFR Part 701, Subparts A, B, C, and D derived from the Secretary of the Navy Instruction 5720.42 series, which implements within the Department of the Navy the provisions of Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act Program (32 CFR Part 286) pertaining to action on requests for release of departmental records under the Freedom of Information Act (5 U.S.C. 552). This rule is being published by the Department of the Navy for guidance and interest of the public in accordance with 5 U.S.C. 552(a)(1). It has been determined that invitation of public comment on these changes to the Department of the Navy's implementing instruction prior to adoption would be impracticable and unnecessary, and it is therefore not required under the public rulemaking provisions of 32 CFR Parts 286 and 701, Subpart E. Interested persons, however, are invited to comment in writing on this amendment. All written comments received will be considered in making subsequent amendments or revisions to 32 CFR Part 701, Subparts A, B, C, and D, or the instruction upon which it is based. Changes may be initiated on the basis of comments received. Written comments should be addressed to Mrs. Doris M. Lama (OP-09B3OP), Office of the Chief of Naval Operations, Washington, DC 20350-2000. It has been determined that this final rule is not a "major rule" within the criteria specified in section 1(b) of Executive Order 12291 and does not have substantial impact on the public.

## List of Subjects in 32 CFR Part 701

Administrative practice and procedure, Freedom of Information, Privacy.

Accordingly, 32 CFR Part 701 is amended as follows:

1. The authority citation for Part 701 is revised to read as follows:

Authority: 5 U.S.C. 552.

2. In 32 CFR Part 701, Subparts A, B, C, and D are revised to read as follows:

**PART 701—AVAILABILITY OF DEPARTMENT OF THE NAVY RECORDS AND PUBLICATION OF DEPARTMENT OF THE NAVY DOCUMENTS AFFECTING THE PUBLIC**

**Subpart A—Department of the Navy Freedom of Information Act Program**

- Sec.  
701.1 Purpose.  
701.2 Scope and effect.  
701.3 Definitions.  
701.4 Policy.  
701.5 Responsibility and authority.  
701.6 For Official Use Only (FOUO).  
701.7 Format and procedures for requesting records under FOIA.  
701.8 Procedures for processing FOIA requests.  
701.9 FOIA appeals.  
701.10 Publication, indexing, and public inspection of certain classes of records.  
701.11 Authentication of records released under FOIA.

**Subpart B—Guidelines on Matters Which Are Exempt from Public Disclosure**

- 701.21 General rule.  
701.22 Reasonably segregable matters.  
701.23 Judicial review.  
701.24 Specific exemptions.

**Subpart C—Addresses for Department of the Navy Records and Locations for Public Inspection**

- 701.31 Addresses for requests for Department of the Navy records.  
701.32 Locations at which Department of the Navy records are available for public inspection.

**Subpart D—Fee Guidelines**

- 701.40 FOIA fees.  
701.41 Fee waivers.  
701.42 Fee assessment.  
701.43 Aggregating requests.  
701.44 Effect of Debt Collection Act of 1982 (Pub. L. 97-365).  
701.45 Computation and collection of fees.  
701.46 Schedule of FOIA fees.  
701.47 FOIA fee remittance/receipt controls.  
701.48 Technical data fees.

**Subpart A—Department of the Navy Freedom of Information Act Program**

**§ 701.1 Purpose.**

Subparts A, B, C, and D of this Part 701 implement the Freedom of Information Act (5 U.S.C. 552), and the

Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act Program, (see 32 CFR Part 286) and outline the policies and procedures for disclosure of records, establish mandatory time limits for Freedom of Information Act (FOIA) responses and explain how members of the public may inspect or obtain copies of Department of the Navy records.

**§ 701.2 Scope and effect.**

(a) *Applicability.* Subparts A, B, C, and D of this Part 701 apply throughout the Department of the Navy and govern disclosure of agency records to any person.

(b) *Requests from persons with private interests.* The Freedom of Information Act (FOIA) applies to persons with private interests as opposed to federal agencies or foreign governments seeking information. Requests from persons acting in their private capacity will be in writing, and clearly show all other addressees within the Federal Government to whom this or a similar request was also sent. This reduces processing time and ensures better inter- and intra-agency coordination.

(c) *Requests from state and local government officials.* State or local government officials who submit FOIA requests for Department of the Navy records shall be given the same consideration as any other requester, except that such requests shall be treated expeditiously when possible if release of the records requested would significantly benefit the general public.

(d) *Requests from foreign governments.* Foreign governments seeking information should use established official channels for obtaining information.

(e) *Privileged release to officials.* Documents that are otherwise exempt from disclosure under the scope of Subparts A, B, C, and D of this Part 701 may be released to:

- (1) Congress;
  - (2) Federal Courts, when ordered by officers of the court for the administration of justice;
  - (3) Other federal executive and administrative agencies as determined by the head of a naval activity;
  - (4) State and local officials as determined by the head of a naval activity; and,
  - (5) Government Accounting Office (GAO) for records during an audit.
- Officials receiving requests under the provisions of this paragraph shall be advised that the records are privileged and exempt from disclosure under



FOIA, and shall be apprised of any special handling requirements.

(f) *Publication and public availability of special classes of records.* The requirements of 5 U.S.C. 552 that certain classes of Department of the Navy regulatory, rulemaking, and organizational records must be published in the *Federal Register* for the guidance of the public and made available for public inspection and copying are implemented in 32 CFR Part 701, Subpart C.

(g) *Public affairs regulations.* Subparts A, B, C, and D of this Part 701 are intended to complement, not restrict, the conduct of Department of the Navy public affairs, media relations, community relations and internal relations functions and practices authorized in Secretary of the Navy Instruction 5720.44 series, "Department of the Navy Public Affairs Regulations." Should the practices authorized in that regulation conflict in any respect, the provisions of these subparts shall be controlling.

(h) *U.S. Navy Regulations.* Release of a record to a member of the public under FOIA shall be deemed to have occurred in the discharge of official duties (Article 1116.3, U.S. Navy Regulations (1973)). Process a request by a member of the public for a record designated as FOR OFFICIAL USE ONLY (FOUO) under the instructions outlined in § 701.6 (Article 1116.4, U.S. Navy Regulations).

(i) *Other directives.* The following directives, to the extent they do not conflict, supplement Subparts A, B, C, and D of this Part 701:

(1) Marine Corps Manual, paragraph 1015 (also, for Headquarters Marine Corps, HQO P5000.12E, Chapter 10)—release of information from the personnel records of members and former members of the Marine Corps.

(2) Federal Personnel Manual. Chapters 293, 294, 297, 335, 339, and 713—release of information from active and inactive civilian personnel records.

(3) Manual of the Medical Department, U.S. Navy (NAVMED P-117), Chapters 23-70 through 23-79 release of information from active and inactive medical records.

#### § 701.3 Definitions.

(a) *FOIA request.* A written request for Department of the Navy records by a member of the public, an organization, or business, etc., that either explicitly or implicitly invokes 5 U.S.C. 552, Department of Defense Directives 5400.7 and 5400.7-R series, "Department of Defense Freedom of Information Act Program" (see 32 CFR Part 286) and/or Subparts A, B, C, and D of this Part 701. At a minimum, the request must be in

writing, contain a reasonable description of the record(s) sought, and contain a statement as to the requester's willingness to pay all fees or those up to a specified amount, if the costs for processing the request are expected to exceed the minimum fee waiver threshold. Verbal requests shall not be honored.

(b) *Agency record.* The products of data compilation, regardless of physical form or characteristics, made or received by a naval activity in connection with transacting public business, and preserved by a naval activity as evidence of organization, policies, functions, decisions, or procedures of the naval activity. The following are not included in the definition of "record":

(1) Library and museum material made, acquired, and preserved solely for reference or exhibition.

(2) Objects or articles, such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment and parts of wrecked aircraft and ships, whatever their historical value, or value as evidence.

(3) Commercially exploitable resources, including but not limited to: Maps, charts, map compilation manuscripts, map research materials, and data if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of the Department of the Navy.

(4) Computer software, if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of a naval activity. This does not include the data processed and produced by such software and stored with the software.

(5) Unaltered publications and processed documents such as regulations, manuals, maps, charts, related geophysical materials and audiovisual productions available to the public through an established distribution system with or without charges.

(6) Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

(7) Personal records not subject to agency creation or retention requirements, created and maintained primarily for an agency employee's convenience, and not distributed to other agency employees for their official use. For example, supervisor's personal notes on employees' performance not required by naval instruction or regulation used solely as a memory aid

in preparing evaluation reports and then destroyed, are not "agency records." Also, Division Officer's notebooks and Marine Corps Unit Leader's notebooks are not "agency records."

(8) Information stored in a computer for which there is no existing computer program or printout.

(c) *Release authority.* Release authorities are commanding officers and heads of Navy and Marine Corps activities (departmental and field) authorized to furnish copies of records under their cognizance for which no FOIA exemption applies.

(d) *Initial Denial Authority (IDA).* An official who has authority to withhold records under FOIA, either in whole or in part, based on the FOIA exemptions. IDA's may also grant or deny requests for reduction or waiver of fees. A list of IDA's is contained in § 701.5.

(e) *Appellate authority.* The Judge Advocate General and the General Counsel have jurisdiction to rule on administrative appeals of denials of FOIA requests for information under their cognizance, as outlined in § 701.9.

(f) *Administrative appeal.* Appeal made by a requester to the appellate authority or their designee, to reverse an IDA's decision where all or part of a requested record or a request for waiver or reduction of fees was denied. A requester may also file an administrative appeal for a non-response to an FOIA request within the statutory time limit.

#### § 701.4 Policy.

Naval personnel shall comply with the spirit and intent of 5 U.S.C. 552, Department of Defense Directive 5400.7 and 5400.7-R series, "Department of Defense Freedom of Information Act Program" (see 32 CFR Part 286) and Subparts A, B, C, and D of this Part 701. Strict adherence is necessary to provide uniformity in implementing the Department of the Navy FOIA Program and to create conditions that promote public trust. Naval activities shall assist requesters in understanding and complying with Subparts A, B, C, and D of this Part 701 and shall ensure procedural matters do not necessarily impede a requester from promptly obtaining Department of the Navy records.

(a) *Disclosure.* (1) Department of the Navy will make available to any party, U.S. and foreign citizens, the maximum information concerning its operations, activities, and administration. A naval record shall only be withheld when it is exempt from disclosure under FOIA. Records that may be withheld under an exemption nevertheless shall be made

available to the public when it is determined that no governmental interest will be jeopardized by their release. The determination of jeopardy to a governmental interest is within the sole discretion of the cognizant official, consistent with statutory requirements, security classification requirements, or other requirements of law. Therefore, subject to FOIA's exemptions and the requester's compliance with prescribed minimum requirements, records requested by the public shall be made available promptly, fully, and willingly.

(2) Initial determination to release or deny a record shall normally be made and reported to the requester within 10 working days after receipt of the request by the cognizant activity.

(b) *Public domain.* Nonexempt records released under Subparts A, B, C, and D of this Part 701 are in the public domain. Nonexempt records maintained in a naval activity's Public Reading Room, or which can be made available in the Public Reading Room within a short time (15 minutes or less) are in the public domain. Exempt records released under 5 U.S.C. 552 or other statutory or regulatory authority may be considered to be in the public domain only when their release constitutes a waiver of an FOIA exemption. When release does not constitute such a waiver, such as disclosure to a properly constituted advisory committee or a Congressional Committee, the released records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, Subparts A, B, C, and D of this Part 701 apply if the same individual seeks the records in a private or personal capacity.

(c) *Requests for records.* Naval activities receiving written or oral requests from members of the public are responsible for advising the requester of the correct means for obtaining permission to examine or copy records at appropriate times and locations where they are held, or for obtaining copies of such records. Minimum requirements are prescribed in § 701.7.

(d) *Time limits.* (1) Each naval activity is responsible for developing procedures to ensure the expeditious handling, prompt retrieval, and review of requested records. The cognizant official responsible for the record(s) has a statutory time limit of 10 working days (excluding Saturdays, Sundays, and legal holidays) to respond to the requester's FOIA request. The 10 working day time limit commences upon receipt of the request by the cognizant activity.

(2) If the cognizant official is unable to respond to the requester within the

statutory time limit, he or she may seek a formal or informal extension of time.

(3) If a naval activity has a significant number of requests (e.g., 10 or more), the requests generally will be processed in order of receipt. But a naval activity may complete action on an easily answered request, regardless of its ranking within the order of receipt.

(e) *Identification of records.* (1) The requester must provide a description of the desired record(s) to enable the naval activity to locate the record(s) with a reasonable amount of effort. FOIA does not authorize "fishing expeditions." If a request does not contain a reasonable description, the naval activity shall advise the requester of the defect and when possible assist the requester in reframing the request. Naval activities are not obligated to act on the request until the requester responds with more specificity. When practical, naval activities shall assist the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with FOIA.

(2) The following guidelines are provided for "fishing expedition" requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories—file related and event related. File related includes information on the type of record (e.g., memorandum, letter, etc.), title, index citation, subject area, date the record was created, and originator. Event related includes the circumstances resulting in the record's creation or date and circumstances surrounding the event the record covers.

(3) Generally, a record is reasonably described when the description contains sufficient file related information to permit an organized nonrandom search of the activity's filing arrangements and existing retrieval systems, or unless the record contains sufficient event related information needed to conduct such a search.

(4) The decision of a naval activity on the reasonableness of description must be based on knowledge of its files. If the description enables naval personnel to locate the record with reasonable effort, the description is adequate. However, if a naval activity receives a request not "reasonably described" it shall notify the requester of the defect and provide guidance on specificity required to begin a search.

(5) Requests by individuals for access to records about themselves are processed under the provisions of the Privacy Act (PA) cited in the request. Requests that cite both Acts or neither Act are processed under both Acts,

using the time limits of the FOIA and the fee provisions of the PA. Ordinarily when personal identifiers are provided in connection with a request for records concerning the requester, only records retrievable by personal identifier need be searched. Search for such records may be conducted under PA procedures. Even though a request that invokes the FOIA is administratively processed under PA procedures, no record shall be withheld that would be released under FOIA procedures.

(f) *Creating a record.* A record must exist and be in the possession and control of the Department of the Navy at the time of the request to be considered subject to FOIA. Mere possession of a record does not presume departmental control; such records, or identifiable portions, should be referred to the originating activity for direct response to the requester. There is no obligation to create or compile a record to satisfy an FOIA request. A naval activity may, however, compile a new record if it is a more useful response to the requester, or less burdensome to the naval activity than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. See Subpart D for fees.

(g) *Fees.* (1) The response to the requester should contain information on the fee status of the request. Generally, information shall reflect one or more of the following conditions:

(i) "The fees for processing your request total \$\_\_\_\_\_. Please forward your check or money order made payable to the Treasurer of the United States to this office within 30 days." (Subpart D of this Part 701 addresses when fees may be collected in advance of forwarding the documents.)

(ii) All fees have been received.

(iii) Fees have been waived because they fall below the automatic fee waiver threshold.

(iv) A request for waiver/reduction of fees has been denied.

(v) Fees have been waived or reduced from a specified amount to another specified amount because the rationale provided in support of a request for waiver has been accepted.

(vi) Fees due in a specified amount have not been received.

(2) Guidance on FOIA fees and fee rates for technical data is addressed at Subpart D.

(h) *Special mail services.* Naval activities may use registered mail, certified mail, certificates of mailing,



and return receipts when needed to establish proof of dispatch or receipt of FOIA correspondence.

#### § 701.5 Responsibility and authority.

(a) **Authority.** (1) The Secretary of the Navy has designated the Chief of Naval Operations as the official responsible for administering and supervising the execution of 5 U.S.C. 552, Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act Program (see 32 CFR Part 286) throughout the Navy. The Chief of Naval Operations has designated the Assistant Vice Chief of Naval Operations (OP-09B30) as principal FOIA Coordinator for the Department of the Navy who:

- (i) Serves as the principal advisor on all FOIA matters.
- (ii) Serves as the Department of the Navy's principal advisor for the release/denial of all naval nuclear weapons information (NNWI).
- (iii) Develops Navy-wide FOIA training program and serves as training-oversight manager.
- (iv) Conducts staff assistance visits within the Department of the Navy to review compliance with 5 U.S.C. 552 and Subparts A, B, C, and D of this Part 701.
- (2) The Commandant of the Marine Corps is responsible for administering and supervising the execution of this instruction within the Marine Corps.
- (b) **FOIA coordinator.** Each addressee is responsible for implementing and administering an FOIA program under Subparts A, B, C, and D of this Part 701. Each addressee shall designate an official as FOIA Coordinator to:

- (i) Serve as principal point of contact on FOIA matters.
- (ii) Provide training for activity/command personnel on the provisions of Subparts A, B, C, and D of this Part 701.
- (iii) Issue an implementing instruction which designates the activity's FOIA Coordinator and Initial Denial Authority(ies), provides guidance on the marking, handling, and safeguarding of documents marked FOUO, FOIA records disposition, and FOIA processing procedures.
- (iv) Review internal directives, practices, and procedures, including those for forms and records, for conformity with this instruction, when applicable.
- (v) Compile and submit input for the Annual FOIA Report.
- (vi) Review activity conformance with the marking, handling, transporting, and safeguarding of FOUO information.
- (vii) Provide guidance on handling FOIA requests and the scope of the FOIA exemptions.

(viii) Review Subpart C of this Part 701 and provide Chief of Naval Operations (OP-09B30) with updated information, as appropriate.

(c) **Release authorities.** Commanding officers and heads of all Navy and Marine Corps activities (departmental and field) are authorized to furnish copies of records under their cognizance and to make such records available for examination, upon proper request, subject to the exceptions noted in paragraphs (e) (2) and (3) of this section. Coordination with officials having cognizance over the subject matter of the requested record is advised when there is a question as to its releasability. If it is determined that a requested record should not be released, in whole or in part, the release authority should forward the request, a copy of the requested document(s), and recommendations, to the IDA in the chain of command. If geographically isolated, the release authority may forward the request to another IDA, if so authorized by the IDA in the chain of command. For records which are part of the Navy's Privacy Act systems of records, the record custodian specified in the systems notice is the appropriate authority to respond to the request.

(d) **Initial Denial Authorities (IDA's).** The following chief officials, their respective vice commanders, deputies, and those principal assistants specifically designated by the chief official are authorized to: Deny and grant requests, either in whole or in part, for documents or records; to grant one 10-working day formal extension to the time limit for responding to FOIA requests and, deny requests to waive or reduce FOIA fees, when the information sought relates to matters within their respective geographical areas of responsibility or chain of command:

- (1) Department of the Navy: Civilian Executive Assistants; Chief of Naval Operations; Commandant of the Marine Corps; Commanders of the Naval Military Personnel Command, Naval Medical Command, Naval Systems Commands, Naval Intelligence Command, Naval Security Group Command, Naval Data Automation Command, and Naval Telecommunications Command; Auditor General of the Navy; Naval Inspector General; Director, Office of Civilian Personnel Management and the Director, Naval Civilian Personnel Center; Chief of Naval Education and Training; Commander, Naval Reserve Force; Chief of Naval Research; Commander, Naval Oceanography Command; heads of DON Staff Offices, Boards, and Councils; Flag Officers; Assistant Judge Advocate General (Civil

Law); and, Assistant Judge Advocate General (Military Law). The Judge Advocate General and his Deputy, and the General Counsel and his Deputies, are excluded from this grant of authorization, but the Assistant Judge Advocates General, Assistants to the General Counsel, and Director, Litigation Office, Office of the General Counsel, are so authorized.

(2) For the shore establishment:

- (i) All officers authorized under Article 22, UCMJ, or designated in section 0115a, Manual of the Judge Advocate General, to convene general courts-martial.
- (ii) Commander, Naval Investigative Service Command and Deputy Commander (Management and Operations), Naval Legal Service Command.
- (iii) In the operating forces: All officers authorized by Article 22, UCMJ, or designated in section 0115a, Manual of the Judge Advocate General (JAGINST 5800.7B), to convene general courts-martial.

(e) **Responsibility for acting on requests.** (1) General rule. When a Department of the Navy official receives a request for a copy of, or permission to examine a record under his or her cognizance that official is responsible for acting on the request as prescribed in § 701.8.

(2) If an official receives a request for records that he or she holds, but which were originated by another naval activity, the official shall normally coordinate with that activity prior to referring the FOIA request and copies of the requested documents for direct response. The naval activity that initially received the request is responsible for notifying the requester of the referral. That naval activity shall not release or deny such records without prior consultation with the other naval activity.

(3) If an official receives a request for records that he or she holds, but were created for another naval activity or government agency, the official shall refer the FOIA request and copies of the requested documents to that activity/agency for direct response, after coordination and concurrence. The activity/agency may have an equally valid interest in withholding the record as the naval activity that created it. In such referrals, the naval activity should provide a recommendation concerning release with the referral. The naval activity that initially received the request is responsible for notifying the requester of the referral.

(4) Records requiring special handling. The following actions shall be taken on requests for:

- (i) Classified records:
  - (A) If a naval activity receives a request for information whose existence or nonexistence is itself classifiable under Executive Order 12356, the naval activity shall refuse to confirm or deny the existence or nonexistence of the requested information.
  - (B) If a naval activity receives a request for documents in its custody that were classified by another agency, or which contain information classified by another agency, it shall refer the request and copies of the requested documents to the originating agency for processing, and may, after consultation with the originating agency inform the requester of the referral. Referred records shall be identified consistent with security requirements. In cases where the originating agency determines they can neither confirm nor deny the existence or nonexistence of the requested information, the referring agency shall deny the request.
- (C) If a naval activity receives a request for classified records or information originated by another naval activity, for which the head of the activity is not the classifying authority under OPNAV Instruction 5510.1 series, "Department of the Navy Information Security Program Regulation," the request, copies of the requested documents, and a recommendation concerning release (if appropriate) shall promptly be readdressed and forwarded to the official having classification authority for the subject matter. That official will make a release determination concerning the classified information and notify the requester, or the activity originally receiving the request, within 10 working days of that determination. The naval activity that initially received the request has responsibility for notifying the requester of the referral. Referred records shall only be identified to the extent consistent with security requirements.

(ii) Naval Investigative Service (NIS) reports—The Commander, Naval Investigative Service Command (NISCOM) is the release/denial authority for all NIS reports. Accordingly, a request for a NIS report shall be promptly readdressed and forwarded to NISCOM and the requester notified of the referral. Direct liaison with NISCOM prior to the referral is encouraged.

(iii) Naval Inspector General Reports—The Naval Inspector General (NAVINGEN) is the release/denial authority for all Navy hotline complaints and all other investigations and

inspections conducted by the NAVINGEN. Requests for local command Inspector General reports shall be coordinated with NAVINGEN.

(iv) Judge Advocate General (JAG) Manual investigative reports—The Judge Advocate General is the release/denial authority for all JAG Manual investigative reports. Requests for JAG Manual investigative reports shall be promptly readdressed and forwarded to the Judge Advocate General and the requester notified of the referral.

(v) Mishap investigation reports—The Commander, Naval Safety Center (COMNAVSAFECEN) is the release/denial authority for all requests for mishap investigation reports. Requests for mishap investigation reports shall be promptly readdressed and forwarded to COMNAVSAFECEN and the requester notified of the referral.

(vi) Naval Audit Service reports—The Auditor General of the Navy is the release/denial authority for all Naval Audit Service reports. Requests for audit reports shall be promptly readdressed and forwarded to the Auditor General and the requester notified of the referral.

(vii) Technical documents controlled by distribution statements—a request for a technical document to which "Distribution Statement B, C, D, E, F, or X" (see OPNAVINST 5510.1 series) is affixed shall be promptly readdressed and forwarded to the "controlling DOD office" for review and release determination. The naval activity that initially received the request is responsible for notifying the requester of the referral. Direct liaison with the cognizant official prior to referral is encouraged.

(viii) Records originated by other government agencies—When a request for records originated by an agency outside the Department of the Navy is received, promptly readdress and forward the request along with copies of the requested documents to the cognizant agency and notify the requester of the referral. This may be accomplished by sending a copy of the referral letter, less attachments, to the requester. The 10 working day time limit begins when the request is received by the cognizant agency. If additional guidance is required, contact Chief of Naval Operations (OP-09B30) or Commandant of the Marine Corps (Code MPI 10), as appropriate. Direct liaison with the cognizant agency is encouraged to ensure expeditious handling of the request.

(ix) National Security Council (NSC) documents/White House files—The Director, NSC is the release/denial authority for NSC documents or White House files. Requests for these

documents shall be promptly readdressed and forwarded to NSC for direct response to the requester, with an information copy to Chief of Naval Operations (OP-09B30). Department of the Navy documents in which NSC has a concurrent reviewing interest shall be forwarded to the Director, Freedom of Information and Security Review (DFOISR), OASD(PA), for action with an information copy to Chief of Naval Operations (OP-09B30). DFOISR, OASD(PA) shall coordinate with NSC, and return the documents to the naval activity upon completion of the NSC review/determination.

(x) Naval Telecommunications Procedures (NTP) publications—The Commander, Naval Telecommunications Command (COMNAVTELCOM) is the release/denial authority for NTP publications. Requests for NTP publications shall be promptly readdressed and forwarded to COMNAVTELCOM and the requester notified of the referral. Direct liaison with COMNAVTELCOM prior to referral is encouraged.

(xi) Naval Nuclear Weapons Information (NNWI)—Chief of Naval Operations (OP-09B30) is the release/denial authority for all requests for NNWI. A copy of the requested records and a recommendation on their release, shall be promptly readdressed and forwarded to Chief of Naval Operations (OP-09B30) for review and release determination and the requester notified of the referral. Direct liaison with Chief of Naval Operations (OP-09B30) prior to referral is encouraged.

(xii) Naval Nuclear Propulsion Information (NNPI)—The Director, Naval Nuclear Propulsion Program (OP-OON) is the release/denial authority for all information concerning NNPI. A copy of the requested records and a recommendation on their release shall be promptly readdressed to OP-OON who will ensure proper coordination and review.

(5) Misdirected requests. Misdirected/misaddressed requests for copies of or permission to examine Department of the Navy records shall be promptly readdressed and forwarded directly to the cognizant naval activity for acting on the request. Although the 10 working day time limit does not commence until the request is received by the cognizant official, direct liaison is encouraged to alert the official that the request is being referred. The requester should be notified of the referral.

(6) Records of a non-U.S. Government source:

- (i) When a request is received for a record that was obtained from a non-

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U.S. Government source, or for a record containing information clearly identified as provided by a non-U.S. Government source, the source of the record or information (known as "the submitter" for proprietary data under FOIA exemption (b)(4)) will be notified of the request and afforded reasonable time (e.g., 30 calendar days) to present any objections on release, unless there can be no valid basis for objection. This practice is required for FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4). If the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed exempt under exemption (b)(4) shall be made by an official equivalent or superior in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the naval activity may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on legal and substantive issues prior to making an agency determination. When the source advises he or she will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified and action on the request normally shall not be taken until after the outcome of that court action is known.

(ii) The coordination provisions of this paragraph also apply to any non-U.S. government record in the possession and control of the Department of the Navy from multinational organizations, such as NATO and NORAD, or foreign governments. Coordination with foreign governments will be made through the Department of State.

(7) Government Accounting Office (GAO) documents:

(i) On occasion, the Department of the Navy receives FOIA requests for GAO documents containing Department of the Navy information, either directly from requesters, or as referrals from the GAO. The GAO is outside the Executive Branch and therefore their records are excluded from processing under the FOIA. However, to be responsive requests for GAO documents containing Department of the Navy information will be processed under the provisions of Mandatory Declassification Review.

(ii) Requests for unclassified GAO reports containing Department of the

Navy information will be forwarded to the Director, GAO Distribution Center, ATTN: DHISF, P.O. Box 6015, Gaithersburg, MD 20877 for direct response to the requester.

(iii) Requests received in the Department of the Navy for classified GAO documents, or documents unidentifiable as to classification, will be referred to the GAO, Office of Security and Safety, Washington, DC 20548. After internal review, the GAO will refer the request, documents, and recommendation regarding their release to the DOD Office of the Inspector General. In turn, that official will refer the action to the Assistant Secretary of Defense (Public Affairs), Directorate for Freedom of Information and Security Review for processing under Mandatory Declassification Review provisions.

#### § 701.6 For Official Use Only (FOUO).

(a) *General.* (1) FOUO applies to information not given a security classification under the criteria of an Executive Order, but which may be withheld from the public under FOIA exemptions (b)(2) through (b)(9). No other material shall be considered or marked FOUO as FOUO is not authorized as a classification to protect national security interests.

(2) *Prior FOUO application.* The prior application of FOUO is not a conclusive basis for withholding a record requested under FOIA. When such a record is requested, it shall be evaluated to determine whether FOIA exemptions still apply in withholding the record or portions of it. Information which is reasonably segregable and does not fall under an FOIA exemption(s) must be released to the requester. If an exemption applies, it may be released when it is determined that no governmental interest will be jeopardized.

(3) *Historical papers.* Records such as notes, working papers, and drafts retained as historical evidence of Department of the Navy actions have no special status apart from FOIA exemptions.

(4) *Time to mark records.* Marking records at their creation provides notice of FOUO content and facilitates review when a record is requested under FOIA. The originator or higher authority is responsible for marking FOUO on all or part of the document that may qualify for withholding from the public under FOIA exemptions (b)(2) through (b)(9). Records requested under FOIA not bearing such markings shall not be assumed releasable without examination for the presence of information that requires continued

protection and qualifies as exempt from public disclosure under the FOIA.

(5) *Distribution statement.* Information in a technical document that requires a distribution statement under OPNAV Instruction 5510.1 series, "Department of the Navy Information and Personnel Security Program Regulation," shall bear that statement and not be marked FOUO. However, the document shall be afforded the same physical protection as a document marked FOUO.

(b) *Location of markings.* (1) An unclassified document containing FOUO information shall have FOR OFFICIAL USE ONLY typed, stamped, or printed in capital letters centered at the bottom edge on the first and last page of the document. For documents with cover or title pages, the same procedure shall be followed and FOR OFFICIAL USE ONLY shall be typed, stamped, or printed in capital letters centered at the bottom on the front cover and on the outside of the back cover.

(2) Within a classified document, an individual page containing both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(3) Within a classified or unclassified document, an individual page with FOUO information, but no classified information, shall have FOR OFFICIAL USE ONLY typed, stamped, or printed in capital letters centered at the bottom edge of the page.

(4) Other records, such as photographs, films, cassette tapes, movies, or slides, shall be marked FOR OFFICIAL USE ONLY so that a recipient or viewer knows the status of the information therein.

(5) Unclassified automatic data processing (ADP) media with FOUO information shall be marked as follows:

(i) An unclassified deck of punched or aperture cards with FOUO information shall be marked as a single document with FOR OFFICIAL USE ONLY marked on the face of the first and last card, and on the top of the deck.

(ii) An unclassified magnetic tape, cassette, or disk pack with FOUO information shall have FOR OFFICIAL USE ONLY marked externally on a removable label. The resulting hard copy report or computer printout shall reflect the FOR OFFICIAL USE ONLY marking on the top and bottom of each page. This may be accomplished by using a programmable header or marking the hard copy manually.

(6) FOUO material transmitted outside Department of the Navy requires an expanded marking to explain the

significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information EXEMPT FROM MANDATORY DISCLOSURE under the FOIA. Exemption(s) \* \* \* apply(ies).

(c) *Release and transmission procedures.* Until FOUO status is terminated, the following release and transmission instructions apply:

(1) FOUO information may be disseminated within Department of the Navy activities and between officials of the Department of the Navy and contractors and grantees who conduct official business for the Department of the Navy or the Department of Defense. Transmission shall be by means that preclude unauthorized public disclosure and documents should inform recipients of the status of such information.

(2) Holders of FOUO information may convey such information to officials in other departments and agencies of the executive and judicial branches to fulfill a governmental function, subject to any limitations contained in the Privacy Act (PA) (see Subpart F of this Part 701), and on disclosure of personal information from PA record systems. When transmitting these records, ensure they are marked FOR OFFICIAL USE ONLY, and the recipient is advised the information may be exempt from public disclosure under FOIA and any special handling instructions, if applicable. For purposes of disclosing records, the Department of Defense is an "agency."

(3) Records released to Congress or the Government Accounting Office (GAO) should be reviewed to see if the information warrants FOUO status. If not, prior FOUO markings shall be removed. If the withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect it against public disclosure for reasons that are explained.

(4) Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted per communications security procedures in ACP-121 (United States Supplement 1, "Communication Instructions" for FOUO information).

(d) *Transporting FOUO information.* Records containing FOUO information

shall be transported in a manner that precludes disclosure of contents. If not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments that otherwise qualify under postal regulations may be sent fourth-class mail.

(3) *Safeguarding FOUO information.*

(1) During normal working hours, records with FOUO information shall not be left unattended in work areas accessible to non-governmental personnel.

(2) At the close of business, FOUO records shall be stored to preclude unauthorized access. Filing such material with other unclassified records in unlocked files, desks, or similar containers is adequate when U.S. Government or government contractor internal building security is provided during nonduty hours. When internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles, such as file cabinets, desks, or bookcases.

(3) Guidance for safeguarding media marked FOUO and processed by an ADP system, activity, or network is addressed in OPNAV Instruction 5239.1 series, "Department of the Navy Automatic Data Processing Security Program."

(f) *Termination.* The originator or other competent authority, such as an IDA or appellate authority, will terminate FOUO markings or status when the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified as practical. Upon notification, holders shall remove the FOUO markings. Records in file or storage need not be retrieved solely for that purpose.

(g) *Disposal.* Copies of FOUO materials (including hard copy reports and computer printouts) may be destroyed by tearing each copy into pieces to preclude reconstructing, and disposed in regular trash containers. When local circumstances or experience indicates that this destruction method is insufficient, local authorities may direct other methods while considering the additional expense balanced against the sensitivity of FOUO information in the records. FOUO information on unclassified magnetic storage media shall be disposed of by overwriting the media one time with any one character. Storage areas within the ADP system (internal memory, buffers, registers, and similar storage areas) may be cleared by using a hardware clear switch, a power-

on reset cycle, or a program designated to overwrite the storage area.

(h) *Unauthorized disclosure.* The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of Department of the Navy information classified for security purposes. However, appropriate administrative or disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may result in criminal and civil sanctions against responsible person(s). The naval activity that originated the FOUO information shall be informed of its unauthorized disclosure.

#### § 701.7 Format and procedures for requesting records under FOIA.

(a) *Minimum requirements.* To qualify as an FOIA request under Subparts A, B, C, and D of this Part 701, a request for copies of or permission to examine Department of the Navy records must:

(1) Be in writing and indicate expressly, or clearly imply, that it is a request under 5 U.S.C. 552, Department of Defense Directive 5400.7-R series, Department of Defense Freedom of Information Act Program (see 32 CFR Part 286) or Subparts A, B, C, and D of this Part 701;

(2) Contain a reasonable description of the particular record(s) requested to enable naval personnel to locate or identify the particular record(s) desired with a reasonable amount of effort; and,

(3) Contain a clear statement of the requester's willingness to pay all fees or those up to a specified amount if the fees are expected to exceed the minimum fee waiver threshold, or provide satisfactory evidence that he or she is entitled to a waiver or reduction of such fees.

(b) *Treatment of requests which do not meet the minimum requirements.* (1) Requests not meeting the minimum requirements should be answered within 10 working days after receipt. The response should attempt to assist the requester in refining the request to obtain the requested records. If the requester fails to offer to pay fees, furnish the requester with a reasonable estimate of the fees associated with the processing of the request. Activities are encouraged to contact requesters, if practicable, to clarify what they are seeking.

(2) If a request fails to qualify within Subparts A, B, C, and D of this Part 701 but the requested record is available and releasable in its entirety, the responding official may provide a copy of the record if he or she determines it to



be in the best interests of the activity. This provision is within the sole and exclusive discretion of the responsible official of the activity concerned and does not create an exception to or grounds for waiver of the minimum requirements.

#### § 701.8 Procedures for processing FOIA requests.

(a) *Control System.* A request for records that invokes FOIA shall be entered into a formal control system to ensure compliance with FOIA. A release determination must be made and the requester informed within the time limits of the FOIA.

(1) *Receipt controls.* At the minimum, controls shall include date stamping the request upon receipt, establishing of a suspense control record and follow-up procedures, and conspicuous stamping or labeling the request "FREEDOM OF INFORMATION ACT REQUEST" to indicate priority handling throughout processing.

(2) *Forwarding controls.* When a request is forwarded to another activity for review or other action, the request, letter of transmittal, and envelope or cover shall be conspicuously stamped or labeled "FREEDOM OF INFORMATION ACT REQUEST" and a record shall be kept of the request, and the date and activity to which it was forwarded.

(b) *Time limits for determinations.* When the cognizant official receives the request, a response shall be made to the requester within 10 working days (excluding Saturdays, Sundays, and legal holidays), unless a formal or informal extension of the time limit is sought to complete processing of the request.

(1) *Formal extension of time limits.* In unusual circumstances when additional time is needed to respond, the naval activity shall acknowledge the request in writing within the 10 working day period, describe the circumstances for the delay, and indicate the anticipated date for substantive response not exceeding 10 additional working days. Unusual circumstances justifying delay are:

(i) *Search.* The need to search for and collect records located in whole or part at places separate from the activity processing the request;

(ii) *Examine.* The need to search for, collect, and examine a substantial number of records responsive to a request; or,

(iii) *Consult.* The need to consult with another naval activity or Federal agency with a substantial interest in the determination of the request.

(2) When a formal extension of time is needed, the IDA shall acknowledge the

request in writing within the 10 working day period, describe the circumstance(s) for the delay, and indicate the anticipated date for a substantive response.

(3) If it appears the request might be ultimately denied, in whole or in part, the Judge Advocate General or the General Counsel, as appropriate, may be consulted by expeditious means prior to authorizing a formal extension.

(4) When it is anticipated that the normal statutory time limits (including the statutory time extension) are insufficient to provide a response, the IDA shall acknowledge the request in writing prior to the expiration of the normal statutory time limits (including the statutory time extension), describe the circumstance(s) requiring the delay and indicate the anticipated date for the substantive response. The requester shall be advised that an appeal may be made to the designee of the Secretary of the Navy within 60 calendar days or await a substantive determination by a specified date. It shall be made clear that such an agreement does not prejudice the right of the requester to appeal an adverse substantive determination.

(5) In these unusual cases where the statutory time limits cannot be met and no informal extension has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester, with notification that the delay may be treated as an initial denial with a right to appeal, or that the requester may agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. Further, naval activities should be advised that the requester still retains the right to treat this delay as a denial with full administrative remedies.

(6) *Informal extension of time limits.* As an alternative to a formal extension of time described in paragraphs b(1) (i) through (iii) of this section, the official responsible for release of the requested information may negotiate an informal extension of time with the requester. An informal extension of time allows the naval activity to negotiate with the requester a response date beyond 10 additional working days allowed by a formal extension. The informal extension is based on the inability to respond within 10 working days and does not affect any time extension the appellate authority may use when responding to an FOIA appeal.

(c) *Action by release authorities.* Release authorities shall take one of the following actions in response to an

FOIA request within applicable time limits:

(1) If requested records are releasable in their entirety, forward the records with a statement on fees to the requester.

(2) If requested records are releasable in their entirety but not yet available, notify the requester the request has been approved and the requested records will be forwarded by a specified date.

(3) If the request for examination of records is approved, notify the requester of the time and place.

(4) If the request has been misaddressed or the requested records are held by another naval activity, promptly refer the request and advise the requester of the referral.

(5) If the requested records must be denied, in whole or in part, advise the requester that his or her request has been referred to higher authority (include the IDA's complete address) for a release determination and direct response. The referral to the IDA shall include a copy of the request, documents responsive to the request, recommendation on partial/total denial, and supporting rationale for the exemption(s) claimed.

(d) *Action by IDA's.* When an IDA receives a referral from a subordinate activity recommending an FOIA request be denied in whole or in part, or receives an FOIA request for documents under his/her cognizance, the IDA shall take one of the following actions within 10 working days:

(1) Respond to the requester as specified in paragraphs (c) (1) through (4) of this section or, if appropriate, direct the subordinate activity to do so.

(2) If the processing of a request cannot be completed within the applicable time limit, explain the reason(s) for the delay to the requester, with notification that he or she may treat this delay as an initial denial with a right to submit an administrative appeal to the appropriate appellate authority, or that the requester may agree to await a substantive determination by a specified date. It shall be made clear that any such agreement does not prejudice the right of the requester to appeal an adverse substantive determination.

(3) If the IDA determines the record contains information which is not releasable under FOIA, and any releasable information contained in the record is not reasonably segregable from the non-releasable information, notify the requester of the exemption(s) claimed, include a brief description of the governmental interest jeopardized by release, and provide advice

concerning the requester's right to appeal to either the Judge Advocate General (Code 14) or the General Counsel, as appropriate, within 60 calendar days of the denial letter.

(4) If the IDA determines that the requested record contains releasable information reasonably segregable from the nonreleasable information, he or she shall:

(i) As to the releasable information, act as indicated in paragraphs (c) (1) through (3) of this section; and

(ii) As to the nonreleasable information, act as indicated in paragraph (d)(3) of this section.

(5) If the IDA determines that the requester's claimed entitlement to waiver/reduction is not warranted, the IDA shall notify the requester of such determination, provide the reason(s) for the denial, and advise the requester of the right to appeal the determination to either the Judge Advocate General (Code 14) or the General Counsel, as appropriate, within 60 calendar days. If the requester appeals the denial to waive/reduce fees, the release of the records may be withheld until the fee is paid or the appellate authority grants a waiver/reduction of fees.

(e) *Reasonably segregable information.* Reasonably segregable portions of records must be released when the meaning of these portions is not distorted by deletion of the denied portions, and when it reasonably can be assumed that a skillful and knowledgeable person could not reasonably reconstruct the excised information. When a record is denied in whole, the response to the requester will specifically state that it is not reasonable to segregate portions of the record for release.

(f) *Other reasons.* The six "other reasons" for not complying with a request for a record are:

(1) *Transferred.* The request is transferred to another naval activity or federal agency.

(2) *Lack of records.* The naval activity determines through knowledge of its files and reasonable search efforts that it neither controls nor otherwise possesses the record.

(3) *Failure of requester to reasonably describe records being sought.* The requester failed to describe the requested record(s) with sufficient particularity to enable the naval activity to conduct a reasonable search.

(4) *Other failures by requester to comply with published rules and/or directives.* The requester failed to comply with procedural requirements of this instruction, including payment of fees.

(5) *Withdrawal.* The requester withdrew the request or appeal.

(6) *Not an agency record.* The information requested is not a record within the meaning of FOIA and Department of Defense Directives 5400.7 and 5400.7-R series, Department of Defense Freedom of Information Act Program (see 32 CFR Part 286).

These "other reason" responses are not denials and, therefore, do not require the signature of an IDA.

(g) *Consultation/coordination.* The Department of the Navy processes thousands of FOIA requests annually. Because there is no central repository for records and no central release/denial authority, proposed responses shall be properly coordinated and appropriate officials consulted prior to a response being made to the requester. Specifically:

(1) Naval activities and federal agencies with a substantial interest in the subject matter of the requested records should be consulted prior to release or denial of information.

(2) Public affairs officers or the Chief of Information should be consulted when an FOIA request is received from a news media representative, the records requested are considered newsworthy, or a denial of a request is expected to be publicly challenged. The Chief of Information (OP-09C) should be promptly notified of any release having evident public affairs implications and a copy of the request and response should be provided.

(3) The appropriate Navy JAG Attorney or OGC Counsel in the field should be consulted on the interpretation and application of 5 U.S.C. 552 and Subparts A, B, C, and D of this Part 701 where a denial of a request is expected to be judicially challenged.

(h) *Mailing lists.* Frequent FOIA requests are received for mailing lists of the home addresses and/or duty station addresses of naval personnel.

(1) A list of home addresses is not releasable without the individuals' consent because it is a clearly unwarranted invasion of the individuals' personal privacy, and therefore, may be withheld from disclosure under 5 U.S.C. 552(b)(6).

(2) Unclassified information about service members may be withheld when disclosure "would constitute a clearly unwarranted invasion of personal privacy" under FOIA (exemption (b)(6) applies). Disclosure of lists of names and duty addresses or duty telephone numbers of members assigned to units that are stationed in foreign territories, routinely deployable, or sensitive,

constitutes a clearly unwarranted invasion of personal privacy. Disclosure of such information poses a security threat to those service members because it reveals information about their degree of involvement in military actions in support of national policy, the type of naval unit to which they are attached, and their presence or absence from their households. Release of such information aids the targeting of service members and their families by terrorists or other persons opposed to implementation of national policy. Only an extraordinary public interest in disclosure of this information can outweigh the need and responsibility of the Navy to protect the tranquility and safety of service members and their families who repeatedly have been subjected to harassment, threats, and physical injury. Units covered by this policy are:

(i) Those located outside the 50 states, District of Columbia, Commonwealth of Puerto Rico, Guam, U.S. Virgin Islands, and American Samoa.

(ii) Routinely deployable units—Those units that normally deploy from home port or permanent station on a periodic or rotating basis to meet operational requirements or participate in scheduled exercises. This includes routinely deployable ships, aviation squadrons, and operational staffs. Routinely deployable units do not include ships undergoing extensive yard work or whose primary mission is support of training, e.g., yard craft and auxiliary aircraft landing training ships.

(iii) Units engaged in sensitive operations—Those primarily involved in training for or conduct of covert, clandestine, or classified missions, including units primarily involved in collecting, handling, disposing, or storing of classified information and materials. This also includes units engaged in training or advising foreign personnel. Examples of units covered by this exemption are nuclear power training facilities, SEAL Teams, Security Group Commands, Weapons Stations, and Communication Stations.

(3) Exceptions to this policy must be coordinated with the Chief of Naval Operations (OP-09B30) or the Commandant of the Marine Corps (MPI 10) prior to responding to requests, including those from Members of Congress. The foregoing policy should be considered when weighing the releasability of the address or phone number of a specifically named individual.

(4) Disclosure of duty addresses of Navy civilian employees is governed by Office of Personnel Management Regulations.



(5) Lists of Department of the Navy personnel names and duty addresses (civilian and military) created primarily for internal housekeeping purposes may be withheld under 5 U.S.C. 552(b)(2) if the administrative burden outweighs any legitimate public interest. Factors to consider when determining public interest are whether the requester serves the public, e.g., a nonprofit association which provides a tangible benefit to the individual on the roster, versus a purely private commercial purpose.

#### § 701.9 FOIA appeals.

(a) *General.* An IDA's decision that a record is exempt may be appealed by the requester in writing to a designated appellate authority. The appeal should be accompanied by a copy of the denial letter and contain rationale for disagreement with the IDA. Appeal procedures also apply to disapproval of a request for waiver or reduction of fees. The requester cannot appeal an agency's finding of "no record", but may provide more detailed identification to facilitate another search of files.

(b) *Time of receipt.* The time limits for responding to an FOIA appeal commence when the appeal reaches the office of the appellate authority having jurisdiction over the record. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(c) *Responsibility and authority.* (1) Delegation of authority. The Judge Advocate General and the General Counsel are authorized to adjudicate appeals made to the Secretary of the Navy on denials of requests for copies of Department of the Navy records or portions thereof, or refusals to waive or reduce fees on matters within their respective areas of cognizance. This includes the authority to release or withhold records, or portions thereof, waive or reduce fees, and to act as required by the Secretary of the Navy for appeals under 5 U.S.C. 552 and Subparts A, B, C, and D of this Part 701.

(2) Respective areas of cognizance. As delineated in SECNAV Instructions 5430.25 and 5430.27 series, the respective areas of cognizance of the Judge Advocate General and the General Counsel for providing legal services for the Department of the Navy are:

- (i) Judge Advocate General—In addition to military law, all matters except those falling under the cognizance of the General Counsel.
- (ii) General Counsel—
  - (A) Business and commercial law aspects of:
  - (1) Acquisition, custody, management, transportation, taxation, and disposition of real and personal property and the

procurement of services, including the fiscal, budgetary, and accounting aspects thereof; excepting, however, tort claims and admiralty claims arising independently of contracts, and matters relating to the naval petroleum reserves;

(2) Operations of the Military Sealift Command, excepting tort and admiralty claims arising independently of contracts;

(3) Office of the Comptroller of the Navy;

(4) Naval Data Automation Command;

(5) Patents, inventions, trademarks, copyrights, royalty payments, and similar matters;

(6) Procurement of foreign military sales, co-production and cooperative research and development and related agreements, NATO standardization agreements, and matters relating to the Arms Exports Control Act.

(7) DON litigation before the Armed Services Board of Contract Appeals; and,

(B) Civilian personnel law matters on employing present and former Navy civilian employees.

(d) *Addresses for appeals.* Appeals to the Secretary of the Navy under 5 U.S.C. 552 and Subparts A, B, C, and D of this Part 701 should be addressed to the appropriate authority noted above. The mailing addresses are:

(1) Judge Advocate General (Code 14), Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(2) General Counsel, Navy Department, Washington, DC 20360-5110.

(e) *Time limits for filing FOIA appeals:* (1) The requester should file the appeal so it reaches the appellate authority not later than 60 calendar days from the date of the initial denial letter. At the end of 60 calendar days, the case may be considered closed; however, the requester may file litigation for denial of the appeal. If the requester was provided several incremental determinations for a single request, the time limit for filing the appeal begins when the requester receives the last response. Records which are denied shall be retained during the time permitted for appeal.

(2) Final determinations on appeals shall normally be made within 20 working days after receipt.

(f) *Delay in responding to an FOIA appeal.* If additional time is needed due to unusual circumstances (see § 701.8(b)(1)), the final decision may be delayed for the number of working days (not to exceed 10), that were not utilized as additional time for responding to the initial request. If a determination cannot be made and the requester is notified within 20 working days, the appellate

authority shall acknowledge to the requester in writing the date of receipt of the appeal, circumstances for the delay, and anticipated date for substantive response. Requesters may be advised that if the delay exceeds the statutory extension or is for reasons other than "unusual circumstances," they may consider their administrative remedies exhausted. Further, requesters should be advised that they may wait for a substantive response without prejudicing their right to judicial remedy. The appellate authority shall continue to process the case expeditiously whether or not the requester seeks a court order for release of the record(s). A copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.

(g) *Action upon receipt.* Upon receipt of an FOIA appeal, the Judge Advocate General or the General Counsel shall inform the IDA of the appeal. The IDA shall forward the case with comments and recommendations as he or she or other interested officials deem appropriate within 10 working days.

(h) *Consultation/coordination.* (1) The Assistant for Naval Investigative Matters and Security (OP-09N) may be consulted to resolve inconsistencies or disputes involving classified records.

(2) Direct liaison with appropriate officials within the Department of the Navy and other interested federal agencies is authorized at the discretion of the appellate authority, who also coordinates with appropriate officials of the Departments of Defense and Justice as prescribed by directives of the Secretary of Defense.

(3) The Secretary of the Navy or appropriate Civilian Executive Assistants shall be consulted and kept advised of cases with unusual implications. The Chief of Information (Code 09C) shall be consulted and kept advised on cases described in § 701.8, paragraph (g)(2).

(i) *Response to the requester.* (1) When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the records released should be promptly forwarded to the requester after compliance with any procedural requirements, such as payment of fees.

(2) Final denial to provide a requested record or to approve a request to waive or reduce fees must be made in writing by the appellate authority. The response shall include the following:

(i) An explanation of the basis for the denial including the applicable statutory exemption(s) invoked.

(ii) If the final denial is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, is based on a declassification review, and the review confirmed the continuing validity of the security classification.

(iii) The response shall advise the requester that the material denied does not contain reasonably segregable portions.

(iv) The response shall advise the requester of the right to judicial review.

(v) The final denial shall include the name and title of the official responsible for the denial.

(j) *Judicial actions.* A requester may seek an order from a U.S. District Court to compel release of a record after exhaustion of administrative remedies, i.e., the IDA or appellate authority denied release or when a naval activity failed to respond within the prescribed time limits.

(1) *Burden of proof.* The naval activity has the burden of proof to justify its refusal to provide a record. The court evaluates the case de novo (anew) and may examine any requested record in camera (in private) to determine whether the denial was justified.

(2) *Actions by the Court.* (i) When a naval activity fails to make a determination within the statutory time limits but can demonstrate due diligence exceptional in circumstances, the court may retain jurisdiction and allow the naval activity additional time to complete its review of the records.

(ii) If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

(iii) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether civilian personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit Systems Protection Board will conduct an investigation to determine whether or not disciplinary action is warranted. The naval activity is obligated to take the action recommended by the special counsel.

(iv) When a naval activity fails to comply with the court order to produce records that have been withheld improperly, the court may punish the responsible official for contempt.

(3) *Non-United States government source information.* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or

records based on information obtained from a non-government source. The Source shall be notified promptly of the court action. If the source advises that it is seeking court action to prevent release, the naval activity shall defer answering or otherwise pleading to the complaint as long as permitted by the Court or until a decision is rendered in the court action initiated by the source, whichever is sooner.

#### § 701.10 Publication, indexing, and public inspection of certain classes of records.

Secretary of the Navy Instruction 5720.45, "Indexing, Public Inspection, and Federal Register Publication of Department of the Navy Directives and other Documents Affecting the Public," assigns the heads of Department of the Navy components, Commanders of the Naval Systems Commands, and the Military Sealift Command responsibilities for executing the following additional requirements on records under their respective cognizance:

(a) Publication of certain classes of Department of the Navy organizational, regulatory, policy, procedural interpretative, and substantive records on a current basis in the *Federal Register*, for the guidance of the public;

(b) Maintenance of current indexes of various classes of records which are precedential for decisions affecting members of the public, and publication of such indexes at least quarterly or making them available to the public by other authorized means; and,

(c) Making the above records and indexes regularly available for public inspection and copying at naval locations.

#### § 701.11 Authentication of records released under FOIA.

In addition to the requirements of FOIA, records provided under FOIA shall be authenticated when necessary to fulfill an official governmental or other legal function. Authentication will be made with an appropriate seal. This service, is not included in the FOIA fee schedule and naval activities may charge \$5.20 for each authentication.

#### Subpart B—Guidelines on Matters Which Are Exempt From Public Disclosure

##### § 701.21 General rule.

A naval record, or portion thereof, may be withheld from disclosure to the public when it is within the scope of one or more of the FOIA exemptions. A record that is exempt under one or more of the FOIA exemptions shall be made available to the public when it is determined that no governmental

interest will be jeopardized. It is at the discretion of the cognizant activity to determine jeopardy to the government interest, consistent with statutory requirements, security classification requirements, and other requirements of law. Information shall not be denied solely because its release might embarrass the Department of the Navy or its military or civilian officials. All records must be reviewed in their entirety to determine releasability.

##### § 701.22 Reasonably segregable matters.

If a record contains both releasable and non-releasable information, the releasable information shall be made available if reasonably segregable from the non-releasable information in the record. Releasable information is "reasonably segregable" if it provides the requester with meaningful and undistorted information after the non-releasable information is excised and if it can be reasonably assumed that a skillful and knowledgeable person could not reconstruct the non-releasable information of the record. When a record is denied in whole, the response advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release. Information in an exempt record may be released to a member of the public when in the judgment of the official making the determination:

(a) The release of the information would not be inconsistent with a statutory requirement or OPNAVINST 5510.1 series; or,

(b) The release of the information would not jeopardize a governmental interest.

##### § 701.23 Judicial review.

All total or partial denials of information are subject to both administrative and judicial appeals. Each naval activity shall maintain copies of all initial denials in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation. If judicially reviewed, a U.S. District Court may examine the withheld record or portions in their entirety to determine whether the record or portions are exempt from disclosure. Therefore, extreme care must be used when claiming an exemption(s) to ensure that a governmental interest exists for the withholding of the information.

##### § 701.24 Specific exemptions.

The following exemptions may apply to naval records requested under FOIA:



(a) Exemption (b)(1)—Exempts those records properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under criteria established by Executive Order (i.e., Executive Order 12356) and implemented by regulations. The following general rules apply:

(1) The request must be referred, with information and recommendations, to an official authorized under § 701.5 of Subpart A to deny requests and who has cognizance of the classified matters in the records, if the basis of the classification is:

(i) An approved security classification guide issued under OPNAVINST 5510.1 series;

(ii) Resource document originated by another naval activity or government agency;

(iii) An original classification determination with written justification for classification, and the justification remains valid; or

(iv) Not readily identifiable, but classification is believed warranted because of classification criteria and OPNAVINST 5510.1 series, "Department of the Navy Information and Personnel Security Program Regulation."

(2) If the original classifier of a record receives a request for the record and upon review determines that there is no basis for continued classification, either in whole or part, the record or portions of it should be declassified. It must be reviewed to determine whether any other FOIA exemptions apply to the declassified information, and, if so, whether a Governmental interest would be jeopardized by its release. All "reasonably segregable" information must be released to the requester.

(3) In some instances, the compilation of unclassified paragraphs may result in the classification of the record as a whole.

(4) Material is classified at the time of the FOIA request may undergo a classification review to determine whether the information should be classified. (The provisions of OPNAVINST 5510.1 series, "Department of the Navy Information and Personnel Security Program Regulation," regarding classification of information after receipt of an FOIA request are to be strictly complied with).

(b) Exemption (b)(2)—Exempts those records "related solely to the internal personnel rules and practices of an agency," such as rules, regulations, orders, manuals, directives, and instructions. Release to the public would substantially hinder the effective performance of a significant function of DON and the rules and practices do not

impose requirements directly on the public. Examples include:

(1) Security classification guides. (Note: Those security classification guides which are classified shall be denied under exemptions (b)(1) and (b)(2)).

(2) Operating rules, guidelines, and manuals for investigators, inspectors, auditors, or examiners, and certain schedules or methods of operation which would reveal:

(i) Negotiating and bargaining techniques;

(ii) Bargaining limitations and positions;

(iii) Inspection schedules and methods; or,

(iv) Audit schedules and methods.

(3) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(c) Exemption (b)(3)—Exempts those records containing matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or under criteria established by that statute for withholding or referring to particular types of matters to be withheld. Authorization or requirement may be found in the statute itself or in Executive Orders or regulations authorized by, or in implementation of a statute. The Privacy Act, 5 U.S.C. 552a, is not an applicable statute under 5 U.S.C. 552(b)(3). Examples include:

(1) Public Law 86-36 [50 U.S.C. 402 note)—National Security Agency Information Exemption, Pub. L. 86-36, section 6.

(2) 35 U.S.C. 181-188, Patent Secrecy—any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(3) 42 U.S.C. 2162—Restricted Data and Formerly Restricted Data.

(4) 18 U.S.C. 798—Communication Intelligence.

(5) 50 U.S.C. 402(d)(3) and (g) Intelligence sources and methods.

(6) 21 U.S.C. 1175—Drug abuse prevention/rehabilitation. Records of the identity, diagnosis, prognosis, or treatment of any patient maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly assisted by any department or agency of the U.S., unless expressly authorized.

(7) 42 U.S.C. 4582—Alcohol abuse prevention/rehabilitation.

(8) 10 U.S.C. 130—Authority to withhold from public disclosure unclassified technical data with military or space application which contains

critical technology in the possession of, or control of, a Department of Defense component or naval activity which may not be exported lawfully without an approval, authorization, or license under Executive Order 12470 or the Arms Export Control Act.

(9) 10 U.S.C. 1102, Confidentiality of Medical Quality Records.

(d) Exemption (b)(4)—Exempts those records containing trade secrets or commercial or financial information that a naval activity receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information, impair the government's ability to obtain necessary information in the future, or impair some other legitimate government interest. Examples include records that contain:

(1) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, and privileged information or information received in confidence such as trade secrets, inventions and discoveries, or other proprietary data.

(2) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(3) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

(4) Financial data provided in confidence by private employers in connection with local wage surveys used to fix and adjust pay schedules applicable to the prevailing wage rate for employees within the Department of the Navy.

(5) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(6) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with federal funds and in part at private

expense, where the contractor or subcontractor retains a legitimate proprietary interest in the data under 10 U.S.C. 2320-2321 and DOD Federal Acquisition Regulation Supplement (DFARS), Subpart 27.4. Technical data developed exclusively with federal funds may be withheld under exemption (b)(3) if it meets the criteria of 10 U.S.C. 130.

(e) Exemption (b)(5)—Exempts those records containing internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether between agencies or between Department of Defense and Department of the Navy components, except as provided in paragraph (e)(ii) through (v) of this section.

(1) Examples include:

(i) Nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions, or suggestions.

(ii) Advice, suggestions, or evaluations prepared on behalf of Department of the Navy individual consultants or by boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups formed for the purpose of obtaining advice and recommendations.

(iii) Nonfactual portions of evaluations by Department of the Navy personnel or contractors and their products.

(iv) Information of a speculative, tentative, or evaluative nature on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate government functions.

(v) Trade secrets or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interests.

(vi) Records that are exchanged among agency personnel and between Department of the Navy, Department of Defense, or other agencies in preparation for anticipated administrative proceeding by an agency or litigation before any federal, state, or military court, as well as records that qualify for the attorney-client privilege.

(vii) Portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or

the internal management, administration, or operation of one or more naval activities, when these records have traditionally been treated by courts as privileged against disclosure in litigation.

(2) If any such intra- or inter-agency record or reasonably segregable portion of such record would be made available routinely through the "discovery process" (the legal process by which litigants obtain information from each other relevant to the issues in a trial or hearing) in the course of litigation with the Department of the Navy, such record, should not be withheld even though discovery has not been sought in actual litigation. If the information could only be made available through the discovery process by special order of the court based on the needs of a litigant balanced against the interests of the Department of the Navy in maintaining its confidentiality, the record or document need not be made available.

(3) Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely available through "discovery" and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(4) A direction or order from a superior to a subordinate contained in internal communication cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(5) An internal communication on a decision subsequently made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(f) Exemption (b)(6)—Exempts information in personnel and medical files, and similar personal information in other files, that if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy.

(1) Examples of files other than personnel and medical files containing similar personal information include:

(i) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility

of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(ii) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(2) This exemption is relevant to a request for information that is intimate to an individual or that possibly could have adverse effects upon that individual or his or her family if disclosed. Section 701.105 lists several examples of non-derogatory information about the official character of a naval member or employee that can routinely be disclosed to a member of the public without constituting a clearly unwarranted invasion of personal privacy of the individual concerned.

(3) In determining whether the release of information would result in a "clearly unwarranted invasion of personal privacy," consider the stated or ascertained purpose of the request. When determining whether a release is "clearly unwarranted," the public interest in release must be balanced against the sensitivity of the privacy interest threatened. For example, lists of names and duty addresses of Department of the Navy personnel (civilian and military) assigned to units that are sensitive, routinely deployable, or stationed in foreign territories must be withheld because release could aid in the targeting of Department of the Navy employees and their families by terrorists. See § 701.8, paragraph (h).

(4) When withholding information solely to protect the personal privacy of the subject of the record, information should not be withheld from that individual or from his or her designated representative. The personal privacy of others discussed in that record may constitute a basis for deleting reasonably segregable portions of the record even when providing it to the subject of the record. This exemption shall not be exercised in an attempt to protect the privacy of a deceased person but may be used to protect the privacy of the deceased person's family.

(5) Individuals' personnel, medical, or similar file may be withheld from them or their designated legal representative only as consistent with Subpart F.

(6) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical, or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record.

(g) Exemption (b)(7).



(1) Exempts those records or information compiled for law enforcement purposes, (i.e., civil, criminal, or military law, including the implementation of Executive orders or regulations issued pursuant to law). This exemption applies, however, only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A));

(ii) Would deprive a person of the right to a fair trial or an impartial adjudication (5 U.S.C. 552(b)(7)(B));

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy (5 U.S.C. 552(b)(7)(C));

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of the Navy, a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and in the case of record or information compiled by a criminal law enforcement agency conducting a lawful national security intelligence investigation, information furnished by a confidential source (5 U.S.C. 552(b)(7)(D));

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention or, the law (5 U.S.C. 552(b)(7)(E)); or,

(vi) Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F)).

(2) Examples include:

(i) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

(ii) The identity of firms or individuals investigated for alleged irregularities involving contracting with Department of Defense or Department of the Navy when no indictment has been obtained nor any civil action filed against them by the United States.

(iii) Information obtained in expressed or implied confidence, in the course of a criminal investigation by a criminal law enforcement agency or office within the Department of the Navy, or a lawful national security intelligence investigation conducted by an authorized agency or office within the Department of the Navy. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining

affirmative or counterintelligence information.

(3) When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by Subpart F.

(4) *Exclusions.* In certain narrowly defined situations agencies may treat certain records compiled for law enforcement purposes as not subject to the requirements of the FOIA. These exclusions differ from the (b)(7) exemption in that, where applicable, the appropriate agency response denies the existence of the record itself, rather than simply denying its release. Two such exclusions are applicable to the Department of the Navy.

(i) An agency may treat a request for law enforcement records compiled in the course of an ongoing criminal investigation as not subject to the requirements of the FOIA when:

(A) there is no reason to believe the subject of the investigation is aware of its pendency; and

(B) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings. The agency may treat such records as outside the FOIA only as long as those circumstances exist. The proper response to the requester states that no records were found.

(ii) Request for informant records maintained by a criminal law enforcement agency of the Department of the Navy under the informant's name or personal identifier may be treated as not subject to the requirements of the FOIA when:

(A) The request is made by a third party according to the informant's name or personal identifier; and

(B) The informant's status as an informant has not been officially confirmed.

The proper response to the requester should state that no records were found.

(h) *Exemption (b)(8)*—Exempts those records contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(i) *Exemption (b)(9)*—Exempts those records containing geological and geophysical information and data, including maps, concerning wells.

#### Subpart C—Addresses for Department of the Navy Records and Locations for Public Inspection

##### § 701.31 Addresses for requests for Department of the Navy records.

Members of the public should address requests to the Commanding Officer or

head of the activity where the record is located. When the official having custody of the record is not known, the request should be addressed to the originating official or the official having primary responsibility for the subject matter involved. The following are the most commonly requested types of records:

(a) *Audit Reports.* Send requests for internal audit matters to the Auditor General of the Navy, P.O. Box 1206, Falls Church, VA 22041.

(b) *Chaplain Corps.* Send requests for religious affairs matters to the Chief of Chaplains, Navy Department, Washington, DC 20370.

(c) *Civilian Personnel Records.* (1) Send requests for personnel records of current civilian employees, or those separated from Federal employment less than 30 days, to the employing installation marked to the attention of the civilian personnel officer.

(2) Send requests for individuals formerly employed by the Department of the Navy, or separated from Federal employment for more than 30 days, to the Director, National Personnel Records Center, (Civilian Personnel Records), 111 Winnebago Street, St. Louis, MO 63110.

(d) *Contractual/procurement records and related matters.* (1) Send requests for copies of Navy procurement directives and Defense Federal Acquisition Regulations (DFARs) to the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

(2) Send requests for copies of current contracts to the contracting officer or head of the procurement activity when known. If unknown, submit requests for Navy contracts to the Chief of Naval Operations (OP-09B30), Pentagon, Washington, DC 20350-2000 and Marine Corps contracts to the Deputy Chief of Staff for Installations and Logistics, U.S. Marine Corps, Washington, DC 20380.

(e) *Courts-martial records.* (1) Send requests for records of trial by general courts-martial or special courts-martial which resulted in a bad conduct discharge, or involving commissioned officers to the Judge Advocate General, Code 20, 200 Stovall Street, Alexandria, VA 22332-2400.

(2) Send requests for records of trial by summary courts-martial or special courts-martial not involving a bad conduct discharge to the officer having supervisory authority in the review process.

(f) *Naval Inspector General reports.* Send requests for Navy hotline complaints and all other investigations and inspections conducted by the

NAVINGEN to the Naval Inspector General, Navy Department, Washington, DC 20370. Send requests for local command Inspector General (IG) reports to the local IG office.

(g) *Investigative records.* (1) Send requests for NIS investigatory records and related matters to the Commander, Naval Investigative Service Command, Washington, DC 20388.

(2) Send requests for JAG Manual investigative reports to the Judge Advocate General, Code 21, Navy Department, 200 Stovall Street, Alexandria, VA 22332-2400.

(3) Send requests for mishap investigative reports to the Commander, Naval Safety Center, Naval Air Station, Norfolk, VA 23511.

(h) *Legal matters.*—(1) *General Counsel legal matters.* Those relating to the acquisition, custody, management, transportation, taxation, and disposition of real and personal property, and the procurement of services, including the fiscal, budgetary, and accounting aspects thereof, excepting, however, tort claims and admiralty claims arising independently of contract, and matters relating to the naval petroleum reserves; operations of the Military Sealift Command, excepting tort and admiralty claims arising independently of contract; the Office of the Comptroller of the Navy; procurement matters in the field of patents, inventions, trademarks, copyrights, royalty payments, and similar matters, including those in the Defense Federal Acquisition Regulations (DFARs), and Navy procurement directives; and, industrial security claims and litigation should be directed to the Office of Counsel of the concerned activity. If unknown, submit to the General Counsel, Navy Department, Washington, DC 20360.

(2) *Judge Advocate General legal matters.* In addition to military law, all matters except those outside the jurisdiction of the General Counsel should be directed to the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400.

(h) *Medical records.* (1) Send requests for inpatient medical treatment records of active duty Navy and Marine Corps personnel and their dependents to the medical treatment facility where the patient is or was treated. These records are held for two years and then retired to the National Personnel Records Center, 9700 Page Avenue, St. Louis, MO 63132.

(2) Send requests for outpatient medical treatment records of active duty Navy and Marine Corps personnel and their dependents to the military treatment facility attached to the command at which they are assigned.

(3) Send requests for outpatient medical records of Navy personnel separated (discharged, retired, or deceased) for less than four months to the Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800. After four months, send requests to Director, National Personnel Records Center (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132. Send requests for dependents' outpatient records to the last medical facility where treatment was provided if within two years of sponsor's release/separation from the service. After the two years, send requests to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132.

(4) Send requests for outpatient medical records of Marine Corps personnel separated (discharged, retired, or deceased) for less than four months to Director, Marine Corps Reserve Support Center, 10950 El Monte Street, Overland Park, KS 66211-1408. After four months, send requests to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132. Requests for dependents, outpatient records should be addressed to the last medical facility where treatment was provided if within two years of active duty member's release/separation from the service. After two years, send requests to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132.

(5) When the location of a military member or dependent's medical record is not known, send requests to Commander, Naval Medical Command, Navy Department, Washington, DC 20312.

(6) Send requests for medical records of drilling reservists to the reserve centers where they are assigned.

(7) Send requests for medical records of inactive or retired reservists to Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800.

(8) Civilian employee medical records. Send requests to the medical facility where the person is/was treated. After two years, send requests to Director, National Personnel Records Center, (Civilian Personnel Records), 111 Winnebago Street, St. Louis, MO 63118.

(j) *Military personnel records.* (1) Send requests for records of active duty Navy personnel, or those separated (discharged, retired, or deceased for up to one year) to Commander, Naval Military Personnel Command, Navy Department, Washington, DC 20378 and

for Marine Corps personnel to Commandant of the Marine Corps, (Code M), Navy Department, Washington, DC 20380.

(2) Send requests for records of Navy and Marine Corps personnel separated (discharged, retired or deceased) for more than one year and inactive reservists to Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132.

(3) Send requests for former officer personnel separated prior to 1902 and former enlisted personnel separated prior to 1885 to Chief, Military Service Branch, Military Archives Division, National Archives, Washington, DC 20408.

(4) Send requests for records of drilling reservists to the member's servicing personnel support unit.

(5) Send requests for records of inactive duty reservists who still have an obligation to the Navy to the Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800.

(6) Send requests for records of separated reservists who have not retired to the Director, National Personnel Records Center, (Military Personnel Records), 9700 Page Avenue, St. Louis, MO 63132.

(7) Send requests for records of retired reservists to the Commanding Officer, Naval Reserve Personnel Center, New Orleans, LA 70149-7800.

(k) *Publications.* (1) Send requests for unclassified instructions, other than Secretary of the Navy Instructions, issued under the Department of the Navy's directives issuance system and subject index thereof (NAVPUBNOTE 5215) to the Commanding Officer, Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

(2) Send requests for all Secretary of the Navy Instructions and OPNAVINSTs marked FOUO or classified to the Chief of Naval Operations, (OP-09B30), Pentagon, Washington, DC 20350-2000.

(3) Send requests for Marine Corps directives, publications, and manuals to Commandant of the Marine Corps., (Code HQS), Navy Department, Washington DC 20380.

(4) Send requests for military specifications, standards, and handbooks to the Commanding Officer, Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

(l) *Research records.* Send requests for records regarding basic research and grants to the activity having custody of



the record. If unknown, send to the Chief of Naval Research, 800 North Quincy Street, Arlington, VA 22217.

(m) *Systems commands*—(1) *Aeronautical weapons systems*. Send requests for information on aeronautical weapons systems, associated sub-systems and related systems and equipment to the Commander, Naval Air Systems Command, Naval Air Systems Command Headquarters, Washington, DC 20361.

(2) *Facilities*. Send requests for information on facilities and land management (design, construction, and maintenance; utilities; housing; and real estate matters) to the Commander, Naval Facilities Engineering Command, 200 Stovall Street, Alexandria, VA 22332.

(3) *Ships*. Send requests for information on ships and ordnance materials to the Commander, Naval Sea Systems Command, Naval Sea Systems Command Headquarters, Washington, DC 20362.

(4) *Space and Naval Warfare*. Send requests for information on development technologies regarding battle force architecture and engineering, space communications, navigation, undersea and ocean surveillance, oceanographic matters, anti-submarine warfare, information transfer systems, and information management systems to the Commander, Space and Naval Warfare Systems Command, Washington, DC 20363-5100.

(5) *Supply*. Send requests for information on naval supply matters to the Commander, Naval Supply Systems Command, Naval Supply Systems Command Headquarters, Washington, DC 20376 and for Marine Corps supply matters to the Commandant of the Marine Corps, (Code L), HQ USMC, Washington, DC 20308.

(n) *Ships deck logs*. Send requests for ships deck logs originating after 30 June 1945 to the Director, Naval Historical Center, Ships Histories Section, Washington, Navy Yard, Washington, DC 20374. Those originated prior to 1945 are held by Chief, Military Reference Branch, Military Archives Division, National Archives, Washington, DC 20408.

(o) *Supply catalogs*. Send requests for Navy and Federal supply catalogs, master cross-reference indexes, and related cataloging publications (cataloging handbooks such as H2-1 and H-3 and Federal manuals for supply cataloging, such as MI-1, -2 and -3) to Superintendent of Documents, United States Government Printing Office, Washington, DC 20402-9325.

(p) *Technical reports*. Send requests for unclassified technical reports on

publications to the Director, National Technical Information Service, 5285 Port Royal Road, Springfield, VA 20402.

(q) If requesters are unable to determine the official having cognizance over the requested records, they should send their request for naval matters to the Chief of Naval Operations, (Code 09B30), Pentagon, Washington, DC 20350-2000 and Marine Corps matters to Commandant of the Marine Corps, HQMC (Code M10), Navy Department, Washington, DC 20380.

#### **§701.32 Locations at which Department of the Navy records are available for public inspection.**

(a) *Navy Department Library*. The Navy Department Library is located at the Washington Navy Yard, Building 44, Second Floor, U.S. Naval Station, 9th and M Streets, SE., Washington, DC 20374.

(1) *Hours of Operation*. 9 a.m. to 4 p.m., Monday through Friday, except holidays.

(2) *Type of Materials Held*. The library has 130,000 volumes of information of interest to the Navy, such as naval and general history, international law and diplomacy, naval architecture and shipbuilding, naval customs and traditions, naval shore stations, yards and bases, uniforms, insignia, awards and flags, geography, travel and guide books, aviation, Navy music, etc. Also contained are approximately 5,000 rare book collections. Additionally, the library has an index by subject matter of materials held, i.e., NAVPUBNOTE 5215, "Consolidated Subject Index," a semi-annual publication which lists instructions originated by Washington Headquarters organizations and Marine Corps directives system checklist of directives distributed outside Headquarters, U.S. Marine Corps. The library is equipped with desks and study carrels for library users and has specialized devices to facilitate research, such as microfilm reader/printers, copy machines, and outlets for tape recorders.

(b) *Defense Reading Room*. The Defense Reading Room is located in Room 2E165 of the Pentagon, Washington, DC 20310. Due to building security, upon arrival at the Pentagon, call 695-3973 to arrange for an escort to the Reading Room.

(1) *Hours of Operation*. 8 a.m. to 4 p.m., Monday through Friday, except holidays.

(2) *Type of Materials Held*. Microfiche copies of indexes and decisional documents regarding Navy Discharge Review Board and Board for Correction of Naval Records proceedings.

(c) *Law Library of the Judge Advocate General*. The law library is located at the Hoffman Building #2, Room 9S47, 200 Stovall Street, Alexandria, VA 22332-2400.

(1) *Hours of Operation*. 9 a.m. to 4 p.m., Monday through Friday, except holidays.

(2) *Type of Materials Held*. The library has published and unpublished decisions of the Navy-Marine Corps Court of Military Review, Navy and Marine Corps directives, miscellaneous superseded manuals, and courts-martial orders and the Navy Department Bulletin.

#### **Subpart D—Fee Guidelines**

##### **§701.40 FOIA fees.**

(a) *Introduction*. The fees described in this section apply to FOIA requests and conform to the Office of Management and Budget Uniform Fee Schedule and Guidelines. They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which are permitted by the FOIA. The guidelines are not intended to imply that fees must be charged for providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as those in NAVCOMPTMAN, Vol. 3, CH-339, which does not supersede the collection of fees under FOIA. This enclosure does not supersede fees chargeable under a statute specifically setting the level of fees for particular types of records. A "statute specifically providing for setting the level of fees for particular types of records" means any statute that enables a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Naval activities should ensure that documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as GPO or NTIS. Naval activities should inform requesters of the steps necessary to obtain records from those sources.

(b) *Definitions*. (1) "Direct costs" means those expenditures a naval activity actually incurs in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to an FOIA request. Direct costs include, for example, the salary of the employee performing the work (the employee's basic rate of pay plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. Not included are overhead expenses, such as costs of space,

heating, or lighting the facility where records are stored.

(2) "Search" includes all time spent looking for material responsive to a request and a page-by-page or line-by-line identification (if necessary) of material in the document to determine if it, or portions thereof, are responsive to the request. Naval activities should ensure that searches are efficient and completed in the least expensive manner to minimize costs to the naval activity and the requester. For example, naval activities should not do a line-by-line search when duplicating an entire document containing responsive information would be less expensive and quicker to comply with the request. Time spent reviewing documents to determine whether to apply one or more of the statutory exemptions is not search time, but review time.

(3) "Duplication" refers to the process of making a copy of a document in response to an FOIA request. Copies can be paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc). Every effort will be made to ensure that the copy provided is in a form reasonably usable by requesters. If copies are not clearly usable, the requester will be notified that their copy is the best available and the agency's master copy will be made available for review upon appointment. For duplicating of computer tapes and audiovisuals, the cost, including the operator's time shall be charged. If a naval activity estimates that assessable duplication charges may exceed \$25, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such notice shall offer the requester the opportunity to confer with naval personnel to reformulate the request to meet his or her needs at a lower cost.

(4) "Review" refers to examining documents responsive to an FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include time spent resolving general legal or policy issues on applying the exemptions. Charges may be assessed only for the initial review. Naval activities may not charge for reviews during an administrative appeal of an exemption already applied. Records or portions of records withheld in full under an exemption subsequently determined not to apply, may be reviewed again to determine the

applicability of other exemptions not previously considered and the costs for such a subsequent review could be assessed.

(5) "Commercial use request" refers to a request from or on behalf of one seeking information for a use or purpose that furthers the commercial, trade, or profit interest of the requester. In determining whether a requester belongs to this category, naval activities must determine the requester's use of the documents requested. Naval activities should seek additional clarification assigning the request to a specific category when doubting the intended use of the requester, or where the use is not from the request itself.

(6) "Educational institution" refers to a preschool, public or private elementary or secondary school, institution of graduate higher education, institution of undergraduate higher education, institution of professional education, and an institution of vocational education operating a program(s) of scholarly research.

(7) "Non-commercial scientific institution" refers to an institution operated solely for conducting scientific research the results of which are not intended to promote any particular product or industry and not operated on a "commercial" basis.

(8) "Representative of the news media" refers to any person actively gathering news for an entity organized and operated to publish or broadcast news to the public. "News" means information about current events or of current interest to the public. Examples of news media entities include television or radio station broadcasting to the public at large and publishers of periodicals when qualifying as disseminators of "news" who make their products available for purchase or subscription by the general public. These examples are not all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services) alternative media would be included in this category. "Freelance" journalists may be considered as working for a news organization if they can demonstrate a basis for expecting publication by that organization, even if not actually employed. Proof may be by publication contract, but naval activities may also look to the requester's past publication record in making this determination.

(9) "All other requesters" refers to persons who do not qualify as an educational institution, non-commercial scientific institution, representative of

the news media, or commercial use requester. An example is a nonprofit organization.

(c) *Application*—(1) *Commercial requesters*. When records are requested for commercial use, fees shall be assessed to recover reasonable standard charges for document search, review, and duplication. Requesters must reasonably describe the records sought. When naval activities review a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters, are not entitled to two hours of free search time and 100 free pages of documents, however, fees totaling \$15 or less shall be waived. Commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. Because use of the requested materials is the exclusive determining criteria, a commercial enterprise may make a request that is not for commercial use. It is also possible that a nonprofit organization could make a request for commercial use. Such situations must be addressed on a case-by-case basis.

(2) *Educational institution requesters*. When a request is made by an educational institution whose purpose is scholarly, research fees shall be limited to reasonable standard charges for document duplication (excluding charges for the first 100 pages). Requesters must reasonably describe the records being sought and must show that the request is made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly research.

(3) *Non-commercial scientific institution requesters*. When the request is made by a non-commercial scientific institution whose purpose is scientific research fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages). Requesters must reasonably describe the records sought and must show that the request is being made under the auspices of a qualifying institution and that records are not sought for commercial use, but in furtherance of scientific research.

(4) *Representatives of the news media*. (i) When the request is made by a representative of the news media, fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the



first 100 pages). Requesters must reasonably describe the records sought.

(ii) Representatives of the news media must meet the criteria defined in paragraph (b)(8) and the request must not be made for commercial use. A request for records supporting the new dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a request by a newspaper for records relating to an on-going investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of duplication alone (excluding charges for the first 100 pages).

(5) *All other requesters.* Naval activities shall charge requesters who do not fit into any of the above categories fees to recover the full direct cost of search and duplicating records, except the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought. Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act (see Subpart E) which permit fees only for duplication. Naval activities are reminded that this category of requester may be eligible for a waiver or reduction of fees if it is in the public interest.

(d) *Fee restrictions.* (1) A naval activity may not charge fees if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. Except for requesters seeking documents for a commercial use, naval activities shall provide the first two hours of search time and the first 100 pages of duplication without charge. For example, for a request (other than one from a commercial requester) involving two hours and ten minutes of search time and 105 pages of documents, a naval activity would recover the cost of only ten minutes of search time and five pages of duplication. If this processing cost was equal to or less than the cost to the naval activity for billing the requester and processing the fee collected (i.e., \$15), no charges would result.

(2) Requesters receiving the first two hours of search and 100 pages of duplication without charge are entitled to such only once per request. Consequently, if after completing its portion of a request, a naval activity refers the request to another naval activity to act on their portion of the request, the referring naval activity shall inform the recipient of the amount of search time and duplication cost to date so the final Navy response will address

all fees in the processing of the request. For referrals to other federal agencies or DOD components, if the naval costs of processing the request are chargeable based on fee guidelines, the fees should be collected from the requester and the recipient of the referral advised of the fee status of the request. If the fees are not chargeable based on the fee guidelines, the recipient of the referral should be advised of the naval fees associated with the processing of the request.

(3) In determining the "cost of collecting a fee," consider administrative costs to the naval activity of receiving and recording a remittance, and processing the fee for deposit in the Treasury Department's special account. The Treasury's cost to handle such remittance is negligible and shall not be considered in a naval activity's determination.

(4) To determine cost, "pages" refers to standard size paper copies, normally 8 1/2" x 11" or 11" x 14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printouts, meets this restriction.

(5) For computer searches, the first two free hours will be determined by the salary scale of the individual doing the computer search. For example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$24 (two hours of equivalent search at the clerical level) of computer costs in excess of that amount are chargeable as computer search time.

#### § 701.41 Fee waivers.

(a) When the naval activity determines that waiver or reduction of fees is in the public interest, documents will be furnished without charge or at a reduced charge. It is in the public interest when furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of the Navy, and is not primarily in the commercial interest of the requester.

(b) Fees shall be waived automatically for all requesters when direct costs for an FOIA request total \$15 or less.

(c) Decisions to waive or reduce fees that exceed the automatic fee waiver threshold shall be made on a case-by-case basis when:

(1) Disclosure of the information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."

(i) Subject of the requester. Naval activities should analyze whether the subject matter of the request involves issues which will significantly contribute to the public understanding of the operations or activities of the Department of the Navy. Requests for records in the possession of the Department of the Navy originated by non-government organizations and sought for their intrinsic content rather than informative value will not likely contribute to public understanding of the operations or activities of the Department of the Navy. Examples of such records are press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a naval activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of the Navy; however, the age of a particular record shall not be the sole criteria for determining the value of a document. These requests must be closely reviewed while considering the requester's stated purpose for the records and the potential for public understanding of the operations and activities of the Department of the Navy.

(ii) Informative value of the information to be disclosed. Naval activities should analyze the substantive contents of a record or portion of the record to determine whether disclosure is meaningful and will inform the public on the Department of the Navy's operations or activities. While the subject of a request may contain information on operations or activities of the Department of the Navy, it may not have great potential for contributing to a meaningful understanding of these operations or activities. An example would be a heavily redacted record, with only random words, fragmented sentences, or paragraph headings. A determination as to whether this type of record will contribute to the public understanding of the operations or activities of the Department of the Navy must be weighed against the requester's intended use. Another example is disclosure of information already in the public domain or nearly identical information may add no meaningful new information on the Department of the Navy's operations and activities.

(iii) Contribution to the public's understanding from disclosure. Disclosure contributes to the public's understanding when disclosure will inform or have the potential to inform the public, rather than the individual requester or small segment of interested persons. The requester's identity

determines whether the requester has the capability and intention to disseminate the information to the public. Assertions of plans to write a book, research a particular subject, doctoral dissection work, or indigence are insufficient. Requester must demonstrate the capacity to disclose the information in a manner informative to the general public. Requesters should describe their qualifications, nature of their research, purpose of the requested information, and intended means of dissemination to the public.

(iv) The significance of the contribution to public understanding. Naval activities must assess the significance or impact of disclosure against the current level of public knowledge or understanding prior to the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previous unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public. Naval activities shall not make value judgments whether the information is important enough to be made public.

(2) Disclosure of the information "is not primarily in the commercial interest of the requester."

(i) Existence and magnitude of a commercial interest. If the request is a commercial interest, naval activities should address the magnitude of that interest to see if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine whether this is a commercial requester, naval activities may infer it from the requester's identity and circumstances of the request. The requester's commercial benefit must clearly override any personal or nonprofit interest to apply the commercial standards of the FOIA.

(ii) The primary interest in disclosure. Once a requester's commercial interest has been determined, naval activities should then determine if disclosure would be primarily in that interest. This requires balancing the commercial interest of the request against any public benefit derived as a result of that disclosure. Where the public interest served is beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists and the relative commercial interest of the requester is greater than the public interest, then a

waiver or reduction of fees would be inappropriate. For example, while news media organizations have a commercial interest as business organizations however, their role of disseminating news to the public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest is secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research may recognize a commercial benefit, either directly or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and charging a fee would be inappropriate. Conversely, data brokers or others who compile government information for marketing can normally be presumed to primarily have a commercial interest.

(3) The above factors and examples are not all inclusive. Each fee decision must be considered on a case-by-case basis the merits of the information provided in each request. When the decision to charge, reduce, or waive the fee cannot be clearly resolved, naval activities should rule in favor of the requester.

(c) The following additional circumstances describe situations where waiver or reduction of fees are most likely warranted:

(1) A record is voluntarily created to preclude an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

(2) A previous denial of records is reversed in total or in part, and the assessable costs are not substantial (e.g., \$15-\$30).

#### § 701.42 Fee assessment.

(a) Fees may not be used to discourage requesters. FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters), and duplication.

(b) To be responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, naval activities shall:

(1) Analyze each request to determine the category of the requester. If the naval activity's determination of the category of the requester is different than that claimed by the requester, the naval activity will:

(i) Notify the requester that additional justification should be provided to support the category claimed, and that a search for responsive records will not be initiated until agreement on the category of the requester. Absent further category justification from the requester and a reasonable period of time (i.e., 30

calendar days), the naval activity shall render a final category determination and notify the requester of the determination, including administrative appeal rights.

(ii) Advise the requester that a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs for the category determined by the naval activity.

(2) Requesters must submit a fee declaration appropriate for these categories:

(i) Commercial requesters must indicate a willingness to pay all search, review, and duplication costs.

(ii) Educational or non-commercial scientific institution or news media representatives. Requesters must indicate a willingness to pay duplication charges in excess of 100 pages, if more than 100 pages of records are desired.

(iii) All others. Requesters must indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

(3) If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

(4) As described above, naval activities must be prepared to provide an estimate of assessable fees to the requester. While searches vary among naval activities and an estimate is often difficult prior to an actual search, requesters desiring estimates are entitled to them before committing to a willingness to pay. Should naval activity costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the amount agreed to shall not be charged without the requester's agreement.

(5) A naval activity may not require advance payment of any fee (i.e. payment before work is commenced or continued on a request) unless the requester previously failed to timely pay fees or the agency determined that the fee exceeds \$250. A timely fashion is 30 calendar days from the date of billing by the naval activity.

(6) Where a naval activity estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250, the naval activity should notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges for requesters without a history of payment.



(7) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the naval activity may require the requester to pay the full amount owed, pay any interest, demonstrate that the fee had been paid, and to make an advance payment of the full amount of the estimated fee before the naval activity begins to process a new or pending request. Interest is at the rate prescribed in 31 U.S.C. 3717.

(8) Once the documents are ready for release, naval activities may request payment prior to forwarding the documents if there is no payment history on the requester or if the requester has previously failed to pay a fee in a timely fashion (i.e., within 30 calendar days of billing). If the requester fails to pay in a timely fashion, paragraph (b)(7) of this section applies. Naval activities may not hold documents ready for release pending payment from requesters with a history of prompt payment.

(9) When naval activities act under paragraphs (b) (1) through (7) of this section, the time limits of the FOIA (10 working days from receipt of initial requests and 20 working days from receipt of appeals, plus permissible extensions of time) begin after the naval activity has received a willingness to pay fees or fee payments, if appropriate.

(10) Naval activities may charge for search time even if that search fails to locate records responsive to the request, or if records located are determined to be exempt from disclosure. If the naval activity estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance a willingness to pay fees up to the estimated amount. The notice shall offer the requester the opportunity to confer with the naval activity to reformulate the request and to lower costs.

#### § 701.43 Aggregating requests.

Except for commercial requesters, a naval activity may not charge for the first two hours of search time or for the first 100 pages of reproduction. A requester may not file multiple requests at the same time each is seeking portions of a document or documents to avoid payment of fees. When a naval activity reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request into a series of requests to evade fees, the naval activity may aggregate the requests and charge accordingly. In determining whether it is reasonable to aggregate the requests, consider the time period of the requests. For example, it would be reasonable to

presume that multiple requests of this type made within a 30-day period had been made to avoid fees. It is harder to make this presumption for requests over a longer time period. Before aggregating requests from more than one requester, naval activities must have a concrete basis to conclude that the requesters are acting in concert to avoid payment of fees. Naval activities may not aggregate multiple requests from one requester on unrelated subjects.

#### § 701.44 Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).

The Debt Collection Act of 1982 (Pub. L. 97-365) provides for a minimum annual rate of interest on overdue debts to the Federal Government. Naval activities may charge an interest penalty for fees outstanding 30 days from the date of billing (the first demand notice). The interest rate shall be as prescribed in 31 U.S.C. 3717. Naval activities should verify the current interest rate with respective accounting and finance offices. After one demand letter has been sent and 30 calendar days have lapsed with no payment, naval activities may submit the debt to the respective accounting and finance offices for collection under the Debt Collection Act of 1982.

#### § 701.45 Computation and collection of fees.

(a) The fee schedule in this section shall be used to compute search, review (in the case of commercial requesters), and duplication costs for processing an FOIA request. Cost shall be computed on time actually spent. Time-based and dollar-based minimum charges for search, review (in the case of commercial requesters), and duplication are not authorized.

(b) Collection of fees. Collect FOIA fees when providing the documents to the requester when the requester specifically states that costs are acceptable or acceptable up to a specified amount. Collection may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the naval activity, or the naval activity determines the fee will be in excess of \$250.

#### § 701.46 Schedule of FOIA fees.

Search time costs. The following schedules outline authorized fees:

##### (a) Manual search.

Type	Grade	Hourly rate
Clerical.....	E9/GS8 and below.....	\$12
Professional.....	01-06/GS9-GS/GM15.....	25

Type	Grade	Hourly rate
Executive.....	07/GS/GM16/ES1 and above.....	45

(b) *Computer search.* Computer search is based on the direct cost of the central processing unit, input-output devices, and memory capacity of the computer configuration. The cost of computer search is based on the computer operator/programmer's time in determining how to conduct and subsequently executing the search and is charged at the rate of a manual search.

##### (c) Duplication costs.

Type	Cost
Pre-printed material (i.e., unaltered directives, publications).	\$0.02 (per page).
Office copy (i.e., xeraxed copies).	.15 (per page).
Microfiche.....	.25 (per page).
Computer copies (tapes or reprints).	Actual cost of duplicating the tape or printout (includes operator's time and cost of the tape).

##### (d) Review Time (in the case of commercial requesters).

Type	Grade	Hourly rate
Clerical.....	E9/GS8 and below.....	\$12
Professional.....	01-06/GS9-GS/GM15.....	25
Executive.....	07/GS/GM16/ES1 and above.....	45

#### § 701.47 FOIA fee remittance/receipt controls.

(a) Naval activities shall advise requesters to make their check/money order payable to the Treasurer of the United States. Upon receipt of a check/money order, the receiving activity shall submit a NAVCOMPT Form 2277, Voucher for Disbursement and/or Collection, and the check/money order to the local disbursing office for processing. "FOIA Receipt Account Number 17249.1203" shall be annotated on the NAVCOMPT Form 2277 when processing all FOIA fees, except those received by naval industrially-funded (NIF) and non-appropriated funded (NAF) activities.

(b) Remittances received by NIF activities shall be made payable to the activity and the requester should indicate on the check "FOIA Remittance." the remittance shall be deposited in the NIF activity account.

(c) Remittances received by NAF activities shall be made payable to the activity and the requester should indicate on the check "FOIA Remittance." The remittance shall be deposited in the NAF activity account.

#### § 701.48 Technical data fees.

(a) *General.* Technical data, recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). This term does not include computer software or data incidental to contract administration, such as financial and/or management information. Technical data requiring release under FOIA shall be released after the requester pays all reasonable costs for search, duplication, and review of the records to be released.

(b) *Retention of funds.* Naval activities shall retain fees received from releasing technical data. The funds shall be available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with the request. Reasonable costs are the full costs to the Government of rendering the service, or fair market value of the service, whichever is greater. Fair market value shall be determined by commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Government. The full cost includes all direct and indirect costs to conduct the search and to duplicate records responsive to the request. This cost is different from the direct costs allowable under the FOIA.

(c) *Waiver.* Naval activities shall waive the payment of costs for technical data when greater than the costs required for release of this same information under FOIA, if:

(1) The request is made by a United States citizen or a United States corporation who certifies that the technical data requested is needed to submit an offer, or determine capability of submitting an offer. The technical data must relate to the product which will be provided to the United States or a contractor with the United States. However, naval activities may require the citizen or corporation to pay a deposit of not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation.

(2) The release of technical data is requested to comply with the international agreement; or,

(3) The naval activity determines that waiver is in the interest of the United States.

##### (d) Fee rates.

(1) Search time is computed as follows:

##### (i) Manual search.

Type	Grade	Hourly Rate
Clerical.....	E9/GS8 and below.....	\$13.25
(Minimum charge).....		8.30

Professional and executive hourly rate of fees are established at actual hourly rate prior to search. A minimum charge will be established at ½-hourly rates.

(ii) Computer search is the total cost of the central processing unit, input-output devices, and memory capacity of the actual; computer configuration. The wage for the computer analyst/operator determining how to conduct and subsequently executing the search will be recorded as part of the computer search and is at the same rate of the manual search scale.

(2) Duplication costs are as follows:

Type	Cost
Aerial photographs, specifications, permits, charts, blueprints, and other technical documents.	\$2.50 each.
Engineering data (microfilm):	
Aperture cards:	
Silver duplicate negative.	.75 per card.
(When key punched and verified).	.85 per card.
Diazo duplicate negative.	.65 per card.
(When key punched and verified).	.75 per card.
35mm roll film.....	.50 per frame.
16mm roll film.....	.45 per frame.
Paper prints (engineering drawings).	1.50 each.
Paper reprints of microfilm indices.	.10 each.

(3) Other technical data records. Charges for services not specifically provided above are at the following rates:

Type	Cost
Minimum charge for office copy (up to six images).	\$3.50.
Each additional image.....	.10.
Each typewritten page.....	3.50.
Certification and validation with seal.....	5.20 each.
Hand-drawn plots and sketches, each hour or fraction thereof.	12.00.

December 19, 1988.

Sandra M. Kay,

Department of the Navy, Alternate Federal Register Liaison Officer.

[FR Doc. 88-29555 Filed 12-23-88; 8:45 am]

BILLING CODE 3810-AE-M

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 117

[CGD7-88-27]

### Drawbridge Operation Regulations; Gulf Intracoastal Waterway, Florida

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

**SUMMARY:** At the request of the Florida Department of Transportation, Sarasota County, and the Venice Area Chamber of Commerce the Coast Guard is modifying regulations governing the Hatchett Creek (SR 45/US-41) and Venice Avenue drawbridges by permitting the number of openings to be limited during certain periods. This change is being made because an increase in highway traffic has occurred on weekdays and bridge openings intensify traffic congestion. This action will accommodate the needs of vehicular traffic and should still provide for the reasonable needs of navigation.

**EFFECTIVE DATE:** These regulations become effective on January 26, 1989.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Commander Gerald Fleming at (305) 536-4103.

**SUPPLEMENTARY INFORMATION:** The original Notice of Proposed Rulemaking (NPRM) was published in the Federal Register on September 2, 1988 and a Supplemental (NPRM) was published on November 21, 1988. The Commander, Seventh Coast Guard District, also published the proposal in Public Notices dated September 17, 1988 and November 29, 1988. Interested persons were given until October 17, 1988 and December 6, 1988, respectively to submit comments. No comments were received to any notice.

#### Drafting Information

The drafters of these regulations are Lieutenant Commander Gerald Fleming, Bridge Administration Specialist, project officer, and Lieutenant Commander S.T. Fuger, Jr., project attorney.

#### Discussion of Comments

No comments were received. The final rule is unchanged from the Supplemental Proposed Rule published on November 21, 1988.

#### Economic Assessment and Certification

These regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under the Department of Transportation regulatory policies and



procedures (44 FR 11034; February 28, 1979).

The economic impact has been found to be so minimal that a full regulatory evaluation is unnecessary. We conclude this because the regulations exempt tugs with tows. Since the economic impact of these regulations is expected to be minimal, the Coast Guard certifies that they will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 33 CFR Part 117

Bridges.

#### Regulations

In consideration of the foregoing, Part 117 of Title 33, Code of Federal Regulations, is amended as follows:

#### PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46 and 33 CFR 1.05-1(g).

2. Section 117.287 (a-1) and (b) are revised to read as follows:

#### § 117.287 Gulf Intracoastal Waterway.

(a-1) The draw of the Venice Avenue bridge, mile 56.6 at Venice, shall open on signal, except that from 7 a.m. to 4:30 p.m., Monday through Friday except Federal holidays, the draw need open only at 10 minutes after the hour, 30 minutes after the hour and 50 minutes after the hour and except between 4:35 p.m. and 5:35 p.m. when the draw need not open.

(b) The draw of the Hatchett Creek (US-41) bridge, mile 56.9 at Venice, shall open on signal, except that, from 7 a.m. to 4:20 p.m., Monday through Friday except Federal holidays, the draw need open only on the hour, 20 minutes after the hour, and 40 minutes after the hour and except between 4:25 p.m. and 5:25 p.m. when the draw need not open. On Saturdays, Sundays, and Federal holidays from 7:30 a.m. to 6 p.m. the draw need open only on the hour, quarter-hour, half-hour, and three quarter-hour.

Dated: December 19, 1988.

Martin H. Daniell,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 88-29823 Filed 12-23-88; 8:45 am]

BILLING CODE 4910-14-M

#### POSTAL SERVICE

##### 39 CFR Part 111

#### Manifest Mailing System

AGENCY: Postal Service.

ACTION: Final rule.

**SUMMARY:** This final rule amends postal regulations governing the use of permit imprints on mail without affixed postage to include the requirements and procedures for a Manifest Mailing System (MMS) that allows participating mailers to combine nonidentical weight and rate pieces of mail of the same class and processing category in a single permit imprint mailing.

The purpose of the final rule is to provide for situations when postage charges cannot be adequately verified by weighing or when normal acceptance procedures are impractical.

**EFFECTIVE DATE:** January 26, 1989.

**FOR FURTHER INFORMATION CONTACT:** Tekla B. Zimmerman, (202) 268-5305.

**SUPPLEMENTARY INFORMATION:** On May 20, 1988, the Postal Service published for comment in the *Federal Register* proposed amendments to Part 145 of the Domestic Mail Manual (DMM) to include the Manifest Mailing System (MMS), completely revise DMM 145.9, and retitling it as Alternate Mailing Systems (AMS). 53 FR 18101-7. A full explanation of the background and reasons for the change was published at that time and is not repeated here. Interested persons were invited to submit written comments concerning the proposed regulations by July 5, 1988.

The Postal Service received nineteen written comments from federal agencies, mailers' organizations, commercial mailers, mail preparation companies and other mailers. Thirteen of the comments received were in general agreement with the proposal with minor suggested changes or modifications. Six commenters objected to the proposal, but did not include any recommended changes. The following is a discussion of the substantive comments received:

One commenter stated that the requirement limiting a single permit imprint mailing to nonidentical weight and rate pieces of mail of the same class and processing category introduces additional sortation, labor and space problems, and causes problems in meeting the minimum piece/weight requirements for each mailing. The commenter suggested allowing mailers to combine classes of mail and generate one manifest for everything in combination form to meet the minimum piece/weight requirement. Two commenters suggested eliminating the

minimum volume requirements for MMS and one commenter also recommended that local postmasters be authorized to waive the minimum volume requirements under certain conditions. Under MMS, mailers are required to meet the same minimum volume requirements outlined for permit imprint mailings or the appropriate class of mail.

Presently, it is not practical for the Postal Service to allow a mailer to mix classes of mail on a single mailing statement (Form 3602 or 3605) to meet minimum piece/weight requirements, for a number of reasons. Postage and presort verification procedures differ for each class or sub-class of mail because of the various applicable postage rates and make-up requirements. Because postage is adjusted as necessary based on a sampling of the mail, combined mailing statements would preclude accurate verification or adjustments unless the postage for each class or subclass is reflected accordingly. Moreover, accountable mail, such as COD or registered mail, establishes a financial liability on the part of the Postal Service and the acceptance, verification, and processing procedures for accountable mail reflect the additional responsibility. Combined manifests or mailing statements would compromise our ability to properly accept and verify this mail. For this reason, the Postal Service will retain current postal regulations which do not allow a mailer to mix classes of mail on a mailing statement (Form 3602 or 3605).

Four comments were received concerning the unique identification numbers required on each piece of mail. Two commenters requested a modification and clarification concerning the placement of the unique identification numbers. One commenter also added that the placement of the identification numbers should be uniform for all MMS options. Based on these comments, the final rule includes a revision that clarifies the acceptable placement of identification numbers and a provision allowing mailers to print the unique identification number below the permit imprint. The printing location for identification numbers is the same for all non-letter mail MMS options. Two other comments suggested eliminating the requirement to list the unique identification numbers for non-letter mail in ascending order on the Manifest listing. This requirement is being modified to allow mailers to list unique identification numbers in ascending order within 5-digit, 3-digit or BMC ZIP codes or within each zone for zone-rated mail MMS options.

Four commenters felt that the 1.5% postage error tolerance was too restrictive. In addition, three commenters suggested eliminating the ten percent penalty charge for errors that exceed 1.5%. The MMS test phase conducted by the Postal Service indicated that neither one of these items caused any problems for the mailers participating in the test program. Experience also indicates that mailers who have installed viable quality control procedures have no problem with this tolerance level. Moreover, an increase in the percentage could require higher sampling levels because of reduced statistical confidence. For these reasons, the Postal Service will retain this provision.

Two commenters made reference to DMM 145.754a concerning the use of customer computer software that automatically skips to the next weight for borderline pieces and asked for clarification of the reference. The note only refers to mailers that utilize software programs that will automatically skip to the next weight for extreme borderline weight cases. It is not the Postal Service's intention to penalize such mailers or to impose a postage adjustment for each mailing because of this programming function. To make this intention clear, the wording of the note referenced in 145.754a has been changed.

Several comments were received concerning manifest listing requirements for non-letter mail options. Two commenters felt that it was not necessary to require page totals for pieces and weight, or cumulative totals from previous pages. They stated that sequential page numbers and cumulative postage would provide sufficient information for verification purposes. The Postal Service agrees and has revised this requirement, except that the bulk bound printed matter option will remain the same since this information is required for postage calculation. The Form 3877 used for accountable mail (e.g., registered mail, COD mail) also will require page totals and cumulative page totals to be shown. Another commenter recommended that report formats for zone-rated options should also allow inclusion of ZIP/Zone information for customer shipper information. Customers that wish to include the 3-digit ZIP Code that is used to determine the zone calculation may do so, as long as all required information is included on the report. Finally, a commenter suggested that the Postal Service require a package content report in addition to the Manifest Listing. This information may prove

useful to the mailer, but is not necessary for the MMS program.

One commenter suggested eliminating the requirement to list ZIP Codes as part of the manifest listing for letter mail. The ZIP Codes must be included as part of the manifest listings in order to meet current listing requirements, as outlined in the DMM, for several presort options available to customers. Provisions are included in the manifesting requirements to allow for mailers who cannot provide this information as part of the manifest to provide a separate listing while the mailer takes the necessary steps to bring its system into compliance. This is consistent with the current provisions in the DMM which provides for the submission of that information as a separate listing.

A number of comments concerned the required keyline information for letter-size mail. One commenter suggested including a date as part of the keyline information. This information is not required, but mailers who wish to include the date may do so, with the caveat that the date will not have the same connotation as a meter impression, where the date must be the actual date of mailing. Two commenters recommended implementation of manifest serial numbers (manifest identification numbers) to prevent security problems concerning revenue and multiple mailings presented on the same day. The Postal Service sees no need for such a number to identify individual mailings; however, mailers that wish to utilize manifest serial number as a means of tracking individual mailings may incorporate this information as part of the keyline for letter-size mail, using the two optional spaces to the right of the required keyline information. If included on non-letter mail options, the manifest serial number must be properly identified, so as not to cause confusion with the unique identification number shown on the mailpiece. Additionally, two commenters claim that the postage paid information is redundant, takes up too much space and can easily be computed by the verifier. The Postal Service has determined that the postage amount included as part of the keyline information facilitates verification, and, thus, will retain the requirement. Two commenters had difficulties with the assignment of consecutive numbers for letter-size mail. One believed the numbering would be too difficult for a multiple machine operation and the other stated it would cause operational delays. Experience indicates that mailers have the ability to accommodate

multiple machine operation, and this requirement has been retained.

Two commenters claimed that the 20-piece batch size was too small, and one of these erroneously thought that each batch had to be packaged separately. Batching does not change presort make-up requirements. Only mail that would be required to be packaged together according to the sortation instructions outlined in the DMM would need to be packaged together under MMS. The Postal Service has determined that the 20-piece batch size is the optimum batch size, but other batch sizes can be approved, depending on the type of mail, by the General Manager, of the appropriate Rates and Classification Center (RCC).

One commenter stated that the Alternate Mailing System (AMS) Cost/Benefit analysis required by proposed DMM 145.923 should be enhanced by Headquarters guidelines for cost/benefit calculations. The Postal Service believes this comment may have some merit and will consider future actions in this regard.

Three comments were received concerning the required quality control (QC) procedures. One commenter believed that these QC procedures were not necessary, since the Postal Service already performs verifications that should serve as the QC check. Another suggested that other QC alternatives be explored, i.e., system certification, automated QC, etc. The third commenter totally opposed the QC concept. The Postal Service considers mailer QC procedures to be a reasonable requirement that ensures a mailer's ability to meet MMS program specifications and the quality of their mail preparation.

One commenter suggested clarification of the language concerning processing categories, recommending that the language clearly state that a mailing could consist of nonidentical-size pieces only for the same processing category (i.e., flat-size, letter-size, irregular parcels, etc.). The Customer Publications developed for each MMS option currently available specifically outline the minimum and maximum size requirements (currently set forth in DMM 128) for a particular processing category. A mailing can consist of various size pieces within the same processing category.

Two commenters correctly pointed out that MMS does not include provisions for certified mail, third-class flats, insured mail and return receipt for merchandise service. The Postal Service intends to proceed with the development of additional MMS options.



once a sufficient demand has been established for any of these mail categories. A provision for third-class flats has already been developed and included in the Customer Publication titled "Third-Class Machinable and/or Irregular Parcels and Flat Size Mail".

One commenter requested that a mailing that is prepared and mailed over a period of days be considered as one MMS mailing. This suggestion will be considered further, but will not be included in this final rule because the practicality of the concept has not been tested.

Another commenter made reference to allowing mixed classes in the same piece and asked whether this would be acceptable under the MMS program. Currently mailers can present combination mailpieces under the provisions of DMM 136, (for example, a fourth-class mailpiece that included a third-class enclosure) if proper documentation is provided to show that the correct amount of postage is actually paid, and may do so under MMS on the same condition.

Five commenters who opposed the MMS concept in general, stated that the MMS program requirements are extensive and would involve excessive costs/investment for the necessary programming, hardware, and manual operations. The Postal Service understands that this program is not attractive for all mailers—it is a completely optional program for those mailers who do find its flexible mailing rules more beneficial than the other options available.

One commenter suggested limiting the MMS letter-size option to large mailings. The Postal Service has not adopted this suggestion because the current regulations provide for efficient mailing operations and no further limitations are warranted. Moreover, the need for a fully automated MMS system will, in practicality, limit the use of MMS to those mailings for which efficiencies can be realized.

One commenter requested that instructions be included for MMS mailings presented on pallets. The palletization program requires separate authorization and has its own requirements. Mailers who wish to participate in both programs must obtain a separate authorization for each. The Postal Service may consider standardized requirements for MMS mailings presented on pallets in the future.

Two additional comments concerned information covered in the Customer Publications. These comments will be considered during the preparation of

revised Customer Publications. Specifically:

1. One commenter asked that it be permitted to use the actual weight of each mail piece (point of shipment) rather than pre-programmed weights (in which the weight of each component of the mail piece, including packaging, is programed into the system). Under MMS, the Postal Service will give mailers the choice of either individually weighing each piece, or programming the weights into the system. Either method is acceptable as long as the system can determine accurate weights for postage computations.

2. The other commenter requested that the bound printed matter option, which currently requires weight to be expressed in pounds and tenths of a pound be changed to pounds and ounces. The BPM Customer Publication will be changed to give mailers the option of using either pounds and tenths of a pound, or pounds and ounces, as long as the calculations are correct.

In addition to the above noted changes to the proposed rule made in response to substantive comments, the Postal Service has made editorial, clarifying and organizational changes in the final rule. A number of sections throughout the DMM are revised to reflect the renumbering of Part 145 being made in this rule.

Section 145.721 has been amended to include an expanded explanation of contents and applicability of the MMS Service Agreement.

Section 145.722 a and b and section 145.723 a and b, have been retitled as Letter Size Mail and Non-Letter Size Mail to clearly define the types of mail described in each section and provide consistency throughout section 145.7.

Section 145.723a has been amended to include a reference to ZIP+4 barcode information and 145.723 a and b have been amended to include a sentence summarizing the requirements of 145.728.

Section 145.729 has been amended to include a related requirement to adjust the mailing statement at the same time the manifest listing is adjusted, and to include a listing of acceptable postage adjustment methods for spoiled mail.

Section 145.741 has been amended to more clearly provide for alternatives to the permit imprint marking requirements.

Section 145.742c has been revised to include approved abbreviations for the 5-digit bulk third-class mail rate category and the ZIP+4 Barcoded rate category for both First- and third-Class mail.

Section 145.742d has been amended to provide that the keyline may not

interfere with the barcode clear zone as well as the OCR read area.

Section 145.743 has been reorganized and revised to make the mailpiece number requirements for non-letter size mail clearer—subsection a clarifies that the number, which under MMS must be computer-generated, can be any number devised by the mailer; subsection b provides for a third permissible location for the number; and subsection c allows the numbers to be printed in ascending order within each ZIP Code or Zone.

Sections 145.751–78 have been reorganized and expanded to more fully explain the MMS authorization, renewal and revocation procedures the Postal Service will follow.

The note to 145.754a has been amended to clarify the circumstances when postage adjustments will be applied to mailers who use a computer software program which automatically skips to the next weight increment for borderline weight pieces.

Section 145.77 has been added to provide procedures for the renewal of an MMS authorization following a Postal Service review. The process was referred to in proposed 145.754c, and has been set forth more specifically in the final rule. Proposed 145.77 has been renumbered as 145.78.

The revocation procedures in 145.783 have been revised to include a description, in 145.783a, of the intermediate review by the RCC of a Division Manager's recommendation to revoke an MMS authorization.

Section 145.925 and the following sections, concerning the application, authorization and revocation procedures for Alternate Mailing Systems (AMS), have been reorganized to be consistent with the format used in 145.7. The regulations concerning authorization requirements for AMS are now separately set forth in 145.926. Proposed 145.926 and 145.927 have been renumbered as 145.927 and 145.928 respectively. The notification provisions proposed in 145.928 have been moved to 145.929a and a new 145.929c has been added to explain the process by which the RCC will review an AMS revocation recommendation of a Division Manager.

Sections 681.222 and 681.223 have been revised to include provisions for accepting nonidentical weight mailings when postage is paid by permit imprint under specific procedures authorized by the General Manager, Rates and Classification Center.

After full consideration of all the comments, the Postal Service hereby adopts the following changes to the Domestic Mail Manual, which is

Incorporated by reference in the Code of Federal Regulations. 39 CFR 111.1.

#### List of Subjects in 39 CFR Part 111 Postal service.

#### PART 111—[AMENDED]

1. The authority citation for Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

#### PART 122—DELIVERY ADDRESS

2. Amend the reference at the end of the sentence in 122.15d to read as follows:  
(145.34)

3. Amend the reference at the end of the second sentence in 122.25 to read as follows:  
(See 122.142 and 145.22)

#### PART 136—MIXED CLASSES OF MAIL

4. Amend 136.84b to read as follows:  
Combined mailings of special fourth-class and bound printed matter which are made through an alternate mailing system (AMS) under the provisions of 145.9 must be identified according to the specific terms and conditions of the approved alternate arrangement.

#### PART 137—OFFICIAL MAIL

5. Amend the seventh sentence in 137.274b to read as follows:

Examples of the penalty permit imprint indicium are provided in 145.42 b, c and d.

6. Amend the first two sentences in 137.274c(1) to read as follows:

(1) General. Mail sent under penalty permit imprint procedures, including international mail, must meet the provisions of 145, except for 145.3 and 145.56. The appropriate Postal Service mailing statement, Form 3602, *Statement of Mailing with Permit Imprints*, or 3605, *Statement of Mailing—Bulk Zone Rates*, as prescribed in 145.55 must be submitted with each penalty permit imprint mailing.

7. Amend the first sentence in 137.274c2(b) to read as follows:

(b) All other requirements for use of permit imprints are met, including the minimum quantity requirements in 145.51 and the requirement in 137.274a(1) that the pieces contain the proper class of mail endorsements either within or immediately adjacent to the permit imprint.

#### PART 145—PERMIT IMPRINTS (MAIL WITHOUT AFFIXED POSTAGE)

8. Retitle 145.1 as General, renumber 145.1, Definition, as 145.11 and amend the last sentence to read as follows:

Permit imprint mailings that have postage paid through an advance deposit account must be weighed by the Postal Service to verify the accuracy of the piece counts claimed and the total weight of the mailing, unless acceptance under an alternative procedure, as described in 145.7, 145.8 or 145.9, is authorized by the Rates & Classification Center.

9. Renumber 145.21, Application, as 145.12.

10. Renumber 145.22, Revocation, as 145.13.

11. Renumber 145.3 Preparation of Permit Imprints, as 145.2 and amend the third sentence in new 145.21 to read as follows:

The content of the imprint must be in accordance with 145.3, and the format in accordance with 145.4.

12. Renumber 145.4, Contents of Permit Imprints, as 145.3.

13. Amend the reference at the end of the second sentence in new 145.31 to read as follows:

(See Exhibit 145.41a–41e)

14. Amend the second sentence in new 145.34 to read as follows:

The company's name may be shown in place of the city and permit number, in accordance with 145.35.

15. Renumber 145.5 Format of Permit Imprints, as 145.4.

16. Amend new 145.41 to read as follows:

Permit imprints for other than official mail or Mailgrams must be prepared in one of the formats shown in *Exhibits 145.41a through 145.41e*. Any of these formats may be used to display the information prescribed by 145.3.

17. Amend new 145.42 to read as follows:

Permit imprints for Mailgrams and official mail must be prepared in one of the formats shown in *Exhibits 145.42a–145.42d*.

18. Renumber 145.6, Mailings with Permit Imprints, as 145.5 and amend the first sentence in new 145.51 to read as follows:

Permit imprint mailings must consist of a minimum of 200 pieces or 50 pounds, except as provided in 145.52.

19. Renumber 145.7 as 145.6 and amend (a) in the first sentence in the new 145.62 to read as follows:

(a) when company permit imprints are used as provided for by 145.35.

20. Add a new 145.7 to read as follows:

145.7 *Manifest Mailing System (MMS).*

145.71 Purpose. The Manifest Mailing System (MMS) permits the Postal Service to accept and verify mailings containing nonidentical weight

and/or rate pieces of the same mail class (except for second-class) and processing category, when generated by the mailer in accordance with the regulations set forth below. The MMS is designed for situations in which postage charges cannot be adequately verified by weighing or when normal acceptance procedures are impractical.

145.72 General Qualification Requirements. In order to use MMS, the conditions in 145.721 and 145.722 must be met.

145.721 Service Agreement. A service agreement must be signed by the mailer, postmaster and the General Manager, Rates and Classification Center before the first MMS mailing is presented to the Postal Service. The service agreement contains the standard provisions common to all participating mailers; they concern the responsibilities of the mailer and the Postal Service, document retention and the duration of the agreement. The agreement will also incorporate a number of attachments which comprises an approved manifest, sample mailpiece or label and the approved quality control procedures.

145.722 Automated Mail Production. The mailer must have an automated mail production system which generates mail consistent with all applicable DMM regulations and calculates postage accurately as follows:

a. Letter-Size Mail. The automated system must fully determine the qualifying presort level and the correct rate of postage. The system must also perform the presort sortation and number each piece in consecutive order.

b. Non-letter Size Mail. The mailer must have an automated mail production system which calculates postage accurately before the mailing is presented to the Postal Service.

145.723 Computerized Manifest. Each mailpiece must be uniquely identified by the mailer. Letter-size mail (as defined in 128.2) must bear the prescribed "key line" information, as outlined in section 145.742a. The automated system must provide a computer-generated manifest listing for each mailing that permits Postal Service verification of the postage amount and levels of presort, as applicable. The manifest listing must account for every piece in the mailing and must include the following information:

a. Letter-Size Mail. The manifest must list destination ZIP Codes, presort categories, batch number ranges, postage amounts, cumulative postage amounts and ZIP+4 or ZIP+4 barcode information, when appropriate. A computer-generated mailing statement

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(Form 3602) or a summary listing showing the required information appearing on the mailing statement must be included as the last page of the manifest.

b. Non-letter Size Mail. The manifest must list the postage for each piece and those factors, such as destination postal zone and piece weight, that are used to calculate the correct amount of postage for the particular class of mail. Each page of the manifest must show cumulative postage totals. A computer-generated mailing statement (Form 3602 or 3605) or a summary listing showing the required information appearing on the mailing statement must be included as the last page of the manifest.

c. Special Services. When special services, such as collect on delivery (COD) or registry are used, the manifest must include the applicable fees for each piece.

145.724 Identification. Each piece in a manifest mailing must bear a unique piece identification number.

145.725 Mailer Quality Control. The mailer must implement a quality control program that (1) demonstrates that the mail is properly prepared, and (2) provides accurate documentation. The service agreement must include a detailed description of the Postal Service approved quality control procedures. Each mailing under an MMS agreement must be accompanied by a statement by the mailer certifying that the approved quality control verification has been performed.

145.726 Permit Imprint. Mailings deposited under the MMS program must qualify as permit imprint mailings in accordance with 145.1, except that for letter-size mail the qualified rate category endorsement must appear in the keyline.

145.727 Batch Definition. Mailings consisting of First- or third-class letter-size mail must be prepared in batches produced in presort order and consecutively numbered to insure that the Postal Service can conduct a valid sample of the MMS mailings. A batch is a small group of pieces within a sortation level, such as carrier route, 5-digit, or 3-digit ZIP Code. A batch may consist of pieces of different weight increments and rate categories. The batch size is specified in the applicable Customer Publication and can only be modified with the concurrence of the General Manager, RCC in an addendum to the Service Agreement.

145.728 Mailing Statement. The mailer must submit a complete and accurate mailing statement with each mailing. The statement may be a computerized facsimile of Form 3602, *Statement of Mailing with Permit*

*Imprints, or Form 3605, Statement of Mailing—Bulk Zone Rates, (as appropriate) if it includes all the information otherwise required on the official Postal Service mailing statement that is relevant to the mailing.*

145.729 Manual Adjustment. An approved method for adjusting the manifest listing and mailing statement must be used when pieces of mail have been mutilated, spoiled, or destroyed during normal processing operations and cannot be presented as part of the mailing. The following postage adjustment methods for spoiled mail are acceptable:

- Write the adjustments directly on the manifest, listing the consecutive serial number, weight increment, rate category and postage of each item (as appropriate) next to the batch which includes the serial number, or
- Prepare a separate listing as an attachment to the manifest showing individual spoiled pieces. The listing must include the following information (as applicable): the consecutive serial number, weight increment, rate category and postage.

**Note:** Vendor supplied software that assigns consecutive serial numbers at the end of the processing operation may require a different method in determining and adjustments for spoiled or destroyed mail. With a vendor supplied system, mail may be mutilated, spoiled, or destroyed during normal processing operations and not included as part of the Manifest Summary Listing because the consecutive serial number and keyline information has not yet been applied. The omission of the spoiled mailpiece may disqualify the remaining mail from the presort rate claimed. (E.g. 10 pieces were originally addressed for ZIP Code 14623, carrier route 16 and one piece for carrier route 16 was spoiled during processing. The remaining 9 pieces no longer qualify at the carrier route presort rates. The manifest should be adjusted to reflect the rate of postage for which they now qualify.) Each piece that had been processed, therefore, would show incorrect information in the keyline because of the spoiled mailpiece. Vendors may include as part of their software program a separate line entry on the Manifest Summary Listing to account for adjustments caused by spoiled mailpieces. When the system determines the spoiled mailpiece(s) disqualifies the remaining pieces claimed at the presort rate, the system may recalculate the postage at the correct rate and indicate the difference amount in the adjustment column.

c. The total number of pieces and postage is deducted at the end of the manifest and on the mailing statement.

145.73 Additional Technical Information. The Postal Service has published a series of Customer Publications to help mailers develop systems meeting the requirements for

each class in MMS. Mailers who develop systems that meet DMM regulations and the specifications and guidelines outlined in the Customer Publication will receive approval for their manifesting application.

#### 145.74 Markings.

145.741 Compliance. When mailings are made under 145.7, mailers may comply with other applicable marking requirements by using the following alternatives:

a. Letter-Size Mail. The markings required by 362 and 662 may be placed in a keyline as described in 145.742.

b. Non-Letter Size Mail. The markings required by 362, 662, 762, 763, 764, and 767, may be:

- Incorporated as part of the permit imprint; or
- Printed, computer-printed or rubber-stamped above the address, and immediately below or to the left of the permit imprint; or

(3) Produced as otherwise specified in the MMS authorization; or

(4) Provided in an endorsement line in the address area, directly above the top line of the address. **NOTE:** When this option is utilized, no additional information other than the carrier route information may appear on the endorsement line.

145.742 Letter Size Mail. Requirements for key line contents, rate category abbreviation, and key line location are as follows:

a. Key Line Contents. The following key line data must be printed in the following order on each piece of letter size First-Class Mail and third-class mail (except as indicated) included in a MMS mailing:

- Consecutive piece number unique to each piece;
- Weight increment (First-Class only);
- Rate category for which the mailpiece qualifies; and
- Postage paid according to weight and rate category.

b. Mailer Key Line Codes. Codes for internal mailer use may be printed to the right of the postage paid information. A break of at least two spaces must appear between the postage paid and any internal code information.

c. Rate Category Abbreviations. The only acceptable rate category abbreviations for letter-size mail key line data are:

- FIRST-CLASS MAIL:
- (a) ZB—ZIP+4 BARCODED
- (b) ZP—ZIP+4 PRESORT
- (c) ZN—ZIP+4 NONPRESORT
- (d) FP—FIRST-CLASS PRESORT
- (e) CP—CARRIER ROUTE PRESORT

#### (f) FN—NONPRESORT

(2) BULK THIRD-CLASS MAIL (Regular and Special Rates):

- ZB—ZIP+4 BARCODED
- ZP—5-DIGIT ZIP+4
- ZN—BASIC ZIP+4
- CP—CARRIER ROUTE
- FD—5-DIGIT

#### (f) BA—BASIC

d. Key Line Location. The key line must be printed either in a position at least two (2) lines above the address or in the lower left corner of the envelope. See Exhibit 145.7. For letter size mail, the placement of the key line must not interfere with the OCR read area or barcode clear zone. See Exhibit 122.33.

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When window envelopes are used, key line data may be printed on the insert in a position above the address provided the address and key line data are entirely visible through the window with at least 1/8 of an inch clearance between the window and the edge of the panel.

## APPLICABLE FOR FIRST-CLASS MAIL

XYZ COMPANY 1234 Foregone Street New York, NY 10001-6789		FIRST CLASS MAIL U.S. POSTAGE PAID PERMIT #1 NEW YORK, NY	
KEYLINE OPTIONAL LOCATIONS	5698 1 CP 0.195	**CR2	
	Mr. John C. English 5395 Allmullin Pl. N.E. Washington, DC 20011-2620		
CONSECUTIVE SERIAL NUMBER	5698 1 CP 0.195	4 1/2 inches	RESERVED FOR BAR CODES
WEIGHT IN OUNCES	RATE CATEGORY	POSTAGE PAID	
	<b>RATE CATEGORY</b> ZB - ZIP+4 BARCODED ZP - ZIP+4 PRESORT CP - CARRIER ROUTE PRESORT FP - FIRST CLASS PRESORT ZN - ZIP+4 NON-PRESORT FN - NON-PRESORT		

## APPLICABLE FOR THIRD-CLASS MAIL

XYZ COMPANY 1234 Foregone Street New York, NY 10001-6789		BULK RATE U.S. POSTAGE PAID PERMIT #1 NEW YORK, NY	
KEYLINE OPTIONAL LOCATIONS	5698 1 CP 0.101	**CR 05	
	Mr. John C. English 5395 Allmullin Pl. N.E. Washington, DC 20011-2620		
CONSECUTIVE SERIAL NUMBER	5698 CP 0.101	4 1/2 inches	RESERVED FOR BAR CODES
RATE CATEGORY	POSTAGE PAID		
	<b>RATE CATEGORY</b> ZB - ZIP+4 BARCODED ZP - 5-DIGIT ZIP+4 ZN - BASIC ZIP+4 CP - CARRIER ROUTE PRESORT FD - 5-DIGIT BA - BASIC		

Exhibit 145.7

BILLING CODE 7710-12-C

145.743 Non-Letter Size Mail. Requirements for the unique mailpiece number, location, and acceptable methods for listing on the manifest are as follows:

- The unique number must be computer-generated. It can be a product number or any other number devised by the mailer, as long as numbers are not duplicated within the mailing.
- The unique number must be printed in one of the following locations:
  - (1) Directly above the address;
  - (2) The lower left corner of the mailing label; or
  - (3) One space/line below the permit imprint.

c. The numbers must be printed in ascending order or ascending order within each 5-digit, 3-digit, BMC ZIP Code or within each zone on the manifest listing.

145.75 Authorization Procedures. 145.751 Applications. The mailer must submit an MMS Application to the postmaster of each post office where mailings will be deposited. Applications and detailed information about mailer requirements and responsibilities and qualifying criteria are available through post offices. The application formally expresses to the local postmaster the mailer's interest in MMS and provides information essential to obtaining authorization.

145.752 Service Agreement/Support Documentation. After completing development of a manifest mailing system that meets postal specifications, the mailer is required to submit the basic Manifest Service Agreement and the following documentation as attachments to the Service Agreement:

- An appropriate addendum, which proposes any requirements not covered in the basic service agreement,
- Sample manifest listing with corresponding sample mailing pieces,
- Sample mailing statement (Form 3602 or 3605),
- A detailed description of the Quality Control procedures to be conducted by the mailer,
- A copy of the application originally submitted, and
- Any additional documents outlined in the basic service agreement.

145.753 Review Procedures. The mailer must submit the signed basic service agreement, and required attachments/supporting documentation, to the post office for consideration under the following review procedure:

- The postmaster will review the MMS agreement and system, provide a letter of recommendation to either approve or disapprove the MMS program (the letter must include a statement specifying the reasons for the

decision), sign the agreement (only if approval is recommended), and forward the entire package to the Field Division General Manager/Postmaster.

b. The Field Division will review the MMS agreement and system, provide a letter of recommendation to either approve or disapprove the MMS program (the letter must include a statement specifying the reasons for the decision), sign the agreement (only if approval is recommended), and forward the entire package to the appropriate General Manager, RCC.

c. The General Manager, RCC makes the initial decision to grant or deny an MMS authorization, pursuant to 145.754 and 145.76. Prior to approving an authorization, the General Manager, RCC, may modify the attachments to the basic service agreement where necessary to meet Postal Service needs and requirements. A Manifest Mailing System is not valid and may not be implemented before an MMS agreement is signed by the General Manager, RCC.

Note: Representative(s) from the division and/or Rates and Classification Center (RCC) may visit the mailer's plant to examine the proposed operation as part of the review procedure.

145.754 Conditions of Authorization. The following conditions apply to all Manifest Mailing Systems:

- Postage Adjustments. Postage adjustments will be required for overpayments or underpayments identified during postal verification; verification samples are deemed to be representative of the entire mailing, and postage adjustment calculations are applied to the total mailing.

Note: Mailers who choose a computer software program which automatically skips to the next weight increment for borderline weight pieces will not be required to make a postage adjustment due to the computer software program. However, if differences are detected other than those generated by the software program (e.g., postage computations or weight calculations), postage adjustments will be applied to the total mailing as specified in 145.754a.

- Postage Error Penalty. Whenever the sampling verification determines that the postage error exceeds 1.5 percent of the corrected postage a penalty will be assessed. The total corrected postage plus a penalty equal to 10 percent of the postage error calculation will be deducted from the permit imprint advance deposit account.

c. Authorization Period. A manifest mailing system will be authorized for a period not to exceed two years. Authorizations may be renewed following a Postal Service review that shows the system remains qualified.

d. System Modification. Advance written notice must be provided to the Postal Service of any plans to modify or adjust the system which will affect the calculation of postage, generation of required mailing documentation, or mail presorting prior to preparing and presenting the mailing for acceptance.

e. Advance Deposit Account. Postage must be paid through an advance deposit account and funds in the account may be deducted by the Postal Service to cover any deficiency discovered after acceptance of the mail.

145.76 Approving or Denying Authorization.

145.761 Responsibility. The General Manager, Rates and Classification Center (RCC), serving the post office to which the mailer submitted the proposed service agreement, ensures that all required documentation has been provided and approves or denies authorizations for all options available under the Manifest Mailing System.

145.762 Approval. If a decision is made to grant an MMS authorization, the General Manager, RCC, will sign the agreement, and forward it, with instructions for administering it, to the Field Division General Manager/Postmaster, who will ensure that (1) the service agreement is re-signed by the mailer if an attachment was modified by the RCC, (2) the agreement is signed by the administering postmaster and (3) all affected parties are provided with a copy of the signed agreement. The Division will return the original signed agreement to the RCC serving the administering post office.

145.763 Denial. If a decision is made to deny an authorization, the General Manager, RCC, will notify the mailer, the administering post office, and the Field Division, in writing, stating the reason for denial. The mailer may appeal a denial, within 15 days from the receipt of the notice by the mailer, by filing a written appeal, including additional evidence as to why the manifest mailing system should be authorized, with the Director, Office of Classification and Rates Administration, USPS Headquarters, Washington, DC 20260-5360. The Director will review the appeal and issue the final agency decision. The Director will notify the mailer, the administering post office, the Field Division and the RCC of the decision.

145.77 Authorization Renewals. An MMS authorization may be renewed following a review conducted prior to the expiration date by the General Manager, RCC or designated person, to determine that the system remains qualified. A new service agreement will



be initiated under one of the following conditions:

a. **Approved Without Modifications.** When the review of the MMS determines that the system remains qualified without any modifications, the existing service agreement will be extended for a two (2) year period. The approval to extend the existing agreement may be accomplished by an addendum that states the new expiration date, signed by the administering postmaster, the Field Division General Manager/Postmaster, the RCC General Manager, and the mailer.

b. **Approved With Mailer Modifications.** When the review of the MMS determines that the system has been modified, but remains qualified, a new service agreement must be prepared that outlines, in detail, the changes to the system. The revised service agreement must be signed by the administering postmaster, the Field Division General Manager/Postmaster, the RCC General Manager and the mailer.

c. **Approved With Postal Service Modifications.** When the review determines that the system can only be renewed with modifications required by the Postal Service, the mailer will be so informed and, if he agrees, a new agreement will be prepared and signed as in 145.77b.

**Note:** When the review of the MMS indicates that the system no longer qualifies under the MMS program, or when the mailer does not agree to Postal Service modifications, the procedures for revocation of an MMS authorization apply (See 145.78).

#### 145.78 Revocation.

145.781 **Conditions.** The General Manager, RCC may revoke an MMS authorization for any of the following reasons:

a. If a mailer has provided incorrect data on the manifest listing and appears unable or unwilling to correct the problems.

b. If it is discovered that the mailer is not properly performing the required quality control verification procedures.

c. If the MMS no longer meets the criteria established by this regulation and those outlined in the Manifest Mailing Service Agreement.

d. If there have been no mailings presented under MMS for more than six months (except as provided in the Service Agreement).

e. If a mailer continues to present mailings that are improperly prepared and/or proper postage is not paid.

145.782 **Notification.** Whenever any of the grounds for revocation set forth in 145.781 exist, the Field Division General

Manager/Postmaster will notify the mailer, in writing, of the nature of the discrepancy and the need for corrective action prior to any revocation action. The mailer and the Division Manager will determine the actions to be taken, and set up an implementation schedule. The General Manager, RCC, will prescribe the time period for corrective action. When the mailer has completed the necessary corrective measures to bring the system into compliance, the Division Manager must be notified and a follow-up review conducted. Failure to correct identified problems is sufficient grounds to revoke a mailer's MMS authorization.

145.783 **Revocation Procedures.** The following procedures apply to a revocation:

a. If, after notification, the mailer is unable or unwilling to correct the discrepancies cited by the Division Manager within the timeframe allotted, the Division Manager will advise the mailer in writing that a recommendation to revoke the authorization to mail under MMS was forwarded to the General Manager, RCC.

b. The General Manager at the RCC will review the recommendation and supporting documentation to determine whether revocation is appropriate. The General Manager makes the initial decision to revoke an MMS authorization. If the General Manager decides to revoke the MMS authorization, the mailer will be notified directly of the decision, with a copy to the postmaster and Field Division.

c. The mailer may appeal this decision in writing within 15 days from the date of receipt of the notice. The mailer's appeal should contain evidence explaining why the MMS authorization should not be revoked. The appeal must be filed with the General Manager, RCC. The mailer may continue to present mail under the MMS pending a decision on appeal.

d. If evidence provided by the mailer indicates that the authorization should be continued, the General Manager, RCC, may reverse the decision.

e. If the General Manager, RCC, does not find sufficient evidence to reverse the revocation, the appeal will be forwarded to the Director, Office of Classification and Rates Administration, USPS Headquarters, Washington, DC 20260-5360. The Director will issue the final agency decision and notify the mailer, the administering post office, the Field Division, and the RCC of the decision. The revocation decision is effective 15 days after receipt by the mailer.

21. Amend 145.82 to read as follows:

145.82 **Qualification Requirements.** Any permit imprint mailer whose mailings comply with the requirements of 145.5 may apply for authorization to use optional acceptance procedures. Optional procedure authorization will not be granted if (a) mailings do not meet the requirements of 145.5, (b) the Postal Service cannot be assured of the receipt of proper postage revenue, or (c) significant recoverable savings will not result for the Postal Service.

22. Amend the heading of 145.9 and the entire 145.91-145.92 to read as follows:

#### 145.9 Alternate Mailing Systems (AMS).

145.91 **Purpose.** The purpose of this section is to provide for situations where other systems for the acceptance of permit imprint mail, not specifically outlined in 145.7 or 145.8, satisfactorily provide for proper postage payment and mail preparation without verification by weight.

#### 145.92 General Qualification Requirements and Request Procedures.

145.921 **AMS Request.** Mailers may request authorization to pay postage by an alternate method by submitting a written request to the postmaster at the office of mailing. The request must include (1) a complete description of the type(s) of matter to be mailed, (2) the proposed method of paying postage, (3) the proposed method to determine correct mail make-up and (4) a statement of the mailer's reasons for requesting the alternate system.

145.922 **Postage Payment.** All postage must be paid in accordance with the provisions of 145.11, unless an alternate system is approved in writing by the General Manager, Rates and Classification Center (RCC).

145.923 **Cost/Benefit.** There must be no additional cost to the Postal Service to administer the AMS Agreement in excess of the costs of current mail acceptance procedures for the mail in question. The applicable Field Division will perform a detailed cost/benefit analysis which will be included in the supporting documentation provided to the General Manager, RCC.

145.924 **Mailer Quality Control.** The Mailer must implement a quality control program acceptable to the Postal Service. The program must demonstrate that accurate documentation is provided and that mail is properly prepared. The supporting documentation must include a detailed description of the proposed quality control procedures. Each mailing under an AMS agreement must be accompanied by a statement by the mailer certifying that a Quality Control verification has been performed.

145.925 **Application Procedures.** The following procedures apply to the submission of an application for an AMS authorization:

a. The mailer must submit to each entry post office a written request and supporting documentation that includes all the information outlined in 145.921.

b. The entry office postmaster will review and evaluate the AMS request, supporting documentation and system description, provide a letter of recommendation to either approve or disapprove the AMS (the letter must include a statement specifying the reasons for the decision), and forward the entire package to the Field Division General Manager/Postmaster.

c. The Field Division will review the AMS request, supporting documentation and system description, conduct a detailed cost/benefit analysis, provide a letter of recommendation to either approve or disapprove the AMS (the letter must include a statement specifying the reasons for the decision), and forward the entire package to the appropriate RCC General Manager, who will make the final decision.

d. The General Manager, RCC, makes the initial decision to grant or deny an AMS authorization, pursuant to 145.926 and 145.927. An Alternate Mailing System is not valid and may not be implemented before an AMS agreement is prepared and signed by the General Manager, RCC.

**Note.**—Representative(s) from the division and/or Rates and Classification Center (RCC) may visit the mailer's plant to review the proposed operation as part of this review procedure.

145.926 **Authorization Requirements.** The conditions of authorization are as follows:

a. Authorization to use AMS may be granted only when its adoption is in the best interests of the Postal Service.

b. Overpayments or underpayments identified during postal verification will require a postage adjustment. Verification samples are deemed to be representative of the entire mailing and postage adjustment calculations will be based on the total mailing.

c. The mailer must pay a penalty whenever the sampling verification determines the postage error exceeds 1.5 percent of the corrected postage. The total corrected postage for the entire mailing, plus a penalty equal to 10 percent of the postage error calculation, will be deducted from the permit imprint advance deposit account.

d. Alternate Mailing System is not valid and may not be implemented without a signed AMS agreement.

e. The agreement must specify the terms and conditions for use of AMS, including a time limit not to exceed two years.

145.927 **Approving or Denying Authorizations.** The procedures for approving or denying authorizations are as follows:

a. **Responsibility.** The General Manager, Rates and Classification Center (RCC), serving the post office to which the mailer's request was submitted, will approve or deny a written request for AMS. Concurrence of the General Manager, Business Systems Division (BSD), Headquarters, Washington, DC, must be obtained prior to approval.

b. **Approval.** If a decision is made to grant an AMS authorization, the General Manager, RCC, will prepare, sign and forward the agreement containing instructions for its administration to the Field Division General Manager/Postmaster, who will ensure that (1) the agreement is signed by the mailer and the administering postmaster and that (2) all affected parties are provided with a copy of the signed agreement. The Division will return the original signed agreement to the RCC serving the administering post office.

c. **Denial.** If a decision is made to deny an authorization, the General Manager, RCC, will notify the mailer, the administering post office, and the Field Division, in writing, stating the reason for denial. The mailer may appeal a denial within 15 days from the receipt of the notice by the mailer, by filing a written appeal (containing additional evidence as to why the AMS request should be approved), with the Director, Office of Classification and Rates Administration, USPS Headquarters, Washington, DC 20260-5360. The Director will review the appeal and issue the final agency decision. The Director will notify the mailer, the administering post office, the Field Division and the RCC of the decision.

145.928 **Revocation.** The General Manager, RCC, may revoke an AMS authorization for any of the following reasons:

a. If a mailer has provided incorrect data for mailings and appears unable or unwilling to correct all problem(s).

b. If it is discovered that the mailer is not properly conducting the required quality control verification procedures.

c. If the AMS no longer meets the criteria established by this regulation and those outlined in the Agreement.

d. If there have been no mailings presented under AMS for more than six months (except as provided in the Service Agreement).

e. If a mailer continues to present mailings that are improperly prepared and/or proper postage is not paid.

145.929 **Revocation Procedures.** The following procedures apply to revocation:

a. **Notification.** Whenever grounds for revocation set forth in 145.928 exist, the Field Division General Manager/Postmaster will notify the mailer, in writing, of the nature of the discrepancy and the need for corrective action prior to any revocation action. The mailer and the Division Manager will agree on the actions to be taken and set up an implementation schedule. The General Manager, RCC will prescribe the time period for corrective action. When the mailer has completed the necessary corrective measures to bring the system into compliance, the Division Manager must be notified and a follow-up review conducted. Failure to correct identified problems is sufficient grounds to revoke a mailer's AMS authorization.

b. **Recommendation.** If, after notification, the mailer is unable or unwilling to correct the discrepancies cited by the Division Manager within the time frame allotted, the Division Manager will advise the manager in writing that a recommendation to revoke the authorization to mail under AMS was forwarded to the General Manager, RCC.

c. **Recommendation Review.** The General Manager at the RCC will review the recommendation and supporting documentation to determine whether revocation is appropriate. The General Manager makes the initial decision to revoke an AMS authorization. If the General Manager decides to revoke the AMS authorization, the mailer will be notified in writing of the reasons for the decision, with a copy to the postmaster and Field Division.

d. **Appeal Rights.** The mailer may appeal this decision in writing within 15 days from the date of receipt of the notice. The mailer's appeal should contain evidence explaining why the AMS authorization should not be revoked. The appeal must be filed with the General Manager, RCC. The mailer may continue to present mail under the AMS pending a decision on appeal.

e. If evidence provided by the mailer indicates that the authorization should be continued, the General Manager may reverse the decision.

f. If the General Manager does not find sufficient evidence exists to reverse the revocation, the appeal will be forwarded to the Director, Office of Classification and Rates Administration, USPS Headquarters, Washington, DC 20260-5360. The Director will issue the



final agency decision and notify the mailer, postmaster, the Field Division, and the RCC. The revocation decision is effective 15 days after receipt by the mailer.

23. Amend 145.932 to read as follows: Western Union Mailgram messages are enclosed in window envelopes that bear in the upper right corner of the address side the Mailgram message imprint illustrated in 145.42a.

24. Amend 362.2a, 362.31a, 362.42, 362.5, 662.3, 662.4, 662.5 and 662.6 by adding the following sentence to the end of each section.

Exception: A mailer authorized to mail under Manifest Mail System (MMS) in 145.7, may place the rate category identification marking in a keyline as described in 145.742.

25. Amend the last sentence in 381.1, 382.1, and 781, by adding 145.7 to the DMM reference sections. Each sentence will read as follows:

Permit imprints may be used on mailings of nonidentical weight only under the provisions of 145.7, 145.8, 145.9 or 137.274(c)2.

26. Amend the note to 641 to read as follows:

Note: This fee is separate from the fee that must be paid for a permit to mail under the permit imprint system (See 145.12).

27. Amend the last sentence in 667.92 to read as follows:

This normally will require that the mailings be made under the provisions of 145.7, 145.8 and 145.9.

28. Amend the first sentence in 681.221a to read as follows:

a. Permit Imprint. When pieces in a nonidentical mailing are subject to a pound rate and the pieces qualify for mailing at the basic or five-digit rate, postage may be paid by permit imprint, provided the mailer has been specifically authorized by the General Manager, Rates and Classification Center, serving the office of mailing, in accordance with 145.7, 145.8 or 145.9.

29. Amend 681.222 to delete the word "only" from existing text and add the following sentence to the end of the section.

Nonidentical weight pieces subject to minimum per-piece charges may be paid by permit imprint only under a *manifest mailing system, optional procedure or alternate mailing system* procedure authorized by the General Manager, Rates and Classification Center (see 145.7, 145.8 and 145.9).

30. Amend 681.223 to read as follows:

Postage for mailings that include pieces subject to pound rates and pieces subject to minimum per-piece charges may be paid by meter stamp. Postage may also be paid by permit imprint

under a *manifest mailing system, optional procedure or alternate mailing system* procedure when authorized by the General Manager, Rates and Classification Center (see 145.7, 145.8 and 145.9)

31. Amend 681.312 to read as follows: Nonidentical weight pieces may be paid by permit imprint only under a *manifest mailing system, optional procedure or alternate mailing system* procedure authorized by the General Manager, Rates and Classification Center (see 145.7, 145.8 and 145.9).

32. Amend the last sentence in 722.21 to read as follows:

Mailings of pieces of nonidentical weight may only be made at bulk zone rates when authorized by the Rates and Classification Center serving the post office of mailing, in accordance with 145.7, 145.8 or 145.9.

33. Amend the last sentence in 723.21 to read as follows:

Mailings may contain pieces of nonidentical weight only if postage is affixed to each piece (using the instructions in 711.24), or if the Rates and Classification Center, serving the office of mailing, has authorized payment of postage by permit imprint, in accordance with 145.7, 145.8 or 145.9.

34. Amend 724.24a to read as follows:

When postage is paid by permit imprint, nonidentical pieces, including those of different postage values, may be merged, presorted together, and presented as a single mailing, if the mailer has demonstrated that adequate records are maintained to enable the Postal Service to accurately verify and audit such mailings, and the procedure has been specifically authorized by the Rates and Classification Center serving the post office of mailing in accordance with 145.7, 145.8 or 145.9.

35. Amend 741 to read as follows:

Nonidentical pieces may be mailed at the parcel post bulk zone rate only when the mailer has demonstrated that adequate records are maintained to verify and audit such mailings, and the procedure has been specifically authorized by the Rates and Classification Center serving the post office of mailing in accordance with 145.7, 145.8 or 145.9.

A transmittal letter making these changes in the pages of the Domestic Mail Manual will be published and will be transmitted to subscribers automatically. Notice of issuance of the transmittal letter will be published in

the Federal Register as provided by 39 CFR 111.3.

Fred Eggleston,  
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Division.  
[FR Doc. 88-29618 Filed 12-23-88; 8:45 am]  
BILLING CODE 7710-12-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 61

[FRL-3496-2]

#### National Emission Standards for Hazardous Air Pollutants; Delegation to the State of Oregon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Delegation of authority.

**SUMMARY:** EPA is announcing approval of a request dated October 4, 1988, from the Director of the Department of Environmental Quality to amend the current delegation of authority for Subpart M (Asbestos), National Emission Standards for Hazardous Air Pollutants (NESHAPS).

**DATE:** December 13, 1988.

**ADDRESSES:** The relevant material in support of this delegation may be examined during normal business hours at the following locations: Air Programs Branch, Docket No. 10A-88-10, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101; State of Oregon, Department of Environmental Quality, 811 SW Sixth Avenue, Portland, Oregon 97204.

**FOR FURTHER INFORMATION CONTACT:** Armina Nolan, Air Programs Branch, AT-082, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101, Telephone: (206) 442-1757 FTS: 399-1757.

**SUPPLEMENTARY INFORMATION:** On April 6, 1973 (38 FR 8820), pursuant to section 112 of the Clean Air Act, as amended, the Administrator promulgated national emission standards for three hazardous air pollutants (NESHAPS). Section 112(d) directs the Administrator or Regional Administrator to delegate his authority to implement and enforce NESHAPS to any State which has submitted adequate procedures.

On November 20, 1975, the Regional Administrator of EPA, Region 10 delegated to the State of Oregon the authority to implement and enforce the National Emission Standards for Hazardous Air Pollutants (NESHAPS) for Subpart M (Asbestos) as promulgated by EPA prior to January 1,

1975. This delegation was published in the Federal Register on February 20, 1976 (41 FR 7749). An additional amendment was made on December 8, 1982 (47 FR 55303).

Amendment to the national emission standard for asbestos were proposed in the Federal Register on July 13, 1983 (48 FR 32129), and finalized on April 5, 1984 (49 FR 13661). This action promulgates the amendments under section 112 of the Clean Air Act as amended in 1977. The intended effect of the amendments is to reinstate work practice and equipment provisions of the standard that were held not to be emission standards by the U.S. Supreme Court in 1978. The amendments also reword and rearrange the standard for clarity.

The Department of Environmental Quality in a letter dated October 4, 1988, requested their asbestos rules and regulations, OAR 340-33-010 through 100, be approved for delegation in compliance with the April 5, 1984, amendments to Subpart M (Asbestos). EPA reviewed the request and in a letter dated December 13, 1988, approved the delegation. The letter is as follows:

Fred Hansen,  
Director, Department of Environmental  
Quality, 811 SW Sixth Avenue, Portland,  
Oregon 97204

Dear Mr. Hansen: On October 4, 1988, you requested that EPA amend the delegation of authority to enforce Subpart M (Asbestos) under the National Emission Standards for Hazardous Air Pollutants (NESHAPS) as granted to the Department of Environmental Quality (DEQ). We have reviewed your submittal and hereby approve your request.

This delegation is subject to the conditions outlined in the original letter of delegation dated November 20, 1975, and published in the Federal Register on February 20, 1976 (41 FR 7749).

Since this delegation is effective immediately, there is no requirement that DEQ notify EPA of its acceptance. Unless EPA receives from DEQ written notice of objections within 10 days of the date of receipt of this letter, DEQ will be deemed to have accepted all the terms of the delegation.

An advance copy of this Register is enclosed for your information.

Sincerely,  
Robie G. Russell,  
Regional Administrator.  
Enclosure  
cc: J. Herlihy, EPA-000

This notice is being published to notify the public that a delegation of authority under NESHAPS has occurred.

Authority: Section 110 Clean Air Act 42 U.S.C. 7410(a) and 7502.

Date: December 13, 1988.

#### List of Subjects in 40 CFR Part 61

Intergovernmental relations, Air pollution control, Asbestos, Beryllium,

Hazardous materials, Mercury, Vinyl chloride.

Charles E. Findley,

Acting Regional Administrator.

[FR Doc. 88-29493 Filed 12-23-88; 8:45 am]  
BILLING CODE 6560-50-M

### 40 CFR Part 61

[FRL-3497-2]

#### National Emission Standards for Hazardous Air Pollutants; Subdelegation of Authority to a Local Agency in Oregon

AGENCY: Environmental Protection Agency (EPA).

ACTION: Subdelegation of authority.

**SUMMARY:** EPA is announcing approval of a request dated December 2, 1987, from the Director of the Lane Regional Air Pollution Agency (LRAPA) to amend the current subdelegation of authority for Subpart M (Asbestos), National Emission Standards for Hazardous Air Pollutants (NESHAPS).

**DATE:** December 13, 1988.

**ADDRESSES:** The relative material in support of this subdelegation may be examined during normal business hours at the following locations:

Air Programs Branch, Docket No. 10A-88-11, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101

Lane Regional Air Pollution Authority, 225 North Fifth, Suite 501, Springfield, Oregon 97477

**FOR FURTHER INFORMATION CONTACT:** Armina Nolan, Air Programs Branch, AT-082, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101, Telephone: (206) 442-1757, FTS: 399-1757

#### SUPPLEMENTAL INFORMATION:

On April 6, 1973 (38 FR 8820), pursuant to section 112 of the Clean Air Act, as amended, the Administrator promulgated national emission standards for three hazardous air pollutants (NESHAPS). Section 112(d) directs the Administrator or the Regional Administrator to delegate his authority to implement and enforce NESHAPS to any State which has submitted adequate procedures.

On April 23, 1982, the Regional Administrator of EPA, Region 10 subdelegated to the Lane Regional Air Pollution Authority the authority to implement and enforce the National Emission Standards for Hazardous Air Pollutants (NESHAPS) for Subpart M (asbestos) as promulgated by EPA prior to January 1, 1975. This subdelegation

was published in the Federal Register on May 12, 1982 (47 FR 20305).

Amendments to the national emission standard for asbestos were proposed in the Federal Register on July 13, 1983 (48 FR 32126), and finalized on April 5, 1984 (49 FR 13661). This action promulgates the amendments under section 112 of the Clean Air Act as amended in 1977. The intended effect of the amendments is to reinstate work practice and equipment provisions of the standard that were held not to be emission standards by the U.S. Supreme Court in 1978. The Amendments also reword and rearrange the standard for clarity.

Lane Regional Air Pollution Authority in a letter dated December 2, 1987, requested their asbestos rules and regulations under Title 35 be rescinded and replaced with Title 43. This amendment would amend their program so it would be in compliance with Subpart M (Asbestos) under section 112 of the Clean Air Act. EPA reviewed the request and in a letter dated December 13, 1988, approved the subdelegation. The letter is as follows:

Donald R. Arkell,  
Director, Lane Regional Air Pollution  
Authority,  
225 North Fifth, Suite 501,  
Springfield, Oregon 97477.

Dear Mr. Arkell: On December 2, 1987, you requested that EPA amend the delegation of authority to enforce Subpart M (Asbestos) under the National Emission Standards for Hazardous Air Pollutants (NESHAPS) as granted to the Lane Regional Air Pollution Authority (LRAPA). EPA could not formally amend the delegation to the Lane Regional Air Pollution Control Authority (LRAPA) until the State requested corresponding amendments to their asbestos NESHAP delegation. DEQ submitted their request on October 4, 1988. We have reviewed both submittals and are hereby approving the LRAPA request.

This delegation is subject to the conditions outlined in the original letter of delegation dated April 23, 1982, and published in the Federal Register on May 12, 1982, (47 FR 20305).

Since this delegation is effective immediately, there is no requirement that LRAPA notify EPA of its acceptance. Unless EPA receives from LRAPA written notice of objections within 10 days of the date of receipt of this letter, LRAPA will be deemed to have accepted all the terms of the delegation.

An advance copy of this Register is enclosed for your information.

Sincerely,  
Robie G. Russell,  
Regional Administrator.

Enclosure  
cc: F. Hansen, DEQ, J. Herlihy, EPA-000



This notice is being published to notify the public that a subdelegation of authority under NESHAPS has occurred.

Authority: Section 110 Clean Air Act 42 U.S.C. 7410(s) and 7502.

Dated: December 13, 1988.

Charles E. Findley,  
Acting Regional Administrator.

#### List of Subjects in 40 CFR Part 61

Intergovernmental relations, Air pollution control, Asbestos, Beryllium, Hazardous materials, Mercury, Vinyl chloride.

[FR Doc. 88-29494 Filed 12-23-88; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 81

[FRL-3496-2]

#### Designation of Areas for Air Quality Planning Purposes; Attainment Status Designations; Ohio

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Final rulemaking.

**SUMMARY:** USEPA is revising the carbon monoxide (CO) designation for Hamilton and Franklin Counties from nonattainment to attainment for the National Ambient Air Quality Standards (NAAQS) for carbon monoxide (CO). USEPA is redesignating these counties based on the State's request and submittal of data that demonstrate that these areas have attained the standards. Under the Clean Air Act, designations can be changed if sufficient data are available to warrant such change.

**EFFECTIVE DATE:** This final rulemaking becomes effective on January 26, 1989.

**ADDRESSES:** Copies of the redesignation request, technical support documents and the supporting air quality data are available at the following addresses:

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch (5AR-26), 230 S. Dearborn Street, Chicago, Illinois 60604

Ohio Environmental Protection Agency, Office of Air Pollution Control, 1800 WaterMark Drive, P.O. Box 1049, Columbus, Ohio 43266-0149

**FOR FURTHER INFORMATION CONTACT:** Anne E. Tenner, (312) 353-2205.

**SUPPLEMENTARY INFORMATION** Under section 107(d) of the Clean Air Act (Act), the Administrator of USEPA has promulgated the NAAQS attainment status for each area of every State. See 43 FR 8962 (March 3, 1978) and 40 CFR Part 81. These area designations may be revised whenever the data warrant.

The primary NAAQS for CO is violated if, more than once in a calendar

year, maximum CO concentrations exceed either (1) the maximum allowable 8-hour concentration of 9 parts per million (ppm) or (2) the maximum allowable 1-hour concentration of 35 ppm.

USEPA's criteria for a supportable redesignation request, as they pertain to CO, are discussed in the following USEPA memoranda:

1. June 12, 1979, from Richard G. Rhoads to the Directors of Air and Hazardous Materials Division, Regions I-X, Subject: "Section 107 Redesignation Criteria."

2. April 21, 1983, from Sheldon Meyers to Directors of Air Management Divisions, Region I-X, Subject: "Section 107 Designation Summary Policy."

3. December 23, 1983, from G.T. Helms to Chief of Air Programs Branches, Regions I-X, Subject: "Section 107 Questions and Answers."

The USEPA policy relevant to CO redesignation is summarized as follows:

1. The most recent 2 years (8 consecutive quarters) of quality assured, representative air quality data are to be considered for each monitoring site.

2. Evidence must be provided to show that a control strategy fully approved by USEPA has been implemented. The monitored air quality improvement must be related to the emissions impacts of the implemented control strategy and show that attainment of the standards can be justified in terms of the implementation of permanent, enforceable control measures.

3. Supplemental data, such as air quality modeling data, emissions data, etc., should be used to determine whether or not the monitoring data characterize the worst-case air quality in the area.

4. An entire urban core area should be designated as nonattainment if standard violations or the potential for such standard violations exist in the core area.

#### Franklin County (Columbus)

On March 3, 1978 (43 FR 9026), USEPA designated all of Franklin County, which includes the City of Columbus, as nonattainment for CO. On December 6, 1985, the State of Ohio submitted a request to USEPA that Franklin County be redesignated from nonattainment to attainment for CO. Additional technical support was submitted by the State on March 4, 1986. On March 18, 1987 (52 FR 8448), USEPA proposed to approve the redesignation based on the technical support discussed below. No public comments were received on USEPA's proposal to approve this redesignation.

#### Air Quality Data

According to the State submittal, CO was monitored at three sites in Franklin County during the period of January 1982 through September 1985. The three sites are: 1313 Chesapeake (Columbus); 1585 Morse Road; and 280 East Broad Street (Columbus). None of these sites has recorded a CO standard violation since 1982. Two of the three monitoring sites in Franklin County are in areas where relatively high CO concentrations might be expected. One monitor, which is located at 280 East Broad Street, is in the Central Business District (CBD) of Columbus. The high traffic density in the CBD coupled with low vehicle speeds in this area should produce relatively high CO concentrations locally. The intersection nearest the monitor carries an average daily traffic (ADT) level of approximately 30,000 vehicles, with the majority of the traffic being on Broad Street immediately in front of the monitor. Because the annual second-high CO concentrations at the 280 East Broad Street site have been well below the 8-hour standard since 1982 and because Broad Street is one of the heaviest travelled streets in the CBD, it can be concluded that none of the intersections in the CBD are likely to experience violations of the CO NAAQS.

The second monitor of possible concern is located at 1585 Morse Road, which is located outside of the CBD. The nearest intersection to this site carries a high ADT of 59,000 vehicles per day, with vehicle speeds between 35 and 40 miles per hour. This site has not had monitored violations of the CO NAAQS in the last 3 years despite its location in a high traffic area.

#### SIP Attainment Demonstration

The State of Ohio's 1979 SIP noted that the 1975 Franklin County CO emission total was estimated to be 266,735 tons/year. The SIP committed to reduce this total to 211,788 tons/year by the end of 1982 as the result of the Federal Motor Vehicle Emissions Control Program (FMVECP) and the implementation of Transportation Control Measures (TCMs). The March 4, 1986, submittal contains estimates of 1984 CO emissions and an updated Reasonable Further Progress (RFP) report. The supplemental submittal shows that the SIP emission reduction commitment was actually exceeded. The actual Franklin County CO emissions for 1982 were estimated to be 150,347 tons/year. Additional TCM based CO emission reductions occurred in 1985.

The March 4, 1986, submittal lists the TCMs that were implemented after 1979 and the CO emission reduction achieved from each measure. These TCMs were: mass transit improvements; ridesharing programs; signalization improvements; and roadway/traffic flow improvements. Between 1980 and 1982, TCM's achieved an estimated CO emission reduction of 7,031 tons/year. An additional estimated CO emission reduction of 3,982 tons/year was achieved between 1982 and the end of 1985. The observed air quality improvements can be explained to result from the implemented TCM's and the FMVECP. Because the TCM's and the FMVECP will continue to reduce CO emissions in the future and substantial growth margin (i.e., an emission reduction in excess of that minimally necessary to assure attainment of the NAAQS) for CO emissions has been obtained, it is expected that the attainment of the CO NAAQS will be maintained at the monitoring sites.

#### Conclusion

USEPA has reviewed both the December 6, 1985, and March 4, 1986, submittals, and has determined that the monitored improvement in CO concentrations to below the NAAQS levels can be explained in terms of permanent, enforceable control measures. In addition, USEPA has concluded that the peak monitored CO concentrations are representative of the worst-case concentrations in Franklin County. Because there are no violations of the 8-hour and 1-hour standard which have been monitored in the most recent 2 years for each site and the SIP containing the approved control strategy has been implemented, USEPA has determined that a redesignation of Franklin County, Ohio, to attainment for CO is acceptable. USEPA is approving the redesignation of Franklin County to attainment for CO.

#### Hamilton County (Cincinnati)

On March 3, 1978 (43 FR 9026), USEPA designated Hamilton County, which includes the City of Cincinnati, as nonattainment for CO. On November 20, 1985, the State of Ohio submitted a request to USEPA that Hamilton County be redesignated from nonattainment to attainment for CO. Additional technical support was submitted by the State on March 4, 1986, and March 19, 1986. On March 18, 1987 (52 FR 8448), USEPA proposed to approve the redesignation based on the technical support discussed below. No public comments were received on USEPA's proposal to approve this redesignation.

#### Air Quality Data

According to the State submittal, CO was monitored at five sites in Hamilton County during the period of January 1982 through August 1985. During this time, no violations have been recorded at any of these sites. These sites are: 1675 Gest Street (1982 data only) (sites are in Cincinnati unless otherwise noted); Fifth and Walnut; Vine and St. Clair; 6950 Ripple Road; and 3001 Harris in Norwood. The 1982 CO SIP revision noted that of the five CO monitors operating during the 1979-1981 period (the base period of the SIP revision), only one monitor, located at the intersection of Vine and St. Clair, recorded a violation of the CO NAAQS, with two monitored 8-hour exceedances (11.1 pm and 9.6 ppm). The State determined after analyzing the emissions in the vicinity of the monitor, that the monitored concentrations at this site were reflective of the impacts of mobile source CO emissions from two relatively small traffic zones surrounding the monitor. In particular, the SIP noted that traffic levels are high along both Vine and St. Clair Avenues.

The Cincinnati CO SIP revision and the November 20, 1985, redesignation request do not address the representativeness of the monitoring sites in terms of monitoring the worst-case CO concentrations that may actually have occurred in Hamilton County. Consequently, USEPA requested supplemental ADT data to verify the representativeness of the monitoring sites. These data were submitted by the State on March 19, 1986.

The Vine and St. Clair monitor is located adjacent to St. Clair Avenue, which has an ADT of 23,000 vehicles per day, and 91 meters east (generally downwind of the monitor) of Vine Street, which has an ADT of 28,000 vehicles per day. Both roadways have low to moderate vehicle speeds of 30 miles per hour or less (low vehicle speeds result in higher per vehicle CO emission rates). The 51,000 vehicles per day passing along Vine Street or St. Clair Avenue are the likely source of the pre-1982 CO standard exceedances monitored at this site. No exceedances of the standard have been recorded at this site since 1982.

With the exception of the Western Hills Viaduct/Beekman Avenue intersection, all other intersections with ADTs equal to or greater than the ADT at Vine/St. Clair are located significantly farther from downtown Cincinnati than the Vine/St. Clair intersection. These intersections should have higher average vehicle speeds than

the Vine/St. Clair intersection and, thus, lower CO emission rates and lower CO concentrations. In addition, these intersections should have lower background CO concentrations due to lower area densities of vehicular traffic.

The only other intersection of concern in this analysis is the intersection of Western Hills Viaduct and Beekman Avenue. This intersection has an ADT very similar to that of Vine and St. Clair. It has a relatively similar location in downtown Cincinnati. Lacking other data, USEPA has concluded that it has CO concentrations similar to those at Vine and St. Clair, and is, therefore, also currently below the standard.

#### SIP Attainment Demonstration

Although the redesignation request itself contains no documentation demonstrating that the monitored attainment of the CO standard is due to implementation of permanent, enforceable control measures, USEPA completed final rulemaking February 23, 1984 (49 FR 6724), approving a 1982 Cincinnati CO SIP revision which does document the impact of such control measure implementation.

The demonstration of attainment contained in the SIP was based entirely on the projected impact of the FMVECP and demonstrated attainment of the CO NAAQS by December 31, 1982. The SIP revision notes that other TCMs, such as the installation of metered parking and enhanced bus services will be implemented in the vicinity of the worst-case monitor. The SIP, however, does not address the emission impact of these additional control measures. These measures would act to further increase the demonstrated margin of attainment.

The approved demonstration of attainment is verified by the air quality data. Because the demonstration of attainment was based entirely on the projected impacts of the FMVECP, and this control program has been implemented and continues to be implemented, it is concluded that the observed air quality improvement can be explained in terms of the SIP's control program. The post-1982 implementation of additional TCM's as well as the continued implementation of the FMVECP should act to maintain attainment of the CO NAAQS at the monitoring sites.

#### Conclusion

USEPA has concluded that the monitored improvements in CO concentrations to below-standard levels in Hamilton County can be explained in terms of permanent, enforceable control measures. USEPA has also concluded



that the peak monitored concentrations are representative of the worst-case concentrations in the Cincinnati area. Since no violations of the standard have been monitored in the most recent 2 years for each site, USEPA has determined that a redesignation of Hamilton County, Ohio to attainment for CO is acceptable. Therefore, USEPA is approving the redesignation of Hamilton County to attainment for CO.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under Section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 27, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2).)

Identification of Subject for Part 81:

List of Subjects in 40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: December 15, 1988.

Lee M. Thomas,  
Administrator.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES—OHIO

Part 81 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 81 continues to read as follows:

Authority: 42 U.S.C. 7401—7642.

2. Section 81.336 is amended by revising the table for "Ohio—CO" to read as follows:

§ 81.336 Ohio.

OHIO—CO		
Designated area	Does not meet primary standards	Cannot be classified or better than national standards
Cuyahoga County...	X	
Franklin County...		X
Hamilton County...		X
All portions of all other counties in the State of Ohio.		X

[FR Doc. 88-29258 Filed 12-23-88; 8:45 am]  
BILLING CODE 9500-50-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 22

[Gen. Docket No. 87-390; FCC 88-317]

Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

**SUMMARY:** This action gives cellular radio licensees the option of offering advanced cellular technology and auxiliary common carrier services by relaxing restrictions on channel plans, emission characteristics and modulation techniques. This action also relaxes cellular base station antenna height-power requirements. Permitting advanced cellular technology and auxiliary service offerings should lead to more efficient use of the spectrum so that a greater number of subscribers can be served, while resulting in improved and more diversified services. Relaxed antenna height-power requirements will allow carriers to achieve less costly cell design and to improve the quality of service in areas of high signal loss. Thus, this action will give cellular licensees the freedom to tailor service to the needs in their particular service areas.

**EFFECTIVE DATE:** January 26, 1989.

**ADDRESS:** Federal Communications Commission; Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Joseph P. Husney or Rodney T. Small, Office of Engineering and Technology, (202) 653-8114 or (202) 653-8116.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order* in General Docket 87-390, FCC 88-317, adopted October 13, 1988 and released December 12, 1988.

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Summary of Report and Order

1. In the *Notice of Proposed Rule Making* in this proceeding (52 FR 39250; October 21, 1987) the Commission on its own motion, proposed amendments to

Parts 2 and 22 of the Rules that would enable cellular radio service operators to introduce advanced technologies and provide auxiliary common carrier services in the 824-849/869-894 MHz cellular frequency bands. This decision, a *Report and Order*, adopts a new section to the rules, {22.930 Special Provisions for Alternative Cellular Technologies and Auxiliary Services, clarifies the definition of dispatch communications prohibited on cellular systems {22.2, revises the table of frequency allocations {2.106, amends the section of permissible communications {22.911, relaxes the power limits placed on cellular base stations {22.904, and liberalizes the antenna height-power requirements {22.905.

2. Based on the record developed in the proceeding, the Commission concludes that a greater range of technical and service options in the cellular service is in the public interest. Cellular systems in major markets are using nearly all available channels while systems in smaller markets have substantial excess capacity. Greater technical freedom will provide incentive for equipment developers to accelerate efforts to meet prospective market demand in major markets while allowing carriers in smaller markets to offer auxiliary services with those channels that are not needed for cellular service.

3. The Commission believes that by relaxing technical standards pertaining to channeling plans, emission types and modulation requirements, equipment employing more efficient communication techniques will be used for cellular service. At the same time, the Commission anticipates that less costly cell design can be achieved, and that improved service to areas of high signal loss or new systems will result by liberalizing the power limits and antenna height-power requirements for base stations. The Commission further anticipates that high-quality cellular service as well as mobile-equipment compatibility will continue to be maintained by cellular operators.

4. However, the Commission has adopted safeguards to ensure the potential for interference will be minimized while compatibility, for the purpose of offering service to roamers, will be maintained. These safeguards maintain the current field strength limit at the boundaries of cellular geographic service areas, expand frequency coordination, keep the current power limit for mobile equipment, require type-acceptance of equipment and subject the use of advanced communications techniques or the offering of auxiliary

services to a secondary status. Auxiliary services may include Basic Exchange Telecommunications Radio Service and mobile services except dispatch service. Further safeguards include requirements that carriers continue to provide adequate cellular service as required by the current rules, {22.914, and that carriers provide service to roamers that use equipment which conforms to the current OST compatibility standards. The methods and channels which cellular operators use to provide compatible service is being left to the discretion of each carrier, since the communications needs and system capacity requirements for each carrier vary from service area to service area.

5. The Commission notes that industry committees are currently involved in developing future compatibility standards and believes that the transition to new cellular technologies will be encouraged and made easier by granting cellular operators the liberty to implement these technologies without the delay involved in a rule making. The Commission, therefore, declines to take action moving towards a new compatibility standard but plans to monitor the progress of the industry.

6. The rule amendments contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information requirement on the public. This requirement has been approved by the Office of Management and Budget (OMB control number 3060-0399).

Ordering Clause

7. Authority for this rule making is contained in 47 USC Sections 154(i), 303(c), 303(f), 303(g) and 303(r).

8. Accordingly, *It is ordered*, that Parts 2 and 22 of the Commission's Rules *Are amended* as specified below effective January 26, 1989.

List of Subjects

47 CFR Part 2

Communications equipment, Radio, Television.

47 CFR Part 22

Communications common carriers, Communications equipment, Radio, Rural areas.

Final Rules

47 CFR Part 2, Frequency allocations and radio treaty matters; general rules and regulations, is amended as follows:

PART 2—[AMENDED]

1. The authority citation for Part 2 continues to read:

Authority: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 USC 154, 303, unless otherwise noted.

2. Section 2.106 is amended by listing footnote NG151 in column 5 for the 824-849 MHz and 869-894 MHz bands and by adding the text of footnote NG151 to the list of footnotes at the end of the table as follows:

§ 2.106 Table of Frequency Allocations.

Non-Government (NG) Footnotes.

NG151 In the frequency bands 824-849 MHz and 869-894 MHz, cellular land mobile licensees are permitted to offer auxiliary services on a secondary basis subject to the provisions of Part 22.

47 CFR Part 22, Public mobile service, is amended as follows:

PART 22—[AMENDED]

1. The authority citation for Part 22 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1083, as amended (47 USC 154, 303), sec. 553 of the Administrative Procedure Act (5 USC 553), unless otherwise noted.

2. In § 22.2, the definition of "basic exchange telecommunications radio service" and "dispatch communication" are revised to read as follows:

§ 22.2 Definitions.

**Basic Exchange Telecommunications Radio Service.** In the Rural Radio Service this service provides public message communication service between a central office and fixed subscribers located in rural areas. In the Domestic Public Cellular Radio Telecommunications Service, this service provides public message communication service to fixed subscribers in Rural Service areas and in rural parts of Metropolitan Statistical Areas.

**Dispatch Communication.** Two-way voice communication, normally of not more than one minute's duration, that is transmitted between a dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities.

3. In § 22.900, the first sentence is revised to read as follows:

§ 22.900 Scope.

This subpart sets out the regulations governing the licensing and operations

of cellular systems authorized in the bands 824-849 MHz and 869-894 MHz.

4. Section 22.904 is revised to read as follows:

§ 22.904 Power limitations.

Stations in this service shall not be permitted to exceed the effective radiated power indicated below.

	Watts (ERP)
Base stations.....	500
Mobile stations.....	7
Auxiliary test stations.....	7

5. Section 22.905 is revised to read as follows:

§ 22.905 Antenna height-power for base stations.

In view of the fact that the predominant characteristic of cellular systems is frequency reuse within a given service area, the effective radiated power (ERP) of base stations with transmitting antennas in excess of 500 feet above average terrain (AAT) must be reduced as shown in the table below, unless coordination is performed and agreements are reached with all neighboring carriers that are within 75 miles.

Antenna height (AAT in feet)	Watts (ERP)
500.....	500
550.....	397
600.....	323
700.....	223
800.....	166
900.....	126
1,000.....	98
1,250.....	57
1,500.....	37
2,000.....	20
2,500.....	13
3,000.....	10
3,500.....	9
4,000.....	8
5,000.....	7

For AATs between the above listed values, linear interpolation should be used.

6. Section 22.911 is amended by revising paragraph (d) and adding new paragraph (e) to read as follows:

§ 22.911 Permissible communications.

(d) General communications are permitted on cellular frequencies. Dispatch communications are prohibited on cellular frequencies.

(e) Cellular operators and resellers so authorized by their state regulatory entities may offer fixed basic exchange



telephone service in RSAs and rural parts of MSAs. Other fixed cellular services may be offered on an incidental basis pursuant to § 22.308 of the Rules.

7. Section 22.930 is added to read as follows:

**§ 22.930 Special provisions for alternative cellular technologies and auxiliary services.**

Provided that interference to other cellular systems is not created, and service to roamers whose mobile equipment conforms to OST 53 is offered, cellular licensees may employ alternative cellular technologies and auxiliary common carrier services in the frequency bands 824–849 MHz and 869–894 MHz, except on the cellular control channels. These special provisions will be referred to as the cellular service option. The cellular service option may be exercised subject to the following requirements:

(a) Cellular licensees may offer advanced cellular technology or auxiliary mobile communication services on a secondary basis. The cellular licensee will be responsible for all operations in its authorized frequency block and service area.

(b) Cellular licensees are required to inform the Commission of the new technology or new services to be provided under the cellular service option by filing Form 489, pursuant to the requirements specified in § 22.117, at least thirty days prior to the implementation of the services. The information required to be filed with the Commission includes a description and classification of the services intended to

be offered, and a listing of any new or modified transmitting facilities.

(c) Operations under the cellular service option are subject to the technical requirements in §§ 22.903, 22.904 and 22.905. The emission requirements of § 22.907 will be applied, but only to the extent of those emissions that fall outside the specific cellular frequency bands licensed to the operator, i.e., band A or band B. Mobile transmitters are subject to type acceptance in accordance with Part 2 of the Rules.

(d) A cellular licensee's CGSA will be based on cellular facilities only. The 39 dBu contours of auxiliary service facilities will not be considered when demonstrating the 75 percent coverage requirement specified in § 22.903. In addition, the 39 dBu contours of auxiliary service facilities must be contained within the CGSA. Furthermore, the construction of an auxiliary service facility does not satisfy the construction requirements of § 22.43(c).

(e) Operations under the cellular service option are not subject to the channeling requirements of § 22.902, the types of emissions and modulation requirements of § 22.906, or the emission requirements of § 22.907. The requirements of § 22.911 pertaining to permissible communications shall apply under the cellular service option, except for the channel pairing requirement.

(f) For mobile facilities (other than cellular radio), the information required by paragraph (b) of this section must include the number of units to be placed in service, manufacturer's name, FCC

identification number, and specific frequencies of operation. Licensees shall submit emission bandwidth and frequency tolerance data to the Commission demonstrating compliance with the rules.

(g) The only fixed service authorized under the cellular service option is Basic Exchange Telecommunications Radio. For this service, the information required by paragraph (b) of this section must include sufficient technical data and calculations to verify compliance with the aggregate field strength limit. Calculations are required at eight equally spaced intervals around the service contour. Other data required for fixed transmitters is the manufacturer's name, model number, rated output power, operating frequency, frequency tolerance, modulation type, emission profile, and antenna location, elevation, orientation and pattern.

(h) Operations under the cellular service option are subject to frequency coordination in accordance with § 22.902(d) and the following requirements. The cellular system operator must perform an engineering analysis to ensure that interference will not occur from implementation of auxiliary services or alternative cellular technologies. The operator must obtain the concurrence of other cellular systems on the same frequency block within 75 miles.

Federal Communications Commission.

Donna R. Searcy,  
Secretary.

[FR Doc. 88–29367 Filed 12–23–88; 8:45 am]

BILLING CODE 6712-01-M

## Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

### DEPARTMENT OF AGRICULTURE

#### Food and Nutrition Service

##### 7 CFR Part 250

#### Donation of Food for Use in the United States, Its Territories and Possessions and Areas Under Its Jurisdiction

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule—Extension of comment period.

**SUMMARY:** This document provides a 30 day extension to the public comment period on a proposed rule published by the Department on October 20, 1988 (53 FR 41172). That proposed rule would amend the Food Distribution Program Regulations (7 CFR Part 250) by: (1) Improving the manner in which agricultural commodities acquired by the Department of Agriculture are distributed to recipient agencies; (2) establishing mandatory criteria to be used by distributing agencies in determining service fees; and (3) establishing minimum performance standards to be followed by distributing agencies responsible for intrastate distribution of donated commodities. These proposed changes are intended to improve the distribution of commodities to recipient agencies. The original 60 day comment period on the proposal closed on December 19, 1988. In response to requests from commenters, this document reopens and extends the comment period until January 18, 1989.

**DATE:** To be assured to consideration, comments must be postmarked on or before January 18, 1989.

**ADDRESS:** Comments should be sent to: Susan E. Proden, Chief, Program Administration Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, Alexandria, Virginia 22302. Comments in response to these rules may be inspected at 3101 Park Center Drive, Room 506, Alexandria, Virginia

during normal business hours (8:30 a.m. to 5:00 p.m., Mondays through Fridays).

**FOR FURTHER INFORMATION CONTACT:** Susan E. Proden, Chief, Program Administration Branch at area code (703) 756-3660.

**SUPPLEMENTARY INFORMATION:** The proposed rule published on October 20, 1988 was the last in a series of rules published by the Department to implement the requirements of Pub. L. 100-237, "The Commodity Distribution Reform Act and WIC Amendments of 1987." The proposed changes to the food distribution regulations are intended to improve the distribution of commodities to recipient agencies. The proposed rule addresses the use of commercial warehousing and delivery systems, mandatory criteria for establishing service fees, and minimum performance standards for distributing agencies. The proposed rule contains several of the most complex provisions of Pub. L. 100-237. Comments are being solicited to assist the Department in developing regulations which will provide for a more efficient, effective and uniform operation of the Food Distribution Program.

The Department recently received several requests for a 60 day extension of the comment period on that proposal. One request of particular importance was submitted by the National Association of State Agencies for Food Distribution (NASAFD). The reasons were that the regulations will have wide ranging effects on recipient agencies as well as State agencies; and that the initial comment period did not provide adequate time for recipient agencies and other interested parties to be notified about the proposal and for them to prepare comments.

The Department appreciates the fact that NASAFD is instrumental in both disseminating information to recipient agencies about regulations and in assisting the Department by encouraging interested parties to provide comments on our regulations. Therefore, the Department regrets that it cannot comply completely with the request for a 60 day extension of the comment period. However, for the following reasons the Department has determined that a 30 day extension is the maximum the Department will provide. States have been extensively informed about the requirements of Pub. L. 100-237 since

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January 8, 1988 when it was enacted. All FNS regional offices held program directors' meetings to advise State administrators of the requirements contained in the law. FNS staff also attended the national conference held by NASAFD to outline the new requirements. Moreover, and of greatest significance, Congress set forth timelimits in which the Department must complete the rulemaking process.

Therefore, the distribution believes that an extension of no longer than 30 days strikes a balance between the needs of the public for more time to prepare comments and the needs of the Department to implement the law as expeditiously as possible.

The Department will continue to accept comments postmarked on or before January 18, 1989. Commenters who have already submitted comments are welcome to submit additional recommendations if they wish to address new subjects or revise previous remarks. Otherwise, the comments previously submitted will be considered in the comment analysis.

Date: December 20, 1988.

Anna Kondratas,  
Administrator.

[FR Doc. 88–29571 Filed 12–23–88; 8:45 am]

BILLING CODE 3410-30-M

### Food Safety and Inspection Service

#### 9 CFR Parts 309 and 310

[Docket No. 87-001P]

#### Sulfonamide and Antibiotic Residues in Young Calves; Certification Requirement

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Proposed rule.

**SUMMARY:** This proposal would amend the Federal meat inspection regulations by adding specific language requirements on written certifications under the voluntary certification program for young calves. Such language would provide consistency among all certifications signed by producers and any subsequent custodians of young calves certifying that their animals have not been treated with drugs or have been treated with one or more drugs in accordance with



label directions approved by the Food and Drug Administration (FDA) and have been withheld from slaughter for the period(s) of time specified by those label directions. It would also advise the certifying parties of the consequences of false statements. The proposed rule would also amend the definition of certified calf to include any subsequent custodians of calves, along with producers, as parties to certify the calves and would require that all prior certifications be attached to the most recent certification when the animal is presented for slaughter. This proposed action is in accord with a recent recommendation by the Office of the Inspector General to develop a standard form for the certified calf program.

**DATE:** Comments must be received on or before February 27, 1989.

**ADDRESS:** Written comments to Policy Office, ATTN: Linda Carey, FSIS Hearing Clerk, Room 3171, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC, 20250. (See also "Comments" under Supplementary Information.)

**FOR FURTHER INFORMATION CONTACT:** Mr. John McCutcheon, Acting Assistant Deputy Administrator, Inspection Management Program, Meat and Poultry Inspection Operations, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-3697.

#### SUPPLEMENTARY INFORMATION:

##### Executive Order 12291

The Agency has determined that this proposed rule is not a "major rule" under Executive Order 12291. This proposed rule would not result in an annual effect on the economy of \$100 million or more; or a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographical regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprise to compete with foreign-based enterprises in domestic or export markets.

This proposed rule would provide language to assure that all certificates used under the certified calf program contain consistent statements of certification and warnings of the legal consequences of falsifications of those documents.

##### Effect on Small Entities

The Administrator, FSIS, has determined that this proposed rule will not have a significant economic impact

on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). Written certifications are currently required under the voluntary certified calf program. This proposed rule serves only to require specific language in certifications that would advise the certifier of the legal consequences of falsifying any statements in certifications; it would also provide language consistency among all certifications.

##### Paperwork Requirements

This proposed rule would (1) require specific, standard language on certifications, including language on the penalties for false statements, (2) permit subsequent custodians as well as producers of calves to "certify" calves, and (3) require that any subsequent "certifier," as a result of change in custody, attach a copy of any previous certification when the certified calf is presented for slaughter. These paperwork and recordkeeping requirements have been approved by the Office of Management and Budget (OMB) as control number 0583-0053. However, FSIS is submitting additional information and revised burden estimates to OMB for approval under an inventory correction worksheet.

##### Comments

Interested persons are invited to submit written comments concerning this proposal. Written comments should be sent to the Policy Office. Please indicate the docket number that appears in the heading of this document. All comments submitted in response to the proposal will be made available for public inspection in the Policy Office between 9:00 a.m. and 4:00 p.m., Monday through Friday.

##### Background

Because of increasing high concentrations of sulfonamide and antibiotic residues in young calves, FSIS published in the *Federal Register* (49 FR 23602, June 7, 1984) an interim rule, effective June 4, 1984. The interim rule intensified implant testing procedures for detecting violative concentrations of sulfonamide and antibiotics in calves up to 3 weeks in age or 150 pounds in weight. It provided for a voluntary written certification program that allowed less intensive testing on calves that were certified in writing by the producer as not having been treated with such drugs or, if so, that the prescribed withdrawal period had passed. The interim rule was made final on September 9, 1985, in the August 9, 1985, *Federal Register* (50 FR 32162).

The written certifications are signed by the producer verifying that the animal was not treated with drugs or, if so, that prescribed withdrawal periods on the drug's label were followed. Any subsequent custodian of such animal, such as an auction market, normally maintains a record of the producer's certification and, if necessary, makes the certification available to the establishment which slaughtered the animal or to the inspector at that establishment. In instances where a positive test result occurs, the inspector must know the identity of the producer to conduct followup testing of subsequent animals presented for slaughter by the producer, and to inform FDA of the positive test result.

On January 20, 1987, FSIS published an interim rule, which became effective immediately, implementing modified testing procedures to reflect current marketing and calf management practices (52 FR 2101). The interim rule bases intensity of testing primarily on the history of condemnations for sulfonamide and antibiotic residues in young veal calves at each establishment. Certification is still given some weight in determining intensity of testing. The certification program has proven to be a successful strategy in recognizing producers who practice good calf management practices; however, FSIS determined that an additional, more direct approach to residue testing is necessary. As residue condemnations increase at an establishment, the inspector increases the testing rate. Conversely, the inspector decreases the testing rate when minimal residue condemnations occur.

The interim rule also (1) discontinues the testing of animals condemned for pathological conditions, (2) permits establishment personnel to assist inspection personnel in conducting the tests; (3) clarifies that the certification of the animals must be in writing, and (4) clarifies that the veterinary medical officer can authorize the reduction of line speeds when necessary to allow sufficient time for performing tests.

##### Proposed Rule

In signing certifications, the individual and/or the entity which the individual represents is subject to section 407 of the Federal Meat Inspection Act (21 U.S.C. 677), which incorporates criminal penalties under 15 U.S.C. 50 for false statements, and to 18 U.S.C. 1001 and 3632, which contain alternative fines and criminal penalties for false statements. Criminal penalties are imposed upon an individual or entity

only when there is proof of criminal intent to falsify a certification by such individual or entity. In addition, an individual or entity is held responsible only for the time period covered by the signed certification.

FSIS has not required specific language on the certifications. As such, a warning of criminal penalties is not included on the certifications. In a recent report concerning its audit of the meat and poultry inspection program, the Office of the Inspector General recommended, in part, that FSIS develop a standard form for the certified calf program to warn producers of the consequences of false statements.

This proposed rule would add specific language to be included in the certifications warning the certifying party that falsification of such certifications is a crime and may result in a fine or imprisonment or both. In addition to the warning, certifications would be required to contain a list of the animals being certified and an identifying number which would correspond to the number displayed on the backtag, eartag, or other secure identification for those certified animals.

Currently, only producers certify animals. This proposal would also extend the certification program to each subsequent custodian of the animal. That is, each custodian of the animal from birth to presentation for slaughter would be given the opportunity to certify. However, any subsequent "certifier" as a result of a change in custody would be required to attach a copy of any previous certification to the certification presented with the calf at the time of slaughter. This information will assist FSIS in its efforts to trace back to all custodians of the animal. Therefore, the definitions of "certified calf" and "certified group" would be amended to include any other subsequent custodian of the animal and would require that any and all previous certifications be attached to the certification presented with the animal at the time of slaughter.

##### List of Subjects

###### 9 CFR Part 309

Ante-mortem inspection; Drug residues; Meat inspection.

###### 9 CFR Part 310

Post-mortem inspection; Drug residues; Meat inspection.

For the reasons set forth in the preamble, Parts 309 and 310 would be amended as set forth below.

#### PART 309—ANTE-MORTEM INSPECTION

1. The authority citation for Part 309 continues to read as follows:

Authority: 34 Stat. 1260, 79 Stat. 903, as amended, 81 Stat. 584, 84 Stat. 91, 438; 21 U.S.C. 601 *et seq.*, 33 U.S.C. 1254(b).

2. Section 309.16 would be amended by revising paragraphs (d)(1)(ii) and (3) to read as follows:

##### § 309.16 Livestock suspected of having biological residues.

(d) \* \* \*

(1) \* \* \*

(ii) *Certified calf.* A calf that the producer and any other subsequent custodian of the calf certifies has not been treated with any animal drug or has been treated with one or more drugs in accordance with FDA approved label directions and has been withheld from slaughter for the period(s) of time specified by those label directions.

(3) *Certified group.* (i) For a calf to be considered certified, the producer and other subsequent custodians of the calf must certify in writing that while the calf was in his/her custody, the calf was not treated with animal drugs or has been treated with one or more drugs in accordance with FDA approved label directions and has been withheld from slaughter for the period(s) of time specified by those label directions. Any prior certification must be attached to the certification that is presented with the animal at the time of slaughter. The certification shall contain a list of the calves with accompanying identification numbers, as required by paragraph (3)(ii) of this section, followed by the following language:

I hereby certify that, while in my custody, from \_\_\_\_\_ to \_\_\_\_\_ (time period of custody), the above-listed calf or calves were not treated with drugs, or have been treated with one or more drugs in accordance with FDA approved label directions and have been withheld from slaughter for the period(s) of time specified by those label directions. I certify that, to the best of my knowledge and belief, all information contained herein is true, that the information may be relied upon at the official establishment, and that I understand that any willful falsification of this certification is a felony and may result in a fine of \$250,000 or more for an individual or \$500,000 or more for a corporation, or imprisonment for not more than 5 years, or both (21 U.S.C. 677, 18 U.S.C. 1001 and 3623).

Executed on \_\_\_\_\_  
(date of certification)

(signature of certifier)

(typed or printed name and address of certifier)

(business of certifier)

(ii) Each calf must be identified by use of backtag, eartag, or other type of secure identification which displays a number which shall be recorded on all written certifications.

#### PART 310—POST-MORTEM INSPECTION

3. The authority citation for Part 310 continues to read as follows:

Authority: 34 Stat. 1260, 79 Stat. 903, as amended, 81 Stat. 584, 84 Stat. 91, 438; 21 U.S.C. 71 *et seq.*, 801 *et seq.*, 33 U.S.C. 1254(b).

4. Section 310.21 would be amended by revising paragraph (b)(2) to read as follows:

##### § 310.21 Carcasses suspected of containing sulfa and antibiotic residues; sampling frequency; disposition of affected carcasses and parts.

(b) \* \* \*

(2) *Certified calf.* A calf that the producer and any other subsequent custodian of the calf certifies has not been treated with any animal drug or has been treated with one or more drugs in accordance with FDA approved label directions and has been withheld from slaughter for the period(s) of time specified by those label directions.

Done at Washington, DC, on: December 21, 1988.

Lester M. Crawford,  
Administrator, Food Safety and Inspection Service.

[FR Doc. 88-29635 Filed 12-23-88; 8:45 am]

BILLING CODE 3410-DM-M

#### 9 CFR Parts 318 and 320

[Docket No. 86-041P]

#### Processing Procedures and Cooking Instructions for Cooked, Uncured Meat Patties

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would provide processors of fully and partially cooked, and char-marked, uncured meat patties with specific manufacturing, handling, and labeling requirements for these products to reduce the potential for incidents of food-borne, pathogen-caused illness from consumption of inadequately cooked, uncured meat patties. There has been increasing



evidence in recent years that food-borne pathogens survive in product many consumers consider fully-cooked, such as "Char-Broiled Beef Patties," "Salisbury Steak," and "Pre-Browned Fresh Pork Sausage Patties," but which is not fully-cooked without sufficient additional heating. Recently a strain of *Escherichia coli*, (*E. coli* 0157:H7) was epidemiologically linked to an outbreak of food poisoning which hospitalized and seriously endangered six Minnesota school children. The Centers for Disease Control have determined that consumption of undercooked, uncured beef patties caused the illnesses; although the specific strain of *E. coli*, *E. coli* 0157:H7, has not been isolated from the patties. The proposed rule would establish (1) holding temperature and time requirements for raw meat used for cooked, uncured meat patties; (2) internal temperature and time combination processing requirements fully and partially-cooked, uncured meat patties and for uncured meat patties which are char-marked with heat but remain raw; (3) a requirement that a cooking instruction be placed on the label of partially-cooked and char-marked, uncured meat patties, instructing the final preparer to cook the patties to a well done state (a minimum internal meat temperature of 160 °F.); and (4) requirements to assure that fully-cooked, uncured meat patties are not contaminated after cooking. The proposed rule is designed to prevent instances of illness from the consumption of such patties.

**DATES:** Comments must be received by January 26, 1989.

**ADDRESS:** Written comments may be mailed to the U.S. Department of Agriculture, Food Safety and Inspection Service, Policy Office, Attn: Linda Carey, Room 3171, South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250. (See also "Comments" under **SUPPLEMENTARY INFORMATION**.)

**FOR FURTHER INFORMATION CONTACT:** Bill F. Dennis, Director, Processed Products Inspection Division, Technical Services, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447-3840.

#### **SUPPLEMENTARY INFORMATION:**

##### **Executive Order 12291**

The Agency has made a determination that this proposed rule would not be a major rule under Executive Order 12291. It would not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries,

Federal, State or local government agencies or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in foreign or domestic markets.

##### **Effect on Small Entities**

The Administrator has made an initial determination that this proposed rule may have a significant economic impact on a substantial number of small entities. Currently 130 establishments produce cooked, uncured meat patties. Although FSIS is unable, at this time, to determine how many of these establishments are small businesses, it is true that the majority of producers are small entities. The proposed rule would require that fully-cooked products be cooked to a minimum of 160 degrees Fahrenheit or an equivalent temperature/time combination, that specific handling requirements for raw and cooked products be followed, and that partially-cooked and char-marked products be labeled to indicate that further cooking by the consumer is needed. Compliance with these requirements appears necessary to protect the public from products which may be contaminated with enteric pathogenic bacteria. An analysis reflecting the impact of this proposed rule on small entities will be available prior to the publication of the final rule.

##### **Paperwork Requirements**

This proposed rule would require that those establishments which encounter a monitoring defect, a process deviation, or a process failure maintain a written record of the defect, deviation, or failure in the instant case as well as the steps that will be taken by the establishment to prevent a recurrence. This written record would have to be available for review by FSIS program employees and any other duly authorized representative of the Secretary upon request. This proposed rule also would require that establishments perform analyses for coliforms (enteric bacteria which may or may not be pathogenic), *Salmonella*, and *E. coli* for each lot of product subject to sampling. Results of these analyses would have to be on file at the establishment and available for review by FSIS program employees and any other duly authorized representative of the Secretary upon request. These recordkeeping requirements have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act (44 U.S.C. 3501).

##### **Comments**

Interested persons are invited to submit comments concerning this action within a period of 30 days after publication. Written comments must be sent to the Policy Office at the address shown above and should refer to the docket number located in the heading of this document. All comments submitted in response to this action will be available for public inspection in the Policy Office between 9:00 a.m. and 4:00 p.m., Monday through Friday.

##### **Background**

###### *Recent History of Enteric Pathogens in Meat Products*

In the past 3 years, there has been increasing evidence that pathogens originating in the intestinal tracts of food animals (enteric organisms) can survive in undercooked, uncured meat patties and can cause serious and potentially fatal food-borne illnesses in people who eat the product without sufficient reheating.

One of the primary enteric organisms of public health significance in meat is *Salmonella*, which causes salmonellosis. Human clinical symptoms of salmonellosis include diarrhea, vomiting, and fever. Infants, young children, the elderly and individuals suffering from an illness may be seriously affected.

The Agency has confirmed a number of occurrences of salmonellosis in "cooked" beef, roast beef, and "cooked" corned beef. Until the Agency issued processing regulations in 1977 (42 FR 44217), these cooked beef products were a significant vehicle of human salmonellosis in the United States. Now other meat products are emerging as potential carriers for *Salmonella*.

In 1985, FSIS confirmed one instance of *Salmonella* in commercially produced "fully-cooked," "char-broiled," uncured beef patties. Although there had been no prior confirmed cases of human salmonellosis from "fully-cooked," uncured beef patties, the potential was known to exist. These patties, labeled "fully-cooked," "char-broiled," and similarly prepared products that indicate they are ready-to-eat, were cooked in some cases to very low internal temperatures. This product had been produced for the Chicago school system; potentially affecting a large number of individuals, mostly children. The processing establishment's procedure for cooking and handling this product was insufficient to eliminate this food-borne pathogenic bacteria. *Salmonella* was detected during routine microbiological sampling procedures of

the frozen-stored product, and the product was recalled before it was consumed.

Another potential microbial contaminant of undercooked, uncured beef patties is *Escherichia coli* 0157:H7. This pathogenic serotype of *E. coli* causes illness including hemorrhagic colitis and hemolytic uremic syndrome (HUS). HUS is a serious and potentially fatal condition which causes other complications such as hypertension, chronic renal insufficiency, seizure, blindness, and psychomotor retardation. The death rate for HUS is approximately 5 percent, and approximately 10 percent of the survivors suffer some permanent damage. A toxin similar to that produced by *Shigella* is believed to be involved. The toxin and the bacteria are vulnerable to heat and can be destroyed by heat during cooking.

Outbreaks from *E. coli* 0157:H7 infections have been reported in nursing homes, schools, and day care centers, usually after patients or children have eaten undercooked hamburger. The most severe illnesses have occurred among the most vulnerable population groups—the very old and the very young. In mid-1987, 16 people suffered from hemorrhagic colitis as a result of eating undercooked beef which was found to contain *E. coli* 0157:H7. Of the 16 persons, eight developed HUS and four died. In October of this year, the same virulent strain, *E. coli* 0157:H7, was the causative organism for several confirmed illnesses among Minnesota school children; 54 became ill with bloody diarrhea, many of them very ill, and six required hospitalization. The Centers for Disease Control (CDC) and the Minnesota Department of Health determined epidemiologically that the vehicles were "fully-cooked," uncured beef patties. The Agency's investigation revealed that the patties had been undercooked by the processing establishment.

##### *Agency and Industry Actions*

Under the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Secretary is responsible for assuring consumers that meat and meat food products distributed to them are not adulterated. Section 1(m)(3) of the FMIA (21 U.S.C. 601(m)(3)) provides that any carcass, part thereof, meat, or meat food product is adulterated " \* \* if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food." To prevent adulterated product from reaching consumers, section 6 of the FMIA (21 U.S.C. 606) provides that all such

product shall be condemned and destroyed for food purposes.

In direct response to the 1985 Chicago *Salmonella* outbreak from undercooked beef patties, FSIS issued Notice 92-85.<sup>1</sup> The notice was an interim measure required to protect the public health.

The notice requested information on current industry processing practices and provided optimum processing guidelines to processors on those types of products similar to the beef patties which were implicated in the Chicago outbreak. The notice specifically applied to cooked, uncured, comminuted, formed or unformed red meat products, and to battered and breaded poultry items which were heated only to set the batter. The notice recommended safe cooking temperature and time combinations for fully-cooked products and safe cooking instructions for partially-cooked products.

The processing procedures and label information submitted in response to the notice showed that an overwhelming majority of the procedures developed to produce fully-cooked, uncured, comminuted products were insufficient to destroy all enteric pathogenic organisms. In addition, labels for partially-cooked products did not carry cooking instructions, or carried instructions for heating which were insufficient to ensure destruction of surviving enteric pathogenic organisms.

##### *Microbial Control*

To rectify the problem of pathogenic enteric bacteria survival in fully-cooked, uncured meat patties, microbial control must be established for raw product.

**Incidence.** Meat, meat products, poultry, and poultry products were responsible for a significant number of the reported food-borne outbreaks in the United States between 1968 and 1977. According to recent FSIS surveys, carcasses of approximately 2 percent of raw beef, 12 percent of raw pork, and 35 percent of young chickens are contaminated by salmonellae.<sup>2</sup> FSIS has not recovered *E. coli* 0157:H7 from ground beef or brisket samples at plant level, but has discovered the organism in a low percentage (less than 1 percent) of veal samples from the North Central states. A recent random check by the University of Wisconsin Food Research Institute of ground beef at retail stores in Madison, Wisconsin, and Calgary,

<sup>1</sup> A copy of FSIS Notice 92-85 is available from the FSIS Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

<sup>2</sup> Surveys are available for review in the Office of the FSIS Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

Canada, revealed that up to 1.5 percent of raw ground beef in the United States and 3.7 percent of raw ground beef in Canada carried the bacteria.<sup>3</sup>

##### *Production and Processing Practices*

Clean livestock production practices and good manufacturing practices during slaughter can greatly reduce the number of enteric pathogenic bacteria which may remain on carcasses prior to boning and processing. During boning operations, temperature and time controls, proper handling, and proper storage are effective in reducing microorganism growth. Product holding temperatures of 40 °F. or lower are effective in retarding microbial activity in perishable commodities and specifically in meat trimmings. Although pathogenic organisms can, and do, multiply at these temperatures, the rate of reproduction is relatively slow. Shortened holding periods, in combination with low refrigeration temperatures, significantly decrease the probability that *Salmonella*, *E. coli* 0157:H7, and other food-borne pathogens will multiply on raw product.

Grinding of meat distributes microorganisms residing on external surfaces throughout the mass. However, handling and storing ground meat at low temperatures is effective in retarding most pathogenic bacterial activity. Any temperature abuse, for example, allowing the surface temperature to exceed 40 °F., would cause accelerated microbial growth.

Thorough cooking, as defined in the proposed regulation, of the ground meat is effective in destroying all enteric pathogenic bacteria. The number of bacteria on raw product should be minimized since heat treatment may be insufficient to destroy bacteria if they are present in unusually high numbers. When undercooking or improper cooking occurs, food-borne pathogens can survive and cause illness.

Once cooked, it is essential that the temperature be lowered rapidly, especially in the temperature ranges of 90 °F. to 120 °F. where surviving pathogenic bacteria grow well. In addition, exposing raw or undercooked product to cooked product, must be avoided to prevent cooked product from becoming contaminated.

<sup>3</sup> These data are available for review in the Office of the FSIS Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.



### A System for Process Control: The Hazard Analysis and Critical Control Point (HACCP) System

Control of pathogenic bacteria can be effectively implemented through a HACCP system. The Agency supports, and is actively involved in, development of HACCP-based quality control. A HACCP system, as defined by the Agency, includes (1) the identification of potential hazards, (2) the identification of critical control points (CCP's), (3) the development of effective process limits at those CCP's, and (4) the use of appropriate monitoring activities to assure that the limits are met.

A hazard is any contaminant, adulterant, factor, or condition that results in an unwholesome product or may cause product to be a health risk to the consumer. Hazard analysis is the evaluation of ingredients, processing operations, and human factors which can cause the product to present a real or potential hazard to the consumer. Lastly, a CCP is any point where a process can be changed or controlled to assure that a hazard does not cause the product to become adulterated.

It is imperative that processors of meat products manufacture their products according to HACCP system principles. Slight modifications to a processing procedure could seriously threaten public health, especially when a CCP is modified.

The National Research Council, in its 1985 report on *An Evaluation of the Role of Microbiological Criteria for Foods and Food Ingredients*, recognized that HACCP systems must be developed for numerous foods. Cooked, uncured meats were specifically discussed and the report noted that the potential hazard for precooked, uncured meats produced in commercial establishments is high.<sup>4</sup> The report included CCP's in the manufacturing of these products; i.e., microbiological quality of raw materials, the heat process and post-heat process handling, proper chilling of the heated product, proper refrigeration, and adequate reheating.

### Development of the Proposed Rule

In view of the public health risks associated with improper and inadequate processing of cooked, uncured meat patties and the lack of

<sup>4</sup> *An Evaluation of the Role of Microbiological Criteria for Foods and Food Ingredients*, Subcommittee on Microbiological Criteria, Committee on Food Protection, Food and Nutrition Board, National Research Council, National Academy Press, Washington, DC 1985. A copy of this publication is available for review in the Office of the Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

HACCP-based regulatory enforcement and guidance procedures, the Agency is issuing this proposed rule for fully-cooked, partially-cooked, and char-marked, uncured, meat patties because these products appear to be at greatest immediate risk. FSIS is developing further rulemaking for all heated, uncured, comminuted meat products which will, if finalized, be issued at a future time.

### The Prescribed Procedure

This proposed rule specifies three processes: One for fully-cooked patties; one for partially-cooked patties; and one for patties char-marked by a heat source. Each procedure contains CCP's which all processors using that process would be required to use. Processors could also identify additional CCP's for their processes; however, all CCP's identified in the rule would have to be used. For each CCP, the proposed rule identifies process control limits—limits at the CCP to assure that only product which is not adulterated is produced.

### CCP's Required in the Proposed Rule

**Raw Material Handling.** Sound microbiological quality of raw meat appears important to the production of unadulterated cooked, uncured meat patties. Raw meat would not be used for preparing these cooked products if it has been received or stored at temperatures exceeding 40 °F.; if it has been held at refrigeration temperatures in the establishment for longer than 72 hours; or if it has been completely thawed for more than 24 hours. These process control limits, when enforced, would appear to greatly reduce the potential for food-borne pathogens to grow. Refrigeration of the meat prior to processing appears to reduce the potential for growth since pathogens reproduce slowly at lower temperatures.

**Non-Refrigerated Exposure.** For fully-cooked products, the specified time and temperature combinations would require that raw meat product not be removed from refrigerated storage (40 °F. or lower) more than 2 hours prior to cooking. Additionally, raw meat product would have to be returned to refrigerated storage within 1 hour of a heat processing equipment failure.

For partially-cooked and char-marked products, the specified time and temperature combinations would require that raw meat product not be removed from refrigerated storage (40 °F. or lower) more than 1 hour prior to cooking. Additionally, raw meat product would have to be returned to refrigerated storage within 1 hour of a heat processing equipment failure.

In addition, if the failure exceeds 2 hours, the equipment would have to be cleaned and sanitized prior to restarting processing operations. These provisions would appear to reduce the time pathogens spend at the temperature which allows their most rapid reproduction, lessen the pathogen load on product, and thereby increase the effectiveness of the cook.

**Cooking.** Three cooking processes are specified: Fully-cooked, partially-cooked, and char-marked with a heat source. Thermal destruction of microorganisms in meat appears to be a function to both temperature and time. At higher temperatures microbial death appears to occur within a short period of time; at lower temperatures longer exposure times appear to be required. Based on research, the Agency has developed a series of temperature and time combinations with equivalent effects, so that, for instance, 160 °F. instantaneously is equivalent to 130 °F. for 121 minutes.<sup>5</sup> However, the industry practice for cooking meat patties appears to be an instantaneous cook without dwell time. Pursuant to this proposed regulation, an internal temperature of 160 °F. would constitute the minimum standard for a fully-cooked patty.

The Agency has contracted for, and received a copy of, a research study on "Lethality of Heat to *Listeria Monocytogenes* Scott A and *Escherichia coli* 0157:H7, Part I: D-Value Determinations in Ground Beef and Turkey." <sup>6</sup> A preliminary assessment indicates *E. coli* 0157:H7 is also effectively destroyed at these same temperatures cited above for destroying *Salmonella*.

The permitted temperature and time combinations of the proposed rule for fully-cooked patties appears to affect the yield, and to some extent the appearance and texture of the patties as they leave the federally inspected establishment. However, since these combinations appear safe and effective in destroying enteric pathogenic microorganisms, the public health concerns would seem to outweigh the economic consequences, and, thus, require the Agency to act accordingly. Other temperature and time combinations do not seem to be completely safe nor effective. In any

<sup>5</sup> Goodfellow, S.J., and W.L. Brown. 1978. Fate of *Salmonella* inoculated into beef for cooking. *Journal of Food Protection* 41:598-605.

<sup>6</sup> ABC Research, 1988. Unpublished. A copy of this study is available for review in the Office of the FSIS Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

case, since even the fully-cooked patties would be reheated before use, the consumer may well notice no difference at all.

For partially-cooked patty processes, this proposed rule also specifies minimum cooking temperature and time combination requirements. Temperature/time heat treatments less intense than those for fully-cooked patties would not seem to be completely safe nor effective in destroying enteric food-borne pathogens. The minimum temperature required in this proposed rule for partially-cooked patties—140 °F.—is the temperature many establishments are currently using to cook "fully-cooked" patties. Partially-cooked product safety appears to be dependent, by definition, on adequate cooking before consumption and prominent, clear labeling. However, these requirements could, and do appear to, minimize the possible load of pathogenic organisms and this, in turn, would assure that the final cooking by the end-user—the consumer or an institutional food service organization—would be more effective.

Char-marked patties, except where they touch the heat source, are not really cooked at all. However, they are heated in producing the char-marks, and the possibility of temperature abuse appears to exist. If the char-marking were performed inefficiently and the patties were allowed to rise to the 90 °F.-120 °F. range and remain there for a number of hours, any pathogens present would be likely to multiply quickly since conditions include a nutrient-rich media and a favorable temperature. Therefore, the Department proposes to include these patties in this rule. The proposed rule specifies a maximum internal temperature the patties could reach, and a maximum time in which the patties could be above 40 °F. These requirements should reduce the potential for increased microbiological activity while "heat" processing patties.

### Selection of Required Temperatures

Both *Salmonella* and *E. coli* 0157:H7 are susceptible to heat, although *Salmonella* is slightly more resistant. In addition to manufacturing procedures intended to reduce the potential for food-borne microorganisms to grow, a kill-step sufficient to destroy viable enteric pathogens appears necessary. Currently, the Agency has no required minimum temperature for fully-cooked, partially cooked, or char-marked, uncured meat patties. To destroy enteric pathogens in meat patties, either an instant internal temperature of 160 °F. or an equivalent temperature and time combination is necessary. This is

basically the same criteria used by the Agency in the FSIS Notice 92-85 in 1985.

The minimum temperature of 160 °F. for fully-cooked, uncured meat patties would differ from the 145 °F. requirement for cooked beef roasts established in a rule published on September 2, 1977 (42 FR 44217). There are several reasons for this. Roasts are processed differently than patties and are of larger size. Once an internal temperature of 145 °F. is attained, the produce remains at or near that temperature for some time both before and after the target temperature is reached. This is called come-up time and come-down time, respectively. It is an elementary physical principle that a large dense mass will retain heat better than a small dense mass. In addition, roasts are generally cooked in the presence of moisture (*Salmonella* is more resistant to heat in a dry environment than in the presence of moisture); the larger size increases the time the product is at a destructive temperatures; and they have a lower surface area in relation to volume for microorganisms to grow. On the other hand, patties are currently generally exposed to high heat sources for extremely short periods of time—sometimes, just to brown the surface or to apply char-marks. An FSIS survey of 12 establishments in 1985 revealed a range of heating from 90 °F. to 145 °F.<sup>7</sup> No additional moisture is present during the processing. Because of the small mass, there appears to be no appreciable come-up or come-down time and the relative surface area seems large. The 145 °F. temperature requirement for cooked beef roasts appears, therefore, insufficient for destroying all enteric pathogens in meat patties.

The presence of curing agents, such as sodium and potassium nitrite, in comminuted meat products reduces the survival potential of most food-borne pathogens. *Salmonella*, in particular, is adversely affected by the curing process. Therefore, uncured patties would be much more likely to contain food-borne pathogens than cured patties. Food-borne outbreaks caused by cooked, cured meat patties are possible but are not likely.

The minimum temperature of 140 °F. for partially-cooked patties would appear to effectively reduce the number of enteric pathogens. Since the raw material's microbial load appears

<sup>7</sup> A copy of the survey is available for review in the Office of the Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.

directly related to the wholesomeness of the final cooked product, this temperature would greatly increase the probability that the product would be safe when recooked by the end-user.

### Food-Borne Concerns in Various Meat and Poultry Products

Because beef is the type of meat most likely to be used in patties, it has most often been implicated in patty-borne food-poisoning outbreaks; however, other meat species, as well as poultry, are also implicated. Pork sausage patties were confirmed *Salmonella*-positive by the Agency in 1981. Although cooked pork products are sometimes heated to a specified temperature and time combination to destroy trichinae (helminths causing the disease trichinosis), traditionally-used temperatures are not adequate to destroy enteric bacterial pathogens. Thus, cooking pork to 144 °F. may destroy trichinae but is ineffective in destroying enterics. Partially-cooked pork patties are required by this rule to be handled as a partially-cooked product.

Neither lamb nor veal cooked patties are commonly associated with food-borne disease; however, veal is known as a host for *E. coli* 0157:H7.

Nearly all cooked poultry products are temperature-regulated by the Poultry Products Inspection Regulations and are cooked either to 160 °F. or 155 °F. (as required for uncured and cured products, respectively). Consequently, cooked poultry has been infrequently linked to illnesses. However, cooked red meat products prepared under the Federal Meat Inspection Regulations may contain poultry which would appear to pose a potential for illness. As mentioned earlier, the incidence of *Salmonella* on young chickens is high, in comparison to meat. This proposed change to the meat regulations would either require the cooked product to be cooked sufficiently to destroy enteric pathogens (similar to the poultry regulations), or limit the enteric pathogen population by controlling the raw material and require that finished product be labeled as a partially-cooked or char-marked product which requires a thorough cook by the end-user.

**Cooling.** The Time and Temperature Table (Table B of this proposed rule) would require that fully-cooked, uncured meat patties be immediately cooled after the heat treatment. Fully-cooked patties would have to be rapidly and continuously cooled from 130 °F. to 80 °F. to 40 °F. within 5 hours.

FSIS has been concerned with the cooling of full-cooked products. Cooling



guidelines were issued by FSIS Directive 7110.3, May 12, 1988, to help prevent the outgrowth of surviving pathogenic organisms or those unintentionally added to the product after the heat treatment.\* The cooling requirement limits in this proposed rule for fully-cooked patties are the same as are in the guideline for other fully-cooked products.

For partially cooked and char-marked patties, the cooling requirements would be more stringent. The cooling requirements, however, would be included as part of the cooking process restrictions and would be contained as part of the CCP for cooking. Partially-cooked products would have to be cooked from 40 °F. to a minimum of 140 °F. and be cooled back down to 40 °F. within 2 hours; char-marked patties would be limited to temperatures above 40 °F. for no more than 2 hours. These requirements appear practical for the industry. A large majority of comminuted products currently are immediately cooled or frozen after cooking, and already appear to be in compliance with these cooling requirements. However, some present cooling procedures may not be sufficient to prevent the outgrowth of surviving pathogenic organisms or of those intentionally added to the product after cooking.

Cooling procedures were included as an essential part of the cooked beef regulations (9 CFR 318.17) issued in 1983 and have proven useful in preventing outbreaks of salmonellosis.

**Cooking Instruction.** For partially-cooked and char-marked patties (as opposed to fully-cooked), a thorough cook, as provided in this proposed rule, just prior to consumption appears necessary to assure that pathogens and toxins that survive partial-cooking or char-marking are destroyed.

Accurate and effective labeling as to final cooking instructions for the consumer, coupled with handling and preparation practices for the establishment would seem to provide the needed margin of safety in lieu of full cooking.

#### Required Label Features

As a label feature, partially-cooked, uncured meat patties would bear the following statement "Partially Cooked: For Safety, Cook Until Well Done (Internal Meat Temperature 160 °F.)." As a label feature, char-marked, uncured

meat patties would bear the statement "Uncooked, Char-Marked Product: For Safety, Cook Until Well Done (Internal Meat Temperature 160 °F.)." These statements would be label qualifiers for the product name and would be placed adjacent to the product name, in lettering of easily readable style, and at least one-half the size of the product name. As an alternative to revising existing labels, this statement could be applied as a pressure sensitive label for addition to existing labeling, provided it satisfies the placement, style, and size requirements described. The establishment would have to develop a monitoring activity, such as a sampling plan for finished product, to assure appropriate modification of applicable product labels. This monitoring requirement would remain effective until the existing supply of labeling was used.

#### Cooking Instruction Temperature Requirement

Regarding the cooking instruction, FSIS would require time and temperature values for cooking in terms of the internal temperature of the product (160 °F.). This is standard for scientific research since an internal temperature of the meat tends to be more accurate than the temperature of the oven in which it is cooked.

Traditional cooking instructions to consumers are given in terms of chamber temperature and time; or, for a microwave, in terms of power setting and time. Although product internal temperature is more accurate than the temperature of the oven in which it is cooked, measurement of internal temperature would be difficult for consumers since most patties are relatively thin and it is difficult to get an accurate internal temperature. Insertion of a meat thermometer would probably not result in a reliable measurement.

The establishments that prepare partially-cooked or char-marked product would be required by this proposed rule to label the product with an internal meat temperature cooking instruction. The Agency would, and the industry would be encouraged to, educate consumers so that they might be able to recognize uncured meat patties that are "well done" or "partially-cooked."

**Sanitary Practice.** Fully-cooked meat products appear susceptible to recontamination from many sources, including raw and undercooked food, improper equipment cleaning, and poor personnel sanitation. Thus, this proposed rule would adopt the sanitation provisions established for cooked roast beef, 9 CFR 318.17, that

have proven to be effective in reducing the potential for recontamination.

#### Microbiological Analyses

In addition to the proposed FSIS required processing controls, the proposed rule would specify the microbiological analyses that could be required during the investigation of a monitoring defect and would be required during the investigation of a process deviation unless the processor was willing to grant a process failure was involved and proceed accordingly in a fully-cooked patty process. The analyses would be performed for coliforms, *E. coli*, and *Salmonella*. If *E. coli* or *Salmonella* were detected, then known enteric pathogens would have been found in a product that was supposed to be fully-cooked. This would mean a process failure would have occurred, the product would be a known public health risk, and the product would have to be treated to destroy these pathogens before it could be used in any fashion.

If coliform organisms (enteric bacteria which include *E. coli*, and may or may not be pathogens) were found, but *E. coli* itself was not, the process would have shown a deviation, all enteric organisms would not have been killed and the product would again have to be fully-cooked before it leaves the establishment, even though pathogens could not be detected in the product samples.

#### Records

The recordkeeping which would be involved in the creation of reports of monitoring defects, process deviations, and process failures, and in the filing of laboratory results might exceed the present requirement and the practice of most establishments. These records are necessary, however, to enable FSIS employees to determine whether the establishments are effectively controlling the process.

For reasons set out in the preamble, 9 CFR Parts 318 and 320 would be amended as set forth below:

#### List of Subjects

##### 9 CFR Part 318

Meat inspection, Preparation of products, Quality control.

##### 9 CFR Part 320

Records.

#### PART 318—ENTRY INTO OFFICIAL ESTABLISHMENTS: REINSPECTION AND PREPARATION OF PRODUCT

1. The authority citation for Part 318 would continue to read as follows:

Authority: 34 Stat. 1280, as amended, 81 Stat. 584, as amended (21 U.S.C. 601 *et seq.*), 72 Stat. 862, 92 Stat. 1069, as amended (7 U.S.C. 1901 *et seq.*) 76 Stat. 663 (7 U.S.C. 450 *et seq.*).

2. Part 318 would be amended by adding a new § 318.22 which would read as follows:

#### § 318.22 Processing procedures and cooking instructions for cooked, uncured meat patties.

(a) **Definitions.** For purposes of this section, the following definitions shall apply:

(1) **Critical control point (CCP).** Any point where a process or procedure can be changed or controlled to assure that cooked, uncured meat patties are wholesome and not adulterated.

(2) **Hazard.** Any contaminant, adulterant, factor, or microbial condition that results in an unwholesome product or which may cause the product to be a health risk to the consumer.

(3) **Monitoring activity.** The systematic observation by establishment personnel at a critical control point at a predetermined frequency to ascertain if the process is under control by comparing the observation to the process control limit.

(4) **Monitoring defect.** An incorrectly performed or omitted monitoring activity by the establishment.

(5) **Patty.** A shaped and formed comminuted (chopped or ground) meat food product for individual servings.

(6) **Process control limits.** Limits at the critical control points used to control the process and assure that wholesome and unadulterated product is produced.

(7) **Process deviation.** A deviation from a process control limit, indicating that the production lot has been exposed to a hazard.

(8) **Process failure.** One or more process deviations which result in production of adulterated product.

(9) **Production lot.** A separable, identifiable amount of sequentially produced, cooked, uncured meat patties designated as the chosen lot size by the establishment, not to exceed one day's production.

(b) **Processing Procedure.** Establishments which process fully-cooked, partially-cooked, or char-marked, uncured meat patties shall use the following CCP's, process control limits, and monitoring activities.

(1) **CCP—Raw Material Handling.**

(i) The establishment shall adhere to the following process control limits for raw meat used in fully-cooked, partially-cooked, and char-marked, uncured meat patties:

(A) Raw meat entering the

establishment shall not exceed an internal temperature of 40°F. nor shall the raw meat be held above that temperature prior to processing; however, if raw meat is directly derived from boning of carcasses or carcass parts and is immediately processed this temperature requirement does not apply.

(B) Refrigerated, raw meat which has never been frozen shall not be held in the processing establishment more than 72 hours prior to cooking.

(C) Frozen raw meat shall be cooked within 24 hours after completion of thawing.

(ii) **Monitoring activities.** The establishment shall develop monitoring activities for the method and the frequency of assuring raw meat handling compliance and the calibration of the temperature measuring device. The temperature measuring device shall be accurate within 1°F.

(2) **CCP—Cooking.**

(i) The establishment shall use process control limits, depending on the product, as follows:

(A) Fully-cooked, uncured meat patties. The establishment shall select as process control limits a temperature and time combination from Table A below.

TABLE A.—PERMITTED COOKING TEMPERATURE/COOKING TIME COMBINATIONS

Degrees Fahrenheit	Degrees Centigrade	Minimum processing time after minimum temperature is reached
		Time (minutes)
130	54.4	121
131	55.0	97
132	55.6	77
133	56.1	62
134	56.7	47
135	57.2	37
136	57.8	32
137	58.4	24
138	58.9	19
139	59.5	15
140	60.0	12
141	60.6	10
142	61.1	8
143	61.7	6
144	62.2	5
145	62.8	4
146	63.3	3
148	64.4	2
151	66.1	1
154	67.8	(1)
160	71.1	(2)

<sup>1</sup> 30 seconds.

<sup>2</sup> Instantly.

(B) Partially-cooked, uncured meat patties. The processor shall raise the internal temperature at the center of each raw patty to a minimum internal temperature of 140°F. and cool it to a

maximum internal temperature of 40°F. within 2 hours. The internal temperature of the patty shall be measured through the side of the patty and not through the top.

(C) Char-marked, uncured meat patties. If the establishment places char-markings using a heat source on the meat patty surface only, it shall raise the internal temperature at the center of each raw patty to a maximum internal temperature of 70°F. and cool it to a maximum internal temperature of 40°F. within 2 hours.

(ii) **Monitoring activities.** The establishment shall develop monitoring activities for the method and the frequency of temperature and time measurement and calibration. The temperature measuring device shall be accurate within 1°F.; the time recording device shall be accurate within 1 second.

(3) **CCP—Non-Refrigerated Temperature Exposure.**

(i) The establishment shall use process control limits, depending on the product, as follows:

(A) Fully-cooked, uncured meat patties. The establishment shall not hold the raw meat or formulated raw meat at a room temperature of 40°F. or above for more than 2 hours prior to cooking.

(B) Partially-cooked or char-marked, uncured meat patties. The establishment shall not hold the raw meat or formulated raw meat at a room temperature of 40°F. or above for more than 1 hour prior to cooking.

(ii) In the case of an equipment failure or a stop in production, any raw meat or formulated raw meat shall be returned to a room temperature of 40°F. or below within 1 hour.

(iii) If an equipment failure or a stop in production persists for more than 2 hours, the equipment shall be cleaned and sanitized before production resumes.

(iv) **Monitoring activities.** The establishment shall develop monitoring activities for the method and the frequency of temperature and time measurement and calibration. The temperature measuring device shall be accurate within 1°F.; the time recording device shall be accurate within 1 second.

(4) **CCP—Cooling.**

(i) Fully-cooked, uncured meat patties. The establishment shall use the process control limits for cooling as specified in Table B below:

\* A copy of the Cooling Guidelines is available from the FSIS Hearing Clerk, Rm 3171-South Agriculture Building, Food Safety and Inspection Service, U.S. Department of Agriculture, Washington, DC 20250.



TABLE B.—PERMITTED COOLING TEMPERATURE/COOLING TIME COMBINATIONS

Maximum Internal temperature		Maximum time to achieve the lowest allowed temperature time (hours)
Degrees Fahrenheit	Degrees centigrade	
130 to 80.....	(54.4 to 26.7).....	1.5
80 to 40.....	(26.7 down to 4.4).	5

(ii) Partially-cooked or char-marked, uncured meat patties. The cooling process control limits have been combined with those for cooking and are contained in the CCP for cooking in paragraph (b)(2) of this section.

(iii) Monitoring activities. Cooling shall begin following the completed heating cycle. The processor shall develop monitoring activities for the method and the frequency of temperature and time measurement. The temperature measuring device shall be accurate within 1 °F.; the time recording device shall be accurate within 1 second.

(5) CCP—Cooking Instruction Label Requirement.

(i) The establishment shall establish process control limits, depending on the product, as follows:

(A) Partially-cooked, uncured meat patties. Product shall bear the labeling statement "Partially-Cooked: For Safety, Cook Until Well Done (Internal Meat Temperature 160 °F.)". The labeling statement shall be adjacent to the product name, in lettering of easily readable style, and at least one-half the size of the product name. As an alternative to revising existing labels, this statement may be applied as a pressure sensitive label in addition to existing labeling, provided the placement, style, and size requirements are satisfied.

(B) Char-marked, uncured meat patties. Product shall bear the labeling statement "Uncooked, Char-Marked: For Safety, Cook Until Well Done (Internal Meat Temperature 160 °F.)". The labeling statement shall be adjacent to the product name, in lettering of easily readable style, and at least one-half the size of the product name. As an alternative to revising existing labels, this statement may be applied as a pressure sensitive label in addition to existing labeling, provided the placement, style, and size requirements are satisfied.

(ii) Monitoring Activities. The establishment shall develop monitoring activities to assure application of appropriate product labels.

(6) CCP—Sanitary Handling Practices.

(i) The establishment shall develop and implement a sanitary handling practice to assure that cooked, uncured meat patties are not recontaminated by direct or indirect contact with other product. The practice shall address the following process control limits:

(A) *Product Separation.* The establishment shall physically separate areas where raw product is handled from areas where exposed, cooked product is handled. In addition, fully-cooked product must be physically separated from partially-cooked products and char-marked products. Such separation may be accomplished by using either solid, impervious floor to ceiling walls; or handling the raw or exposed, cooked product and the exposed, fully-cooked product at different times, and cleaning the entire area after the raw material or exposed, cooked product handling is completed and prior to the handling of fully-cooked product. Any other methods to maintain product separation must be approved by the Administrator.

(B) *Equipment cleaning and sanitizing.* The establishment shall thoroughly clean and sanitize any work surface, machine, or tool which contacts raw product or exposed, cooked product before it contacts specified cooked product. The sanitizer shall be germicidally equivalent to 50 ppm chlorine.

(C) *Employee instructions.* The establishment shall assure that all employees wash their hands and sanitize them with a sanitizer germicidally equivalent to 50 ppm chlorine whenever they enter the heat processed product area or before preparing to handle specified cooked product, and as frequently as necessary during operations to avoid product contamination.

(D) *Employee garments.* The establishment shall provide all employees with outer garments, including aprons, smocks, and gloves specially identified as restricted for use in a specified cooked product area only, changed at least daily, and hung in a designated location when the employee leaves the area.

(E) *Storage of cooked patties.* The processor shall assure that specified cooked product is not stored in the same room as other product unless it is first packaged in a sealed, water-tight container or is otherwise protected by a covering that has been approved, upon request, by the Administrator.

(ii) Monitoring activities. The establishment shall develop monitoring activities, such as unscheduled

inspections by establishment personnel, to assure that the establishment's sanitary handling practices of cooked, uncured meat patties are enforced.

(c) *Microbiological Analysis.* The establishment shall use the following microbiological sampling methods whenever a process deviation has occurred and in those cases of monitoring defects which in the judgment of the FSIS program employee requires such sampling to determine whether or not product is adulterated unless the establishment admits that a process failure has occurred and proceeds according to paragraph (d)(3) of this section.

(1) *Analysis for Salmonella.* From each production lot to be sampled, the processor shall randomly select 13 finished meat patties at the point of packaging. Each patty sample is to be individually packaged and submitted to a laboratory for *Salmonella* analysis. The laboratory should be instructed to composite the samples for *Salmonella* analysis provided that the composite has a weight of at least 325 grams. If needed, additional patties may be selected to make up the weight. The processor shall not release the lot until the laboratory result showing the patties negative for salmonellae has been received. A copy of all laboratory reports shall be on file in the establishment and available to an FSIS program employee or any duly authorized representative of the Secretary upon request.

(2) *Analysis for Coliforms and Escherichia coli (E. coli).* From each production lot to be sampled, the processor shall randomly select at least 5 finished meat patties at the point of packaging. Patty samples are to be individually packaged and submitted to a laboratory for analysis for coliforms and *E. coli* determinations. The laboratory should be instructed that 5 grams from each of the 5 samples are to be tested for coliforms and *E. coli*. The processor shall not release the lot until the laboratory result showing the patties negative for coliforms and *E. coli* has been received. A copy of all laboratory reports shall be on file in the processing establishment and available to any FSIS program employee or any duly authorized representative of the Secretary upon request.

(d) *Requirements for handling monitoring defects, process deviations, and process failures.*—(1) *Monitoring defects.* (i) If for any reason a monitoring defect has occurred in any cooked, uncured meat patty process, the establishment shall investigate and identify the cause; take steps to assure

that the defect will not recur; and maintain a record of the cause of the defect and the steps taken to assure that the defect will not recur on file in the establishment and available to an FSIS program employee or any duly authorized representative of the Secretary upon request.

(ii) In addition, if the process was intended to produce a fully-cooked product, the processor shall notify an FSIS program employee of the nature of the monitoring defect. If, in the judgment of the FSIS program employee, it is deemed necessary to determine whether or not product is adulterated, the processor shall test the affected production lot for the presence of *Salmonella*, coliforms, and *E. coli*, as described in paragraph (c) of this section, and hold the affected production lot pending the laboratory results. A copy of all laboratory results shall be on file in the processing establishment and available to any FSIS program employee or any duly authorized representative of the Secretary upon request.

(2) *Process deviations.* (i) If for any reason a process deviation has occurred in any fully-cooked, partially-cooked, or char-marked, uncured meat patty process, the processor shall hold all affected product; investigate; identify the cause; take steps to assure that the deviation will not recur; and place a report of the investigation, the cause, and the steps taken to assure that the deviation will not recur on file in the processing establishment and available to any FSIS program employee or any duly authorized representative of the Secretary upon request.

(ii) In addition, if the process was intended to produce a fully-cooked product, the processor shall test the held production lot for the presence of *Salmonella*, coliforms, and *E. coli*, as described in paragraph (c) of this section, and hold the affected production lot pending the laboratory results. A copy of all laboratory results shall be on file in the establishment and available to any FSIS program employee or any duly authorized representative of the Secretary upon request.

(iii)(A) If held fully-cooked product contains pathogens it will be considered a process failure and treated as required in paragraph (d)(3)(i) (A) and (B) of this section. If no pathogens are found the product can be reprocessed to be fully cooked or labeled as partially cooked if it meets those requirements.

(B) Held partially-cooked or char-marked product, should be fully-cooked.

(3) *Process failures.* (i) If for any reason a process failure has occurred in any fully-cooked, partially-cooked, or

char-marked, uncured meat patty process, the establishment shall stop all production; hold all affected product; investigate the failure to identify the cause; and correct the processing procedure. An FSIS program employee must review and approve the corrected procedure before production can be conducted. The establishment shall take any necessary steps to assure that the process failure will not recur and place a report of the investigation, including the cause, and the FSIS/establishment agreed-upon correction to the processing procedure, on file in the establishment. Such report shall be available to any FSIS program employee or duly authorized representative of the Secretary upon request. If pathogenic bacteria are found in product that should be fully-cooked, affected production lots shall:

(A) Be condemned and be handled as prescribed in Part 314 of this subchapter, or

(B) Be cooked to a minimum internal temperature of 160 °F. prior to any other use.

(ii) [Reserved]

## PART 320—RECORDS, REGISTRATION, AND REPORTS

3. The authority citation for Part 320 would continue to read as follows:

Authority: 34 Stat. 1280, 79 Stat. 930, as amended, 81 Stat. 584, 84 Stat. 91, 438 (21 U.S.C. 71 *et seq.*, 601 *et seq.*).

4. Part 320 would be amended by adding § 320.1(b)(7) to read as follows:

### § 320.1 Records required to be kept.

(b) \* \* \*

(7) Records as required in § 318.22 (c) and (d).

Done at Washington, DC, on December 22, 1988.

Lester M. Crawford,  
Administrator, Food Safety and Inspection Service.

[FR Doc. 88-29794 Filed 8-23-88; 8:45 am]

BILLING CODE 3410-DM-M

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 122

#### Business Loans

AGENCY: Small Business Administration.  
ACTION: Notice of proposed rulemaking.

SUMMARY: Title VIII of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418 (102 Stat. 1107), enacted

August 23, 1988, amends the Small Business Act (15 U.S.C. 636) with respect to export loans. This proposed rule would implement the amendments relating to the provisions affecting such export loans.

DATES: Comments must be submitted on or before February 27, 1989.

ADDRESS: Comments may be mailed to: Gail Hepler, Small Business Administration, 1441 L Street NW., Room 804, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Gail Hepler, 202-653-6570.

SUPPLEMENTARY INFORMATION: The Small Business Administration (SBA) presently is authorized to guaranty an export revolving line of credit loan (ERLC) not to exceed eighteen months in order to enable the borrower to utilize pre-export financing or to develop foreign markets. Under the statutory change, an applicant small concern may be, but is not required to be, a small business export trading company or a small business export management company. The proposed amendment to § 122.54-2 of SBA regulations (13 CFR 2122.54-2) reflects this provision and in subsection (b) thereof it would define these entities. Both types of companies specialize in providing marketing and management services for firms which wish to engage in exporting but which have limited or no experience in selling abroad.

Proposed § 122.54-3 is the same as present § 122.54-3 with respect to the use of proceeds, namely that proceeds can be used only to penetrate or develop a foreign market and/or to finance labor and materials for pre-export production. New language was added to section 7(a)(14) of the Small Business Act concerning the use of proceeds, namely that SBA, in considering these ERLC loans, is to give weight to export-related benefits. The Agency decided not to include such language in the proposed regulation because of an explanatory statement in H.R. Rep. No. 38, 100th Cong., 1st Sess., at p. 32 (1987), that such statutory provision "is not intended to be read as a limitation on the existing mandate regarding export financing, but is intended to consider favorably those applications with export benefits which also meet other criteria which the Administration is required to consider."

Proposed § 122.54-4, relating to fees, would restate present § 122.54-4. Thus, a lender could continue to charge the borrower of an ERLC loan a commitment fee equal to one-fourth of one percent of the loan or \$200, whichever is greater. Proposed § 122.54-5, relating to collateral, would restate



present § 122.54-5. The only collateral acceptable would thereby continue to be that located in the United States, its territories and possessions. Proposed § 122.54-6 is the same as present § 122.54-6, relating to loan conditions.

Public Law 100-418 added a new subsection 16 to section 7(a) of the Small Business Act. This notice of proposed rulemaking would add a new § 122.57 to SBA regulations to reflect the statutory amendment relating to a new category of international trade loans. Proposed § 122.57-1 of SBA regulations would provide that the Agency could assist an eligible small business concern in an industry engaged in or adversely affected by international trade. The purpose of such guaranteed financing would be for the acquisition, construction, renovation, modernization, improvement or expansion of productive facilities or equipment to be used in the United States in the production of goods or services involved in international trade. SBA in each case would be required to determine whether the upgrading of the plant or equipment would allow the applicant to improve its competitive position. If the loan would be made by a Preferred Lender pursuant to Part 120, Subpart D of these

regulations (13 CFR Part 120), the Preferred Lender would be required to make such a determination.

Proposed § 122.57-2 would provide that, in addition to meeting the eligibility criteria applicable to all loans made under section 7(a) of the Small Business Act, the applicant would have to show that either (1) it is in a position to significantly expand existing export markets or to develop new export markets, or (2) it is adversely affected by import competition because it (i) is confronting increased direct competition with foreign firms in the relevant market and (ii) can demonstrate injury attributable to such competition. To show import competition the applicant must establish that increased imports of articles like, or directly competitive with, those produced by it have contributed importantly to a decline in its competitive position. To show that SBA assistance would help export promotion, the applicant would have to submit a business plan which identifies the amount of expected sales abroad and which provides information—such as an export marketing analysis and plan—to reasonably support projected export sales.

Section 122.57-3 of the regulations would reflect that a loan guaranteed under subsection 7(a)(16) of the Small Business Act would not exceed \$1,000,000 for facilities or equipment. In addition, a borrower would be eligible for SBA financing not to exceed \$250,000 to be used solely for working capital, supplies or an ERLC loan. Further, this proposed subsection would make clear that the aggregate amount of \$1,250,000 available from the business loan and investment fund (BLIF) would be reduced by any other financing from SBA pursuant to section 7(a) of the Small Business Act (Act). Thus, if an applicant had a section 7(a) loan for \$200,000 for facilities and equipment (F&E), it would be eligible under proposed § 122.57 for \$800,000 for F&E, plus \$250,000 for working capital (WC). If Applicant had a \$500,000 loan under section 7(a) of the Act for F&E and \$250,000 for WC, it would be eligible under proposed § 122.57 for only \$500,000 in F&E and no additional financing for WC. In both cases presented, the aggregate financing under section 7(a) of the Act could not exceed \$1,250,000. Examples of this rule are reflected in the following chart:

Prior financing under section 7(a) of the Act		Section 7(a)(16) eligibility			
F&F	WC	F&E	WC	Aggregate from BLIF	
	\$200,000	\$1,000,000	\$50,000	\$1,250,000	
	300,000	950,000	0	1,250,000	
	750,000	500,000	0	1,250,000	
\$200,000	0	800,000	250,000	1,250,000	
200,000	200,000	800,000	50,000	1,250,000	
500,000	250,000	500,000	0	1,250,000	
750,000	0	250,000	250,000	1,250,000	

Section 122.57-4 would provide that the only acceptable security would be collateral located in the United States, its territories and possessions. The statute also requires that the lender of international trade loans under subsection 7(a)(16) of the Small Business Act must obtain a first lien position or first mortgage on the property or equipment financed. This section of the regulations would reflect this statutory requirement.

Section 122.57-5 would reflect the statutory provision that a lender making a loan under this section would have to sell the guaranteed portion in the secondary market within 180 days of the date when full disbursement is completed. If the sale is not made within such time frame, the SBA guaranty would terminate without further action or notice by SBA.

For purposes of the Regulatory Flexibility Act (5 U.S.C. 605(b)), SBA certifies that this proposed rule will not, if promulgated in final form, have a significant economic impact on a substantial number of small entities.

SBA certifies that this proposed rule does not constitute a major rule for the purposes of Executive Order 12291, since the change is not likely to result in an annual effect on the economy of \$100 million or more.

This proposed rule, if promulgated in final form, would impose additional reporting or recordkeeping requirements which would be subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35. Section 122.57-2(c) would require the applicant to submit a business plan which identifies the amount of expected sales abroad and which provides information to

reasonably support projected export sales.

This proposed rule would not have a federalism implications warranting the preparation of a Federal Assessment in accordance with Executive Order 12612.

#### List of Subjects in 13 CFR Part 122

Loan programs/business.

Pursuant to the authority contained in section 5(b)(6) of the Small Business Act (15 U.S.C. 634(b)(6)), SBA hereby proposes to amend Part 122, Chapter I, Title 13, Code of Federal Regulations, as follows:

#### PART 122—[AMENDED]

1. The authority citation for Part 122 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6) and 636(a).

2. Sections 122.54, 122.54-1, 122.54-2, 122.54-3, 122.54-4 122.54-5, and 122.54-6 are revised to read as follows:

#### § 122.54 Export revolving line of credit loans under section 7(a)(14) of the Act.

##### § 122.54-1 Policy.

The Act authorizes a revolving line of credit for pre-export financing and for export purposes in order to develop foreign markets. No such loan shall be made for a period which exceeds eighteen months.

##### § 122.54-2 Eligibility

(a) *General.* An applicant for an Export Revolving Line of Credit (ERLC) loan under this subsection, in addition to meeting the eligibility criteria applicable to all loans made under the authority of section 7(a) of the Act, 15 U.S.C. 636(a), shall have been in operation for at least 12 full months prior to filing an application. An applicant small business concern may be, but is not required to be, a small business export trading company or a small business export management company. This 12-month requirement may be waived by the appropriate SBA regional office if the management of the applicant has sufficient export trade experience or other management ability to warrant an exception to the general rule. Waivers can be made only by regional office officials who have delegated authority to approve ERLC loans.

(b) *Definitions.* An export trading company and an export management company are independent firms which specialize in providing marketing and management services for firms which wish to engage in exporting but have limited or no experience in selling abroad.

##### § 122.54-3 Use of proceeds.

Proceeds of an ERLC loan can be used only to penetrate or develop a foreign market and/or to finance labor and materials for pre-export production. Professional export marketing advice or services, foreign business travel or participation in trade shows are examples of eligible expenses related to developing or penetrating a foreign market. The cost of acquiring or renting office or commercial space in a foreign country, equipping such an office, or wages for staff in such an office are examples of ineligible uses of proceeds.

##### § 122.54-4 Fees.

In addition to other allowable fees [see Section 120.104-2 of this Chapter], the participant in an ERLC loan may charge the borrower a commitment fee equal to one-fourth (1/4) of one (1)

percent of the loan or \$200, whichever is greater. This fee shall not be charged until the SBA has approved the lender's request for guaranty.

##### § 122.54-5 Collateral.

Only collateral that is located in the United States, its territories and possessions shall be acceptable security for these loans.

##### § 122.54-6 Additional loan conditions.

(a) *Cash flow projection.* All ERLC loan applications shall include a projected cash flow chart for the term of the loan that supports the need for the funds and that evidences repayment ability. The projection must cover the applicant's total operation and clearly identify the intended use(s) of the loan proceeds and source(s) or repayment.

(b) *Monthly progress reports.* The ERLC borrowers must submit monthly progress reports to the Lender and explain discrepancies between the projected cash flow and the progress report.

3. Sections 122.57, 122.57-1, 122.57-2, 122.57-3, 122.57-4, and 122.57-5 are added to read as follows:

#### § 122.57 International trade loans under section 7(a)(16) of the Act.

##### § 122.57-1 Policy.

The Act authorizes assistance to an eligible small business concern in an industry engaged in or adversely affected by international trade for the financing of the acquisition, construction, renovation, modernization, improvement or expansion of productive facilities or equipment to be used in the United States in the production of goods and services involved in international trade. For each loan request approved by the Agency, the SBA must make a determination that the upgrading of the plant or equipment will allow the applicant to improve its competitive position. If the loan is made under the Preferred Lender Program (PLP) (Part 120, Subpart D of these regulations), the PLP Lender must make such a determination.

##### § 122.57-2 Eligibility.

(a) *General.* An applicant, in addition to meeting the eligibility criteria applicable to all section 7(a) loans, is eligible if it can establish that it is (1) in a position to significantly expand existing export markets or to develop new export markets or (2) adversely affected by import competition because it is confronting increased direct competition with foreign firms in the relevant market and it can demonstrate injury attributable to such competition.

(b) *Import competition.* An applicant, by narrative explanation submitted in writing with its loan application, must establish that increased imports of articles like, or directly competitive with, those produced by it have contributed importantly to a decline in its competitive position. In addition, an applicant must establish that an upgrading of plant and/or equipment is likely to help to improve its competitive position with respect to foreign competition.

(c) *Export promotion.* In order for the applicant to show that SBA financial assistance is likely to significantly expand the applicant's export markets or to develop new export markets for the applicant, it must prepare and submit a business plan which identifies the amount of expected sales abroad and which provides information to reasonably support projected export sales.

##### § 122.57-3 Amount and percentage of loan guaranty.

A guaranty commitment made by SBA pursuant to section 7(a)(16) of the Act shall not exceed 85 percent of the amount of the loan. Such guaranty commitment by SBA shall not exceed \$1,000,000 of guaranty authority for financing of facilities or equipment. This is in addition to any other SBA financing made available to the same applicant solely for working capital, supplies, or ERLC purposes in an amount not to exceed \$250,000. The aggregate amount of \$1,250,000 available from the business loan and investment fund under this subsection shall be reduced by any other financing from SBA pursuant to section 7(a) of the Act.

##### § 122.57-4 Collateral and lien position.

Only collateral that is located in the United States, its territories and possessions shall be acceptable security for a loan made under subsection 7(a)(16) of the Act. The Lender must take a first lien position or first mortgage on the property or equipment financed under this section. This is in addition to any other collateral security position which SBA may require.

##### § 122.57-5 Sale in secondary market.

Any Financial Institution making a loan under this section must agree to sell the guaranteed portion in the secondary market within 180 days of the date when full disbursement is completed (see Subparts G and H, Part 120 of these regulations). If the Financial Institution does not sell within this statutory time frame, the SBA guaranty



shall terminate without further action or notice by SBA.

(Catalog of Federal Domestic Assistance Programs No. 59.012, Small Business Loans)

Dated: November 30, 1988.

James Abdnor,

Administrator.

[FR Doc. 88-29668 Filed 12-23-88; 8:45 am]

BILLING CODE 8025-01-M

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[PS-260-82]

#### Election, Revocation, Termination, and Tax Effect of Subchapter S Status

**AGENCY:** Internal Revenue Service, Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to the election, revocation, termination, and corporate effect of electing subchapter S treatment as a result of the changes to the tax law made by the Subchapter S Revision Act of 1982, as amended by the Tax Reform Act of 1984, the Tax Reform Act of 1986, and the Technical and Miscellaneous Revenue Act of 1988. The regulations would provide guidance to persons seeking to elect, revoke, or terminate subchapter S status.

**DATES:** Written comments and requests for a public hearing must be mailed or delivered February 27, 1989. The regulations are proposed to be effective for taxable years beginning after December 31, 1982, except for § 1.1362-3(d) which is proposed to be effective for taxable years beginning after December 31, 1981, and except for that portion of § 1.1362-1(c) relating to taxable years of 2½ months or less which is proposed to be effective for elections made after October 19, 1982. The portion of § 1.1362-3(d)(5)(ii) relating to options or commodities dealers is proposed to be effective and shall apply to positions established after July 18, 1984, in taxable years ending after such date.

**ADDRESS:** Send comments and requests for a public hearing to: Internal Revenue Service, Attn: CC:CORP:T:R (PS-260-82), Room 4429, Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Stuart G. Wessler, 202-566-3822 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION: Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer for the Internal Revenue Service, Office of Management and Budget, Washington, DC 20503, with copies to the Internal Revenue Service at the address previously specified.

The collections of information in this regulation are §§ 1.1362-1, 1.1362-2, 1.1362-3, 1.1362-4, 1.1362-5, and 1.1362-6. This information is required by the Internal Revenue Service to effectuate the statutory provisions of section 1362. This information will be used to determine the eligibility of corporations and their shareholders to receive the special benefits of the Code under section 1362. The likely respondents are individuals or households, farms, business or other for-profit institutions, and small businesses or organizations.

Estimated total annual reporting and recordkeeping burden: 80,000 hours.

Estimated number of respondents: 80,000.

Estimated average annual burden per respondent: 1 hour.

Estimated annual frequency of responses: On occasion.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

#### Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) with respect to the election, termination, and corporate effect of subchapter S status. These amendments are necessary to implement sections 1362 and 1363 of the Internal Revenue Code of 1986 as added by section 2 of the Subchapter S Revision Act of 1982 (98 Stat. 1669), as amended by sections 102 and 721 of the Tax Reform Act of 1984 (98 Stat. 623 and 966), sections 511, 632, and 701 of the Tax Reform Act of 1986 (100 Stat. 2244, 2275, and 2320), and sections 1006(f)(6)-(7) and 1007(g)(9) of the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. No. 100-647).

#### Explanation of Provisions

Section 1362 provides that a corporation may file its Subchapter S election at any time before the 16th day of the third month of its taxable year, at any time before the 16th day of the third month following the first day of the taxable year if the taxable year is 2½ months or less, or at any time during the preceding taxable year. Proposed § 1.1362-1 provides rules with respect to the time and manner of making a Subchapter S election. The proposed regulations define the term "month" to mean the period commencing with the beginning of the first day of the taxable year and ending with the close of the day preceding the numerically corresponding day of the succeeding taxable month.

Proposed § 1.1362-2 contains the rules relating to the requirement that shareholders must consent to the Subchapter S election. Provisions for an extension of time to file the required consents are provided in the proposed regulations.

Proposed § 1.1362-3 provides rules with respect to the termination of a corporation's Subchapter S election. An election may be revoked provided that shareholders holding more than 50 percent of the issued and outstanding shares of stock, including non-voting stock, consent to the revocation. A revocation made on or before the 15th day of the third month of the taxable year shall be effective on the first day of the taxable year unless the revocation states a prospective date. A revocation made after the 15th day of the third month of the taxable year shall be effective for the following taxable year unless the revocation states some other prospective date. The proposed regulations provide that a revocation, once made, may be rescinded prior to its effective date.

A corporation's election is terminated by its ceasing to be a small business corporation as described in proposed § 1.1362-3(c). A corporation's election also is terminated whenever the corporation has subchapter C earnings and profits at the close of each of three consecutive taxable years, and has gross receipts for each of the three taxable years more than 25 percent of which are passive investment income as provided in § 1.1362-3(d).

Passive investment income generally includes gross receipts derived from royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities. This definition was not amended by the Subchapter S Revision Act of 1982 ("The 1982 Act").

However, the passive investment income limitation now only applies to S corporations with C corporation earnings and profits. The legislative history of this provision indicates that the purpose for retaining the rule is "to prevent the conversion of a regular corporation's operating company into a holding company whose income is not subject to a corporate level tax, without the imposition of any shareholder tax on accumulated corporate earnings as would occur if the corporation was liquidated." H.R. Rept. No. 826, 97th Cong., 2d Sess. 5 (1982). Consistent with this purpose, the proposed regulations provide that royalties do not include royalties that would not be personal holding company income under section 543(a) if the corporation remained a C corporation. Thus, proposed § 1.1362-3(d)(5)(iii) provides that copyright royalties that are excluded from personal holding company income under section 543(a)(4), mineral, oil, or gas royalties excluded from personal holding company income under section 543(a)(3), and active computer software royalties (as defined in section 543(d), but determined without regard to section 543(d)(5)) are not treated as royalties for purposes of the passive investment income limitation. The Service invites public comment on the appropriate scope of the passive investment income limitation, including the use of these personal holding company rules to distinguish passive investment income from other types of income. In particular, the Service invites public comment on alternative definitions of passive investment income (e.g., a definition that would distinguish between passive investment income and income earned in the active conduct of a trade or business.)

Proposed § 1.1362-4 provides rules relating to the treatment of an "S termination year." Generally, section 1362(e) requires the pro rata allocation of items of income, loss, deduction, and credit for the taxable year to each of the short S and C years. Exceptions from the pro rata allocation method apply where (1) the corporation elects to have items assigned to each short year under its normal tax accounting method, (2) an election is made under section 338 with respect to the corporation to treat the purchase of its stock as an asset purchase, or (3) there is a sale or exchange of 50 percent or more of the stock of the S corporation during the S termination year. In such cases where the pro rata rules do not apply, the corporation must allocate items of income, gain, loss, deduction, and credit

to the short S and short C years on the basis of normal tax accounting rules.

Section 1362(f) provides that the Secretary may waive certain inadvertent terminations of subchapter S elections. Proposed § 1.1362-5 contains rules relating to the determination of inadvertence as well as the procedures for requesting a waiver of the terminating event.

Proposed § 1.1363-1 sets forth rules relating to the general effect on the corporation that elects to receive subchapter S treatment.

#### Special Analyses

The Commissioner of Internal Revenue has determined that this proposed regulation is not a major regulation subject to review under Executive Order 12291. Accordingly, a Regulatory Impact Analysis is not required.

The Commissioner of Internal Revenue has concluded that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, this proposed regulation is a regulation not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

#### Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted to the Internal Revenue Service. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who also submits written comments. If a public hearing is held, notice of time and place will be published in the *Federal Register*.

#### Drafting Information

The principal author of these regulations is Stuart G. Wessler of the Office of Assistant Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

#### List of Subjects

26 CFR 1.1361-0A—1.1388-1

Income taxes, Small businesses, S corporations, Cooperatives.

#### Proposed Amendments to the Regulations

The proposed amendments to 26 CFR, Chapter 1, Part 1 are as follows:

#### PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1986

**Paragraph 1.** The authority for Part 1 is amended by adding the following citation:

**Authority:** 26 U.S.C. 7805. \* \* \* Sections 1.1362-0 through 1.1362-6, and 1.1363-1 are also issued under 26 U.S.C. 1377.

**Par. 2.** There are added immediately after § 1.1361-0A the following new §§ 1.1362-0, 1.1362-1, 1.1362-2, 1.1362-3, 1.1362-4, 1.1362-5, 1.1362-6, and 1.1363-1:

#### § 1.1362-0 Election, revocation, and termination of S corporation.

In order to facilitate use of §§ 1.1362-1 through 1.1362-6, this section lists the paragraphs, subparagraphs, and subdivisions contained in those sections.

#### § 1.1362-1 Election to be an S corporation.

- (a) In general.
- (b) Manner of making election.
- (c) Time of making election.
- (1) In general.
- (2) Elections made during the first 2½ months treated as made for the following taxable year.
- (3) Definition of "month" and the beginning of the taxable year.
- (4) Cross reference.
- (d) Years for which election is effective.
- (e) Examples.

#### § 1.1362-2 Shareholders' consent.

- (a) In general.
- (b) Persons required to consent.
- (1) In general.
- (2) Special rules.
- (c) Extension of time for filing consents.

#### § 1.1362-3 Termination of election.

- (a) In general.
- (b) Revocation.
- (1) In general.
- (2) When effective.
- (3) Revocations specifying a prospective revocation date.
- (4) Effect on taxable year of corporation.
- (5) Rescission of a revocation.
- (6) Creation of an S termination year.
- (7) Examples.
- (c) Corporation ceasing to be a small business corporation.
- (1) In general.
- (2) When effective.
- (3) Effect on taxable year of the corporation.
- (4) Creation of an S termination year.
- (5) Examples.
- (d) Excess passive investment income.
- (1) In general.
- (2) When effective.
- (3) Subchapter C earnings and profits.
- (4) Gross receipts.
- (i) In general.
- (ii) Sales of capital assets, stock and securities.
- (A) Sales of capital assets.



- (B) Sales of stock or securities.
- (iii) Other exclusions from gross receipts.
- (iv) Examples.
- (5) Passive investment income.
- (i) In general.
- (ii) Special rule for options or commodities dealer.

- (A) Exclusion of certain capital gains
- (B) Definitions.
- (2) Options dealer.
- (2) Commodities dealer.
- (3) Section 1256 contract.
- (C) Effective date.
- (iii) Royalties.
- (A) In general.
- (B) Copyright royalties.
- (C) Mineral, oil, or gas royalties.
- (D) Active business computer software royalties
- (iv) Rents.
- (v) Dividends.
- (vi) Interest.
- (vii) Annuities.
- (viii) Gross receipts from the sale of stock or securities.
- (ix) Treatment of certain lending or finance companies.
- (6) Example.

#### § 1.1362-4 Treatment of S termination year.

- (a) In general.
- (b) Pro rata allocation.
- (c) Income, loss, deduction, and credit items assigned to each short taxable year under normal tax accounting rules.

- (1) In general.
- (2) Election.
- (3) Pro rata allocation not to apply to certain items if purchase of stock treated as an asset purchase under section 338.

- (i) In general.
- (ii) Special rule.
- (4) Pro rata allocation not to apply if 50 percent change in ownership during S termination year.

- (i) In general.
- (ii) Newly owned stock.
- (iii) Stock acquired other than by sale or exchange.

- (A) In general.
- (B) Qualified transferor.
- (iv) Special rule.
- (v) Examples.
- (5) Special rule for S corporation that is a partner in a partnership.

- (d) Tax for the C short year.
- (1) In general.
- (2) Minimum tax.
- (3) Example.
- (e) Other special rules.
- (1) Short year treated as taxable year.
- (2) Year for carryover purposes.
- (3) Due date for S year return.
- (4) Year in which income from short S year is includible.

#### § 1.1362-5 Inadvertent terminations.

- (a) In general.
- (b) Inadvertent termination.
- (c) Corporation's request for determination of an inadvertent termination.
- (d) Correction of terminating event.
- (e) Consent to Commissioner's requirement.
- (f) Adjustments.
- (g) Status of corporation.

#### § 1.1362-6 Election after termination.

- (a) In general.
- (b) Successor corporation.
- (c) Special rule for certain terminations.

#### § 1.1362-1 Election to be an S corporation.

(a) *In general.* Except as provided in § 1.1362-6, for taxable years beginning after December 31, 1982 (and for taxable years beginning before January 1, 1983, with respect to which an election was made after October 19, 1982), a small business corporation (other than a qualified casualty insurance electing small business corporation described in section 6(c)(2) of the Subchapter S Revision Act of 1982, or a qualified oil corporation described in section 6(c)(3) of that Act) may elect to be an S corporation under section 1362. For election made under section 1372 (a) (as in effect before the enactment of the Subchapter S Revision Act of 1982) see section 1379.

(b) *Manner of making election.* To make the election to be an S corporation, a small business corporation shall file Form 2553, containing all the information required by that form. The election form shall be signed by any person who is authorized to sign the return required to be filed under section 6037 and shall be filed with the service center designated in the instructions applicable to Form 2553. The election is not valid unless each shareholder who is required by § 1.1362-2(b) to consent to the election of the corporation makes the consent in the manner provided in § 1.1362-2(a).

(c) *Time of making election.*—(1) *In general.* The election described in paragraph (a) of this section may be made by a small business corporation at any time during the taxable year that immediately precedes the taxable year for which the election is to be effective, or during the taxable year for which the election is to be effective provided that such election is made before the 18th day of the third month of such year. If a corporation makes an election for a taxable year that meets all the requirements provided in this section, but the election is made at any time during the period beginning after the 15th day of the third month of such taxable year and ending before the 16th day of the third month of the following taxable year, the election is treated as being made for that following taxable year provided that the corporation meets all requirements provided in section 1361(b) at the time the election is made. For taxable years of 2½ months or less, an election made after October 19, 1982, and before the 16th day of the third month after the first day of the

taxable year shall be treated as made during such year.

(2) *Elections made during the first 2½ months treated as made for the following taxable year.* If a corporation makes the election described in paragraph (a) of this section during the taxable year for which the election is to be effective and such election is made before the 16th day of the third month of such year but—

(i) The corporation is not a small business corporation at any time during the portion of such taxable year which occurs before the date the election is made, or

(ii) Any person who held stock in the corporation at any time during the portion of such taxable year which occurs before the time the election is made, and who does not hold stock at the time the election is made, does not consent to the election,

the election is treated as made for the following taxable year provided that the corporation meets the requirements of section 1361(b) at the time the election is made.

(3) *Definition of "month" and beginning of the taxable year.* For purposes of this paragraph (c), the term "month" means a period commencing on the same numerical day of any calendar month as the day of the calendar month on which the taxable year began and ending with the close of the day preceding the numerically corresponding day of the succeeding calendar month or, if there is no such corresponding day, with the close of the last day of such succeeding calendar month. In addition, for purposes of this paragraph (c), the taxable year of a new corporation begins on the date that the corporation has shareholders, acquires assets, or begins doing business, whichever is the first to occur.

(4) *Cross-reference.* For rules relating to when an election is treated as made, see section 7502 and the regulations thereunder. For rules relating to the time for the making of the election where the last day prescribed for making the election falls on Saturday, Sunday, or a legal holiday, see section 7503 and the regulations thereunder.

(d) *Years for which election is effective.* An election under section 1362 is effective for the entire taxable year of the corporation for which it is made and for all succeeding taxable years of the corporation, unless it is terminated with respect to any taxable year. Thus, the election has a continuing effect and need not be renewed annually, although annual returns of information must be filed under section 6037.

(e) *Examples.* The provisions of this section may be illustrated by the following examples:

*Example (1).* A calendar year small business corporation begins its first taxable year on January 7, 1988. To be an S corporation beginning with its first taxable year, the corporation must make the election set forth in this section during the period that begins January 7, 1988, and ends before March 22, 1988. An election made earlier than January 7, 1988, will not be valid.

*Example (2).* Assume the same facts as in example (1), except that the corporation begins its first taxable year on November 8, 1988. To be an S corporation beginning with its first taxable year, the corporation must make the election set forth in this section during the period that begins November 8, 1988, and ends before January 23, 1989.

*Example (3).* On January 1, 1988, the first day of its taxable year, subchapter C corporation had 15 shareholders. On January 30, 1988, two of the C corporation's shareholders, A and B, both individuals, sold their shares in the corporation to P, Q, and R, all individuals. On March 1, 1988, the corporation filed its election to be an S corporation for the 1988 taxable year. The election will be effective (assuming the other requirements of section 1361 (b) are met) provided that all of the shareholders as of March 1, 1988, as well as former shareholders A and B, consent to the election.

*Example (4).* On January 1, 1988, two individuals and a partnership own all of the stock of a calendar year subchapter C corporation. On January 31, 1988, the partnership dissolved and distributed its shares in the corporation to its five partners, all individuals. On February 28, 1988, the seven shareholders of the corporation consented to the corporation's election of subchapter S status. The corporation files a properly completed Form 2553 on March 2, 1988. The corporation is not eligible to be a subchapter S corporation for the 1988 taxable year because during the period of the taxable year prior to the election it had an ineligible shareholder. The election is treated as made for the corporation's 1989 taxable year.

*Example (5).* On January 1, 1988, three individuals own all of the stock of a calendar year subchapter C corporation. On April 15, 1988, the corporation, in accordance with paragraph (b) of this section, files a properly completed Form 2553. The corporation anticipates that the election will be effective beginning January 1, 1989, the first day of the succeeding taxable year. On October 1, 1988, the three shareholders collectively sell 75% of their shares in the corporation to another individual. On January 1, 1989, the corporation has as shareholders the three original individuals as well as the new shareholder. Because the election was valid and binding when made, it is not necessary for the new shareholder to consent to the election. The corporation's subchapter S status will begin on January 1, 1989.

#### § 1.1362-2 Shareholders' consent.

(a) *In general.* The consent of a shareholder to an election by a small business corporation must be made

either on Form 2553 or on a separate statement signed by the shareholder in which the shareholder consents to the election of the corporation. The separate statement must set forth the name, address, and taxpayer identification number of the corporation, the name, address, and taxpayer identification number of the shareholder, the number of shares of stock owned by the shareholder, the date (or dates) on which the stock was acquired and the date on which the shareholder's taxable year ends. When a shareholder's consent is made on a separate statement, that statement must be attached to the election of the corporation. The shareholder's consent is binding and may not be withdrawn after a valid election is made by the corporation. Except as provided in paragraph (c) of this section, the election of the corporation is not valid if any consent required by paragraph (b) of this section is not filed in accordance with the rules contained in this paragraph (a).

(b) *Persons required to consent.*—(1) *In general.* Each person who is a shareholder (including any person who is treated as a shareholder under section 1361(c)(2)(B)) at the time the election is made, must consent to the election of the corporation. If the election is made before the 16th day of the third month of the taxable year and is intended to be effective for that year, each person who was a shareholder (including any person who was treated as a shareholder under section 1361(c)(2)(B)) at any time during the portion of that year which occurs before the time the election is made, and who is not a shareholder at the time the election is made, must also consent to the election. If the election is made to be effective for the following taxable year, no consent need be filed by any shareholder who is not a shareholder on the date of the election. For purposes of this paragraph (b), any person who is considered to be a shareholder for state law purposes solely by virtue of his or her status as an incorporator is not treated as a shareholder.

(2) *Special rules.* When stock of the corporation is owned by husband and wife as community property (or the income from which is community property), or is owned by tenants in common, joint tenants, or tenants by the entirety, each person having a community interest in such stock and each tenant in common, joint tenant and tenant by the entirety must consent to the election. The consent of a minor must be made by the minor or by the legal representative of the minor (or by a natural or an adoptive parent of the minor if no legal representative has been

appointed). The consent of an estate must be made by an executor or administrator thereof. In the case of a trust described in section 1361(c)(2)(A) (including a trust treated under section 1361(d)(1)(A) as a trust described in section 1361(c)(2)(A)(i)), only the person treated as the shareholder for purposes of section 1361(b)(1) must consent to the election.

(c) *Extension of time for filing consents.* An election that is timely filed for any taxable year, and that would be valid except for the failure of any shareholder to file a timely consent, is not invalid for such reason if—

(1) It is shown to the satisfaction of the district director or director of the service center with which the corporation files its income tax return that there was reasonable cause for the failure to file such consent and that the interests of the Government will not be jeopardized by treating such election as valid,

(2) Such shareholder files a proper consent to the granted by the Internal Revenue Service, and

(3) New consents are filed within such extended period of time as may be granted by the Internal Revenue Service by each person who was required to consent to the corporation's election pursuant to paragraph (b) of this section.

#### § 1.1362-3 Termination of election.

(a) *In general.* An election in effect under section 1362(a) may be terminated for any year in any one of three ways described in section 1362(d) (1) through (3) and paragraphs (b) through (d) of this section.

(b) *Revocation.*—(1) *In general.* An election made under section 1362(a) may be revoked by the corporation for any taxable year of the corporation, including the first taxable year for which the election is effective. A revocation may be made only with the consent of shareholders who, at the time the revocation is made, hold more than one-half of the number of issued and outstanding shares of stock (including non-voting stock) of the corporation. Such revocation shall be made by the corporation by filing a statement that the corporation revokes the election made under section 1362(a), which statement shall state the section 1362(a), which statement shall state the number of shares of stock (including non-voting stock) that are issued and outstanding at the time the revocation is made. For revocations which specify a prospective revocation date (as defined in paragraph (b)(3) of this section), the statement shall indicate the date on which the revocation is intended to be effective.



The statement shall be signed by any person authorized to sign the return required to be filed under section 6037 and shall be filed with the service center with which the election was properly filed. In addition, there shall be attached to the statement of revocation a statement of consent, stating the name, address, and taxpayer identification number of each shareholder who consents to the revocation, and the number of issued and outstanding shares of stock (including non-voting stock) held by each shareholder (whether consenting or not) at the time of the revocation. The statement shall be signed by each shareholder who consents to the revocation. For purposes of this paragraph (b), a revocation is made once it is filed in accordance with section 7502 and the regulations thereunder with the service center with which the election was properly filed.

(2) *When effective.* Except as provided in paragraph (b)(3) of this section, a revocation made during the taxable year and before the 16th day of the third month of such taxable year shall be effective on the first day of such taxable year, and a revocation made after the 15th day of the third month of the taxable year shall be effective for the following year. Except as provided in paragraph (b)(3) of this section, if a corporation make an election to be an S corporation which is to be effective beginning with the next taxable year (see § 1.1362-1) and revokes such election prior to the first day of such next taxable year, such corporation will be deemed to have revoked its election on the first day of such next taxable year.

(3) *Revocations specifying a prospective revocation date.* In the case of a corporation that specifies a date for revocation which is on or after the day on which the revocation is made, such revocation shall become effective on and after the date so specified. The preceding sentence shall apply only if the prospective revocation date is expressed in terms of a stated day, month, and year rather than in terms of particular event.

(4) *Effect on taxable year of corporation.* In the case of a corporation that revokes its election to be an S corporation effective on the 1st day of the first taxable year for which such election was effective, any statement on the Form 2553 regarding a change in the taxable year of the corporation filed by such corporation with respect to such election will have no effect on such corporation's taxable year.

(5) *Rescission of a revocation.* A revocation under paragraph (b) (2) or (3) of this section may be rescinded by a

corporation at any time before the revocation becomes effective. A rescission may be made only with the consent of each person who became a shareholder of the corporation within the period beginning on the first day after the date the revocation was made and ending on the date on which the rescission is made. Such rescission shall be made by the corporation by filing a statement that the corporation rescinds the revocation made under section 1362(d)(1). The statement shall contain the name, address, and taxpayer identification number of the corporation and shall be signed by any person authorized to sign the return required to be filed under section 6037. The statement shall be filed with the service center with which the revocation was properly filed. In addition, there shall be attached to the statement of rescission a statement of consent stating the name, address, and taxpayer identification number of each shareholder who consents to the rescission. The statement shall be signed by each shareholder who consents to the rescission. For purpose of this paragraph (b)(5), a rescission is made once it is filed in accordance with section 7502 and the regulations thereunder with the service center with which the revocation was properly filed.

(6) *Creation of an S termination year.* A corporation that specifies a prospective date for revocation that is other than the first day of the taxable year will create an S termination year and will be subject to the rules in section 1362 (e) and § 1.1362-4.

(7) *Examples.* The principles of this paragraph (b) may be illustrated by the following examples:

*Example (1).* A calendar year S corporation has issued and outstanding 40,000 shares of class A voting common stock and 20,000 shares of class B non-voting common stock. The corporation wishes to revoke its election of subchapter S status. Shareholders owning 11,000 shares of class A stock sign revocation consents and 29,000 do not. Shareholders owning 20,000 shares of class B stock sign revocation consents. The corporation has obtained the required shareholder consent to revoke its subchapter S election because shareholders owning more than one-half of the total number of issued and outstanding shares of stock of the corporation consented to the revocation.

*Example (2).* In June 1988, a calendar year S corporation determines that it will revoke its subchapter S election effective August 1, 1988. To do so it must file its revocation statement with consents attached on or before August 1, 1988, indicating that the revocation is intended to be effective August 1, 1988.

*Example (3).* Corporation M, a subchapter C corporation that uses a June 30 taxable year, elects to be an S corporation for its

taxable year beginning on July 1, 1988, by filing a properly completed Form 2553 on July 15, 1988. On the Form 2553, M states that it will change its taxable year to a calendar year. On September 15, 1988, M properly revokes its S election effective July 1, 1988. Because M revoked its election to be an S corporation effective on the first day for which its election to be an S corporation was effective, the statement on the Form 2553 regarding the change in M's taxable year will have no effect on M's taxable year. Therefore, M will retain a June 30 taxable year for its taxable year beginning July 1, 1988.

(c) *Corporation ceasing to be a small business corporation—(1) In general.* An election under section 1362(a) shall be terminated if at any time on or after the first day of the first taxable year for which the election is effective, the corporation ceases to be a small business corporation as defined in section 1361(b). Thus, for example, the election is terminated if a 36th person, a nonresident alien, an ineligible trust, a partnership, or a corporation becomes a shareholder. In the event of a termination under this paragraph (c)(1), the corporation shall immediately notify the service center with which the election under section 1362(a) was filed. Such notification shall set forth the cause of the termination and the date thereof. In addition, if the termination was caused by the transfer of stock to a 36th shareholder, to a nonresident alien, or to an ineligible trust, partnership, or corporation, the notification shall specify the number of shares transferred to such person, the name of such person (or in the case of a trust, the names of the trustee and beneficiary), and the name of the shareholder who transferred such stock to such person. If the termination was caused by the issuance of a second class of stock, the notification shall indicate the number of shares of such new class issued and shall describe the differentiating characteristics of the new class of stock.

(2) *When effective.* If an election terminates because of a specific event that causes the corporation to fail to meet the definition of a small business corporation, such termination is effective as of the date on which such event occurred. If a corporation makes an election to be an S corporation which is to be effective beginning with the next taxable year (see § 1.1362-1), and fails to meet the definition of a small business corporation on the first day of such taxable year, its election will be treated as having terminated on such first day. For purposes of the preceding sentence, if a corporation meets the definition of a small business corporation on the first day of its

taxable year for which the election is effective, there is no termination of its election as a result of the failure to meet such definition at any time during the period beginning after its election and before the first day of such year.

(3) *Effect on taxable year of the corporation.* In the case of a corporation that fails to meet the definition of a small business corporation on the first day of the first taxable year for which its election to be an S corporation was effective, any statement on the Form 2553 filed by such corporation with respect to such election regarding a change in such corporation's taxable year will have no effect on the taxable year of the corporation.

(4) *Creation of an S termination year.* A corporation that ceases to be a small business corporation on a date other than the first day of the taxable year will create an S termination year and will be subject to the rules in section 1362(e) and § 1.1362-4.

(5) *Examples.* The principles of this paragraph (c) may be illustrated by the following examples:

*Example (1).* On January 1, 1988, the first day of its taxable year, a subchapter C corporation had three individuals as shareholders. On April 15, 1988, the corporation, in accordance with § 1.1362-1, filed a properly completed Form 2553. The corporation anticipated that the election would become effective January 1, 1989, the first day of the succeeding taxable year. On October 1, 1988, one of the shareholders sold 40 percent of his shares in the corporation to a partnership. On January 1, 1989, the corporation had as its shareholders, the original three individuals as well as the partnership. The corporation fails to meet the definition of a small business corporation on January 1, 1989, and its election will be treated as having terminated on that date. Because the corporation ceases to be a small business corporation on the first day of the taxable year an S termination year is not created.

*Example (2).* On July 15, 1988, Corporation M, a subchapter C corporation that uses a June 30 taxable year, files a properly completed Form 2553 to be an S corporation for its taxable year beginning on July 1, 1989. On the Form 2553, M states that it will use a calendar year as its taxable year. On June 15, 1989, one of the shareholders of M sells his entire interest in the corporation to a partnership. M fails to meet the definition of a small business corporation on July 1, 1989, and its election will be treated as having terminated on that date. Because M failed to meet the definition of a small business corporation on the first day of the first taxable year for which its election to be an S corporation was effective, the statement on the Form 2553 regarding the change in M's taxable year will have no effect on M's taxable year. Therefore, M will retain a June 30 taxable year for its taxable year beginning on July 1, 1989.

(d) *Excess passive investment income—(1) In general.* A corporation's election under section 1362(a) shall terminate if such corporation has subchapter C earnings and profits at the close of each of three consecutive taxable years and has gross receipts more than 25 percent of which for each of such taxable years are derived from passive investment income (as defined in paragraph (d)(5) of this section). For purposes of this paragraph (d), only taxable years beginning after December 31, 1981, for which the corporation was an S corporation (an electing small business corporation for taxable years beginning before January 1, 1983) will be taken into account in the determination of the consecutive three year period. For the tax imposed on the excess passive investment income of an S corporation with subchapter C earnings and profits, see section 1375 and the regulations thereunder.

(2) *When effective.* A termination under this paragraph (d) shall be effective on and after the first day of the first taxable year beginning after the third consecutive year in which the S corporation with subchapter C earnings and profits had passive investment income in excess of 25 percent of gross receipts.

(3) *Subchapter C earnings and profits.* For purposes of this paragraph (d), the "subchapter C earnings and profits" of any corporation are its earnings and profits (within the meaning of section 312 and the regulations thereunder) for any period during which it was not an S corporation (or an electing small business corporation under prior law). The subchapter C earnings and profits of an S corporation shall be modified as required by section 1371(c).

(4) *Gross receipts—(i) In general.* The term "gross receipts" as used in section 1362(d)(3) is not synonymous with "gross income". The term "gross receipts" means the total amount received or accrued under the method of accounting used by the corporation in computing its taxable income. Thus, the total amount of receipts is not reduced by returns and allowances, costs of goods sold, or deductions. For example, gross receipts will include the total amount received or accrued during the corporation's taxable year from the sale or exchange (including a sale or exchange to which section 337, as it existed prior to its amendment by the Tax Reform Act of 1986, applies) of any kind of property (except capital assets, stock, and securities), from investments, and for services rendered by the corporation.

(ii) *Sales of capital assets, stock and securities—(A) Sales of capital assets.*

Gross receipts from the sales or exchanges of capital assets (as defined in section 1221 and the regulations thereunder), other than stock and securities, shall be taken into account only to the extent of the capital gain net income therefrom. For purposes of this paragraph (d), the term "capital gain net income" has the same meaning given such term in section 1222 and the regulations thereunder.

(B) *Sales of stock or securities.* In applying section 1362(d)(3), gross receipts from the sales or exchanges of stock or securities shall be taken into account only to the extent of gains therefrom. Thus, the gross receipts from the sale of a particular share of stock will be the excess (if any) of the amount realized over the adjusted basis of such share. Losses on sales or exchanges of stock or securities do not offset gains on the sales or exchanges of other stock or securities for purposes of computing gross receipts from such sales or exchanges. Gross receipts from the sale or exchange of stock and securities include gains received from such sales or exchanges by a corporation even though such corporation is a regular dealer in stocks and securities.

However, gross receipts from the sale or exchanges of stock or securities does not include certain amounts which are treated under section 31 (relating to corporate liquidations) as payments in exchange for stock owned by the S corporation, if, on the date of the first distribution with respect to such liquidation, the S corporation owned more than 50 percent of each class of stock (whether voting or nonvoting) of the liquidating corporation. Shares of stock of the liquidating corporation held by a shareholder of the S corporation shall not be attributed to the S corporation. For purposes of this paragraph (d)(4)(ii), the term "stock or securities" includes shares or certificates of stock, stock rights or warrants, or an interest in any corporation (including any joint stock company, insurance company, association, or other organization classified as a corporation by the Code), an interest in any partnership, certificates of interest or participation in any profit-sharing agreement, or in any oil, gas, or other mineral property, or lease, collateral trust certificates, voting trust certificates, bonds, debentures, certificates or indebtedness, notes, car trust certificates, bills of exchange, or obligations issued by or on behalf of a State, Territory, or political subdivision thereof.

(iii) *Other exclusions from gross receipts.* For purposes of section 1362 (d)



(3), gross receipts does not include (A) amounts received in nontaxable sales or exchanges (other than those to which former section 337 applies), except to the extent that gain is recognized by the corporation on the sale or exchange, (B) amounts received as a loan, as a repayment of a loan, as a contribution to capital, or on the issuance by the corporation of its own stock, or (C) certain amounts which are treated under section 331 (relating to corporate liquidations) as payments in exchange for stock (see paragraph (d) (4) (ii) (B) of this section).

(iv) *Examples.* The meaning of the term "gross receipts" as used in section 1362 (d) (3) may be further illustrated by the following examples:

*Example (1).* A corporation that uses an accrual method of accounting sells: (1) A depreciable asset, held for more than 6 months, which is used in the corporation's business, (2) a capital asset (other than stock and securities) for a gain, (3) a capital asset (other than stock and securities) for a loss, and (4) securities, and receives payment for each asset partly in money and partly in the form of a note payable at a future time. The corporation elects not to report the sales on the installment method. The amount of money and the face amount of the note received for the business asset would be considered gross receipts in the taxable year of sale and would not be reduced by the adjusted basis of the property, costs of sale or any other amount. With respect to the sale of the capital asset, gross receipts would include the cash down payment and face amount of any notes, but only to the extent of the corporation's capital gain net income. In the case of the sale of the securities, gross receipts would include the cash down payment and face amount of the notes, but only to the extent of gain on the sale. In determining gross receipts from sales of securities, losses would not be netted against gains.

*Example (2).* A corporation has a long-term contract as defined in paragraph (b) of § 1.451-3 with respect to which it reports income according to the percentage-of-completion method as described in paragraph (c) (1) of § 1.451-3. The portion of the gross contract price which corresponds to the percentage of the entire contract which has been completed during the taxable year shall be included in gross receipts for such year.

*Example (3).* For its 1983 taxable year, a corporation which regularly sells personal property on the installment plan elects to report its taxable income from the sale of such property (other than property qualifying as a capital asset or stock or securities) on the installment method in accordance with section 453A. The installment payment actually received in a given taxable year of the corporation shall be included in gross receipts for such year.

(5) *Passive investment income*—(i) *In general.* Except as provided in this paragraph (d)(5), the term "passive investment income" means gross

receipts (as defined in paragraph (d)(4) of this section) derived from royalties, rents, dividends, interest, annuities, and gains from the sales or exchanges of stock or securities.

(ii) *Special rule for options or commodities dealers*—(A) *Exclusion of certain capital gains.* In the case of any options dealer or commodities dealer, passive investment income shall be determined by not taking into account any gain or loss (in the normal course of the taxpayer's activity of dealing in or trading section 1256 contracts) from any section 1256 contract or property related to such a contract.

(B) *Definitions.* For purposes of this paragraph (d)(5)(ii)—

(1) *Options dealer.* The term "options dealer" has the meaning given to such term by section 1256 (g)(8).

(2) *Commodities dealer.* The term "commodities dealer" means a person who is actively engaged in trading section 1256 contracts and is registered with a domestic board of trade which is designated as a contract market by the Commodities Future Trading Commission.

(3) *Section 1256 contract.* The term "section 1256 contract" has the meaning given to such term by section 1256 (b).

(C) *Effective date.* This paragraph (d)(5)(ii) shall apply to positions established after July 18, 1984, in taxable years ending after such date.

(iii) *Royalties*—(A) *In general.* Except as provided in this paragraph (d)(5)(iii), the term "royalties" as used in section 1363 (d)(3)(D) means all royalties, including mineral, oil, and gas royalties, and amounts received for the privilege of using patents, copyrights, secret processes and formulas, good will, trademarks, tradebrands, franchises, and other like property. For purposes of this paragraph (d)(5)(iii), the gross amount of royalties shall not be reduced by any part of the cost of the rights under which they are received or by any amount allowable as a deduction in computing taxable income.

(B) *Copyright royalties.* The term "royalties" does not include copyright royalties if the income from such royalties would not be treated as personal holding company income under section 543(a)(4) if the corporation were a C corporation. For the definition of "copyright royalties," see paragraph (b)(12)(iv) of § 1.543-1.

(C) *Mineral, oil, or gas royalties.* The term "royalties" does not include mineral, oil, or gas royalties if the income from such royalties would not be treated as personal holding company income under section 543(a)(3) if the corporation were a C corporation. Moreover, the term "royalties" does not

include amounts received upon disposal of timber, coal, or domestic iron ore with a retained economic interest with respect to which the special rules of section 631 (b) and (c) apply. For the definition of "mineral, oil, or gas royalties," see paragraph (b)(11) (ii) and (iii) of § 1.543-1.

(D) *Active business computer software royalties.* The term "royalties" does not include active computer software royalties as that term is defined in section 543(d) (without regard to paragraph (d)(5)).

(iv) *Rents.* The term "rents" as used in section 1362(d)(3)(D) means amounts received for the use of, or right to use, property (whether real or personal) of the corporation. The term "rents" does not include payments received for the use or occupancy of property if the corporation also performs significant services in return for such payments. Examples of payments not treated as rents for purposes of section 1362(d)(3)(D) include payments for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist homes, motors courts, or motels. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. Maid service supplied by a hotel is an example of such services; in contrast, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and similar activities are not considered as services rendered to the occupant. Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple housing units, of offices in an office building, etc., generally constitute "rents" under section 1362(d)(3)(D). Payments for the parking of automobiles ordinarily do not constitute rents. Payments for the warehousing of goods or for the use of personal property constitute rents unless significant services are rendered in connection with such payments.

(v) *Dividends.* The term "dividends" as used in section 1362(d)(3)(D) includes dividends as defined in section 316, amounts required to be included in gross income under section 551 (relating to foreign personal holding company income taxed to U.S. shareholders), and consent dividends as provided in section 565.

(vi) *Interest.* The term "interest" as used in section 1362(d)(3)(D) means any amounts received for the use of money

(including tax-exempt interest and amounts treated as interest under section 483, 1272, 1274, or 7872). However, amounts received as interest on obligations acquired in the ordinary course of the corporation's trade or business from the sale of property described in section 1221(1) shall not constitute passive investment income.

(vii) *Annuities.* The term "annuities" as used in section 1362(d)(3)(D) means the entire amount received as an annuity under an annuity, endowment, or life insurance contract, regardless of whether only part of such amount would be includible in gross income under section 72.

(viii) *Gross receipts from the sale of stock or securities.* Gross receipts from sales or exchanges of stock or securities (to the extent of gains therefrom) as described in paragraph (d)(4)(ii)(B) of this section constitute passive investment income.

(ix) *Treatment of certain lending or finance companies.* An S corporation that is a lending or finance company as defined in section 542(c)(6) and the regulations thereunder shall not include in its passive investment income for the year gross receipts which are derived from the active and regular conduct of a lending or finance business, as defined in section 542(d)(1) and the regulations thereunder. The preceding sentence does not apply to gross receipts that are not directly derived from the active and regular conduct of a lending or finance business. Thus, the corporation's passive investment income will include amounts that are not directly related to the activities described in section 542(d)(1). Thus, for example, interest from the investment of idle funds in short-term securities, interest on judgments obtained on a defaulted loan and rent derived from property acquired by reason of a borrower's default on a loan do not constitute gross receipts derived directly from the conduct of the corporation's lending or finance business and therefore would not be excluded by section 1362(d)(3)(D)(iii). However, subject to the exception provided in section 542(d)(1)(B), gross receipts from the sale or transfer of (A) notes acquired in the business of making loans and (B) accounts receivable, notes, or installment obligations acquired in the business of purchasing or discounting accounts receivable, notes, or installment obligations constitute gross receipts derived directly from the conduct of the corporation's lending or finance business and thus would be excluded from inclusion in

such corporation's passive investment income.

(6) *Example.* The principles of this paragraph (d) may be illustrated by the following example:

*Example.* X, an S corporation with subchapter C earnings and profits, in the first taxable year for which its election was effective had gross income from business operations of \$75,000 of which \$5,000 was received from royalty payments with respect to a patent. In addition, X received \$3,000 gross rental receipts, \$1,000 gross interest receipts from inventory sales on open account, and \$500 in gross dividend income. X recognized a gain of \$2,500 on a sale of stock in P corporation and recognized a loss of \$1,000 on a sale of stock in Q corporation. X also sold two parcels of land it had purchased and held for investment. The parcels sold for \$10,000 each and carried a basis of \$5,000 for parcel 1 and \$11,000 for parcel 2. Finally, X sold a business asset for \$3,000. X originally purchased the asset for \$3,000 and had an adjusted basis of \$2,805. The corporation's total gross receipts will be calculated as follows:

Gross receipts from operations	\$75,000
Gross rental receipts	3,000
Gross interest receipts	1,000
Gross dividend receipts	500
Gain on sale of P stock (loss on Q stock is not taken into account) Net gain on sale of parcels 1 and 2	4,000
Gross receipt on sale of business asset	3,000
Total gross receipts	89,000

Passive investment income is determined as follows:

Gross patent royalty receipts	\$5,000
Gross rental receipts	3,000
Gross dividend receipts	500
Gain on sale of P stock (loss on Q stock is not taken into account)	2,500
Total passive investment income gross receipts	11,000

X's passive treatment income percentage for its first year as an S corporation is 12.36 percent. This does not exceed 25 percent of X's gross receipts and consequently will not begin the running of the 3 year period for purposes of terminating the election under section 1362(d)(3).

#### § 1.1362-4 Treatment of S termination year.

(a) *In general.* Terminations under § 1.1362-3 that take effect during the taxable year on a date other than the first day of the taxable year will result in the creation of an S termination year. The portion to the S termination year ending on the close of the last day prior to the effective date of the termination shall be treated as a short taxable year for which the corporation is an S corporation and is hereinafter referred to as an S short year. The portion of the S termination year beginning on the first day the termination is effective shall be treated as a short taxable year for which

the corporation is a C corporation and is hereinafter referred to as a C short year. Generally, the accounting books and records of a corporation do not have to be closed as of the termination date; rather, the corporation will allocate income or loss for the entire year on a pro rata basis. The pro rata allocation rules set forth in section 1236(e) (2) and paragraph (b) of this section will not apply (1) if the election under 1362 (e) (3) and paragraph (c) (2) of this section is made by the corporation to have items assigned to each short taxable year under the corporation's normal tax accounting rules, (2) to any item resulting from an election made by an acquiring corporation to treat the purchase of the corporation's stock as an asset purchase under section 338, or (3) if there is a sale or exchange of 50 percent or more of the stock (as defined in paragraph (c) (4) of this section) of the corporation during an S termination year. Where the pro rata allocation rules do not apply, the corporation will allocate items of income, gain, loss, deduction, and credit under normal tax accounting rules as set forth in paragraph (c) of this section.

(b) *Pro rata allocation.* Except as provided in paragraph (c) of this section, the items of income, gain, loss, deduction, and credit for an S termination year shall be allocated between the S short year and the C short year in the following manner:

(1) Determine, for the entire S termination year, the amount of each of the separately stated items of income, loss, deduction, or credit described in section 1366 (a) (1) (A), and the amount of nonseparately computed income or loss described in section 1366 (a) (2).

(2) Assign an equal ratable portion of each amount determined under paragraph (b) (1) to each day of the S termination year. For example, if a corporation has an S termination year in 1987 that consists of an S short year from January 1 through June 30 and a C short year from July 1 through December 31, it will make a pro rata allocation of 181/365 of its separately and nonseparately computed amounts to the S short year and will allocate 184/365 of such amounts to the C short year.

(c) *Income, loss, deduction, and credit items assigned to each short taxable year under normal accounting rules*—(1) *In general.* If paragraph (c) (2) or (4) of this section applies, or to the extent that paragraph (c) (3) of this section applies, then the rules of section 1363 (e) (2) and paragraph (b) of this section shall not apply, and the determination of the

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corporation's income, loss, deduction, and credit for its S short year and C short year shall be allocated under this paragraph (c). To the extent that this paragraph (c) applies, items of income, loss, deduction, and credit shall be assigned to each short taxable year on the basis of the corporation's method of accounting, as determined under section 446 and § 1.446-1.

(2) *Election.* A corporation may elect under section 1362 (e) (3) and this paragraph (c) (2) to allocate its S termination year income on the basis of its normal tax accounting method rather than under section 1362 (e) (2). An election under this paragraph to have the rules of section 1362 (e) (2) not apply can be made only with the consent of all persons who are or were shareholders in the corporation at any time during the S short year and all persons who are or were shareholders in the corporation at any time during the first day of the C short year. To make such election, a corporation shall file a statement that it elects under section 1362 (e) (3) to have the rules provided in section 1362 (e) (2) not apply. Such statement shall set forth the cause of the termination and the date thereof and shall be signed by any person authorized to sign the return required to be filed under section 6037. The statement shall be filed with the return for the short taxable year described in section 1362 (e) (1) (B). In addition, there shall be attached to the statement of election a statement of consent, signed by each person who is or was a shareholder in the corporation at any time during the S short year and each person who is or was a shareholder of the corporation at any time during the first day of the C short year. The separate statement must set forth the name, address, and taxpayer identification number of the corporation, and the name, address, and taxpayer identification number of each person required to consent.

(3) *Pro rata allocation not to apply to certain items if purchase of stock treated as an asset purchase under section 338—(i) In general.* Section 1362 (e) (2) and § 1.1362-4 (b) will not apply with respect to any item resulting from the application of section 338. In such case, the principles of section 1362 (c) (3) and this paragraph (c) shall be applicable with respect to such items without election by the shareholders.

(ii) *Special rule.* Paragraph (c) (3) (i) of this section shall not apply to any item resulting from the application of section 338 if—

(A) Any portion of the qualified stock purchase under section 338 is pursuant to a binding contract entered into on or

after October 19, 1982, and before July 18, 1984, and

(B) The purchasing corporation establishes by clear and convincing evidence that such contract was negotiated in contemplation that, with respect to the deemed sale under section 338, section 1362(e)(2) would apply.

(4) *Pro rata rule not to apply if 50 percent change in ownership during S termination year—(i) In general.* Section 1362(e)(2) and § 1.1362-4(b) will not apply to an S termination year if at any time during such year, as a result of sales or exchanges of stock in the corporation during that year, 50 percent or more of the issued and outstanding shares of stock of the corporation (whether an S or C corporation) is newly owned stock within the meaning of paragraph (c)(4)(ii) of this section. In such case, the principles of section 1362(e)(3) and paragraph (c) of this section shall be applicable without any election by the shareholders.

(ii) *Newly owned stock.* For purposes of paragraph (c)(4)(i) of this section, the stock of a corporation owned by any person immediately after the close of any sale or exchange of stock shall be treated as newly owned stock to the extent that—

(A) The percentage of the corporation's issued and outstanding shares of stock (whether as an S or C corporation) owned by such person immediately after such sale or exchange, exceeds

(B) The percentage of the corporation's issued and outstanding shares of stock owned by such person on the last day of the taxable year immediately preceding the S termination year.

However, stock will not be treated as newly owned stock to the extent that such stock is treated as newly owned stock with respect to another person immediately after the close of any previous sale or exchange of stock.

(iii) *Stock acquired other than by sale or exchange—(A) In general.* For purposes of paragraph (c)(4)(ii) of this section, if a person acquired stock in the corporation after the last day of the taxable year immediately preceding the S termination year and such stock was acquired by such person from a qualified transferor other than by a sale or exchange, then such stock shall be treated as held on the last day of the taxable year immediately preceding the S termination year by the person that so acquired the stock from a qualified transferor.

(B) *Qualified transferor.* For purposes of paragraph (c)(4)(A) of this section, the

term "qualified transferor" means a person—

(1) Who (or whose estate) held stock in the S corporation on the last day of the taxable year immediately preceding the S termination year, or

(2) Who acquired the stock in an acquisition which meets the requirements of paragraph (c)(4)(iii)(A) of this section.

(iv) *Special rule.* Paragraph (c)(4)(i) of this section shall not apply to an S termination year if—

(A) On or before July 18, 1984, 50 percent or more of the newly owned stock (as defined in paragraph (c)(4)(ii) of this section) was sold or exchanged in 1 or more transactions, and

(B) The person (or persons) acquiring such stock established by clear and convincing evidence that such acquisitions were negotiated in contemplation that section 1362(e)(2) would apply to the S termination year in which such sales or exchanges occurred.

(v) *Examples.* The provisions of this paragraph (c)(4) may be illustrated by the following examples:

*Example (1).* A, an individual, owns all 100 outstanding shares of stock of Corporation M, a calendar year S corporation. On January 31, 1988, A sells 60 shares of M stock to B, an individual. On June 1, 1988, A sells 5 shares of M stock to P, a partnership. M ceases to be a small business corporation on June 1, 1988, and pursuant to section 1362(d)(2) its S corporation election terminates effective on that date. All of the M stock acquired by B and P is newly owned stock because neither B nor P held such stock on December 31, 1987. Thus, 65 percent of the issued and outstanding shares of stock is treated as newly owned stock. Because more than 50 percent of the issued and outstanding shares of M stock is treated as newly owned stock, M must assign the items of income, loss, deduction, or credit for the S termination year to the two short taxable years on the basis of M's method of accounting.

*Example (2).* Assume the same facts as in Example (1), except that A sells the 60 shares of M stock to B on July 1, 1988. Since 65 percent of the issued and outstanding shares of M stock is treated as newly owned stock, M must assign the items of income, loss, deduction, or credit for the S termination year to the two short taxable years on the basis of M's method of accounting.

*Example (3).* C and D are shareholders in Corporation N, a calendar year S corporation. Each owns 50 percent of the issued and outstanding shares of the corporation on December 31, 1987. On March 1, 1988, C makes a gift of his entire shareholder interest to T, a trust not permitted as a shareholder under section 1361(c)(2). N ceases to be a small business corporation on March 1, 1988, and pursuant to section 1362(d)(2) its S corporation election terminates effective on that date. As a result of the gift, T owns 50 percent of N's issued and outstanding stock. However, because T acquired the stock by

gift from C, a qualified transferor, the stock is treated as owned by T on December 31, 1987. Hence, the stock acquired by T is not treated as newly owned stock.

(5) *Special rule for S corporation that is a partner in a partnership.* For purposes of section 706(c), if—

(i) A corporation's election under section 1362(a) is terminated under paragraph (b) or (c) of this section;

(ii) Paragraph (c) (2) or (4) of this section applies to such corporation;

(iii) Such corporation is a partner in a partnership during any portion of the S short year; and

(iv) Any taxable year of such partnership ends with or within the C short year;

then such termination shall be treated as a sale or exchange of such corporation's entire interest in such partnership. A sale or exchange pursuant to the preceding sentence shall be deemed to occur on the last day of the S short year. For rules on determining each shareholder's share of the corporation's items of income, loss, deduction, or credit that are attributable to a partnership, see sections 1366 and 1377 and the regulations thereunder.

(d) *Tax for the C short year—(1) In general.* The tax liability for the C short year shall be a portion of the amount of tax that is determined on the annualized taxable income for the C short year. For purposes of this paragraph (d)(1), the annualized taxable income for the C short year is determined by multiplying the taxable income for such short year by the number of days in the S termination year and by dividing the result by the number of days in the C short year. The tax on the annualized taxable income is then computed according to the corporate rate brackets; this result is adjusted to determine the C short year tax liability. The adjustment is made by multiplying the tax on the annualized taxable income by the number of days in the C short year and dividing the result by the number of days in the S termination year.

(2) *Minimum tax.* For purposes of computing the corporation's liability for the corporate minimum tax with respect to the C short year, section 443(d) shall apply.

(3) *Example.* A corporation determines, under either paragraph (2) or (3) of section 1362(e), that it has taxable income of \$4,000 for the C short year December 12, 1989 through December 31, 1989. The taxable income on an annual basis is \$73,000 [(\$4,000 × 365)/20]. Tax on the annualized taxable income is \$13,250 (\$7,500 + \$5,750), and the tax liability for the C short year is \$726 [(\$13,250 × 20)/365].

(e) *Other special rules—(1) Short year treated as taxable year.* Except as otherwise provided in paragraph (e)(2) of this section, the short S and C years will be treated as two separate years for purposes of all provisions of the Code.

(2) *Year for carryover purposes.* The short S and C years will be treated as one year for purposes of determining the number of taxable years to which any item may be carried back or forward by the corporation.

(3) *Due date for S year return.* The due date for filing the return for the S short year shall be the same as the due date for filing the return for the C short year, including extensions thereof.

(4) *Year in which income from short S year is includible.* A shareholder shall include in taxable income for the year with or within which the S termination year ends the shareholder's pro rata share of the items described in section 1366(a) for the S short year.

#### § 1.1362-5 Inadvertent terminations.

(a) *In general.* A corporation will be treated as continuing to be an S corporation during the period specified by the Commissioner if—

(1) A valid election under section 1362(a) is terminated under § 1.1362-3 (c) or (d),

(2) The Commissioner determines that the termination was inadvertent,

(3) Steps were taken by the corporation to return to small business corporation status within a reasonable period after discovery of the terminating event, and

(4) The corporation and shareholders agree to adjustments required by the Commissioner for such period.

Any reference in this section to steps taken by the corporation to return to small business corporation status shall include steps taken by the corporation so that it no longer violates the passive investment income limitations under § 1.1362-3(d). For purposes of this section, consideration will be given only to terminating events occurring in taxable years beginning after December 31, 1982.

(b) *Inadvertent termination.* For purposes of this paragraph (b), the determination of whether a termination was inadvertent will be made by the Commissioner. The corporation has the burden of establishing that under the relevant facts and circumstances the Commissioner should determine that the termination was inadvertent. The fact that the terminating event was not reasonably within the control of the corporation and was not part of a plan to terminate the election, or the fact that the event took place without the knowledge of the corporation

notwithstanding its due diligence in the course of its business to safeguard itself against such an event, tends to establish that the termination was inadvertent. For example, if a corporation, in good faith and using due diligence, determined that it had no subchapter C earnings and profits, but it was later determined on audit that its election terminated by reason of violating the passive investment income test for three consecutive years because the corporation in fact had accumulated earnings and profits, it may be appropriate for the Commissioner to find that the terminating event was inadvertent.

(c) *Corporation's request for determination of an inadvertent termination.* A corporation that believes its election was terminated inadvertently shall request a determination of inadvertent termination from the Commissioner. The request shall be made in the form of a ruling request and shall contain the information required by regulations and revenue procedures pertaining thereto. The request shall set forth all relevant facts pertaining to the event including, but not limited to, the facts described in paragraph (b) of this section, the date of the corporation's election under 1362(a), a detailed explanation of the event causing termination, when and how such event was discovered, and the steps taken to return the corporation to small business corporation status. Send requests for a determination of inadvertent termination to: Internal Revenue Service, Associate Chief Counsel (Technical), Attention: CC:PS, 1111 Constitution Ave., NW., Washington, DC 20224.

(d) *Correction of terminating event.* In order to satisfy paragraph (a) of this section, a corporation the election of which terminates by reason of a disqualifying event must, within a reasonable period of time after discovery of such event, take steps to correct the event so that the corporation is once more a small business corporation. For example, if the terminating event is one that causes the corporation to have more than one class of stock, the corporation must take steps to eliminate the second class of stock. If the election is terminated because the corporation had an ineligible shareholder, the corporation must take steps to terminate such shareholder's interest. If the cause of termination is excessive passive investment income, the corporation must reduce such excess income or eliminate its subchapter C earnings and profits. For purposes of this paragraph (d), a corporation will



have discovered the terminating event when it has actual knowledge of such event, or at such time as a reasonable person would have had knowledge of such event. Before a waiver can become effective, the steps taken must be completed so that the corporation is once more a small business corporation.

(e) *Consent to Commissioner's requirement.* Before any waiver is granted, the corporation and the shareholders must consent to any adjustment required by the Commissioner for the specified period. The adjustment required must be consistent with the treatment of the corporation as an S corporation during the specified period. The period specified by the Commissioner may be retroactive either for all years or for the period in which the corporation again became eligible for treatment under subchapter S. All persons who were shareholders of the corporation at any time during the period specified by the Commissioner must consent to the Commissioner's adjustments. Shareholder and corporate consents shall be in the form of a statement setting forth the Commissioner's requirements, the period for which a waiver of the terminating event is given, and must be signed by the shareholder (in the case of a shareholder consent) or the person authorized to sign the return required by section 6037 (in the case of corporate consent). A shareholder's consent statement shall set forth the name, address, and taxpayer identification numbers of the corporation and shareholder, the number of shares of stock owned by the shareholder during the period, and the dates during the period on which such stock was owned. The corporate consent statement shall set forth the name, address, and taxpayer identification numbers of the corporation and each shareholder. The consent of the shareholders and of the corporation must be attached to the return for the period in which the adjustments are to be made.

(f) *Adjustments.* In the case of a transfer of stock to an ineligible shareholder which is treated as an inadvertent termination under section 1362 (f), the Commissioner may require such an adjustment as will cause the ineligible shareholder to be treated as a shareholder of an S corporation during the period such shareholder actually held stock in the corporation. Moreover, the Commissioner may require such protective adjustments as will prevent any loss of revenue which may otherwise result because of a transfer of stock to an ineligible shareholder (e.g., a

transfer to a nonresident alien). The agreement to make the required adjustments may be reflected in a closing agreement entered into pursuant to the authority contained in section 7121.

(g) *Status of corporation.* The status of the corporation after the terminating event and before the determination of inadvertence shall be determined by the period of waiver specified by the Commissioner. A waiver may be granted retroactive for all years for which the terminating event was effective, in which case the corporation will be treated as if its election has not terminated. A waiver may be granted retroactive only for the period in which the corporation again became eligible for subchapter S treatment, in which case the corporation will be treated as a C corporation during the period for which the corporation was not eligible for subchapter S treatment.

#### § 1.1362-6 Election after termination.

(a) *In general.* If a corporation has made a valid election and such election has been terminated, unless the Commissioner consents to a new election, such corporation (or any successor corporation) is not eligible to make a new election for any taxable year prior to its fifth taxable year which begins after the first taxable year for which such termination is effective. The burden will be on the corporation to establish that under the relevant facts the Commissioner should consent to a new election. The fact that more than 50 percent of the stock in the corporation is owned by persons who did not own any stock in the corporation on the date of the termination will tend to establish that consent should be granted. In the absence of such fact, consent will ordinarily be denied unless it can be shown that the event causing termination was not reasonably within the control of the corporation or shareholders having a substantial interest in the corporation, and was not part of a plan on the part of the corporation or of such shareholders to terminate the election.

(b) *Successor corporation.* The term "successor corporation" as used in section 1362(g) means any corporation—

(1) 50 percent or more of the stock of which is owned, directly or indirectly, by the same persons who, on the date of the termination, owned 50 percent or more of the stock of the small business corporation with respect to which the election was terminated, and

(2)(i) Which acquires a substantial portion of the assets of such small business corporation, or

(ii) A substantial portion of the assets of which were assets of such small business corporation.

(c) *Special rule for certain terminations.* The five year waiting period described in paragraph (a) of this section shall not apply to corporations if the termination occurred because the corporation—

(1) Revoked its election effective on the first day of the first taxable year for which its election to be an S corporation was effective (see § 1.1362-3(b)(2)), or

(2) Failed to meet the definition of a small business corporation on the first day of the first taxable year for which its election to be an S corporation was effective (see § 1.1362-3(c)(2)).

Thus, for terminations described in this paragraph (c), a corporation is not required to wait five years for reelection and is not required to secure the consent of the Commissioner for such reelection.

#### § 1.1363-1 Effect of election on corporation.

(a) *Exemption of corporation from income tax—(1) In general.* Except as provided in this paragraph (a), the effect on a small business corporation of a valid election under section 1362(a) is to exempt the corporation from the taxes imposed by chapter 1 of the Code with respect to taxable years of the corporation for which the election is in effect.

(2) *Taxable years beginning after December 31, 1986.* For taxable years beginning after December 31, 1986, an S corporation shall not be exempt from the tax imposed by section 47 (relating to the tax on the early disposition of section 38 property) or section 1375 (relating to the tax imposed when passive investment income of corporation having subchapter C earnings and profits exceeds 25 percent of gross receipts). An S corporation shall also not be exempt from the tax imposed by section 1374 (as amended by the Tax Reform Act of 1986 or as in effect prior to its amendment by the Act). See also section 1363(d) (relating to the recapture of LIFO benefits) for the rules regarding the payment by an S corporation of LIFO recapture amounts.

(3) *Taxable years beginning after December 31, 1982, and before January 1, 1987.* For taxable years beginning after December 31, 1982, and before January 1, 1987, an S corporation shall not be exempt from the tax imposed by section 47 and section 1375. An S corporation shall also not be exempt from the tax imposed by section 56 (relating to corporate minimum tax) and section 1374 (relating to tax imposed on certain capital gains), as those sections

were in effect prior to their amendment by the Tax Reform Act of 1986.

(b) *Computation of corporate income—(1) In general.* The taxable income of an S corporation shall be computed in the same manner as the taxable income of an individual except that section 248 shall apply and except as otherwise provided in this paragraph (b). An S corporation is required to state separately in its return the items of income (including tax-exempt income), loss, deduction, or credit the separate treatment of which could affect the tax liability of any shareholder.

(2) *Deductions not allowed.* An S corporation is not allowed the following deductions:

(i) The deductions for personal exemptions provided in section 151.

(ii) The deduction provided in section 164(a) for taxes, described in section 901, paid or accrued to foreign countries and to possessions of the United States.

(iii) The deduction for charitable contributions provided in section 170.

(iv) The net operating loss deduction provided in section 172.

(v) The additional itemized deductions for individuals provided in part VII of Subchapter B, as follows: Expenses for production of income (section 212); medical, dental, etc., expenses (section 213); alimony, etc. payments (section 215); amounts representing taxes, interest and business depreciation of a cooperative housing corporation (section 216); moving expenses (section 217); retirement savings (section 219); and deduction for two-earner married couples (section 221) and adoption expenses (section 222), as sections 221 and 222 were in effect prior to their repeal by the Tax Reform Act of 1986.

(vi) The deduction for depletion with respect to oil and gas wells provided in section 611.

(3) *Corporate preference items.* Section 291 of the Code shall apply to the computation of the taxable income of an S corporation if the S Corporation (or any predecessor) was a C corporation for any of the 3 immediately preceding taxable years.

(c) *Elections of the S corporation—(1) General rule.* Any elections (other than those described in paragraph (c)(2) of this section) affecting the computation of items derived from an S corporation shall be made by the corporation. For example, elections of methods of accounting, of computing depreciation, of treating soil and water conservation expenditures, and the option to deduct

as expenses intangible drilling and development costs, shall be made by the corporation and not by the shareholders separately. All corporate elections are applicable to all shareholders.

(2) *Exceptions—(i)* Each shareholder shall add his pro rata share of expenses described in section 617 paid or accrued by the S corporation to any such expenses paid or accrued by him and shall treat the total amount according to his method of treating such expenses, notwithstanding the treatment of the expenses by the corporation.

(ii) Each shareholder shall add his pro rata share of taxes described in section 901 paid or accrued by the S corporation to foreign countries or possessions of the United States (according to its method of treating such taxes) to any such taxes paid or accrued by him (according to his method of treating such taxes), and may elect to use the total amount either as a credit against tax or as a deduction from income.

(iii) For shareholder taxable years beginning before January 1, 1987, each shareholder shall:

(A) Add his pro rata share of investment interest, paid or accrued by the S corporation, to any such interest paid by him,

(B) Add his pro rata share of investment income and expenses (exclusive of interest) incurred by the S corporation to those incurred by him, and

(C) Subject the total amounts to the rules provided in section 163(d).

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 88-29606 Filed 12-23-88; 8:45 am]

BILLING CODE 4830-01-M

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 117

[CGD7-88-45]

#### Drawbridge Operation Regulations; New River, South Fork, Florida

AGENCY: Coast Guard, DOT.

ACTION: Proposed rule.

**SUMMARY:** At the request of the City of Fort Lauderdale, the Coast Guard is considering a change to the regulations governing the Southwest 12th Street (Davie Boulevard) drawbridge at Fort Lauderdale, Florida, by extending the hours of the existing regulation to provide draw openings on 15-minute

intervals during the winter season. The proposal is being made because of complaints about highway traffic delays. This action should accommodate the needs of vehicular traffic and still provide for the reasonable needs of navigation.

**DATE:** Comments must be received on or before February 10, 1989.

**ADDRESSES:** Comments should be mailed to Commander (oan), Seventh Coast Guard District, Brickell Plaza Federal Building, 909 SE. 1st Avenue, Miami, Florida 33131-3050. The comments and other materials referenced in this notice will be available for inspection and copying on the 4th Floor, of the Brickell Plaza Federal Building, 909 SE. 1st Avenue, Miami, Florida. Normal office hours are between 7:30 a.m. and 4 p.m., Monday through Friday, except holidays. Comments also may be hand-delivered to this address.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brodie Rich (305) 536-4103.

**SUPPLEMENTARY INFORMATION:** Interested persons are invited to participate in this rulemaking by submitting written views, comments, data, or arguments. Persons submitting comments should include their names and addresses, identify the bridge, and give reasons for concurrence with or any recommended change in the proposal. Persons desiring acknowledgement that their comments have been received should enclose a stamped, self-addressed postcard or envelope.

The Commander, Seventh Coast Guard District, will evaluate all communications received and determine a course of final action on this proposal. The proposed regulations may be changed in light of comments received.

#### Drafting Information

The drafters of this notice are Mr. Brodie Rich, Bridge Administration Specialist, project officer, and Lieutenant Commander S.T. Fuger, Jr., project attorney.

#### Discussion of Proposed Regulations

The Davie Boulevard drawbridge presently opens on signal, except that, from 7:30 a.m. to 8:30 a.m. and 4:30 p.m. to 5:30 p.m. Monday through Friday, the drawbridge need not be opened for the passage of vessels. Public vessels of the United States, regularly scheduled cruise vessels, tugs with tows, and vessels in distress shall be passed through the draw as soon as possible.



The City of Fort Lauderdale has asked that the bridge open only on the hour, quarter-hour, half-hour, and three-quarter hour from 7 a.m. to 7 p.m. daily, year-round while allowing an hour closed period from 7:30 a.m. to 8:30 a.m. and 4:30 p.m. to 5:30 p.m. Monday through Friday. The Coast Guard has carefully evaluated information about highway traffic volumes, drawbridge openings and waterway traffic conditions for this bridge. Although regulation changes appear to be needed to help reduce highway traffic delays, the level of highway service and limited number of drawbridge openings do not justify opening restrictions during the off-season months.

The proposed 15-minute operating schedule during the busiest boating months from October 1st through May 31st should allow accumulated vehicular traffic to disperse between bridge openings with minimal additional delay to vessels. Public vessels of the United States, regularly scheduled cruise vessels, tugs with tows, and vessels in distress would be passed through the draw as soon as possible.

#### Economic Assessment and Certification

These proposed regulations are considered to be non-major under Executive Order 12291 on Federal Regulation and nonsignificant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979).

The economic impact of this proposal is expected to be so minimal that a full regulatory evaluation is unnecessary. We conclude this because the regulations exempt tugs with tows and regularly scheduled cruise vessels. Since the economic impact of this proposal is expected to be minimal, the Coast Guard certifies that, if adopted, it will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 33 CFR Part 117

Bridges.

#### Proposed Regulations

In consideration of the foregoing, the Coast Guard proposes to amend Part 117 of Title 33, Code of Federal Regulations, as follows:

#### PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for Part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.48; 33 CFR 1.05-1(g); 33 CFR 117.43.

2. Section 117.315(a) is revised to read as follows:

#### § 117.315 New River, South Fork.

(a) *Davie Boulevard (Southwest 12th Street) bridge, mile 0.9 at Fort Lauderdale.* The draw shall open on signal; except that, year-round, from 7:30 a.m. to 8:30 a.m. and 4:30 p.m. to 5:30 p.m., Monday through Friday, the draw need not open; and from October 1 through May 31 from 7 a.m. to 7 p.m., daily, with the exception of the authorized closed periods, the draw need open only on the hour, quarter-hour, half-hour, and three-quarter hour. Public vessels of the United States, regularly scheduled cruise vessels, tugs with tows, and vessels in distress shall be passed through the draw as soon as possible.

\* \* \* \* \*

Dated: December 19, 1988.

Martin H. Daniell,  
Rear Admiral, U.S. Coast Guard, Commander,  
Seventh Coast Guard District.

[FR Doc. 88-29622 Filed 12-23-88; 8:45 am]

BILLING CODE 4910-14-M

#### NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

#### 36 CFR Part 1234

#### Electronic Records Management

**AGENCY:** National Archives and Records Administration.

**ACTION:** Notice of proposed rulemaking; extension of comment period.

**SUMMARY:** On December 5, 1988, NARA published a notice of proposed rulemaking (53 FR 48936) to revise its regulations concerning Federal agencies' electronic records. In response to requests from several Federal agencies for additional time to submit their comments, we are extending the comment period by an additional 30 days.

**DATE:** Comments must be received by February 3, 1989.

**ADDRESS:** Comments should be sent to Director, Policy and Program Analysis Division (NAA), National Archives and Records Administration, Washington, DC 20408.

**FOR FURTHER INFORMATION CONTACT:** John Constance or Nancy Allard on 202-523-3214 (FTS 523-3214).

Dated: December 20, 1988.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 88-29601 Filed 12-23-88; 8:45 am]

BILLING CODE 7515-01-M

#### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[FRL-3498-3]

#### Approval and Promulgation of Implementation Plans; Wisconsin

**AGENCY:** U.S. Environmental Protection Agency (USEPA).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** USEPA is proposing to approve a revision to the Wisconsin State Implementation Plan (SIP) for Sulfur Dioxide (SO<sub>2</sub>). The revision consists of the addition of Section NR 154.12(10) of the Wisconsin Administrative Code, Rothschild RACT Sulfur Limitations, to the Wisconsin SIP. The revision sets SO<sub>2</sub> emission limits for sources in the City of Rothschild and the Town of Weston, which are located in Marathon County, Wisconsin. USEPA's action is based upon a SIP revision request that was submitted by the Wisconsin Department of Natural Resources (WDNR) to satisfy the requirements of Part D of the Clean Air Act (Act).

The intent of today's rulemaking is to present a discussion of the material submitted by the WDNR and to provide an opportunity for public comment on the regulations and on USEPA's proposed action.

**DATE:** Comments on this revision and on USEPA's proposed action must be received by January 26, 1989.

**ADDRESSES:** Copies of the SIP revision, the technical support document, and other materials related to this rulemaking, are available at the following addresses for review: (It is recommended that you telephone Uylaine E. McMahan, at (312) 886-6031, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 S. Dearborn Street, Chicago, Illinois 60604

Wisconsin Department of Natural Resources, Bureau of Air Management (Air/3), 101 South Webster, Madison, Wisconsin 53707.

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.) Gary Gulezian, Chief, Regulation Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 S. Dearborn Street, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** Uylaine E. McMahan, (312) 886-6031.

#### SUPPLEMENTARY INFORMATION: Background

On March 27, 1984, Wisconsin Department of Natural Resources (WDNR) requested that USEPA revise the air quality attainment status designations for several areas in Marathon County (the City of Rothschild, part of the Towns of Weston and Rib Mountain) from attainment to primary and secondary nonattainment of the SO<sub>2</sub> National Ambient Air Quality Standards (NAAQS). This request was based on modeling and monitoring data that showed violations of the primary and secondary NAAQS in these three areas. Modeling results were used by the WDNR to determine the boundaries of the proposed nonattainment areas and these boundaries were submitted with the redesignation request.

On October 9, 1985 (50 FR 41139), USEPA designated the City of Rothschild as primary and secondary nonattainment for SO<sub>2</sub>, and part of the Towns of Weston and Rib Mountain as secondary nonattainment for SO<sub>2</sub>, under section 107 of the Clean Air Act. In that notice of final rulemaking, USEPA stated that the State of Wisconsin had 1 year to develop and submit a SIP revision meeting the requirements contained in section 110 and Part D of the Clean Air Act, pursuant to sections 171 through 177 of the Clean Air Act, 42 U.S.C. 7501-07, for the Rothschild, Weston, and Rib Mountain SO<sub>2</sub> nonattainment areas. USEPA also stated that, to obtain approval, the plans must provide for attainment of the SO<sub>2</sub> NAAQS as expeditiously as practicable, but no later than October 9, 1990.<sup>1</sup>

On January 28, 1985, the WDNR submitted Section NR 154.12(10) of the Wisconsin Administrative Code, Rothschild RACT Sulfur Limitations, as a revision to the Wisconsin SO<sub>2</sub> SIP. Additional information pertaining to the revision was submitted on November 18, 1985, January 14, 1986, and June 24, 1986. The revision is identified as Natural Resources Board Order A-10-84, and sets emission limits for sources in the City of Rothschild and the Town of Weston, specifically the Weyerhaeuser Paper Company and the Reed-Lignin Company, respectively, which are the major SO<sub>2</sub> sources impacting the Rothschild area. This SIP revision does not set emission limits for the Town of Rib Mountain, which is impacted by the Weston Power Plant, because: (1) The

<sup>1</sup> See "Guidance Document for Correction of Part D SIPs for Nonattainment Areas," January 27, 1984, Office of Air Quality Planning and Standards, USEPA, Research Triangle Park, North Carolina, prepared as a supplement to the "Policy for Correction of Part D SIPs for Nonattainment Areas" (November 2, 1983; 48 FR 50686-50697).

Rib Mountain, secondary nonattainment area is geographically separate from the Rothschild and Western nonattainment areas; and, (2) the emissions from the Weston Power Plant do not impact the City of Rothschild or the Town of Weston. The emission limits for the Town of Rib Mountain are being prepared in conjunction with a new Wisconsin state-wide SO<sub>2</sub> rule, which USEPA will address in a separate rulemaking action.

The Rothschild SO<sub>2</sub> SIP revision sets a compliance schedule for meeting the emission limits, with compliance to be based on the current SIP test method (i.e., stack test). Although, the WDNR submitted a compliance plan for Reed-Lignin on November 18, 1985, and a compliance plan for Weyerhaeuser on January 14, 1986, these plans will not be included in the SIP. The emission limits, and compliance schedule, requirements contained in NR 154.12(10)(a) and NR 154.12(10)(b), respectively, were enacted in Wisconsin by means of Natural Resources Board Order Number A-10-84. A public hearing on the revision was held in Wausau, Wisconsin on May 24, 1984.

The WDNR's SIP revision request, the associated Board Order, and the results of USEPA's review of these documents, are available for public inspection at the Region V office listed above.

#### Proposed Rothschild SO<sub>2</sub> SIP Revision

If approved, Section NR 154.12(10)(a) will modify the SIP to limit SO<sub>2</sub> emissions from any pulp, paper, or pulp and paper mill and from any calcium-bases spent sulfate liquor processing facility in the City of Rothschild and the Town of Weston. At present, there are only two such facilities, the Weyerhaeuser Paper Company, a pulp and papermill, and the Reed-Lignin Company, a sulfate liquor processing facility, both located in the City of Rothschild.

The proposed Weyerhaeuser emission limits include the following sources: fossil fuel-fired boilers, pulp digesters, acid towers (including one being loaded with stone) and all other sources. These limits are given below:

Source	Emission limit
Fossil fuel-fired boiler.....	0.52 lbs SO <sub>2</sub> .
Fossil fuel-fired boiler which can also burn wood.....	0.025 lbs SO <sub>2</sub> /MMBTU.
Pulp digesters.....	4,050 lbs SO <sub>2</sub> /3 hrs. 16,200 lbs SO <sub>2</sub> /24 hrs.
Acid tower being loaded with stone.	52 lbs SO <sub>2</sub> /day during which stone is loaded.

Source	Emission limit
Acid tower not being loaded, acid plant vent, and Kimberly Clark contact cooler.	16.0 lbs SO <sub>2</sub> /hr.
From all other sources.....	0.2 lbs SO <sub>2</sub> /hr.

The proposed emission limits for Reed-Lignin, as incorporated into the Wisconsin Administrative Code, are as follows:

Source	Emission limit
Evaporator with emission point equal to or greater than 87 feet above ground..	16.2 lbs SO <sub>2</sub> /hr.
Evaporator with emission point less than 87 feet above ground.	10.6 lbs SO <sub>2</sub> /hr.
From all other sources.....	4.0 lbs SO <sub>2</sub> /hr.

WDNR has informed USEPA that Reed-Lignin is planning to increase the evaporator stack height to 87 feet from 54.5 feet; and thus, the State of Wisconsin has only submitted technical support for the 16.2 lbs of SO<sub>2</sub>/hour emission limit with an emission point of 87 feet or more. Therefore, USEPA is proposing to approve the 16.2 lbs of SO<sub>2</sub>/hour emission limit, with the understanding that Reed-Lignin will raise the stack to 87 feet or prior to final approval of this SIP revision. USEPA is not proposing to approve the 10.6 lbs of SO<sub>2</sub>/hour because it no longer reflects the intent of either WDNR or the source.

The State's attainment demonstrations was based on modeling results using the Industrial Source Complex (ISC), model, and 5 years (1973-1977) or meteorological data from the National Weather Service Stations in Wausau and Green Bay. The emission source inventory data used in modeling analysis included the emission rates and source parameters for the three major SO<sub>2</sub> sources located in the Rothschild area: Weyerhaeuser, Reed-Lignin, and the Weston Power Plant. Based on the modeling analysis, the WDNR calculated the emission limits for Weyerhaeuser and Reed-Lignin that are necessary to achieve the SO<sub>2</sub> NAAQS for the Rothschild and Weston nonattainment areas. Emission limits for the Weston Power Plant (Rib Mountain nonattainment area) will be established as part of the Wisconsin Statewide SO<sub>2</sub> Rule. USEPA has reviewed the State's technical support document which was submitted to USEPA with the SIP revision request. USEPA has determined that limiting the SO<sub>2</sub> emissions from Weyerhaeuser and Reed-Lignin will ensure attainment of the SO<sub>2</sub> NAAQS in the Rothschild nonattainment area. The



determination was based on a block average interpretation of the SO<sub>2</sub> NAAQS.

The modeling techniques used in the demonstration supporting this revision are based on modeling guidance in place at the time that the analysis was performed, i.e., the USEPA "Guideline on Air Quality Models" (1978). Since that time, revisions to modeling guidance have been promulgated by USEPA, i.e., the USEPA Guideline on Air Quality Models (Revised)" (1986) and "Supplement A to the Guideline on Air Quality Models (Revised)" (1987). Because the modeling analysis was completed prior to promulgation of the revision guidance, USEPA accepts the analysis.

USEPA has also reviewed the compliance schedule and the compliance plans submitted by each of the sources. The compliance schedule identified at NR 154.12(10)(b) sets final compliance dates for each of the sources identified at NR 154.12(10)(a). USEPA proposes to approve this timetable because it is consistent with USEPA policy and the Clean Air Act. Compliance with the revised regulations will be based on the current federally approved SIP test method (i.e., stack test).

On July 8, 1985 (50 FR 27892), USEPA promulgated Stack Height Rules

pursuant to section 123 of the Clean Air Act, as amended. The Rothschild SO<sub>2</sub> SIP revision was reviewed in light of the new stack height rule, as well as subsequent guidance pertaining to the new rule. USEPA has determined that there are no stack height issues in this SIP revision, because neither source has SO<sub>2</sub> emissions equal to or greater than 5000 tons per year.

USEPA has also reviewed this action with respect to the Prevention of Significant Deterioration regulations. Since the SO<sub>2</sub> baseline date has not been triggered for Marathon County, there is no need to assess increment consumption.

USEPA proposes to approve the addition of the Rothschild RACT Sulfur Limitations, Section NR 154.12(10) of the Wisconsin Administrative Code, to the Wisconsin SO<sub>2</sub> SIP. These limits pertain to two sources, the Weyerhaeuser and the Reed-Lignin Companies. USEPA is proposing to approve the emission limits presented above for both companies, with one exception. USEPA is proposing to approve the 16.2 lbs of SO<sub>2</sub>/hour emission limit for the evaporators at Reed-Lignin, with the condition that Reed-Lignin raise the evaporator stack to 87 feet, or more, prior to USEPA's final rulemaking action. However, USEPA is not proposing to approve the 10.6 lbs of SO<sub>2</sub>/hour emission limit for

Reed-Lignin because it no longer reflects the intent of WDNR or Reed-Lignin. Control of SO<sub>2</sub> emissions from these two sources will assure attainment and maintenance of the SO<sub>2</sub> NAAQS in the Rothschild and Weston nonattainment areas. In addition, the compliance schedule and compliance plan requirements set forth in the rule are consistent with Clean Air Act requirements. Therefore, USEPA is proposing to approve this revision.

Interested persons are invited to submit comments on this action. USEPA will consider all comments received by January 26, 1989.

Under 5 U.S.C. 605(b), the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Authority: 42 U.S.C. 7401-7642.

Dated: September 16, 1988.

[Editorial Note: This document was received at the Office of the Federal Register on December 21, 1988]

Peter Wise,

Acting Regional Administrator.

[FR Doc. 88-29589 Filed 12-23-88; 8:45 am]

BILLING CODE 6560-50-M

## Notices

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### DEPARTMENT OF AGRICULTURE

#### Farmers Home Administration

#### Housing Demonstration Program

**AGENCY:** Farmers Home Administration, USDA.

**ACTION:** Notice of Housing Demonstration Program.

**SUMMARY:** The Farmers Home Administration (FmHA) of the U.S. Department of Agriculture (USDA) is accepting in fiscal year 1989, proposals for a Housing Demonstration program under section 506(b) Title V of the Housing Act. Under this section, FmHA may provide loans for innovative housing units and systems which do not meet existing published standards, rules, regulations, or policies. The intended effect is to increase the availability of affordable housing for low-income families, through innovative designs and systems.

**FOR FURTHER INFORMATION CONTACT:** Mathias J. Felber, Branch Chief, Special Programs Branch, Single Family Housing Processing Division, Farmers Home Administration, 14th and Independence Avenue, SW., Room 5334, South Building, Washington, DC 20250, telephone 202-382-1474 or Ray McCracken, Senior Loan Officer, Special Programs Branch, Single Family Housing Processing Division, Farmers Home Administration, 14th and Independence Avenues, SW., Room 5334, South Building, Washington, DC 20250, Telephone 202-382-1486.

**SUPPLEMENTARY INFORMATION:** Under current standards, regulations, and policies, some low-income rural families lack sufficient incomes to qualify for loans to obtain adequate housing. Section 506(b) of Title V of the Housing Act of 1949 authorizes a housing demonstration program that could result in housing that these families can afford. The Congress of the United States made

two conditions: (1) That the health and safety of the population of the areas in which the demonstrations are carried out will not be adversely affected, and (2) that the aggregate expenditures for the demonstration may not exceed \$10 million in any fiscal year.

FmHA State Directors are authorized in fiscal year 1989 to continue to accept proposed demonstration concept proposals from nonprofit organizations, profit organizations and individuals as announced in 51 FR 19240 on May 28, 1986. The type of concepts demonstrated could include but not be limited to the following:

1. Subdivisions that include innovative approaches to site planning, foundation systems, streets layout, sidewalk, set backs, lot sizes, utilities, accessory structures and related facilities, landscaping, etc.

2. Housing systems—new ideas for housing design that reduce the cost and time of construction.

3. Housing that includes built-in furniture.

4. Subdivisions with high density housing that contain supporting facilities such as a day care center that are maintained by a professional manager with oversight by a homeowners association.

The State Directors will evaluate the proposals on a first-come first-served basis. An acceptable proposal is to be sent to the National Office for the Assistant Administrator, Housing concurrence before the State Director may approve it. If the proposal is not selected, the State Director will so notify the applicant, in writing, giving specific reasons why the proposal was not selected.

The funds for the demonstration program are section 502 funds, and are available to housing applicants that may wish to purchase an approved demonstration dwelling. However, there is no guarantee that a market exists for demonstration dwellings and applicants for such a section 502 RH loan must be eligible for the program in all other respects.

This program activity is listed in the Catalog of Federal Domestic Assistance under No. 10.410. For the reasons set forth in final rule related to Notice 7 CFR Part 3015, Subpart V (48 FR 29115, June 24, 1983) and FmHA Instruction 1940-J, "Intergovernmental Review of Farmers Home Administration Programs

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and Activities" (December 23, 1983) this program/activity is excluded from the scope of Executive Order 12372 which requires the intergovernmental consultation with state and local officials.

All interested parties must make a written request for a proposal package. The request must be made to the State Director in the state in which the proposal will be submitted for evaluation. The government will not reimburse or be liable for any expenses incurred by respondents in the development and submission of applications. Following is a list of State Directors and their addresses:

#### Alabama

State/Director, Farmers Home Administration, Room 717, Aronov Building, 474 South Court Street, Montgomery, Alabama 36104

#### Alaska

State Director, Farmers Home Administration, 634 South Bailey, Suite 103, Palmer, Alaska 99645

#### Arizona

State Director, Farmers Home Administration, 201 East Indianola, Suite 275, Phoenix, Arizona 85012

#### Arkansas

State Director, Farmers Home Administration, 700 W. Capitol, Post Office Box 2778, Little Rock, Arkansas 72203

#### California

State Director, Farmers Home Administration, Suite F, 194 West Main Street, Woodland, California 95695-2915

#### Colorado

State Director, Farmers Home Administration, Room 231, #1 Diamond Plaza, 2490 West 28th Avenue, Denver, Colorado 80211

#### Delaware/Maryland

State Director, Farmers Home Administration, 2319 South DuPont Highway, Dover, Delaware 19901

#### Florida

State Director, Farmers Home Administration, Room 214, Federal Building, 410 SE. First Avenue, Gainesville, Florida 32602

#### Georgia

State Director, Farmers Home Administration, Stephens Federal Building, 355 E. Hancock Street, Athens, Georgia 30610



**Hawaii**  
State Director, Farmers Home Administration, Room 311, Federal Building, 154 Wainanue Avenue, Hilo, Hawaii 96720

**Idaho**  
State Director, Farmers Home Administration, 3232 Elder Street, Boise, Idaho 83705

**Illinois**  
State Director, Farmers Home Administration, Illini Plaza, Suite 103, 1817 South Neil Street, Champaign, Illinois 61820

**Indiana**  
State Director, Farmers Home Administration, Suite 1700, 5610 Crawfordsville Road, Indianapolis, Indiana 46224

**Iowa**  
State Director, Farmers Home Administration, Room 873, Federal Building, 210 Walnut Street, Des Moines, Iowa 50309

**Kansas**  
State Director, Farmers Home Administration, Room 178, Federal Building, 444 South East Quincy Street, Topeka, Kansas 66683

**Kentucky**  
State Director, Farmers Home Administration, 333 Waller Avenue, Lexington, Kentucky 40504

**Louisiana**  
State Director, Farmers Home Administration, 3727 Government Street, Alexandria, Louisiana 71302

**Maine**  
State Director, Farmers Home Administration, USDA Office Building, Orono, Maine 04473

**Mass/Conn./RI**  
State Director, Farmers Home Administration, 451 West Street, Amherst, Massachusetts 01002

**Michigan**  
State Director, Farmers Home Administration, Room 209, 1405 South Harrison Road, East Lansing, Michigan 48823

**Minnesota**  
State Director, Farmers Home Administration, 252 Federal Office Building and U.S. Courthouse, 316 N. Robert Street, St. Paul, Minnesota 55101

**Mississippi**  
State Director, Farmers Home Administration, Suite 831, Federal Building, 100 West Capital Street, Jackson, Mississippi 39269

**Missouri**  
State Director, Farmers Home Administration, 555 Vandiver Drive, Columbia, Missouri 65202

**Montana**  
State Director, Farmers Home Administration, Room 324, Federal Building, 10 East Babcock Street, Post Office Box 850, Bozeman, Montana 59715

**Nebraska**  
State Director, Farmers Home Administration, Room 308, Federal Building, 100 Centennial Mall North, Lincoln, Nebraska 68508

**New Jersey**  
State Director, Farmers Home Administration, 100 High, Suite 100, Mount Holly, New Jersey 08060

**New Mexico**  
State Director, Farmers Home Administration, Room 3414, Federal Building, 517 Gold Avenue, SW., Albuquerque, New Mexico 87102

**New York**  
State Director, Farmers Home Administration, Room 871, James M. Hanley Federal Building, 100 S. Clinton Street, Syracuse, New York 13260

**North Carolina**  
State Director, Farmers Home Administration, Room 525, 310 New Bern Avenue, Raleigh, North Carolina 27601

**North Dakota**  
State Director, Farmers Home Administration, Room 208, Federal Building, Third and Rosser, Post Office Box 1737, Bismark, North Dakota 58502

**Ohio**  
State Director, Farmers Home Administration, Room 507, Federal Building, 200 North High Street, Columbus, Ohio 43215

**Oklahoma**  
State Director, Farmers Home Administration, Agricultural Center Office Building, Stillwater, Oklahoma 74074

**Oregon**  
State Director, Farmers Home Administration, Room 1590, Federal Building, 1220 SW. 3rd Avenue, Portland, Oregon 97204

**Pennsylvania**  
State Director, Farmers Home Administration, Room 730, Federal Building, Post Office Box 905, Harrisburg, Pennsylvania 17108

**Puerto Rico**  
State Director, Farmers Home Administration, Room 823, Federico Degetau, Federal Building, Carlos Chardon Street, Hato Rey, Puerto Rico 00918

**South Carolina**  
State Director, Farmers Home Administration, Strom Thurmond Federal Building, Room 1007, 1835 Assembly Street, Columbia, South Carolina 29201

**South Dakota**  
State Director, Farmers Home Administration, Room 308, Federal Building, 200 4th Street, SW., Huron, South Dakota 57350

**Tennessee**  
State Director, Farmers Home Administration, Room 538, Federal Building, 801 Broadway, Nashville, Tennessee 37203

**Texas**  
State Director, Farmers Home Administration, Suite 102, Federal Building, 101 South Main, Temple, Texas 76501

**Utah/Nevada**  
State Director, Farmers Home Administration, Room 5438, Wallace F. Bennett Federal Building, 125 South State Street, Salt Lake City, Utah 84138

**Vermont/N.H.**  
State Director, Farmers Home Administration, 141 Main Street, Post Office Box 588, Montpelier, Vermont 05602

**Virginia**  
State Director, Farmers Home Administration, Room 8213, Federal Building, 400 North Eighth Street, Richmond, Virginia 23240

**Washington**  
State Director, Farmers Home Administration, Room 319, Federal Office Building, Post Office Box 2427, Wenatchee, Washington 98807

**West Virginia**  
State Director, Farmers Home Administration, 75 High Street, Post Office Box 678, Morgantown, West Virginia 26505

**Wisconsin**  
State Director, Farmers Home Administration, 1257 Main Street, Stevens Point, Wisconsin 54481

**Wyoming**  
State Director, Farmers Home Administration, Room 1005, Federal Building, 100 East B. Street, Casper, Wyoming 82602  
Authorities: 42 USC 1480, 7 CFR 2.23, 7 CFR 2.70.  
Dated: December 5, 1988.

**-Neal Sox Johnson,**  
*Acting Administrator Farmers Home Administration.*  
[FR Doc. 88-29636 Filed 12-23-88; 8:45 am]  
BILLING CODE 3410-07-M

# ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

## Meeting

**AGENCY:** Architectural and Transportation Barriers Compliance Board (ATBCB).

**ACTION:** Notice of ATBCB Meeting.

**SUMMARY:** The Architectural and Transportation Barriers Compliance Board (ATBCB) has scheduled a meeting to be held from 9:00 AM to 3:00 PM, on Wednesday, January 11, 1989, in the Prince of Wales Room, New Orleans Hilton Riverside and Towers Hotel, #2 Poydras Street, New Orleans, Louisiana.

**ITEMS ON THE AGENDA:** Public Affairs Plan; FY 1988 Annual Report to Congress; process for the selection of the General Counsel (this portion of the meeting will be in Closed Session); Freedom of Information Act (FOIA); compliance and enforcement report.

A public forum will be held immediately after the business portion of the meeting. Public participation is invited to discuss the issues relevant to the Architectural Barriers Act and the ATBCB. Individuals or organizations interested in testifying must contact the Board for further information.

**DATE:** Wednesday, January 11, 1989, 9:00 a.m.-3:00 p.m.

**ADDRESS:** Prince of Wales Room, New Orleans Hilton Riverside and Towers Hotel, #2 Poydras Street, New Orleans, Louisiana.

The Planning and Budget Committee and the Executive Committee of the ATBCB will meet on Tuesday, January 11, 1989, from 9:00 AM to 4:00 PM in the Prince of Wales Room, New Orleans Hilton Riverside and Towers Hotel, #2 Poydras Street, New Orleans, Louisiana. Some portions of the committee meetings will be closed.

**FOR FURTHER INFORMATION CONTACT:** Barbara A. Gilley, Administrative Officer, (202) 653-7834 (voice or TDD).

Lawrence W. Roffee,  
*Executive Director.*  
[FR Doc. 88-29596 Filed 12-23-88; 8:45 am]  
BILLING CODE 6820-SP-M

## DEPARTMENT OF COMMERCE

### Bureau of Export Administration

[Case No. OEE-1-88]

### Order Renewing Temporary Denial of Export Privileges; Wilfried Lange et al.

In the Matter of: Wilfried Lange, individually and doing business as Purchasing Pool Company and PPC Computer Handles GmbH, AM Stelg 3, 8913 Schondorf, Federal Republic of Germany, Respondents.

The Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (Department), pursuant to the provisions of § 788.19 of the Export Administration Regulations, 15 CFR Parts 768-799 (the

Regulations),<sup>1</sup> issued pursuant to the Export Administration Act of 1979, 50 U.S.C. app. 2401-2420 (1982 and Supp. III 1985), as amended by Pub. L. 100-418, 102 Stat. 1107 (August 23, 1988) (the Act), has asked the Assistant Secretary for Export Enforcement<sup>2</sup> to renew an order temporarily denying all United States export privileges to Wilfried Lange (Lange), individually and doing business as Purchasing Pool Company (PPC) and PPC Computer Handles GmbH (PCH). The initial order was issued on April 20, 1988 (53 Fed. Reg. 15253, April 28, 1988). It was renewed effective June 20, 1988 (53 FR 23294, June 21, 1988), and was renewed again on August 19, 1988 (53 FR 32639, August 26, 1988) and on October 18, 1988 (53 FR 43249, October 28, 1988).

In its renewal request of November 25, 1988, the Department states that, as a result of an ongoing investigation, it continues to have reason to believe that, on numerous occasions since the end of 1985, Lange and PPC have reexported, without the required reexport authorizations from the Department, U.S.-origin computers which are controlled for reasons of national security from West Germany to Austria, Yugoslavia and Hungary. The Department is continuing to try to obtain documents that will further substantiate its belief.

The Department also believes that, in connection with its investigation into the trade-related activities of Lange and PPC, Lange and PPC have provided the Department with false and misleading information. Specifically, based on additional documentation the Department has obtained since it made its initial request, the Department has reason to believe that Lange and PPC have provided it with false invoices in an effort to hide the fact that they have reexported certain controlled U.S.-origin commodities from West Germany without the required reexport authorizations.

The Department further states that its investigation continues to give it reason to believe that a contract for two U.S.-origin computers which are controlled for reasons of national security presently exists between Lange and PPC and a Czechoslovakian foreign trading

firm, and that, in a possible attempt to fulfill that contract, Wilfried Lange, doing business under the new name of PPC Computer Handles GmbH, recently tried to obtain two U.S.-origin computers.

The Department states that, viewed as a whole, the above-described events concerning the past activities of Lange, PPC and PCH demonstrate that they are involved in a scheme to obtain controlled U.S.-origin commodities, lawfully or otherwise, take possession of them in West Germany and then reexport them, oftentimes to proscribed destinations, without obtaining the required reexport authorizations. Accordingly, the Department believes that the activities of Lange, PPC and PCH show a pattern of disregard for the Act and the Regulations.

The Department continues to believe that the past activities of Lange, PPC and PCH establish that the violations of the Act and the Regulations which they are suspected of having committed and which the Department is presently investigating were deliberate and covert and are likely to occur again unless appropriate action is taken to reduce the likelihood that Lange, PPC and PCH can continue to acquire U.S.-origin goods either inside or outside of the United States.

Furthermore, the Department continues to believe that, in order to reduce the likelihood that Lange, PPC and PCH will continue to engage in activities which are in violation of the Act and the Regulations, a temporary denial order naming Wilfried Lange, Purchasing Pool Company and PPC Computer Handles GmbH<sup>3</sup> is necessary to give notice to companies in the United States and abroad that they should cease dealing with these parties in transactions involving U.S.-origin goods.

Therefore, based on the showing made by the Department in its request for renewal, which neither Lange, PPC nor PCH has opposed, I find that an order temporarily denying export privileges to Lange, PPC and PCH is necessary in the public interest to prevent an imminent violation of the Act and the Regulations and to give notice to companies in the United States and abroad to cease dealing with Lange, PPC and PCH in goods and technical data subject to the Act and the regulations in

<sup>1</sup> Effective October 1, 1988, the Export Administration Regulations were redesignated as 15 CFR Parts 768 through 799 (53 FR 37751, September 28, 1988). The transfer merely changed the first number of each Part from "3" to "7." Until such time as the Code of Federal Regulations is republished, the Regulations may be found in 15 CFR Parts 368-399 (1988).

<sup>2</sup> In accordance with Department Organization Order 50-1, dated March 23, 1988, the Assistant Secretary for Export Enforcement is now the Department official who issues temporary denial orders.

<sup>3</sup> To date, PPC Computer Handles GmbH has not been subject to a temporary denial order. However, since the department has reason to believe that Wilfried Lange is now doing business as PPC Computer Handles GmbH, the Department is hereby also temporarily denying the U.S. export privileges of that company.



order to reduce the substantial likelihood that Lange, PPC and PCH will continue to engage in activities which are in violation of the Act and the Regulations.

Accordingly, It is hereby Ordered

I. All outstanding validated export licenses in which Wilfried Lange, Purchasing Pool Company or PPC Computer Handles GmbH appear or participate, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Lange's, PPC's and PCH's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. Respondents Wilfried Lange, Purchasing Pool Company and PPC Computer Handles GmbH, all with an address at AM Stelg 3, 8913 Schondorf, Federal Republic of Germany, their successors or assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported or to be exported from the United States, in whole or in part, or that are otherwise subject to the regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (a) As a party or as a representative of a party to any export license application submitted to the Department, (b) in preparing or filing with the Department any export license application or reexport authorization, or any document to be submitted therewith, (c) in obtaining or using any validated or general export license or other export control document, (d) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported, and (e) in financing, forwarding, transporting, or other servicing of such commodities or technical data. Such denial of export privileges shall extend only to those commodities and technical data which are subject to the Act and the Regulations.

III. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or

business organization with which Lange, PPC or PCH is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of trade or related services.

IV. No person, firm, corporation, partnership or other business organization, whether in the United States or elsewhere, without prior disclosure to and specific authorization from the Office of Export Licensing shall, with respect to U.S.-origin commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with Lange, PPC or PCH or any related party, or whereby Lange, PPC or PCH or any related party may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly: (a) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for Lange, PPC or PCH or any related party denied export privileges; or (b) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any export, reexport, transshipment, or diversion of any commodity or technical data exported or to be exported from the United States.

V. In accordance with the provisions of § 788.19(e) of the Regulations, Lange, PPC or PCH may, at any time, appeal this temporary denial order by filing with the Office of Administrative Law Judges, U.S. Department of Commerce, Room H-6716, 14th Street and Constitution Avenue, NW., Washington, DC 20230, a full written statement in support of the appeal.

VI. This order shall remain in effect for 60 days.

VII. In accordance with the provisions of § 788.19(d) of the Regulations, the Department may seek renewal of this temporary denial order by filing a written request not later than 20 days before the expiration date. Lange, PPC or PCH may oppose a request to renew this temporary denial order by filing a written submission with the Assistant Secretary for Export Enforcement, which be received not later than seven days before the expiration date of this order.

A copy of this order shall be served

on Lange, PPC and PCH and this order shall be published in the Federal Register.

Effective Date: December 17, 1988.

G. Philip Hughes,

Assistant Secretary for Export Enforcement.

[FR Doc. 88-29602 Filed 12-23-88; 8:45 am]

BILLING CODE 3510-DT-M

#### National Oceanic and Atmospheric Administration

##### Gulf of Mexico Fishery Management Council; Public Hearings

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of public hearings and request for comments.

SUMMARY: The Gulf of Mexico and South Atlantic Fishery Management Councils (Councils) will hold public hearings on Draft Amendment 2 to the Fishery Management Plan for Spiny Lobster in the Gulf of Mexico and South Atlantic. The Councils, through the draft amendment, are proposing a regulatory amendment procedure under which the State of Florida could propose certain types of rules directly to the Director, Southeast Region, NMFS, for implementation in Federal waters.

DATES: The public hearings will begin at 7:00 p.m., and will adjourn at 10:00 p.m., on Wednesday, January 11, 1989, and Thursday, January 12, 1989. Public comment period ends January 13, 1989.

ADDRESSES: The public hearings will take place January 11, 1989, at the City Commissioners' Meeting Room, 310 Fleming Street, Key West, Florida, and on January 12 at the Marathon High School Cafeteria, 350 Sombroero Beach Road, Marathon, Florida. Individuals and organizations unable to attend the hearings may comment in writing to: Wayne E. Swingle, Gulf of Mexico Fishery Management Council, 5401 West Kennedy Boulevard, Suite 881, Tampa, FL 33609.

FOR FURTHER INFORMATION CONTACT: Wayne E. Swingle, Gulf of Mexico Fishery Management Council, 813-228-2815.

Dated: December 20, 1988.

Richard H. Schaefer,

Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 88-29616 Filed 12-23-88; 8:45 am]

BILLING CODE 3510-22-M

#### Mid-Atlantic Fishery Management Council and the South Atlantic Fishery Management Council; Atlantic Swordfish Regulatory Amendment; Public Hearings

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of public hearings and request for comments.

SUMMARY: The Mid-Atlantic and the South Atlantic Fishery Management Councils will hold public hearings and provide comment periods to solicit public input into the proposed regulatory amendment to the Atlantic Swordfish Fishery Management Plan. A measure to require mandatory dealer reporting will be discussed. Dealers would be required to provide NMFS with weight and price information for swordfish and related bycatch species, and pertinent information on landings.

DATES: The hearing scheduled by the Mid-Atlantic Fishery Management Council will be held Wednesday, January 4, 1989, at 7:30 p.m. The South Atlantic Fishery Management Council has scheduled a hearing for Tuesday, January 10, 1989, at 7:00 p.m. The public comment period will close January 31, 1989.

ADDRESSES: The Mid-Atlantic Fishery Management Council hearing scheduled for January 4 will take place at the Guest Quarters Suite Hotel, near Baltimore/Washington International Airport, 1300 Concourse Drive, Linthicum, Maryland.

The South Atlantic Fishery Management Council hearing scheduled for January 10 will take place at the Broward County Governmental Center, 115 South Andrews Avenue, Room 515, Ft. Lauderdale, Florida.

Written comments should be sent to John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115 Federal Building, 300 South New Street, Dover, DE 19901; or Robert K. Mahood, Executive Director, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699.

FOR FURTHER INFORMATION CONTACT: John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, 302-674-2331, concerning the hearing scheduled by the Mid-Atlantic Fishery Management Council. Contact Carrie R.F. Knight, Public Information Specialist, South Atlantic Fishery Management Council, 803-571-4366, concerning the hearing scheduled by the South Atlantic Fishery Management Council.

Date: December 20, 1988.

Richard H. Schaefer,

Director of Office of Fisheries, Conservation and Management, National Marine Fisheries Service.

[FR Doc. 88-29617 Filed 12-23-88; 8:45 am]

BILLING CODE 3510-22-M

#### [Modification No. 1 to Permit No. 502]

##### Marine Mammals; Modification of Permit; Dr. Louis Rigley (P270A)

Notice is hereby given that pursuant to the provisions of § 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216), Scientific Research Permit No. 502 issued to Dr. Louis Rigley, Division of Natural and Mathematical Sciences, Dickinson State College, Dickinson, North Dakota 58601, on July 2, 1985 (50 FR 28239) is modified in the following manner:

Section B.7 is replaced by:

7. This Permit is valid with respect to the taking authorized herein until December 31, 1990.

This modification becomes effective on December 31, 1988.

Documents submitted in connection with the above modification are available for review in the following offices:

Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East West Highway, Room 7324, Silver Spring, Maryland 20910; Regional Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702; and Regional Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way, NE., BIN C15700, Seattle, Washington 98115.

Date: December 20, 1988.

Nancy Foster,

Director, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service.

[FR Doc. 88-29673 Filed 12-23-88; 8:45 am]

BILLING CODE 3510-22-M

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

##### Conversion of Import Limits and Charges Based on the Implementation of the Harmonized System

December 21, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs concerning the conversion of limits and charges.

EFFECTIVE DATE: January 1, 1989.

FOR FURTHER INFORMATION CONTACT: Ross Arnold and Diana Solkoff, International Trade Specialists, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

SUPPLEMENTARY INFORMATION: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

On January 1, 1989 the United States Government will implement the Harmonized Tariff Schedule (HTS). As a result, all import limits and charges are being converted to metric units. For your reference, the non-calendar year agreements include those agreements with Bangladesh, Brazil, Bulgaria, Colombia, Czechoslovakia, the Dominican Republic, Indonesia, Mauritius, Panama, Peru, Sri Lanka, Turkey and Uruguay. The conversion factors, in addition to changes in the coverage of certain categories, are described in the letter published below.

James H. Babb,

Chairman, Committee for the Implementation of Textile Agreements.

#### Committee For The Implementation of Textile Agreements

December 21, 1988

Commissioner of Customs,  
Department of the Treasury,  
Washington, DC 20229.

Dear Mr. Commissioner: Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed, effective on January 1, 1989, to convert the units of measure for all import limits and import charges to metric units in order to facilitate implementation of the textile and apparel import restraint program and the non-calendar year agreements. These changes are based upon the implementation of the Harmonized System on January 1, 1989.

The units of measure shall be converted as follows:

1. Square yards or square meters equivalent shall be converted to square meters or square yards equivalent, respectively, at a rate of 0.83612736.

2. Pounds shall be converted to kilograms at a rate of 0.45359237.

3. Square feet shall be converted to square meters at a rate of 0.09290304.

New categories are 237, 439 and 839 (Category 237 is currently 337 and 637.) A description of the content of these categories is published in the CORRELATION.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs



exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
James H. Babb,  
Chairman, Committee for the Implementation of  
Textile Agreements.

[FR Doc. 88-29614 Filed 12-23-88; 8:45 am]

BILLING CODE 3510-DR-M

#### COMMITTEE FOR PURCHASE FROM THE BLIND AND OTHER SEVERELY HANDICAPPED

##### Procurement List 1989; Proposed Additions

**AGENCY:** Committee for Purchase from  
the Blind and Other Severely  
Handicapped.

**ACTION:** Proposed additions to  
procurement list.

**SUMMARY:** The Committee has received  
a proposal to add to Procurement List  
1989 commodities to be produced by  
workshops for the blind or other  
severely handicapped.

Comments must be received on or  
before: January 24, 1989.

**ADDRESS:** Committee for Purchase from  
the Blind and Other Severely  
Handicapped, Crystal Square 5, Suite  
1107, 1755 Jefferson Davis Highway,  
Arlington, Virginia 22202-3509.

**FOR FURTHER INFORMATION CONTACT:**  
Beverly Milkman (703) 557-1145.

**SUPPLEMENTARY INFORMATION:** This  
notice is published pursuant to 41 U.S.C.  
47(a)(2) and 41 CFR 51-2.8. Its purpose is  
to provide interested persons an  
opportunity to submit comments on the  
possible impact of the proposed actions.

If the Committee approves the  
proposed additions, all entities of the  
Federal Government will be required to  
procure the commodities listed below  
from workshops for the blind or other  
severely handicapped.

It is proposed to add the following  
commodities to Procurement List 1989,  
which was published on November 15,  
1988 (53 FR 46018):

##### Pants, Woman's

8410-01-189-9909	8410-01-189-9910
8410-01-189-9911	8410-01-189-9912
8410-01-189-9913	8410-01-189-9914
8410-01-189-9915	8410-01-189-9919
8410-01-189-9920	8410-01-189-9921
8410-01-189-9916	8410-01-189-9917
8410-01-190-9274	8410-01-190-9271
8410-01-190-9272	8410-01-190-9273
8410-01-190-9278	8410-01-190-9277
8410-01-189-9918	8410-01-189-9922
8410-01-189-9923	8410-01-189-9924
8410-01-189-9925	8410-01-190-4257
8410-01-190-9278	8410-01-190-9279
8410-01-190-9280	8410-01-190-9281

8410-01-189-9928	8410-01-190-9275
8410-01-189-9927	8410-01-189-9928
8410-01-189-9929	8410-01-189-9930
8410-01-189-9931	8410-01-189-9932

##### Topper, Woman's

8410-01-187-9636	8410-01-187-9637
8410-01-187-9628	8410-01-187-9629
8410-01-187-9630	8410-01-187-9631
8410-01-187-9642	8410-01-187-9643
8410-01-187-9644	8410-01-187-9645
8410-01-187-9632	8410-01-187-9633
8410-01-187-9634	8410-01-187-9635
8410-01-187-9650	8410-01-187-9651
8410-01-187-9652	8410-01-187-9653
8410-01-187-9638	8410-01-187-9639
8410-01-187-9640	8410-01-187-9641
8410-01-187-9658	8410-01-187-9659
8410-01-187-9710	8410-01-187-9660
8410-01-187-9661	8410-01-187-9662
8410-01-187-9663	8410-01-187-9664
8410-01-187-9665	8410-01-187-9646
8410-01-187-9647	8410-01-187-9648
8410-01-187-9649	8410-01-187-9674
8410-01-187-9686	8410-01-187-9687
8410-01-187-9688	8410-01-187-9705
8410-01-187-9706	8410-01-187-9707
8410-01-187-9708	8410-01-187-9697
8410-01-187-9698	8410-01-187-9699
8410-01-187-9700	8410-01-187-9709
8410-01-187-9675	8410-01-187-9676
8410-01-187-9677	8410-01-187-9654
8410-01-187-9655	8410-01-187-9656
8410-01-187-9657	8410-01-187-9682
8410-01-187-9683	8410-01-187-9684
8410-01-187-9685	8410-01-187-9711
8410-01-187-9689	8410-01-187-9690
8410-01-187-9691	8410-01-187-9692
8410-01-187-9666	8410-01-187-9667
8410-01-187-9668	8410-01-187-9669
8410-01-187-9670	8410-01-187-9671
8410-01-187-9672	8410-01-187-9673
8410-01-187-9693	8410-01-187-9694
8410-01-187-9695	8410-01-187-9696
8410-01-187-9678	8410-01-187-9679
8410-01-187-9680	8410-01-187-9681
8410-01-187-9701	8410-01-187-9702
8410-01-187-9703	8410-01-187-9704

Beverly L. Milkman,  
Executive Director.

[FR Doc. 88-29575 Filed 12-23-88; 8:45 am]

BILLING CODE 6820-33-M

#### CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 89-C0003]

##### The Toro Company, a Corporation; Provisional Acceptance of a Settlement Agreement and Order

**AGENCY:** Consumer Product Safety  
Commission.

**ACTION:** Provisional acceptance of a  
Settlement Agreement under the  
Consumer Product Safety Act.

**SUMMARY:** It is the policy of the  
Commission to publish settlements  
which it provisionally accepts under the  
Consumer Product Safety Act in the  
**Federal Register** in accordance with the  
terms of 16 CFR 1118.20(e). Published  
below is a provisionally-accepted  
Settlement Agreement with the Toro  
Company, a corporation.

**DATE:** Any interested person may ask  
the Commission not to accept this  
agreement or otherwise comment on its  
contents by filing a written request with  
the Office of the Secretary by January  
11, 1989.

**ADDRESS:** Persons wishing to comment  
on this Settlement Agreement should  
send written comments to the Office of  
the Secretary, Consumer Product Safety  
Commission, Washington, DC 20207.

**FOR FURTHER INFORMATION CONTACT:**  
Leonard H. Goldstein, Directorate for  
Compliance and Administrative  
Litigation, Consumer Product Safety  
Commission, Washington, DC 20207;  
telephone (301) 492-6626.

Date: December 20, 1988.

Sheldon D. Butts,  
Deputy Secretary.

##### SUPPLEMENTARY INFORMATION:

In the Matter of THE TORO COMPANY, a  
corporation.

##### Settlement Agreement and Order

1. This Settlement Agreement and  
Order, entered into between The Toro  
Company, a corporation (hereinafter,  
"Toro"), and the staff of the Consumer  
Product Safety Commission (hereinafter,  
"staff"), is a compromise resolution of  
the matter described herein, without a  
hearing or determination of issues of  
law and fact.

##### I. The Parties

2. Toro is a corporation organized and  
existing under the laws of the State of  
Delaware, with its principal corporate  
offices located at 8111 Lyndale Avenue  
South, Minneapolis, Minn.

3. Toro has manufactured certain  
riding lawn mowers, identified further in  
paragraphs 6 and 7 below (hereinafter,  
"riding lawn mowers"), (a) for sale to a  
consumer for use in or around a  
permanent or temporary household or  
residence, or (b) for the personal use,  
consumption or enjoyment of a  
consumer in or around a permanent or  
temporary household or residence.

These riding lawn mowers are  
"consumer products" within the  
meaning of section 3(a)(1) of the  
Consumer Product Safety Act  
(hereinafter, "CPSA"), 15 U.S.C.  
2052(a)(1).

4. Toro manufactured and sold the  
riding mowers through authorized  
dealers throughout the United States.  
Toro, therefore, is a "manufacturer" of a  
"consumer product" which is  
"distributed in commerce," as those  
terms are defined in sections 3(a)(1), (4)  
and (11) of the CPSC, 15 U.S.C. 2052(a)  
(1), (4) and (11).

5. The "staff" is the staff of the  
Consumer Product Safety Commission,  
an independent regulatory agency  
established by Congress pursuant to  
section 4 of the CPSA, 15 U.S.C. 2053.

##### II. The Product

6. Toro manufactured and distributed  
approximately 46,000 riding lawn  
mowers from 1972 through 1979. The  
products were sold as model numbers  
56575, 56025, 56027, 56030, 56033, and  
56044.

7. The riding lawn mowers have a  
gasoline-powered engine directly  
beneath the rider's seat, a battery-  
powered electric starter, and a back-up  
manual start system which is located on  
top of the engine. The manual start  
system can be used when the battery  
has not been charged or the electric  
starter is otherwise inoperative. It is  
used by (a) lifting the rider's seat, which  
is hinged at the rear of the mower, so  
that it swings away from over the top of  
the engine to a position at the rear of the  
mower, (b) inserting the knotted end of  
the starter rope into a cut out opening in  
the circular metal starter cup on top of  
the engine, and winding the rope around  
the outside of the starter cup, and (c)  
pulling the rope hard, thereby causing  
the starter to rotate rapidly and start the  
engine. Once the engine has started, the  
starter cup continues to rotate at high  
speed. The operator is expected to  
swing the seat back in place over the top  
of the engine, sit down on the seat, and  
proceed to operate the riding lawn  
mower.

##### III. Staff Allegations of a Defect in the Riding Lawn Mower and of a Failure by Toro To Comply With the Reporting Requirements of Section 15(b) of the CPSC

8. The riding lawn mowers  
manufactured between 1972 and 1979  
are constructed in a manner that the  
rider's seat is hinged so that it swings to  
the rear of the mower, thereby creating  
the potential for contact with the  
exposed rotating starter cup by  
consumers who, after starting the  
engine, inadvertently fail to return the  
seat to its position over the engine  
before sitting down.

9. In addition to the allegations  
contained in paragraph 8 above, under  
certain circumstances, the engine in

certain of the riding lawn mowers  
produced by Toro in 1973 can be started  
with the transmission partially in gear  
(rather than in neutral), thereby causing  
the mower to move forward upon being  
started, and possibly causing the  
consumer to fall back on the exposed  
rotating starter cup before the rider's  
seat has been returned to its position  
over the engine.

10. In addition to the allegations  
contained in paragraph 8 above, and  
with respect to riding lawn mowers  
manufactured by Toro between 1972 and  
1976, if the consumer accidentally  
bumps the gear shift, the riding lawn  
mower can jump into gear, thereby  
possibly causing the consumer to fall  
back on the exposed rotating starter cup  
before the rider's seat has been returned  
to its position over the engine. Riding  
lawn mowers manufactured by Toro  
after 1976 added a seat switch to the  
interlock system so that the operator  
must be on the seat at all times when  
the blade control system or the traction  
control system are engaged; otherwise  
the engine will stop.

11. During the period between July  
1984 and August 1985, the Commission  
staff mailed to Toro five in-depth  
inspection reports. One additional in-  
depth inspection report was mailed to  
Toro by the Commission staff in August  
1987. In addition, two lawsuits were  
filed against Toro, respectively in 1976  
and 1984; one additional claim was  
submitted against Toro, which was  
settled in 1984 without the filing of a  
lawsuit; and one separate letter was  
mailed to Toro in 1988 by an attorney  
representing a potential claimant for a  
laceration injury. All of these reports  
allege that consumers had received  
lacerations to the buttocks when the  
consumer fell or inadvertently sat on the  
exposed rotating starter cup.

12. The lacerations reported to Toro  
were, in some cases, severe and  
required many stitches to close.

13. The Commission staff alleges that  
one or more of the characteristics  
described in paragraphs 8-10 above,  
constitute a design defect within the  
meaning of the Consumer Product Safety  
Act.

14. Toro knew or should have known  
no later than August 1985 that the  
rotating starter cup was susceptible to  
being sat on by users of the riding lawn  
mower, and that severe lacerations  
could result if a consumer either fell or  
inadvertently sat on the rotating starter  
cup while the rider's seat was in the  
raised position.

15. Toro had received sufficient  
information no later than August 1985 to  
reasonably support the conclusion that  
riding lawn mowers, described in

paragraphs 6 and 7 hereof, contained a  
defect which could create a substantial  
product hazard, but the company failed  
to report such information to the  
Commission in a timely manner as  
required by section 15(b) of the CPSA,  
15 U.S.C. 2064(b).

##### IV. Allegations by the Toro Company of the Absence of Any Defect or Reporting Obligations

16. Toro denies each and all of the  
staff allegations with respect to its  
riding lawn mowers. It further and  
specifically denies that its riding lawn  
mowers contain a defect which creates  
or which could create a substantial  
product hazard within the meaning of  
section 15(a) of the CPSA, 15 U.S.C.  
2064(a), and further specifically denies  
any obligation to report information to  
the Commission under section 15(b) of  
the CPSA, 15 U.S.C. 2064(b), with  
respect to these riding lawn mowers.

Specifically and without limitation on  
any of the denials set forth above, Toro  
alleges that there are no design defects  
within the meaning of the Consumer  
Product Safety Act and alleges that the  
incidents described by the Commission  
staff were caused under highly unusual  
circumstances or possibly through  
inappropriate use by the operator and  
does not admit any liability for any  
accidents or injuries with respect to the  
incidents so described.

##### V. Agreement of the Parties

17. Toro and the staff agree that the  
Commission has jurisdiction in this  
matter for purposes of entry and  
enforcement of this Settlement  
Agreement and Order.

18. Toro agrees to settle the  
Commission's claim for a civil penalty  
by payment of the amount of \$75,000  
within 30 days of final acceptance of  
this Settlement Agreement by the  
Commission and service of the  
Commission's Order on Toro. This  
payment is made in settlement of  
disputed allegations by the staff that  
Toro violated the reporting requirements  
of section 15(b) of the CPSA, 15 U.S.C.  
2064(b), with regard to riding lawn  
mowers manufactured by Toro between  
1972 and 1979, and is made in the  
interest of avoiding the time and cost of  
litigation. Toro makes no admission of  
any fault, liability or statutory violation.  
The Commission does not make any  
determination that such riding lawn  
mowers described in paragraphs 6 and 7  
hereof, contain a defect which could  
create a substantial product hazard or  
that a violation of the CPSA has  
occurred.



19. For purposes of section 6(b) of the CPSA, 15 U.S.C. 2055(b), this matter shall be treated as if a complaint had been issued.

20. Upon final acceptance of this Settlement Agreement by the Commission, Toro knowingly, voluntarily and completely waives any rights it may have (1) to an administrative or judicial hearing with respect to the Commission's claim for a civil penalty, (2) to judicial review or other challenge or contest of the validity of the Commission's action with regard to its claim for a civil penalty, (3) to a determination by the Commission as to whether a violation of section 15(b) of the CPSA, 15 U.S.C. 2064(b), has occurred, and (4) to a statement of findings of fact and conclusions of law with regard to the Commission's claim for a civil penalty. By making this waiver, Toro does not concede that its riding lawn mowers contain a defect which creates or could create a substantial product hazard within the meaning of section 15(a) of the CPSA, 15 U.S.C. 2064(a).

21. Upon final acceptance of this Settlement Agreement and Order by the Commission and payment of the \$75,000 settlement amount by Toro, the Commission agrees to waive its right to pursue any penalty proceeding for a violation of section 15(b) of the CPSA, 15 U.S.C. 2064(b), relating to the matters encompassed by this Settlement Agreement and Order.

22. Upon provisional acceptance of this Settlement Agreement and Order by the Commission, this Settlement Agreement and Order shall be placed on the public record and shall be published in the *Federal Register* in accordance with the procedure set forth in 15 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Settlement Agreement and Order within 15 days, the Settlement Agreement and Order will be deemed finally accepted on the 18th day after the date it is published in the *Federal Register*, in accordance with 18 CFR 1118.20(f).

23. The parties further agree that the incorporated Order be issued under the CPSA, 15 U.S.C. 2051 *et seq.*, and that a violation of the Order will subject Toro to appropriate legal action.

24. No agreement, understanding, representation, or interpretation not contained in this Settlement Agreement and Order may be used to vary or to contradict its terms.

The Toro Company.

Dated: October 20, 1988.

Ralph Murray,

*Vice President and General Manager of The Consumer Products Division.*

Consented to on behalf of the CPSA staff by:

Dated: December 19, 1988.

David Schmeltzer,

*Associate Executive Director, Directorate for Compliance and Administrative Litigation.*

#### Order

Upon consideration of the Settlement Agreement of the parties, it is hereby Ordered that The Toro Company shall pay within 30 days of final acceptance of this Settlement Agreement and service of this Order, a civil penalty in the sum of \$75,000 to the Consumer Product Safety Commission.

Provisionally accepted on the 20th day of December, 1988.

By Order of the Commission.

Sadye E. Dunn,

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 88-29596 Filed 12-23-88; 8:45 am]

BILLING CODE 6355-01-M

#### DEPARTMENT OF DEFENSE

##### Public Information Collection Requirement Submitted to OMB for Review

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Title, Applicable Form, and Applicable OMB Control Number:** Acquisition Management Systems and Data Requirements Control List (AMSDL); Numerous Forms; and OMB Control Number 0704-0188.

**Type of Request:** Revision.

**Average Burden Hours/Minutes Per Response:** 110 hours.

**Frequency of Response:** On occasion; Weekly; Monthly; Quarterly; Semiannually; Annually; and Biennially.

**Number of Respondents:** 763.

**Annual Burden Hours:** 189,370,740.

**Annual Responses:** 1,539,734.

**Needs and Uses:** DOD Standardization Area assignments provide an ongoing and continuing effort to purge duplicative information collection requests from the system. Since 1978, over 5,000 discrete information requests have been deleted from the Acquisition Management Systems and Data Requirements Control List (AMSDL). However, during FY 1988

there has been an increase in the number of information collection requests (Data Item Descriptions). The information collection requests have increased from 1,890 to 2,018 collection requests in the authorized AMSDL. The increase experienced in FY 1988 was due to an unanticipated submission of information collection requests for support type contracts managed by the services. Requirements of the Paperwork Reduction Act have become better known throughout the DOD Services and agencies through training and education efforts of the Defense Data Management Office. This has resulted in an improved compliance with the regulation, but has also resulted in an increase in the number of collections.

**Affected Public:** Businesses.

**Frequency:** Continuing.

**Respondent's Obligation:** Mandatory.

**OMB Desk Officer:** Dr. J. Timothy Sprehe

Written comments and recommendations on the proposed information collection should be sent to Dr. J. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

**DOD Clearance Officer:** Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from, Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, telephone (202) 746-0933.

L.M. Bynum,

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

December 21, 1988.

[FR Doc. 88-29662 Filed 12-23-88; 8:45 am]

BILLING CODE 3810-01-M

#### Office of the Secretary

##### Meetings: DIA Advisory Board

**AGENCY:** Defense Intelligence Agency Advisory Board.

**ACTION:** Notice of closed meetings.

**SUMMARY:** Pursuant to the provisions of subsection (d) of section 10 of Pub. L. 92-463, as amended by section 5 of Pub. L. 94-409, notice is hereby given that a closed meeting of the DIA Advisory Board has been scheduled as follows:

**DATES:** Tuesday and Wednesday, 24-25 January 1989, 9:00 a.m. to 5:00 p.m. each day.

**ADDRESS:** National Security Agency, Fort George G. Meade MD (24 January 1989) The DIAC, Bolling AFB, Washington, DC (25 January 1989).

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Colonel John E. Hatlelid, USAF, Executive Secretary, DIA Advisory Board, Washington, DC 20340 (202/373-4930).

**SUPPLEMENTARY INFORMATION:** The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(1), Title 5 of the U.S. Code and therefore will be closed to the public. The Board will receive briefings on and discuss several current critical intelligence issues and advise the Director, DIA on related scientific and technical intelligence matters.

Linda M. Bynum,

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

December 21, 1988.

[FR Doc. 88-29657 Filed 12-23-88; 8:45 am]

BILLING CODE 3810-01-M

#### Meetings: DIA Advisory Board

**AGENCY:** Defense Intelligence Agency Advisory Board.

**ACTION:** Notice of closed meeting.

**SUMMARY:** Pursuant to the provisions of subsection (d) of section 10 of Pub. L. 92-463, as amended by section 5 of Pub. L. 94-409, notice is hereby given that a closed meeting of a panel of the DIA Advisory Board has been scheduled as follows:

**DATE:** Thursday, 26 January 1989 8:30 a.m. to 5:00 p.m.

**ADDRESS:** The DIAC, Bolling AFB, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Colonel John E. Hatlelid, USAF, Executive Secretary, DIA Advisory Board, Washington, DC 20340-1328 (202/373-4930).

**SUPPLEMENTARY INFORMATION:** The entire meeting is devoted to the discussion of classified information as defined in section 552b(c)(1), Title 5 of the U.S. Code and therefore will be closed to the public. Subject matter will be used in a special study on HUMINT/Scientific and Technical Intelligence Interface.

December 21, 1988.

Linda M. Bynum,

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 88-29660 Filed 12-23-88; 8:45 am]

BILLING CODE 3810-01-M

#### Defense Science Board Task Force on Use of Commercial Components in Military Equipment

**ACTION:** Notice of advisory committee meetings.

**SUMMARY:** The Defense Science Board Task Force on Use of Commercial Components in Military Equipment will meet in closed session on January 23, 1989 at the TRW Corporation, Redondo Beach, California.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At this meeting the Task Force will receive classified briefings on military acquisition programs and systems availability and the affect of increased use of commercial items on force posture.

In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. No. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that this DSB Task Force meeting, concerns matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meeting will be closed to the public.

December 21, 1988

Linda M. Bynum,

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 88-29658 Filed 12-23-88; 8:45 am]

BILLING CODE 3810-01-M

#### Defense Science Board Task Force to Review the Strategic Force Modernization Program

**ACTION:** Notice of advisory committee meetings.

**SUMMARY:** The Defense Science Board Task Force to Review the Strategic Force Modernization Program will meet in closed session on February 2-3 and March 2-3, 1989, at Science Applications International Corporation, Falls Church, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings the Task Force will examine strategic force modernization issues within the context of evolving Soviet threat capabilities, potential strategic arms control restraints, and an increasingly austere fiscal environment.

In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. No. 92-463, as amended (5 U.S.C. App. II, (1982)), it has been determined that these DSB Task Force meetings, concern matters listed in 5 U.S.C. 552b(c)(1) (1982), and that accordingly this meetings will be closed to the public.

December 21, 1988.

Linda M. Bynum,

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 88-29659 Filed 12-23-88; 8:45 am]

BILLING CODE 3810-01-M

#### Defense Logistics Agency

##### Privacy Act of 1974; Notice of a New Continuing Computer Matching Program Between the Department of Defense (DoD) and the U.S. Department of the Treasury

**AGENCY:** Defense Manpower Data Center (DMDC), Defense Logistics Agency (DLA), Department of Defense (DoD).

**ACTION:** Notice for any public comment on a proposed new ongoing computer matching program between the Department of Defense (DoD) and the U.S. Department of the Treasury for debt collection purposes under the Debt Collection Act of 1982 (Pub. L. 97-365). The Treasury component participating in this proposed action is the Bureau of Public Debt (BPD).

**SUMMARY:** On October 7, 1987 at 52 FR 37492, the Department of Defense provided notice of its plan under an interagency agreement to assist Federal creditor agencies in locating delinquent debtors in their debt collection efforts to collect outstanding debts owed by individuals receiving salary or similar compensation from the Federal government. The DMDC, (DLA) has assisted a number of Federal agencies to date in locating delinquent debtors via computer matching and now proposes to assist the Bureau of the Public Debt at the request of the U.S. Department of the Treasury (Treasury).

**DATE:** This proposed action is effective immediately on December 27, 1988, and the computer matching will proceed accordingly without further notice, unless comments are received which would result in a contrary determination.

**ADDRESS:** Any interested party may submit written comments to Mr. Robert J. Brandewie, Deputy Director, Defense Manpower Data Center, Suite 200, 550 Camino El Estero, Monterey, CA 93940-



2321. Telephone: (408) 375-4131; Autovon: 878-2951.

**FOR FURTHER INFORMATION CONTACT:** Mr. Aurelio Nepa, Jr., Staff Director, Defense Privacy Office, Room 205, 400 Army Navy Drive, Arlington, VA 22202-2803. Telephone: (202) 694-3027; Autovon: 224-3027.

**SUPPLEMENTARY INFORMATION:** This proposed computer matching program is being conducted in order to locate by address those individuals Federally employed or retired that are indebted and delinquent in their repayment to the U.S. Government under certain programs administered by the Bureau of the Public Debt, Treasury.

The Office of Management and Budget (OMB) designated the Financial Management Service of the Department of Treasury, as the Lead Agency to coordinate and monitor the implementation of the U.S. Government's Federal Salary Offset Program. An interagency agreement, restricted exclusively to the implementation of the Debt Collection Act of 1982 (Pub. L. 97-365), established an Interagency Working Group to facilitate computer matching and subsequent salary offset procedures throughout the Federal government under the auspices and oversight of the OMB. This Interagency Working Group consists of the Department of the Treasury, Office of Personnel Management and the Department of Defense. As a result, a centralized computer data base for computer matching made up of Department of Defense and Office of Personnel Management records has been established for debt collection purpose in order to have a data bank record of active and retired military members, including the Reserve and Guard, and further including OPM government-wide active and retired civilian personnel that are receiving Federal salaries or other Federal benefit payments. This newly established data bank located in Monterey, CA, is being maintained by the Defense Manpower Data Center of the Department of Defense and is available for matching purposes by any Federal creditor agency to locate individual debtors in enforcing the Debt Collection Act of 1982 to collect outstanding debts.

Set forth below is the information required by the paragraph 5.f.(1) of the Revised Supplemental Guidance for Conducting Computerized Matching Programs issued by the Office of Management and Budget on May 11, 1982 (47 FR 21656, May 19, 1982). A copy of this proposed notice has been provided to the U.S. House Committee

on Government Operations, the U.S. Senate Committee on Governmental Affairs, and the Office of Management and Budget on December 9, 1988, pursuant to the cited OMB Matching Guidelines and the Privacy Act of 1974, as amended.

L.M. Bynum,  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

December 21, 1988.

**Report of a New Continuing Computer Matching Program Between the Department of Defense (DOD) and the U.S. Department of the Treasury**

a. *Authority.* The legal authority under which the computer matching will be conducted is 5 U.S.C. 552a(b)(3), the "routine use" under the Privacy Act of 1974; 5 U.S.C. 5514, Installment deduction of indebtedness; 10 U.S.C. 136, Assistant Secretaries of Defense, appointment, powers and duties; Federal Claims Collection Act of 1966 (Pub. L. 89-508) 31 U.S.C. 952(d); the Debt Collection Act of 1982 (Pub. L. 97-365) 5 U.S.C. 5514, 31 U.S.C. 3711 and 3716-3718; Section 206 of Executive Order 11222; 4 CFR Chapter II, Federal Claims Collection Standards (General Accounting Office—Department of Justice); 5 CFR 550.1101-550.1108, Collection by Offset from Indebted Government Employees—(OPM); 31 CFR Part 5, Subpart B (Treasury—Claims Collection); Office of Management and Budget, "Revised Supplemental Guidelines for Conducting Matching Programs," dated May 11, 1982 (47 FR 21656, May 19, 1982) and "Guidelines on Relationship Between the Privacy Act of 1974 and the Debt Collection Act of 1982," March 30, 1983 (48 FR 15556, April 11, 1983); the Interagency Agreement for Federal Salary Offset Initiative (Office of Management and Budget, Department of the Treasury, Office of Personnel Management and the Department of Defense) signed April 1987, published at 52 FR 37492, October 7, 1987.

b. *Program Description.* The purpose of this computer matching program is to identify and locate those individuals who are receiving Federal salaries or benefit payments and are indebted and delinquent in their repayment of debts to the U.S. Government under certain programs administered by the Bureau of the Public Debt (BPD) of the Department of Treasury in order to collect the debts by voluntary repayment or by administrative or salary offset procedures under the provisions of the Debt Collection Act of 1982.

The BPD, as the source agency, will provide the Defense Manpower Data

Center (DMDC) of the DoD, the matching agency, at Monterey, California, a computer tape containing the names and social security numbers of all the individual delinquent debtors indebted to the U.S. Government under certain programs administered by the BPD, Treasury.

Upon receipt of the computer tape file of debtor accounts, the DMDC will perform a computer matching using all nine digits of social security numbers of delinquents against a DMDC computer data base. The DMDC computer data base, established under an interagency agreement, consists of records of active duty and retired military members, including the Reserve and Guard, and all the OPM Government-wide employed civilian and retired civilian records.

Matching records, "hits" based on the social security number, will be furnished to BPD consisting of the member's name, service or agency, category of employee, salary or benefit amounts, and current work or home address from DMDC's data base records. This "hit" or matching information from DMDC will be referred to BPD for action to contact the debtors so as to recover the outstanding debt(s) by salary or administrative offset when other collection actions have been pursued and have been unsatisfactory.

The BPD will be responsible for reviewing the "hit" records to assure that each individual is positively identified in the match as the debtor; to assure that the debtor is afforded proper due process under GAO regulation (4 CFR Chapter II) "Federal Claims Collection Standards" and that a proper accounting of any further disclosures outside the BPD shall be maintained by in accordance with 5 U.S.C. 552a(c) of the Privacy Act. The BPD is responsible for insuring that the debt is valid and the information is accurate, complete, timely and relevant. Hard copy match records will be used by the BPD to determine any further continued contact or inquiry of the debtors. The notification to the debtor shall include information concerning the amount to be collected, and may include the amount of the proposed monthly deductions if offset procedures is contemplated. The debtor shall be given an opportunity to enter into voluntary agreement to repay the debt before any administrative or salary offset measures are initiated. The debtor shall further be given an opportunity to inspect and copy records related to the debt and for review of the decision related to the debt. If no collection action is needed, the DoD

record provided by DMDC will not be used by the BPD for any other purposes.

c. *Records to be Matched.* The following systems of records, subject to the Privacy Act of 1974 (5 U.S.C. 552a), containing an appropriate routine use permitting records to be matched, are as follows:

United States Department of the Treasury (Source Agency)

(1) Treasury component: Bureau of the Public Debt (BPD).

System identification: Treasury/BPD .002

System name: United States Savings Type Securities—Treasury/BPD  
Federal Register citation: 53 FR 6471, March 1, 1988

Amended: 53 FR 1886, January 22, 1988

(2) Treasury component: Bureau of the Public Debt (BPD).

System identification: Treasury/BPD .003

System name: United States Securities (Other than Savings Type Securities)—Treasury/BPD  
Federal Register citation: 53 FR 6473, March 1, 1988

Amended: 53 FR 1886, January 22, 1988

Department of Defense (Matching Agency)

(1) DoD component: Defense Logistics Agency (DLA).

System identification: S322.10 DLA-LZ  
System name: Defense Manpower Data Center Data Base  
Federal Register citation: 53 FR 44937, November 7, 1988

(2) DoD component: Defense Logistics Agency (DLA).

System identification: S322.11 DLA-LZ  
System name: Federal Creditor Agency Debt Collection Data Base  
Federal Register citation: 52 FR 37495, October 7, 1987

(3) Agency: Office of Personnel Management (OPM).

System identification: OPM/GOVT-1  
System name: General Personnel Records  
Federal Register citation: 49 FR 36954, September 20, 1984

(4) Agency: Office of Personnel Management (OPM).

System identification: OPM/CENTRAL-1

System name: Civil Service Retirement and Insurance Records

Federal Register citation: 49 FR 36950, September 20, 1984

d. *Period of the Match.* The initial match will begin as soon as possible after this public notice is published in the Federal Register and then conducted no more often than semiannually thereafter.

e. *Security Safeguards.* Automated records are stored in limited access computer facilities and accessible only by password. Access to the computer center is by key or picture identification. Hard copy records are maintained in Federal office buildings in lockable file cabinets and accessed only by authorized Federal employees on a need-to-know basis.

f. *Retention and Disposition of Records.* Under a written Memorandum of Understanding (MOU) agreement between the DoD/DMDC and the Treasury/BPD, it is agreed that tapes provided by the BPD for matches shall be destroyed or returned to the BPD upon successful completion of each match and shall be used only for debt collection purposes. Non-hit records will not be used for any purposes. Hard copy matched records (hits) will be used by the BPD to conduct individual reviews and may be used to contact the debtor for payment pursuant to the Debt Collection Act of 1982. Records relating to "hits" will be retained by the BPD until the completion of any necessary administrative collection or legal action and will then be disposed of in accordance with approved records control schedules and/or approved disposition authority from the Archivist of the United States. The BPD will maintain a disclosure accounting record, as required by 5 U.S.C. 552a(c) of the Privacy Act, as a result of the match information received from DMDC when contacting other agencies pursuing individual debtors. If no collection action is needed, the DoD record will not be used for any other purpose. The BPD tape file will be used and accessed only to the match agreed to; it will not be used to extract information concerning "non-hit" individuals for any purpose and it will not be duplicated or disseminated within or outside the DoD matching agency.

[FR Doc. 88-29661 Filed 12-23-88; 8:45 am]  
BILLING CODE 3810-01-M

**DEPARTMENT OF EDUCATION**

**National Assessment Governing Board; Meeting**

**AGENCY:** National Assessment Governing Board.

**ACTION:** Amendment of notice.

**SUMMARY:** This notice is intended to notify the general public of a change in status of the January 5, 1989 meeting of the Board published in FR Vol. 53, No. 243, December 19, 1988, page 50990. The action should read: Notice of Closed Meeting. Also, a summary of the

activities at the closed session and related matters which are informative to the public consistent with Title 5 U.S.C. 552b will be available to the public within fourteen days of the meeting. This summary will be available for public inspection at the U.S. Department of Education, Office of Educational Research and Improvement, 555 New Jersey Avenue NW., Room 600, Washington, D.C. from 8:30 a.m. to 5:00 p.m.

Dated: December 21, 1988

Patricia Hines,

Acting Assistant Secretary for Educational Research and Improvement.

[FR Doc. 88-29628 Filed 12-23-88; 8:45 am]  
BILLING CODE 4000-01-M

**National Assessment Governing Board; Meeting**

**AGENCY:** National Assessment Governing Board.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of a subgroup of the National Assessment Governing Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

**DATE:** January 11, 1989.

**ADDRESS:** U.S. Department of Education, Office of Educational Research and Improvement, Room 600 B, 555 New Jersey Avenue NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Eunice E. Henderson, Designated Federal Official, Office of Assistant Secretary for Educational Research and Improvement, U.S. Department of Education, 555 New Jersey Avenue NW., Room 602C, Washington, DC 20208, Telephone: (202) 357-6050.

**SUPPLEMENTARY INFORMATION:** The National Assessment Governing Board is established under section 406(i) of the General Education Provisions Act (GEPA) as amended by section 3403 of the National Assessment of Educational Progress Improvement Act (NAEP Improvement Act), Title III-C of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 21988 (Pub. L. 100-297); 20 U.S.C. 1221e-1).

The Board is established to advise the Commissioner of the National Center for Education Statistics on policies and actions needed to improve the form and



use of the National Assessment of Education Progress, and develop specifications for the design, methodology, analysis and reporting of test results. The Board also is responsible for selecting subject areas to be assessed, identifying the objectives for each age and grade tested, and establishing standards and procedures for interstate and national comparisons.

A subgroup of the National Assessment Governing Board will meet in Washington, DC on January 11, 1989, from 9:00 a.m. to 4:00 p.m. The proposed agenda includes consideration of the Board's organizational and staffing requirements.

Records are kept of all Board proceedings, and until a permanent office site for the Board has been established, are available for public inspection at the U.S. Department of Education, Office of Educational Research and Improvement, 555 New Jersey Avenue NW., Room 600, Washington, DC from 8:30 a.m. to 5:00 p.m.

Dated: December 21, 1988.

Patricia Hines,  
Acting Assistant Secretary for Educational Research and Improvement.  
[FR Doc. 88-29627 Filed 12-23-88; 8:45 am]  
BILLING CODE 4000-01-M

## DEPARTMENT OF ENERGY

### Conservation and Renewable Energy Office

#### National Energy Extension Service Advisory Board; Open Meeting

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-263, 86 Stat. 770), notice is hereby given of the following advisory committee meeting:

Name: National Energy Extension Service Advisory Board.

Date and Time: Wednesday, January 18, 1989, 8 a.m.-5 p.m.; Thursday, January 19, 1989, 8 a.m.-12 noon.

Place: Radisson Mark Plaza Hotel, 5000 Seminary Road, Alexandria, VA.

Contact: Susan D. Heard, Department of Energy, Forrestal Building-6A081, 1000 Independence Avenue SW., Washington, DC 20585, Telephone: 202-586-8290.

Purpose of the Board: The Board was established to carry on a continuing review of the National Energy Extension Service and the plans and activities of each State in implementing Energy Extension Service programs. Additionally, the Board is responsible for reporting on an annual basis to the Congress, the Secretary of Energy, and

the Director of the Energy Extension Service.

Tentative Agenda: Wednesday, January 18, 1989.

- Preparation of a draft of the Board's Tenth Annual Report
- Public comment (10 minute rule)
- Thursday, January 19, 1989.
- Preparation of a draft of the Board's Tenth Annual Report
- Public comment (10 minute rule)

Public Participation: The meeting is open to the public. The Chairperson of the Committee is empowered to conduct the meeting in a fashion that will, in his judgment, facilitate the orderly conduct of business. Any member of the public who wishes to file a written statement with the Committee will be permitted to do so either before or after the meeting. Members of the public who wish to make oral statements pertaining to agenda items should contact Susan D. Heard at 202-586-8290. Requests must be received at least 5 days prior to the meeting and reasonable provision will be made to include the presentation on the agenda.

Transcripts: Available for public review and copying at the Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue SW., Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC, on December 21, 1988.

J. Robert Franklin,  
Advisory Committee Management Officer.

[FR Doc. 88-29652 Filed 12-23-88; 8:45 am]  
BILLING CODE 6450-01-M

### Office of Conservation and Renewable Energy

[Case No. CAC-004]

#### Energy Conservation Program for Consumer Products; Decision and Order Granting Waiver From Test Procedures for Central Air Conditioners From Airlex Industries, LTD.

AGENCY: Department of Energy, Office of Conservation and Renewable Energy.

ACTION: Decision and order.

SUMMARY: Notice is given of the Decision and Order (Case No. CAC-004) granting Airlex Industries, LTD., a waiver for its ERA/S-RC/RH model series heat pumps in the heating mode from existing DOE test procedures for determining the model's Heating Seasonal Performance Factors.

#### FOR FURTHER INFORMATION CONTACT:

Douglas S. Abramson, U.S. Department of Energy, Office of Conservation and Renewable Energy, Forrestal Building, Mail Station, CE-132, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9127.

Eugene Margolis, Esq., U.S. Department of Energy, Office of General Counsel, Forrestal Building, Mail Station, GC-12, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-9507.

SUPPLEMENTARY INFORMATION: In accordance with 10 CFR 430.27(g), notice is hereby given of the issuance of the Decision and Order as set out below. Airlex Industries, LTD., has been granted a waiver for its ERA/S-RC/RH model, series central air conditioner (heat pump) permitting the company to use an alternate test method in determining the Heating Seasonal Performance Factors (HSPF).

Issued in Washington, DC, December 19, 1988.

Dr. John R. Berg,  
Assistant Secretary Conservation and Renewable Energy.

The Energy Conservation Program for Consumer Products (other than automobiles) was established pursuant to the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 917, as amended by the National Energy Conservation Policy Act (NECPA), Pub. L. 95-619, 92 Stat. 3286, the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12, and the National Appliance Energy Conservation Amendment of 1988 (NAECA 1988), Pub. L. 100-357, which requires DOE to prescribe standardized test procedures to measure the energy consumption of certain consumer products, including central air conditioners and heat pumps. The intent of the test procedures is to provide a comparable measure of energy consumption that will assist consumers in making purchasing decisions. These test procedures appear at 10 CFR Part 430, Subpart B.

DOE has amended the prescribed test procedures by adding 10 CFR 430.27 on September 26, 1980, creating the waiver process. 45 FR 64108. DOE further amended the Department's appliance test procedure waiver process to allow the Assistant Secretary for Conservation and Renewable Energy to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 51 FR 42823, November 26, 1986. The waiver process allows the Assistant Secretary for Conservation and Renewable Energy to waive temporarily test procedures for a

particular basic model when a petitioner shows that the basic model contains one or more design characteristics which prevent testing according to the prescribed test procedures or when the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. Waivers generally remain in effect until final test procedure amendments become effective, resolving the problem that is the subject of a waiver.

Airlex Industries LTD., (Airlex) filed a "Petition for Waiver" dated August 24, 1988, in accordance with § 430.27 of 10 CFR Part 430. DOE published in the Federal Register Airlex's petition, and solicited comments, data and information respecting the petition. 53 FR 39130, October 3, 1988. Airlex filed an "Application for Interim Waiver" under § 430.27(g) which DOE granted on October 3, 1988. 53 FR 39130.

No comments were received concerning either the "Petition for Waiver" or the "Interim Waiver." DOE consulted with the National Institute of Standards and Technology (NIST), formerly the National Bureau of Standards, and the Federal Trade Commission (FTC), concerning the Airlex petition. The NIST submitted to DOE an evaluation of the waiver test procedure in a letter report dated, November 21, 1988. The FTC voiced no opposition to the issuance of the waiver to Airlex.

#### Assertions and Determinations

Airlex's petition seeks a waiver from the DOE test provisions that require a low temperature test at 17°F and a Frost Accumulation Test at 35°F. Instead, Airlex requests permission to perform the low temperature test at 47°F and omit the Frost Accumulation Test at 35°F when testing its heat pumps model series ERA/S-RC/RH to determine HSPF. Airlex stated that the heating ability of its heat pumps is disengaged and replaced by electric resistance heating for temperatures below 40°F. Since DOE test procedures do not address this control feature, Airlex asked that a waiver be granted.

NIST, in its review of the Airlex petition, conclude that it was reasonable for Airlex to accurately determine capacity and power profiles for model series ERA/S-RC/RH down to 40°F. NIST expressed no concern that at 40°F frosting would occur.

DOE, in reviewing the comments by NIST, has determined that in order to provide a fair approach to Airlex and an equitable comparison with other models for consumers, the test procedure

proposed by Airlex is suitable provided the disengaging temperature is set at 40°F with the low temperature test run at 47°F.

Since DOE did not receive any comments on the petition, the petition and NIST's analysis of Airlex's petition have provided the basis for DOE's determination on the procedure requested by Airlex and its suitability as an alternative to the existing procedure.

Based on the information provided by the petitioner, the NIST analysis and the Department's review, DOE is granting Airlex's request for the use of an alternate test procedure to determine the HSPF for its model series ERA/S-RC/RH central air conditioner, heat pumps with the modifications discussed above.

It is, therefore, ordered that:

(1) The "Petition for Waiver" filed by Airlex Industries, LTD., (CAC-004) is hereby granted as set forth in paragraph (2) below, subject to the provisions of paragraphs (3), (4) and (5).

(2) Notwithstanding any contrary provisions of Appendix M of 10 CFR Part 430 Subpart B, Airlex Industries, LTD. shall be permitted to test its ERA/S-RC/RH model central air conditioners and heat pumps on the basis specified in 10 CFR Part 430, with the modifications set forth below:

(i) Test Procedure. The test procedure shall be as specified in Appendix M of 10 CFR Part 430 Subpart B for determining the Seasonal Energy Efficiency Ratio (SEER) without modification. The Heating Seasonal Performance Factor (HSPF) shall be tested in accordance with Appendix M with the following modifications:

(a) The high temperature test, section 3.2.1.1, will be performed at 82°F outdoor temperature;

(b) The low temperature test, section 3.2.1.4, will be performed at 47°F dry bulb, 43°F wet bulb outdoor temperature in lieu of the existing 17°F test;

(c) The requirement for a 35°F Frost Accumulation Test, section 3.2.1.3, is deleted; and

(d) The set point for the model to disengage heat pump operation is to be at 40°F.

(ii) Heating Seasonal Performance Factor. The heating seasonal performance factor (HSPF) shall be expressed in Btu per watt-hour, for each of the six regions specified.

A separate HSPF shall be determined for the standardized maximum DHR, the standardized minimum DHR and for all other standardized DHR's in Appendix M between the maximum and minimum values.

(3) The waiver shall remain in effect from the date of issuance of this Order

until the Department of Energy prescribes final test procedures appropriate to this model central air conditioner and heat pump.

(4) This waiver is based upon the presumed validity of statements, allegations, and documentary materials submitted by the applicant and in the comments. This waiver may be revoked or modified at any time upon a determination that the factual basis underlying the application is incorrect.

(5) Effective January 26, 1989, this waiver supersedes the Interim Waiver granted Airlex on October 5, 1988. 53 FR 39130. (Case No. CAC-004).

[FR Doc. 88-29651 Filed 12-23-88; 8:45 am]

BILLING CODE 6450-01-M

### Energy Information Administration

#### Agency Information Collections Under Review by the Office of Management and Budget

AGENCY: Energy Information Administration, DOE.

ACTION: Notice of requests submitted for review by the Office of Management and Budget.

SUMMARY: The Energy Information Administration (EIA) has submitted the energy information collection(s) listed at the end of this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The listing does not include information collection requirements contained in new or revised regulations which are to be submitted under section 3504(h) of the Paperwork Reduction Act, nor management and procurement assistance requirements collected by the Department of Energy (DOE).

Each entry contains the following information: (1) The sponsor of the collection (the DOE component or Federal Energy Regulatory Commission (FERC)); (2) collection number(s); (3) current OMB docket number (if applicable); (4) collection title; (5) type of request, e.g., new, revision, or extension; (6) frequency of collection; (7) response obligation, i.e., mandatory, voluntary, or required to obtain or retain benefit; (8) affected public; (9) an estimate of the number of respondents per report period; (10) an estimate of the number of responses annually; (11) an estimate of the average hours per response; (12) the estimated total annual respondent burden, and (13) a brief abstract describing the proposed collection and the respondents.

BEST COPY AVAILABLE



**DATE:** January 28, 1989.

**ADDRESS:** Address comments to the Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503. (Comments should also be addressed to the Office of Statistical Standards, at the address below.)

**FOR FURTHER INFORMATION CONTACT:** Carole Patton, Office of Statistical Standards (E1-70), Energy Information Administration, M.S. 1H-023, Forrestal Building, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586-2222.

**SUPPLEMENTARY INFORMATION:** If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this Notice, you should advise the OMB DOE Desk Officer of your intention to do so as soon as possible. The Desk Officer may be telephoned at (202) 395-3084.

The energy information collection submitted to OMB for review was:

1. Federal Energy Regulatory Commission
2. FERC 525
3. 1902-0092
4. Financial Audits
5. Extension
6. (5 year cycle) Regulations
7. Mandatory
8. Businesses or other for profit
9. 69 respondents
10. 69 responses
11. 200 hours per response
12. 13,800 hours (total)
13. The information collected is necessary to ensure compliance with the Commission's Uniform System of accounts and related regulations to insure and establish plus determine the actual, legitimate original cost to enable the Commission to carry out its regulatory responsibilities under the NGPA, FPA, PURPA, and the ICA in establishing just and reasonable rates, in rate proceedings.

Statutory Authority: Sec. 5(a), 5(b), 13(b), and 52, Pub. L. 93-275, Federal Energy Administration Act of 1974, (15 U.S.C. 764(a), 764(b), 772(b), and 790a).

Issued in Washington, DC, December 20, 1988.

Yvonne M. Bishop,

Director, Statistical Standards, Energy Information Administration.

[FR Doc. 88-29653 Filed 12-23-88; 8:45 am]

BILLING CODE 6450-01-M

# **Federal Energy Regulatory Commission**

[Docket No. TM88-5-20-003 and TM89-4-20-000]

## **Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff**

December 21, 1988.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on December 13, 1988 requested that the Commission render moot and of no force or effect Substitute Twentieth Revised Sheet No. 205 and Substitute Tenth Revised Sheet No. 214 as filed in Algonquin's October 31, 1988 filing in Docket No. TM88-5-20-002 and reinstatement of Twentieth Revised Sheet No. 205 and Tenth Revised Sheet No. 214 as filed on July 29, 1988 in Docket Nos. TQ88-2-20-000 and TM88-5-20-000. Additionally, Algonquin proposes to continue its collection and disbursement of the Gas Research Institute ("GRI") Charge at the same 1.46 cents per MMBtu level for calendar year 1989 as that approved for calendar year 1988.

Algonquin states that, on July 29, 1988 in Docket No. TM88-5-20-000, Algonquin filed, pursuant to Sections 7 and 9 of Algonquin's Rate Schedules F-4 and SS-III, respectively, to track changes made by its pipeline supplier, Texas Eastern in the underlying services as set forth in Texas Eastern's Quarterly Purchased Gas Adjustment ("PGA") filing of July 1, 1988 in Docket No. TQ88-2-17 *et al.* Algonquin's filing was accepted by Letter Order dated August 17, 1988 subject to Algonquin filing revised rates to reflect any adjustments in the rates of the pipeline suppliers being tracked.

Algonquin further states that, by Letter Order dated July 29, 1988 the Commission accepted Texas Eastern's PGA filing of July 1, 1988, subject to refund, and requested a fuller explanation to its Electric Power Cost ("EPC") Adjustment. Texas Eastern submitted the requested additional working papers to further support its EPC Adjustment on August 11, 1988. On October 4, 1988 in Texas Eastern's Docket No. TQ88-2-17 *et al.*, the Commission issued an "Order Accepting Compliance Filing And Disallowing Electric Power Cost Adjustment" which required Texas Eastern to file revised rate sheets to reflect the removal of the EPC Adjustment. On October 19, 1988 Texas Eastern filed for rehearing of the Commission's October 4, 1988 Order.

Additionally, Algonquin states that, on October 21, 1988 Texas Eastern, filed the revised rates to comply with the Commission's October 4, 1988 Order. On

October 31, 1988 in Docket No. TM88-5-20-002, Algonquin filed Substitute Twentieth Revised Sheet No. 205 under Rate Schedule F-4 and Substitute Tenth Revised Sheet No. 214 under Rate Schedule SS-III to track Texas Eastern's compliance filing of October 21, 1988 and subsequently received acceptance by Commission Letter Order dated November 16, 1988.

Algonquin states that on November 18, 1988 in Texas Eastern's Docket No. TQ88-2-17 *et al.*, the Commission issued an "Order Granting Rehearing And Rejecting Tariff Sheets" in which the Commission granted Texas Eastern's October 19, 1988 request for rehearing, allowed Texas Eastern to include the EPC Adjustment as originally proposed in Texas Eastern's PGA filing of July 1, 1988 and rejected the revised tariff sheets included in Texas Eastern's October 21, 1988 compliance filing. The revised rates filed by Texas Eastern on October 21, 1988 are the basis for the revised rates filed by Algonquin's in its October 31, 1988 filing in Docket No. TM88-5-20-002 and accepted November 16, 1988.

Algonquin states that, in view of the Commission's rejection of the rates underlying Algonquin's August 1, 1988 effective rates contained in Algonquin's October 31, 1988 filing and to maintain compliance with Section 7 of Rate Schedule F-4 and Section 9 of Rate Schedule SS-III, Algonquin respectfully requests that the Commission render moot and of no force or effect Substitute Twentieth Revised Sheet No. 205 and Substitute Tenth Revised Sheet No. 214 as filed in Algonquin's October 31, 1988 filing in Docket No. TM88-5-20-002. Additionally, Algonquin requested that the Commission reinstate Twentieth Revised Sheet No. 205 and Tenth Revised Sheet No. 214 as filed on July 29, 1988 in Docket Nos. TQ88-2-20-000 and TM88-5-20-000, which were originally accepted by Commission Letter Order dated August 17, 1988 with an effective date of August 1, 1988.

Algonquin states that, on November 30, 1988 the Commission issued Opinion No. 320 in Docket No. RP88-182-000 in which, *inter alia*, the Commission found that the 1989 RD&D funding unit of 1.51 cents per Mcf was just and reasonable and was to be collected by jurisdictional members of GRI from January 1, 1989 through December 31, 1989. As the approved GRI Surcharge for the calendar year 1989 is identical to that approved for the calendar year 1988, 1.51 cents per Mcf, converted to 1.46 cents per MMBtu. Algonquin proposes to continue the approved GRI funding unit to include the calendar year 1989 and

collect it pursuant to Section 28 of Algonquin's General Terms and Conditions.

Algonquin notes that copies of the filing were served upon the affected parties and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§85.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29637 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-45-000]

## **ANR Pipeline Co.; Proposed Changes in FERC Gas Tariff**

December 21, 1988.

Take notice that ANR Pipeline Company ("ANR") on December 14, 1988 tendered for filing as part of its Original Volume No. 1 FERC Gas Tariff, certain tariff sheets.

ANR states that the above-referenced tariff sheets are being filed to institute a buyout and buydown recovery mechanism under Section 2.104 of the Commission's Regulations. Under the proposed filing, ANR is proposing to absorb fifty percent of its buyout and buydown costs and to recover fifty percent of such costs through a fixed monthly charge applicable to its Rate Schedules CD-1, MC-1 and SGS-1 sales customers, because of the Commission's requirement as to cost absorption.

ANR has requested that the Commission accept this filing, to become effective January 14, 1989.

ANR states that copies of the filing were served upon all of its Volume No. 1 customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Commission, 825 North Capitol Street NE., Washington, DC 20426 by

December 29, 1988 in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29638 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-246-003]

## **ANR Pipeline Co.; Proposed Changes in FERC Gas Tariff**

December 21, 1988

Take notice that ANR Pipeline Company ("ANR") on December 14, 1988 tendered for filing as part of its FERC Gas Tariff Original Volume No. 1-A, certain tariff sheets.

ANR states that the above-referenced tariff sheets are being filed in compliance with the Commission's Letter Order of November 14, 1988 in Docket No. RP88-246-001 and the Commission Order of November 30, 1988 in Docket No. RP88-246-002.

ANR has requested that the Commission accept this filing to become effective as of the dates shown on Appendix A.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Such protests or motions must be filed by Dec. 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29639 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF88-72-001]

## **Walker Resources, Inc.; Application for Commission Certification of Qualifying Status of a Cogeneration Facility**

December 21, 1988.

On December 9, 1988, Walker Resources, Inc. of dba Walker Roemer Dairy Processing, Co., P.O. Box 8430, Metairie, Louisiana 70011 submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located at 2800 Richland Street, Metairie, Louisiana. The facility will consist of a natural gas-fired engine generator. The thermal energy recovered from the facility will be used for space heating and also in the absorption chillers for air conditioning. The electric power production capacity of the facility will be 490 KW. The primary source of energy will be natural gas.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29646 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-201-005]

## **East Tennessee Natural Gas Co.; Rate Filing Pursuant to Tariff Rate Adjustment Provisions**

December 21, 1988.

Take notice that on December 15, 1988, East Tennessee Natural Gas Company (East Tennessee) filed Substitute Thirteenth Revised Sheet No. 5 to its FERC Gas Tariff to be effective January 1, 1989.



East Tennessee states that the purpose of this filing is to comply with the November 29, 1988 Commission Order in this docket, in which East Tennessee was directed to credit United Cities with the excess purchases of Tennessee Virginia attributed to the month of December 1988.

East Tennessee states that copies of the filing have been mailed to all of its jurisdictional customers and affected state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1988)). All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29640 Filed 12-23-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP88-44-000]**

**Florida Gas Transmission Co.;  
Proposed Changes in FERC Gas Tariff  
and Offer of Settlement**

December 21, 1988.

Take notice that on December 15, 1988, Florida Gas Transmission Company (FGT) tendered for filing tariff sheets as part of its FERC Gas Tariff to be effective February 1, 1989.

FGT states that the proposed tariff sheets are being filed to revise section 15.2 of FGT's Purchased Gas Adjustment (PGA) Clause to include in its Current Average Cost of Purchased Gas, from and after June 1, 1988, the fixed charge allocation of buy-out and buy-down costs billed to FGT by Southern Natural Gas Company (Southern), as reflected in Southern's filings in Docket Nos. RP88-96, RP88-210 and RP88-229, or any other docket in which Southern is authorized by the Commission to bill FGT a fixed charge allocation of buy-out and buy-down costs as a result of FGT's purchases or purchase deficiencies from Southern under FGT's service agreement under Southern's Rate Schedule OSDL-1, in accordance with the Offer of

Settlement and Stipulation and Agreement (Settlement) concurrently filed by FGT in the captioned-docket. FGT states that a Commission order approving the Settlement would constitute approval and acceptance of the above-referenced tariff sheets effective as of February 1, 1989. FGT further states that pursuant to Rule 602(f) of the Commission's Rules of Practice and Procedure, comments on the Settlement may be filed not later than January 4, 1989, and reply comments may be filed not later than January 16, 1989, unless otherwise provided by the Commission.

FGT states that copies of the filing were mailed to all of FGT's jurisdictional purchasers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29641 Filed 12-23-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. TQ89-1-25-002]**

**Mississippi River Transmission Corp.;  
Rate Change Filing**

December 21, 1988.

Take notice that on December 15, 1988 Mississippi River Transmission Corporation (MRT) tendered for filing Substitute Twenty-Ninth Revised Sheet No. 4 to its FERC Gas Tariff, Second Revised Volume No. 1. MRT requests an effective date of December 1, 1988.

MRT states Substitute Twenty-Ninth Revised Sheet No. 4 was submitted pursuant to a Commission order dated November 30, 1988 in Docket No. TQ89-1-25-000. MRT states that the filing under Rate Schedule CD-1 reflects a commodity rate increase of 3.82 cents per Mcf, a decrease of 6.9 cents per Mcf in the Demand D-1 rate, and a decrease of 1.3 cents per Mcf in the Demand D-2 rate. The single part rate under Rate

Schedule SGS-1 reflects an increase of 1.85 cents per Mcf. The cost impact of such rate changes when applied to quarterly jurisdictional billing determinants is a \$1.3 million increase.

MRT states that copies of its filing have been served on all jurisdictional customers and interested state commissions. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29642 Filed 12-23-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. EL89-9-000]**

**Northern States Power Co.  
(Minnesota); Filing**

December 20, 1988.

Take notice that on December 1, 1988, Northern States Power Company (Minnesota) (NSPM) filed a request for conditional waiver of the Commission's fuel clause regulations. According to NSPM, waiver is sought in order to obtain Commission approval, if needed, of the recovery through the fuel adjustment clause of certain payments made under a minimum take provision of a coal supply contract. NSPM states that its 1988 fuel costs include payments to be made to a coal supplier under a minimum take provision of a coal supply contract. NSPM states that it believes that these amounts are properly recordable in Account 151 and therefore properly recoverable through the fuel adjustment clause. Waiver is requested only in the event that the Commission ultimately determines that the payments should not be recorded in Account 151. NSPM requests an effective date of November 1, 1988, for this filing.

The Commission previously issued a notice of this filing under docket number ER89-99-000. This docket number has now been superseded, and NSPM's filing

will be handled under docket number EL89-9-000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before January 17, 1989. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29643 Filed 12-23-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket Nos. RP88-80-010 and RP88-251-004]**

**Texas Eastern Transmission Corp.;  
Proposed Changes in FERC Gas Tariff**

December 21, 1988.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on December 15, 1988 tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies of the tariff sheets listed on Appendix A.

Texas Eastern states that this filing filed revised tariff sheets to track, in compliance with Commission orders dated July 15, 1988 in Docket No. RP88-80-004 and October 7, 1988 in Docket No. RP88-251-000, the modifications filed in Docket Nos. RP88-177 and RP88-230 by Texas Gas Transmission Corporation (Texas Gas) to flowthrough to customers of Texas Gas (1) United Gas Pipe Line Company's (United) take-or-pay charges to Texas Gas and (2) Tennessee Gas Pipeline Company's (Tennessee) take-or-pay charges to Texas Gas.

(1) Texas Eastern Docket No. RP88-80

Texas Eastern states that on Oct. 21, 1988 Texas Gas filed in Docket No. RP88-17 tariff sheets reflecting a revised fixed take-or-pay charge representing the flowthrough by Texas Gas to Texas Eastern of a portion of Texas Gas' share of United's Docket No. RP88-27 take-or-pay charges, to be billed in addition to Texas Gas' currently effective rates. By the October 21 filing, Texas Gas revised its fixed take-or-pay charges for

jurisdictional customers to reflect (1) changes required by the Commission's October 6, 1988 order in Texas Gas' Docket No. RP88-177, (2) correction of a minor error in the initial filing in the sales volumes for Associated Natural Gas Company (Associated), and (3) a modification in the total amount of take-or-pay costs allocated to Texas Gas by United in United's August 31, 1988 filing in Docket No. RP88-27. As a result of the October 21 filing, Texas Gas now proposes to bill and recover from Texas Eastern an aggregate principal amount of \$1,029,784, which includes amortization interest, by means of a monthly charge of \$28,605 for three years commencing June 1, 1988. On December 8, 1988 the Commission issued an order in Docket Nos. RP88-177-003 and RP88-230-002 approving Texas Gas' October 21, 1988 filing.

Texas Eastern states the tariff sheets listed in Item 1 of Appendix A are being filed solely to track modifications made by Texas Gas on October 21, 1988 in Docket No. RP88-177. In particular, Second Substitute Second Revised Sheet Nos. 52 through 55 set forth the principal amount plus the allocation factor for carrying costs that each customer will be required to pay in order to recover Texas Gas' and United's portion of United's take-or-pay charges billed to Texas Eastern in United's Docket No. RP88-27. Substitute Third Revised Sheet Nos. 52 through 55 set forth the principal amount plus the allocation factor for carrying costs that each customer will be required to pay in order to recover Texas Gas' and United's portion of United's take-or-pay charges billed to Texas Eastern in United's Docket No. RP88-27 as well as charges billed by United to Texas Eastern in United's Docket No. RP88-264. Workpapers setting forth Texas Eastern's determination of the allocation factor for the principal amount (which includes a predetermined carrying charge) and a breakdown of the total and monthly principal amounts (which include a predetermined carrying charge) each Texas Eastern customer will be required to pay are set forth under Appendices B and C.

(2) Texas Eastern Docket No. RP88-251

Texas Eastern states that on Sept. 7, 1988 the Commission issued an order in Texas Gas Docket No. RP88-230 accepting a filing by Texas Gas made August 8, 1988 to recover from its customers take-or-pay charges billed by Tennessee, but rejecting a proposal to bill ANR Pipeline Company (ANR) for Tennessee's take-or-pay charges. The September 7 order directed Texas Gas

to allocate the amounts which would have been allocated to ANR to current jurisdictional and non-jurisdictional customers on the same basis as Tennessee bills the charges to Texas Gas. On October 21, 1988 Texas Gas filed in Docket No. RP88-230 tariff sheets reflecting the reallocation of the charges which Texas Gas had proposed billing ANR. The tariff sheets filed by Texas Gas also correct an alleged error in Associated's sales volumes. On December 8, 1988 the Commission issued an order in Docket Nos. RP88-177-003 and RP88-230-002 approving Texas Gas' October 21, 1988 filing.

Texas Eastern states the tariff sheets listed in Item 2 of Appendix A are being filed solely to track modifications proposed by Texas Gas on October 21, 1988 in Docket No. RP88-230. Substitute Fifth Revised Sheet Nos. 68 through 71 set forth the principal amount plus the allocation factor for carrying costs that each customer will be required to pay in order to recover Texas Gas' portion of Tennessee's take-or-pay charges billed to Texas Eastern in Tennessee's Docket No. RP88-191. Workpapers setting forth Texas Eastern's determination of the allocation factor for the principal amount (which include a predetermined carrying charge) and a breakdown of the total and monthly principal amounts (which include a predetermined carrying charge) each Texas Eastern customer will be required to pay are set forth under Appendix D.

The tariff sheets are proposed to become effective as of the dates proposed on Appendix A.

Copies of the filing were served on Texas Eastern's jurisdictional customers and interested state commissions. In addition, Texas Eastern is mailing a copy of this filing to all parties of record in Docket Nos. RP88-80 and RP88-251.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the



Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29644 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP89-11-002]

**Trunkline Gas Company; Proposed Changes in FERC Gas Tariff**

December 21, 1988.

Take notice that on December 14, 1988, Trunkline Gas Company (Trunkline) tendered for filing the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

First Substitute Original Sheet No. 3-A.7  
First Substitute Original Sheet No. 3-A.8  
Third Revised Sheet No. 21-O  
Third Revised Sheet No. 21-Q

The proposed effective date of these tariff sheets is November 28, 1988.

Trunkline states that the proposed tariff sheets are being filed in compliance with the Commission's November 25, 1988 Order in the above-captioned proceeding accepting Trunkline's proposed recovery of take-or-pay settlement and contract reformation costs under Order No. 500. The Commission's November 25 Order directed Trunkline, pursuant to Ordering Paragraphs (B), (C), (D) and (F) to: (1) Adjust the take-or-pay buydown and buyout and revise the billing amounts, if necessary, to comply with the Commission's requirement that the filing reflect those settlement costs for which a written or verbal obligation to pay had been concluded as of the date of the filing; (2) remove carrying costs which predate the effective date of the proposed tariff sheets and to remove carrying costs on funds not actually disbursed as of the effective date of the proposed tariff sheets; and (3) file revised tariff sheet language that reflects the Commission's interest regulations at 18 CFR 154.67(c) to customer funds collected but not disbursed, and the crediting or refunding of such accrued interest, as appropriate.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NW., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will

not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29645 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM89-2-49-000]

**Williston Basin Interstate Pipeline Co.; Gas Research Institute Funding Unit Adjustment Filing**

December 21, 1988.

Take notice that on December 15, 1988, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff the following tariff sheets:

First Revised Volume No. 1

First Revised Fifteenth Revised Sheet No. 10

Original Volume No. 1-A

First Revised Tenth Revised Sheet No. 11

First Revised Thirteenth Revised Sheet No. 12

Original Volume No. 1-B

First Revised Third Revised Sheet No. 10  
First Revised Third Revised Sheet No. 11

The proposed effective date of the tariff sheets is January 1, 1989.

Williston Basin states that the instant filing reflects the inclusion of the Gas Research Institute funding unit of 1.51 cents per Mcf (1.428 cents on a dekatherm basis), as authorized by the Commission in its Opinion and Order Amending and Approving Gas Research Institutes 1989 Research and Development Program and Related Five-Year Plan for 1989-1993 issued on November 30, 1988 in Docket No. RP88-182-000.

Any person desiring to be heard or to protest said tariff application should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with the Commission's Rules 211 and 214. All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to the proceeding or to participate as a party in any hearing therein must file a motion to intervene. Copies of the filing are on file

with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29647 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-398-000 et al.]

**Texas Gas Transmission Corporation et al.; Natural Gas Certificate Filings**

Take notice that the following filings have been made with the Commission:

**1. Texas Gas Transmission Corporation**

[Docket No. CP89-398-000]

December 20, 1988.

Take notice that on December 13, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-398-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) and the Natural Gas Policy Act (18 CFR 284.223) for authorization to transport natural gas for Ford Motor Company-Ohio Trucking Plant (Ford Motor-Ohio Truck) under Texas Gas' blanket certificate issued in Docket No. CP88-688-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Texas Gas proposes to transport on an interruptible basis up to 5,500 MMBtu of natural gas equivalent on behalf of Ford Motor-Ohio Truck pursuant to a gas transportation agreement dated October 5, 1988, between Texas Gas and Ford Motor-Ohio Truck. Texas Gas would receive the gas at various existing points of receipt on its system in Texas, Kentucky, Tennessee, Illinois, Arkansas, Indiana and Louisiana and redeliver equivalent volumes, less fuel and lost and unaccounted for volumes, at an existing delivery point in Ohio.

Texas Gas further states that the estimated average daily and annual quantities would be 2,500 MMBtu and 2,007,500 MMBtu, respectively. Service under § 284.223(a) commenced on October 21, 1988, as reported in Docket No. ST89-770-000, it is stated.

Comment date: February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

**2. CNG Transmission Corporation**

[Docket No. CP89-405-000]

Take notice that on December 13, 1988, CNG Transmission Corporation (CNG), 445 West Main Street,

Clarksburg, West Virginia 26302, filed in Docket No. CP89-405-000 a prior notice request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authorization to transport natural gas for various shippers under the certificate issued in Docket No. CP88-311-000, all as more fully set forth in the request which is on file with the

Commission and open to public inspection.

CNG proposes to transport gas for the shippers on an interruptible basis from various receipt points on its system to various interconnections between CNG and certain local distribution companies an pipelines. CNG lists for each shipper the receipt and delivery points, the

maximum daily, average daily, and annual volumes, as well as the docket number related to the 120-day transportation service initiated by CNG (see attached appendix).

Comment date: February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

**APPENDIX**

Docket No.	Shipper or customer	Commence date	Max. daily, avg. daily, est. annual	Receipt point	LDC
ST89-991	Bristol Meyers Company .....	9/01/88	7,000 25	A	NIMO
ST89-1032	Crown Leather Finishing, Inc. ....	9/02/88	2,555,000 600 154	A	NIMO
ST89-983	General Chemical Corporation .....	9/01/88	219,000 850 850	A	NIMO
ST89-1031	Gold Bond Building Products .....	9/01/88	310,250 2,500 25	A	NIMO
ST89-1017	The Trustees of Hamilton College .....	9/01/88	912,500 350 25	A	NIMO
ST89-1030	Hussman Corp. ....	9/01/88	127,750 60 25	A	NIMO
ST89-992	Johnstown Knitting Mills .....	9/01/88	21,900 225 25	A	NIMO
ST89-1022	MCA Manufacturing .....	9/01/88	82,125 250 25	A	NIMO
ST89-999	Nelson Taylor, Co .....	9/01/88	91,200 92 50	A	NIMO
ST89-978	Nestle Foods Corp. ....	9/02/88	33,580 2,750 282	A	NIMO
ST89-1013	Pass & Seymour .....	9/01/88	1,003,750 250 31	A	NIMO
ST89-988	Revere Copper Products, Inc. ....	9/01/88	91,250 4,500 300	A	NIMO
ST89-987	Robinson & Smith .....	9/01/88	1,642,500 100 25	A	NIMO
ST89-1008	Smiths Laundry .....	9/01/88	36,500 65 25	A	NIMO
ST89-1012	Somerset Dyeing .....	9/01/88	23,725 175 25	A	NIMO
ST89-990	Special Metals .....	9/01/88	63,875 1,000 25	A	NIMO
ST89-994	The City of Syracuse .....	9/01/88	365,000 50,000 91	A	NIMO
ST89-1029	Utica Corp. ....	9/02/88	18,250,000 400 41	A	NIMO
ST89-989	B.P. Gas Marketing .....	9/02/88	146,000 90,000 112	A	NIMO
ST89-998	Welch Allyn, Inc. ....	9/01/88	32,850,000 32,850,000 150	A	NIMO
ST89-997	Will & Baumer .....	9/01/88	54,750 500 41	A	NIMO
ST89-996	Scott Paper .....	9/01/88	182,500 5,000 927	A	NIMO



## APPENDIX—Continued

Docket No.	Shipper or customer	Commence date	Max. daily, avg. daily, est. annual	Receipt point	LDC
ST89-995	Access Energy .....	9/01/88	1,825,000 50,000 98	B	NIMO
ST89-1028	Wayne Finger Lake BOCES .....	9/01/88	18,250,000 2,200 11	C	NIMO
ST89-993	B.P. Gas Marketing .....	9/02/88	803,000 75,000 148	A	NIMO
ST89-1007	Natural Gas Clearing .....	9/23/88	27,375,000 25,000 975	D	NIMO
ST89-1006	Upton Court, Wesley-On-East .....	9/01/88	9,125,000 43 10	C	NIMO
ST89-1011	Capital District Energy Center .....	9/01/88	15,895 15,000 9,300	B	TGP
ST89-1023	IESCO .....	9/02/88	5,475,000 85,000 117	B	Transco
ST89-1009	BP Gas Marketing .....	9/02/88	23,725,000 35,000 187	D	HGI
ST89-984	IESCO .....	9/02/88	12,775,000 2,000 24	B	North Penn
ST89-1026	Brandywine Ind. ....	9/20/88	730,000 3,000 100	D	EOG
ST89-1024	Kogas, Inc. ....	9/01/88	1,095,000 100,000 78	B	EOG
ST89-1018	Pentech Papers .....	9/03/88	36,500,000 2,056 100	A	H&B
ST89-1003	Latrobe Steel Co. ....	9/01/88	750,440 8,950 500	B	PNG
ST89-1002	CNG Dev. Company .....	9/01/88	2,536,000 18,000 10,900	B	PNG
ST89-1001	Alcan Rolled Products .....	9/02/88	6,570,000 13,500 2,819	B	NIMO
ST89-1000	Gulf Ohio Corp. ....	9/01/88	4,927,500 230 25	B	NIMO
ST89-986	Hammermill Paper .....	9/01/88	83,950 3,500 95	D	NIMO
ST89-1025	Rome Strip Steel .....	9/02/88	1,277,500 600 100	D	NIMO
ST89-985	Beechnut Nutrition .....	9/01/88	201,000 3,700 25	A	NIMO
ST89-1021	Natural Gas Clearinghouse .....	10/19/88	1,350,500 10,000 100	D	Corning
ST89-1020	Natural Gas Clearinghouse .....	10/06/88	3,650,000 50,000 767	D	NYSEG
ST89-1014	Texas-Ohio Gas .....	10/20/88	18,250,000 3,500 707	B	Transco
ST89-1019	Natural Gas Clearinghouse .....	10/14/88	1,277,500 25,000 100	D	HGI
ST89-1015	Natural Gas Clearinghouse .....	10/26/88	9,125,000 50,000 10,000	A	NFG
ST89-1010	Natural Gas Clearinghouse .....	10/18/88	18,250,000 50,000 100	D	PNG
ST89-981	Natural Gas Clearinghouse .....	10/17/88	18,250,000 25,000 100	D	North Penn
			9,125,000		

## APPENDIX—Continued

Docket No.	Shipper or customer	Commence date	Max. daily, avg. daily, est. annual	Receipt point	LDC
ST89-980	Sharon Tube Co. ....	10/11/88	300 50 109,500	B	EOG
ST89-979	Gulf Ohio Corp. ....	10/14/88	900 158 328,500	B	NIMO

Legend of LDC's or Delivery Points: HGI—Hope Gas, Inc. NYSEG—New York State Electric Gas Corp. RGE—Rochester Gas & Electric Corp. EOG—East Ohio Gas Co. PNG—Peoples Natural Gas Company. NIMO—Niagara Mohawk Power Corp. NFG—National Fuel Gas Supply Corp. Transco—Transcontinental Gas Pipeline Corporation. Corgas—Corgas Pipeline Company. North Penn—North Penn Gas Company. H&B—Hanley & Bird. Corning—Corning Natural Gas Corp.  
 Legend of Receipt Points: A—Various interconnects between Tennessee Gas Pipeline Company and CNG. B—Various receipt points in WV/PA/NY. C—Various interconnects between Texas Gas Transmission Corp. and CNG. D—Various interconnects between Texas Eastern Transmission Corp. and CNG.

### 3. Texas Gas Transmission Corporation [Docket No. CP89-408-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-408-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for TXG Gas Marketing Company (TXG), under the blanket certificate issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Texas Gas states that pursuant to a transportation agreement dated October 17, 1988, under its Rate Schedule T, it proposes to transport up to 100,000 MMBtu per day equivalent of natural gas for TXG from points of receipt listed in Exhibit "B" of the agreement to delivery points listed in Exhibit "C", which transportation service involves interconnections between Texas Gas and various transporters. Texas Gas advises that the ultimate consumer of the gas is The City of Murray, Kentucky.

Texas Gas advises that services under § 284.223(a) commenced October 31, 1988, as reported in Docket No. ST89-880. Texas Gas further advises that it would transport 100,000 MMBtu on an average day and 36,500,000 MMBtu annually.

Comment date: February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

### 4. ANR Pipeline Company

[Docket No. CP89-403-000]

Take notice that on December 13, 1988, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP89-403-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for

authorization to transport natural gas for Total Matamore Corporation (TMC), a marketer, under ANR's blanket certificate issued in Docket No. CP88-532-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

ANR proposes to transport up to 25,000 dt equivalent of natural gas per day on an interruptible basis for TMC. ANR states it would receive the gas at an existing point of receipt in the Vermilion Area, offshore Louisiana, and redeliver the gas for the account of TMC at an existing interconnection also located in the Vermilion Area.

ANR states it commenced service for TMC under § 284.223(a) of the Commission's Regulations on November 1, 1988, as reported in Docket No. ST89-1060-000.

Comment date: February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

### 5. Texas Gas Transmission Corporation [Docket No. CP89-413-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-413-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for TXG Gas Marketing Company (TXG), under the blanket certificate issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Texas Gas states that pursuant to a transportation agreement dated October 17, 1988, under its Rate Schedule T, it proposes to transport up to 100,000 MMBtu per day equivalent of natural gas for TXG from points of receipt listed in Exhibit "B" of the agreement to

delivery points listed in Exhibit "C", which transportation service involves interconnections between Texas Gas and various transporters. Texas Gas advises that the ultimate consumer of the gas is Midwest Natural Gas Corporation.

Texas Gas advises that service under § 284.223(a) commenced October 31, 1988, as reported in Docket No. ST89-885. Texas Gas further advises that it would transport 100,000 MMBtu on an average day and 36,500,000 MMBtu annually.

February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

### 6. Texas Gas Transmission Corporation [CP89-412-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-412-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for TXG Gas Marketing Company (TXG), under the blanket certificate issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Texas Gas states that pursuant to a transportation agreement dated October 19, 1988, under its Rate Schedule T, it proposes to transport up to 100,000 MMBtu per day equivalent of natural gas for TXG from points of receipt listed in Exhibit "B" of the agreement to delivery points listed in Exhibit "C", which transportation service involves interconnections between Texas Gas and various transporters. Texas Gas advises that the ultimate consumer of the gas is The City of Hamilton, Ohio.

Texas Gas advises that service under § 284.223(a) commenced October 31,



1988, as reported in Docket No. ST89-879. Texas Gas further advises that it would transport 100,000 MMBtu on an average day and 36,500,000 MMBtu annually.

*Comment date:* February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 7. Texas Gas Transmission Corporation

[Docket No. CP89-409-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street Owensboro, Kentucky 42301, filed in Docket No. CP89-409-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for TXG Gas Marketing Company (TXG), under the blanket certificate issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Texas Gas states that pursuant to a transportation agreement dated October 19, 1988, under its Rate Schedule T, it proposes to transport up to 100,000 MMBtu per day equivalent of natural gas for TXG from points of receipt listed in Exhibit "B" of the agreement to delivery points listed in Exhibit "C", which transportation service involves interconnections between Texas Gas and various transporters. Texas Gas advises that the ultimate consumer of the gas is The City of Jena, Louisiana.

Texas Gas advises that service under Section 284.223(a) commenced October 31, 1988, as reported in Docket No. ST89-889. Texas Gas further advises that it would transport 100,000 MMBtu on an average day and 36,500,000 MMBtu annually.

*Comment date:* February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 8. Northern Natural Gas Company

[Docket No. CP89-372-000]

Take notice that on December 9, 1988, Northern Natural Gas Company, Division of Enron Corp. (Northern), 1400 Smith Street, Houston, Texas 77002, filed in Docket No. CP89-372-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to operate one existing delivery point and appurtenant facilities as a jurisdictional sales facility to delivery gas to Minnegasco, Inc. (Minnegasco) under Northern's blanket certificate issued in Docket No. CP82-

401-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Northern states that the existing delivery point, located in Carver County, Minnesota, was constructed and operated under Section 311 authority and that it now proposes to use the facilities to make jurisdictional natural gas deliveries to the communities of Mayer and New Germany, Minnesota, to be served by Minnegasco. Northern further states that the estimated fifth year peak day and annual volumes are 408 Mcf and 43,513 Mcf respectively and that the end users would be residential and commercial consumers.

Northern asserts that the natural gas delivered at the proposed delivery point would be served from Minnegasco's firm entitlement for delivery to Minneapolis and that the total volumes delivered to Minnegasco would not exceed its authorized firm entitlement.

*Comment date:* February 3, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 9. Texas Gas Transmission Corporation

[Docket No. CP89-396-000]

Take notice that on December 13, 1988, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-396-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide interruptible transportation service on behalf of Ford Motor Company-Batavia Transmission Plant (Ford Motor-Batavia), under Texas Gas' blanket certificate issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Pursuant to an interruptible gas transportation agreement executed October 6, 1988, Texas Gas proposes to transport up to 1,000 MMBtu of natural gas per day on behalf of Ford Motor-Batavia from one hundred seventy (170) points of receipt located offshore Louisiana and within the States Louisiana, Arkansas, Illinois, Indiana, Kentucky, Ohio, Tennessee, and Texas to a single point of delivery located in Butler County, Ohio. The average daily transportation quantity is estimated to be 500 MMBtu and based on that average, the annual transportation quantity would be 182,500 MMBtu. Texas Gas advises that the transportation service commenced

October 21, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-767-000.

*Comment date:* February 3, 1988, in accordance with Standard Paragraph G at the end of this notice.

#### 10. Transco Gas Supply Company

[Docket No. CP89-378-000]

Take notice that on December 12, 1988, Transco Gas Supply Company (Gasco), Post Office Box 1396, Houston, Texas 77251 filed in Docket No. CP89-378-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon sales service to its affiliate Transcontinental Gas Pipe Line Corporation (Transco), all as more fully set forth in the application which is on file with the Commission and open to public inspection. Gasco requests that such authorization be effective December 31, 1988.

Gasco states that it was originally formed in June 1975 for the purpose of securing additional financing for Transco's advance payment program. Under its existing sales authority, Gasco has received an assignment of Transco's rights and obligations under certain advance payment agreements between Transco and its producers, and sells to Transco for Transco's customers all natural gas purchased by Gasco under contracts entered into by Gasco pursuant to the advance payment agreements. It is stated that Transco made advance payments to producers of some \$103,300,000 as of May 1, 1975, and had commitments to make additional advances during the remainder of 1975. Further, certain restrictions in Transco's long-term debt instruments were expected to prevent Transco from borrowing the additional funds to make further advances in 1976 and beyond. Gasco states that in addition to the fact that Gasco was not subject to the restrictions in Transco's debt instruments, Gasco believed its ability to obtain funds for financing an advance program was superior to that of Transco. Gasco reasoned that it would have available for such purpose both the obligation of the producers to repay sums advanced, and the obligation of Transco to make payments to Gasco under a gas sales agreement between Gasco, as seller, and Transco, as buyer. Gasco states that it was issued such sales authority in Docket No. CP76-3.

It is stated that according to the order issuing Gasco the certificate, Transco agreed to assign to Gasco its rights under twenty-eight advance payment agreements with producers. In consideration for the assignment of

Transco's advance payment agreements, Gasco states it agreed to pay Transco an amount equal to the aggregate amount of any unrecouped advances previously made by Transco thereunder, to assume all of Transco's duties thereunder, and to sell to Transco all natural gas purchased by Gasco under gas purchase contracts entered into by Gasco pursuant to the advance payment agreements.

According to Gasco, the sales authority in Docket No. CP76-3 has become unnecessary due to the fact that the very reason for which such sales authority was sought, *ie.*, to assist Transco in securing financing for its advance payment program, no longer exists; Transco's advance payment has been discontinued, and all advance payments made to producers thereunder have been repaid.<sup>1</sup> Gasco further states that it has also fully repaid the debt it issued to finance the advance payment program. As a result of having fully collected its advance payments and repaying all related debts, Gasco avers that the time and expenses associated with its administrative and regulatory duties have become unnecessary and burdensome and should be eliminated.

Gasco further states that both Transco and Transco's customers will benefit if Gasco is granted authority to abandon its sales to Transco because such administrative and regulatory expenses will no longer be included as operating expenses in Transco's general rate filings. It is stated that in addition to the benefit that will flow to Transco and Transco's customers with the elimination of these expenses, neither Transco nor Transco's customers will be disadvantaged in any way if the requested abandonment authorization is granted. Gasco states that, effective as of the date of the Commission's order granting the authorization sought herein, the advance payment agreements which were assigned to Gasco from Transco, and the gas purchase agreements entered into by Gasco pursuant to the advance payment agreements, will be reassigned to Transco and Transco will begin purchasing the same gas supplies covered by the existing sales

<sup>1</sup> Gasco states that as of the date of this filing, a total amount of \$3,314,842, representing a sum of unrecouped prepayments and take-or-pay payments, remains due to Gasco from one producer under its contract entered into pursuant to the advance payment program. Gasco states that it anticipates that this amount will be recouped before December 31, 1988. In the event that any portion of this receivable is still unrecouped on the effective date of the authorization sought herein, Gasco states that such receivable will be assigned from Gasco to Transco as a part of the reassignment of advance agreements and related gas purchase contracts to Transco.

authorization directly from the producers, rather than from Gasco. Gasco contends that Transco will pay the producers under the same applicable contract provisions under which Gasco has made payments, and as a result, Transco's customers will continue to be charged for Transco's gas purchase at the same supply rate as if Transco were continuing to purchase the gas from Gasco. Therefore, it is stated that, although the sales service from Gasco to Transco will be terminated by the proposed abandonment, the availability of gas supplies to Transco and Transco's customers under the applicable gas purchase contracts will remain unchanged, and the gas cost component of Gasco's charge to Transco will remain the same as if Transco were continuing to buy the gas from Gasco.

Gasco further requests that the Commission grant a waiver of any and all otherwise applicable orders, rules, regulations and reporting requirements, now effective or hereafter promulgated or issued by the Commission, to the extent such orders, rules, regulations and reporting requirements are or may be inconsistent with the authorizations requested herein. Finally, Gasco states that it is authorized to represent that its only customer, Transco, concurs with the relief requested by Gasco in its application.

*Comment date:* January 10, 1988, in accordance with Standard Paragraph F at the end of his notice.

#### 11. CNG Transmission Corporation

[Docket No. CP88-311-002]

Take notice that on November 30, 1988, CNG Transmission Corporation (CNG), 445 West Main Street, Clarksburg, West Virginia 26301, filed in Docket No. CP88-311-002 a petition to amend the order issuing a certificate of public convenience and necessity in Docket No. CP86-311-000 to CNG pursuant to section 7(c) of the Natural Gas Act, to authorize an experimental transportation program, all as more fully set forth in the petition to amend which is on file with the Commission and open to public inspection.

CNG states that its upstream pipeline suppliers have filed applications with the Commission for authorization to provide standby sales service. CNG requests authority to make capacity, obtained from CNG's election of standby service on its pipeline suppliers, available to its standby customers for transportation on a firm basis. CNG states that in the event excess capacity remains after its customers have elected any firm transportation service on these pipelines, any party would be permitted

to request interruptible transportation service on a first-come first-served basis consistent with the scheduling of transportation service under Rate Schedule TI. Further, CNG states that the availability of upstream pipeline capacity for firm and interruptible agency transportation services is dependent upon the capacity required to serve CNG's customers for the relevant period.

CNG states it would make firm agency transportation available by notifying its standby customers by the 10th of each month of the amount of any upstream pipeline capacity available during the next month. In the event that nominations exceed available capacity, CNG would allocate capacity *pro rata*, based upon each customer's maximum daily standby quantity. CNG states that five days after it receives nominations, it would notify other customers of any remaining capacity on the upstream pipeline. CNG would make this transportation available consistent with the transportation queue under Rate Schedule TI.

Five days after CNG receives standby customers' nominations, CNG would notify other customers of any available capacity on the upstream pipeline. CNG states it would make this capacity available consistent with the transportation queue under Rate Schedule TI. Further, these customers could nominate any quantity, up to the maximum daily transportation quantity set forth in their transportation agreements with CNG.

CNG feels that the expiration of the Texas Gas Transmission Corporation TSC program will interrupt the purchasing strategies of many LDC's and end-users that used and relied upon the access provided by the TSC program and that the difficulties that flow from the termination of this program are exacerbated by its timing—at the outset of the winter heating season. CNG believes that this application ameliorates these hardships and constructs an experimental mechanism to provide reliable, widespread access to the Southwest. Under this program, CNG's standby customers would have access to CNG's capacity on its upstream pipeline-suppliers that CNG obtains through the exercise of its standby rights. CNG would allow a standby customer that obtains capacity on upstream pipelines to act as an agent for other customers, as long as it makes capacity available on a non-discriminatory basis. Additionally, anyone could obtain interruptible capacity on a first-come, first-served basis. Thus, CNG submits, its proposal



would provide access to the Southwest fields to all customers and others through the administration of a fair and uncomplicated program.

CNG states the although the firm and interruptible service proposed in this application necessarily provides different types of service, they share several common characteristics. First, for both services, buyers would pay the commodity and fuel charges associated with transportation as billed by the upstream pipeline. The buyers would also supply fuel if the upstream pipeline elects to retain fuel. Second, buyers of firm and interruptible service must comply with all applicable tariff provisions of the upstream pipeline. Third, CNG would not be obligated to accept nominations for either service from any buyer that fails to equalize receipts and deliveries in accordance with the tariff of the upstream pipeline until any imbalances are resolved. Finally, under no circumstances would CNG be a guarantor of performance for the upstream pipeline.

CNG's proposal also requires the revision of its purchased gas cost adjustment tariff. Under this tariff, CNG has included in its definition of "purchased gas cost" those standby charges billed to CNG by its pipeline suppliers. CNG states that previously it tracked these costs as demand charges and hence as purchased gas costs and that tracking those costs as standby charges is appropriate in light of the new services provided in this application.

CNG's feels its proposal has the advantage of being administratively simple for all parties involved. For many shippers, arranging for transportation on more than one pipeline as a complex, time-consuming process. Currently, shippers must be familiar with transportation deadlines and tariff conditions on a number of pipelines in order successfully move southwest gas. A missed deadline or incorrect nomination could cost a shipper its transportation for a month. CNG states its agency proposal would eliminate many of these problems by allowing shippers to arrange for transportation on two pipeline systems with one nomination.

Additionally, CNG feels an agency relationship would be far simpler for CNG to implement and administer than a capacity brokering program; and the agency proposal avoids many of the conceptual problems that brokering has encountered. CNG believes it could implement this proposal through existing contracts and can account for and track

each shipper's transportation without major alterations in its operations.

*Comment date:* January 10, 1989, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

#### Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the

time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29650 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP86-589-009; RP86-104-011; RP87-30-018]

#### Colorado Interstate Gas Co.; Substitute Tariff Filing

December 21, 1988.

Take note that on December 14, 1988, Colorado Interstate Gas Company ("CIG") submitted for filing the following tariff sheets of its Second Revised Volume No. 1-A Transportation Tariff in substitution for its previous filing in compliance with the Commission's November 1, 1988 order in these dockets:

Second Substitute Original Sheet No. 26  
Second Substitute Original Sheet No. 27

CIG states that these sheets replace Substitute Original Sheet Nos. 26 and 27, which were filed November 16, 1988, in order to comply with the requirement that CIG modify its "open access" tariff.

Copies of this filing are being served on all jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Rules 214 or 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214 and 385.211). All such motions or protests should be filed on or before December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29649 Filed 12-23-88; 8:45 am]

BILLING CODE 6717-01-M

#### Office of Hearings and Appeals

##### Cases Filed During the Week of November 18 through November 25, 1988

During the Week of November 18 through November 25, 1988, the appeals and applications for other relief listed in the Appendix to this Notice were filed

with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of

notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585. December 20, 1988.

George B. Breznay,

Director, Office of Hearings and Appeals.

#### LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of Nov. 18 through Nov. 25, 1988]

Date	Name and location of applicant	Case No.	Type of submission
Nov. 21, 1988	Hanford Education Action League, Spokane, WA.....	KFA-0233.	Appeal of an information request denial. If granted: The Nov. 2, 1988, freedom of information request denial issued by the DOE Richland Operations Office would be rescinded and the Hanford Education Action League would receive access to reports concerning thyroid testing of school children.
Do.....	Hanford Education Action League, Spokane, WA.....	KFA-0232.	Appeal of an information request denial. If granted: The Oct. 26, 1988, freedom of information request denial issued by the Director, DOE Executive Secretariat, would be rescinded and the Hanford Education Action League would receive access to complete minutes and reports of the Dec. 12-14, 1949, meeting of the Atomic Energy Commission at the Argonne National Laboratory in Lemont, Illinois.
Do.....	Amoco/Belridge/Palo Pinto/Oklahoma, Oklahoma City, OK.	RM21-136, RM8-137, RM5-138.	Request for modification/rescission. If granted: The May 13, 1985, decision and order issued to Oklahoma would be modified, regarding the state's second stage applications in the Amoco, Belridge and Palo Pinto refund proceedings.
Do.....	Economic Regulatory Administration, Washington, DC.	KRZ-0530.	Interlocutory. If granted: The proposed remedial order issued to Merit Petroleum (Case No. KRO-0530) would be amended, regarding the issue of personal liability on the part of certain individuals.

#### REFUND APPLICATIONS RECEIVED

[Week of Nov. 18 to Nov. 25, 1988]

Date received	Name of refund proceeding/ Name of refund applicant	Case No.
Nov. 18, 1988	Farmers Union Central Exchange.	RF312-4.
Nov. 21, 1988	Arrow Gas Service.	RF312-5.
Do.....	Airgas, Inc.....	RD272-72350.
Do.....	Zapata Haynis Corp.	RD272-61177.
Do.....	Little America Refining Co.	RF312-6.
Do.....	Wyoming Gas & Oil Co.	RF312-7.
Do.....	Petrolane Gas Service, Ltd.	RF312-8.
Nov. 22, 1988	Rollins, Inc.....	RD272-71680.
Nov. 23, 1988	Velsicol Chemical Corp.	RD272-62413.
Do.....	Quantum Chemical Corp.	RD272-62473.
Do.....	Empire Drilling Co.	RD272-65942.
Do.....	Globe Drilling Co.	RD272-65961.
Do.....	Hi Light Drilling Co.	RD272-68514.
Do.....	Tiger Oil Co.....	RD272-68538.

#### REFUND APPLICATIONS RECEIVED—Continued

[Week of Nov. 18 to Nov. 25, 1988]

Date received	Name of refund proceeding/ Name of refund applicant	Case No.
Nov. 28, 1988	The Western Co. of North America.	RF272-62495.
Nov. 18, 1988 thru Nov. 25, 1988.	Gulf Oil refund, applications received.	RF300-10604 thru RF300-10614.
Do.....	Exxon refund, applications received.	RF307-6767 thru RF307-6882.
Do.....	Crude oil refund, applications received.	RF272-72116 thru RF272-75131.
Do.....	Atlantic Richfield refund, applications received.	RF304-7272 thru RF304-7349.
Do.....	Murphy refund, applications received.	RF309-529 thru RF309-602.

[FR Doc. 88-29654 Filed 12-23-88; 8:45 am]

BILLING CODE 6450-01-M

#### Issuance of Decisions and Orders Filed During the Week of October 24

During the week of October 24 through October 28, 1988, the decisions and orders summarized below were issued with respect to appeals and applications for other relief filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

##### Appeal

*Stock Equipment Company, 10/25/88, KFA-0222*

Stock Equipment Company filed an Appeal from a determination issued by the Deputy Director of the Office of Intergovernmental and External Affairs of DOE's Albuquerque Operations Office (AOO). That determination denied in part a Request for Information which Stock has submitted under the Freedom of Information Act (FOIA). In considering the Appeal, the DOE found that the AOO had not presented an adequate justification for applying FOIA Exemption 4 to the information withheld in the requested documents. Accordingly, the matter was remanded



for either release of the requested information or a new determination that adequately justifies the withholding of the information.

#### Request for Modification and/or Rescission

Texas, 10/26/88, KER-0045

The DOE issued a Decision and Order approving the Motion filed by the State of Texas seeking reconsideration of a Petition for Special Redress to use \$8 million in Stripper well funds for an Energy Resource Optimization (ERO) program. The ERO program would fund geological research on "oil reservoir characterization" by the State's public universities. In its Motion, Texas demonstrated that the State's petroleum consumers will derive much broader energy-related benefits from the ERO program than the DOE had originally concluded. On that basis, the DOE approved the State's submission.

#### Supplemental Order

Herbert L. Tanner P.A.D., Inc., 10/26/88, KFX-0056

The DOE issued an Order requiring P.A.D., Inc., of Memphis, Tennessee, and its president, Herbert L. Tanner, to show cause why they should not be disqualified from representing refund applicants before the Office of Hearings and Appeals on the grounds that they had submitted claims without proper authorization and had made false and misleading statements. The respondents were given 30 days to file a statement in opposition to the proposed disqualification and to request a hearing.

#### Refund Applications

Aerovox Incorporated, et al., 10/26/88, RF272-4751 et al.

The DOE issued a Decision and Order granting refunds from crude oil overcharge funds to 15 applicants based on their respective purchases of refined petroleum products during the period August 19, 1973, through January 27, 1981. Each applicant was an end-user of the products involved and was therefore presumed injured as a result of the alleged crude oil overcharges. The sum of the refunds granted in this Decision is \$24,655.

Aminoil U.S.A., Inc./County Gas Company, Carolina Wholesale Gas Company, 10/27/88; RF139-66, RF139-65

The DOE issued a Decision and Order concerning Applications for Refund filed by County Gas Company and Carolina Wholesale Gas Company in the Aminoil U.S.A., Inc. special refund proceeding. The firms submitted cost banks and

market price data which indicated that they were forced to absorb Aminoil's alleged overcharges. Therefore, the firms have shown that they were injured, to the full extent of their volumetric allocations of the consent order fund, by the Aminoil's alleged overcharges. After examining the firms' applications and supporting documentation, the DOE concluded that the firms should receive refunds totaling \$134,142, representing \$75,733 in principal and \$58,409 in interest.

Aminoil U.S.A., Inc./Rural Gas Company, Don Loftis, Inc., 10/25/88; RF139-187, RF139-192

The DOE issued a Supplemental Order concerning the Applications for Refund filed by Rural Gas Company and Don Loftis in the Aminoil U.S.A., Inc. special refund proceeding. On September 23, 1988, the DOE issued a Decision and Order granting both firms a refund. The refund amounts, however, were transposed in that Decision. This Supplemental Order corrects that transposition.

Arcadian Corporation, 10/25/88; RF272-9351

The OHA issued a Decision and Order granting an Application for Refund from crude oil overcharge funds based on the applicant's purchases of refined petroleum products during the period August 19, 1973 through January 27, 1981. The applicant, a manufacturer of fertilizer, had calculated its purchase volume by reviewing accounting records of monthly fuel oil purchases.

Arnold Hettich Trucking, 10/26/88; RF272-74998

On August 22, 1988, the DOE issued a Decision and Order granting a refund of \$2 to Arnold Hettich Trucking (Hettich), Case No. RF272-37526. J.W. Millane, et al., 17 DOE ¶ \_\_\_\_\_. (Case Nos. RF 272-37400, et al. (August 22, 1988). The Appendix to this Decision & Order listed erroneous gallonage and refund figures for Hettich. Accordingly, to remedy the situation, the DOE issued a Supplemental Order granting Hettich an additional refund of \$12.

Atlantic Richfield Company/Brinkerhoff Seed Farm Inc., et al., 10/25/88; RF304-330 et al.

The DOE issued a Decision and Order concerning fifty-nine Applications for Refund filed by 55 claimants from a consent order fund made available by Atlantic Richfield Company. As resellers/retailer applying for small claims refunds, those who have elected to limit their refunds to \$5,000, and end-users, these firms were presumed to have been injured. The DOE concluded

that the firms should receive refunds totaling \$84,045, representing \$66,935 in principal and \$17,110 in accrued interest.

Bowers Shell Service, et al., 10/26/88; RF272-13154 et al.

The DOE issued a Decision and Order concerning Applications for Refund filed by nine claimants in the crude oil special refund proceeding. The nine applicants, who were resellers of petroleum products, failed to demonstrate that they were injured by alleged crude oil overcharges. Accordingly, all nine applications were denied.

Broadway Bus Owner's Association, 10/26/88; RF272-9388

The OHA issued a Decision and Order denying a crude oil refund application filed by the Broadway Bus Owner's Association. The applicant had previously waived its rights to receive Subpart V refunds, in order to receive a refund from the Retailer's Escrow established under the Stripper Well Settlement.

Charter Co./Louisiana, 10/26/88; RQ23-440

On July 15, 1988, the OHA issued a Decision denying Louisiana the use of second-stage refund monies for certain scientific research projects because they were judged to be insufficiently restitutionary to injured consumers of petroleum products. See *Palo Pinto Oil & Gas/Louisiana*, 17 DOE ¶ 85,602 (1988). In that Decision, the case number pertaining to the Charter Co. funds, RQ23-440 had been inadvertently omitted. Accordingly, for administrative purposes, the DOE issued a separate Decision and Order denying Case No. RQ23-440.

City of Lubbock, Lubbock Power and Light, 10/26/88; RF272-10447, RF272-75002

The DOE issued a Decision and Order granting two Applications for Refund from crude oil overcharge funds. The applicants, a City and its municipally owned electric utility, both were end-users of petroleum products. Both applicants met the eligibility requirements for a refund by supplying reasonable estimates of their purchase volumes of refined petroleum products during the period of crude oil price control. In addition, the utility submitted the required certification that it would notify its applicable regulatory agency of any refund it receives in these proceedings, and that it will pass through the entirety of its refunds to its customers. Both applicants therefore were entitled to their full volumetric

share of available crude oil monies. The total refund granted in this Decision is \$3,451.

County of Alameda, et al., 10/27/88; RF272-30401 et al.

The DOE issued a Decision and Order granting refunds from crude oil overcharge funds to 15 applicants based on their respective purchases of refined petroleum products during the period August 19, 1983, through January 27, 1981. Each applicant used petroleum products for various activities including farming, manufacturing, and heating public and private school facilities, and each determined its volume claim either by consulting actual purchase records or by reasonably estimating its consumption. Each applicant was an end-user of the products it claimed and was therefore presumed by the DOE to have been injured. The sum of the refunds granted in this decision is \$6,581. All of the claimants will be eligible for additional refunds as additional crude oil overcharge funds become available.

Exxon Corporation/Bells Road Exxon, et al., 10/27/88; RF307-247 et al.

The DOE issued a Decision and Order concerning 23 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon Corporation and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$14,575 (\$12,829 principal plus \$1,746 interest).

Exxon Corporation/Brooksbury Service Station, et al., 10/26/88; RF307-2600 et al.

The DOE issued a Decision and Order concerning 50 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$48,269 (\$42,492 principal plus \$5,777 interest).

Exxon Corporation/Gray's Store, 10/27/88; RF307-6228

The DOE issued a Supplemental Order to Gray's Store (Gray's), an applicant granted a refund in Exxon Corp./Canton Village Exxon 18 DOE

¶ \_\_\_\_\_. Case No. RF307-\_\_\_\_ (October 13, 1988). The refund approved for Gray's in Case No. RF307-1146 was calculated using an incorrect volume of refined petroleum products. The correct purchase volume upon which to calculate Gray's refund was 2,387,526 gallons. Since a Treasury check for the original refund had not yet been issued, the DOE rescinded the prior decision and granted Gray's the correct refund amount of \$681 (\$599 in principal and \$82 in interest).

Exxon Corporation/H.W. Baker, et al., 10/26/88; RF307-1837 et al.

The DOE issued a Decision and Order concerning 13 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$8,591 (\$7,563 principal plus \$1,028 interest).

Exxon Corporation/Larry's Exxon Service Center, et al., 10/26/88; RF307-411 et al.

The DOE issued a Decision and Order concerning 49 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$55,210 (\$48,600 principal plus \$6,610 interest).

Exxon Corporation/Onslow County Board of Education, et al., 10/26/88, RF307-1601 et al.

The DOE issued a Decision and Order concerning 33 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$24,906 (\$21,925 principal plus \$2,981 interest).

Exxon Corporation/Sebago Lake Exxon, et al., 10/26/88, RF307-1342 et al.

The DOE issued a Decision and Order concerning 36 Applications for Refund

filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$31,042 (\$27,326 principal plus \$3,716 interest).

Exxon Corporation/Spalding Gas Inc., et al., 10/28/88, RF307-109 et al.

The DOE issued a Decision and Order concerning 14 Applications for Refund filed in the Exxon Corporation special refund proceeding. Each of the applicants purchased directly from Exxon and was either a reseller whose allocable share is less than \$5,000 or an end-user of Exxon products. The DOE determined that each applicant was eligible to receive a refund equal to its full allocable share. The sum of the refunds granted in this Decision is \$15,188 (\$13,369 principal plus \$1,819 interest).

Getty Oil Company/Atchison, Topeka and Santa Fe Railroad Company, 10/26/88, RR265-1

The DOE issued a Decision and Order concerning a Motion for Reconsideration of a refund granted to the Atchison, Topeka and Santa Fe Railroad Company (ATSF) in the Getty Oil Company (Getty) special refund proceeding. On June 19, 1987, ATSF was granted a volumetric refund of \$40,936 based upon purchases of 13,573,005 gallons of No. 2 diesel fuel from Getty. See *Getty Oil Co./John Walston*, 16 DOE ¶ 85,151 (1987). In its Motion for Reconsideration, ATSF attempted to rebut the volumetric refund presumption in order to receive a larger refund by claiming that it has been disproportionately overcharged by Getty because it had been placed in an incorrect class of purchaser.

The DOE rejected the claim that ATSF had been placed in an incorrect class of purchaser. ATSF purchased product from Getty from July 1, 1971 through July 30, 1972, and did not resume purchasing from Getty until October 1973. The DOE found that since the firm did not purchase from Getty on May 15, 1973, the base rate for pricing purposes under the Mandatory Petroleum Price Regulations. ATSF was not in any established class of purchaser when it resumed its purchasing relationship with Getty in October 1973. Under such circumstances, Getty was required by the regulations to place ATSF in the most similar existing class of purchaser.



Since ATSF was unable to submit any credible evidence to the contrary, the DOE did not accept the firm's claim that Getty violated the Mandatory Petroleum Price Regulations in its class of purchaser treatment of ATSF. Accordingly, ATSF's Motion for Reconsideration in the Getty proceeding was denied.

*Gulf Oil Corporation/City of Moultrie, et al., 10/28/88, RF300-1000, et al.*

The DOE issued a Decision and Order concerning 53 Applications for Refund filed in the Gulf Oil Corporation special refund proceeding. Twenty-four of the applicants are end-users. Each of the end-users was found eligible to receive a refund equal to its full allocable share under the end-user presumption of injury. Twenty-nine of the 53 applicants are retailers. Each of the retailers claimed a refund or less than \$5,000. Therefore, under the small claims presumption, each retailer was found eligible to receive a refund equal to its full allocable share without having to provide a detailed demonstration of injury. The sum of the refunds granted in this Decision, which includes both principal and interest, is \$72,807.

*Gulf Oil Corporation/Clark's Gulf Service, et al., 10/27/88, RF300-6401 et al.*

The DOE issued a Decision and Order concerning 100 Applications for Refund submitted in the Gulf Oil Corporation special refund proceeding. Each application was approved using a presumption of injury. The sum of the refunds granted in this Decision is \$157,466.

*Gulf Oil Corporation/Lewis Oil Company, Inc. 10/28/88, RF300-866*

The DOE issued a Decision and Order dismissing Lewis Oil Company's Application for Refund in the Gulf Oil Corporation refund proceeding. Lewis was a wholly-owned subsidiary of Gulf during the consent order period, and granting a refund to a subsidiary of a consent order firm would be clearly contrary to the restitutionary purposes of a special refund proceeding. Accordingly, the DOE dismissed Lewis' Application for Refund in the Gulf refund proceeding.

*Marchi, Inc., et al., 10/25/88, RF272-8239 et al.*

The DOE issued a Decision and Order denying refund to seven applicants in the crude oil Subpart V proceeding. All seven applicants were retailers of petroleum products during the period August 19, 1973 through January 27, 1981. Because none of the applicants demonstrated that they were injured due

to the crude oil overcharges, they were found ineligible for crude oil refunds. Accordingly, their Applications for Refund were denied.

*Mobil Oil Corp./Atlantic Richfield Company, 10/25/88, RF225-9577, RF225-9578, RF225-9579, RF225-9580*

The DOE issued a Decision and Order partially granting an Application for Refund filed by Atlantic Richfield Company (ARCO) in the Mobil Oil Corp. special refund proceeding. *Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985) (*Mobil*). ARCO, a major, integrated refiner, claimed a refund based on its purchases of 5,395,094 gallons of propane and 643,286 gallons of commercial butane from Mobil during the consent order period. An analysis of purchase invoices submitted by ARCO indicated that the firm obtained 4,089,582 gallons of the propane included in its claim through spot purchases from Mobil. ARCO did not attempt to rebut the presumption of non-injury with regard to those purchases. Accordingly, the DOE denied that portion of the firm's claim. The remaining 1,948,798 gallons of product included in ARCO claim were purchased from Mobil pursuant to long-term contracts. Under the small claims presumption established in *Mobil*, the DOE granted ARCO a refund of \$980, representing \$783 in principal and \$197 in interest, on those purchases.

*Mobil Oil Corp./Frontier Petroleum Company, 10/26/88, RF225-10003, RF225-10004, RF225-10005*

The DOE issued a Decision and Order granting an Application for Refund filed by Frontier Petroleum Company, Inc. in the Mobil Oil Corp. special refund proceeding. *Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985) (*Mobil*). Frontier, a reseller of refined petroleum products, claimed a refund based on its purchases of middle distillates and residual fuel oil from Mobil during the consent order period. The firm's volumetric share of the Mobil consent order funds was \$63,653. In support of the Frontier claim, the firm's president submitted an affidavit in which he stated the level of Frontier's cost banks at the end of the banking period. Noting the absence of other types of supporting documentation, the DOE concluded that the affidavit was unacceptable evidence of the level of Frontier's cost banks. Consequently, the DOE limited Frontier's refund to the small claims threshold established in *Mobil*. The total refund granted to Frontier was \$8,256, representing \$5,000 in principal and \$1,256 in accrued interest.

*Mobile Oil Corp./Priebe Oil Company, 10/26/88, RF225-9027, RF225-9028*

The DOE issued a Decision and Order granting an Application for Refund filed by Priebe Oil Company in the Mobil Oil Corp. special refund proceeding. *Mobil Oil Corp.*, 13 DOE ¶ 85,339 (1985). Priebe, a retailer of refined petroleum products, claimed a refund based on its purchases of Mobile motor gasoline and middle distillates during the period January 1, 1973 through January 27, 1981. After discounting the gallons of products that Priebe purchased outside the relevant refund periods, the DOE granted Priebe a presumption-level refund of \$5,952 in principal on its motor gasoline purchases. Priebe did not attempt to demonstrate that it was injured by its purchases of Mobile middle distillates. Because the firm's motor gasoline refund was greater than the \$5,000 small claims threshold established in *Mobil*, the DOE denied the distillate portion of Priebe's claim. The total refund granted to Priebe was \$7,447, representing \$5,952 in principal and \$1,495 in interest.

*Norwich University, et al., 10/26/88, RF272-74997*

On October 12, 1988, the DOE issued a Decision granting six Applications for Refund in the Subpart V crude oil refund proceedings. *Norwich University, et al.*, 17 DOE ¶ (October 12, 1988) (Case Nos. RF272-1895, et al.) Both the total gallonage approved and total refund amount approved in that Decision were incorrect. The total gallonage approved should have been 29,809,720 gallons, and the total refund approved should have been \$5,961. However, the individual refund and gallonage figures were correctly shown elsewhere in the decision. This supplemental order granted no additional refunds.

*Raymond W. Stehno, 10/26/88, RF272-10587*

The DOE issued a Decision and Order granting an Application for Refund filed by Raymond W. Stehno, a purchaser of refined petroleum products, in the Subpart V Crude Oil refund proceeding. Stehno was found to be eligible for a refund based on an estimated purchase volume of 247,015 gallons. The total refund approved in this Decision was \$49.

*Standard Oil Co. (Indiana)/South Dakota Belridge Oil Co./South Dakota Standard Oil Co. (Indiana)/South Dakota, 10/28/88, RM21-130 RM8-131 RF251-134*

The DOE issued a Decision and Order approving the Motion for Modification filed by the State of South Dakota in the

Standard Oil Co. (Indiana) and Belridge Special Refund Proceedings. South Dakota requested permission to modify its \$16,454 automatic set-back thermostat rebate program to include homes and businesses heated by propane as well as those heated by fuel oil. The DOE approved the new program because it would reach more injured

consumers than the original, and would provide substantial incentives to save energy costs in the future.

*Wayne's Chevron Service, et al., 10/27/88, RF272-60258 et al.*

The DOE issued a Decision and Order denying eight Applications for Refund filed in connection with the Subpart V

crude oil refund proceedings. Each applicant was reseller or retailer during the period August 19, 1973 through January 27, 1981. Because none of the applicants demonstrated that they were injured due to the crude oil overcharges, they were ineligible for a crude oil refund.

#### CRUDE OIL END-USERS

[The Office of Hearings and Appeals granted crude oil overcharge refunds to end-user applicants in the following Decisions and Orders.]

Name	Case No.	Date	No. of Applicants	Total Refund
Cheyenne County Highway Department et al.	RF272-16400	10/26/88	48	\$17,313
Copley Hospital, Inc. et al.	RF272-14011	10/26/88	15	15,430
James T. Jackson et al.	RF272-14416	10/28/88	57	13,383
Lapeer Community Schools et al.	RF272-15316	10/26/88	77	27,759
Marvin A. Mattson et al.	RF272-14205	10/26/88	29	4,333
Robert M. Olson et al.	RF272-9270	10/27/88	50	1,781
Salem Coca-Cola Bottling Company et al.	RF272-30506	10/26/88	45	9,381
William D. Greathouse et al.	RF272-31010	10/28/88	49	14,406

#### Dismissals

The following submissions where dismissed:

*Name and Case No.*

Adkins Gulf Service; RF300-7861  
Admiral Cruises, Inc.; RF272-63889  
Armour Oil Co.; RF300-10368  
Associated Electric Cooperative, Inc.; RF272-55079  
Aviritt Express; RF300-9858  
B.N.M., Inc.; RF300-9435  
B&H Corp.; RF265-2739  
Barney Rogers Dirt Contractor; RF272-67781  
Bloomingdale's Dist. Center; RF272-47507  
Bob's Service Station; RF307-4991  
Burlington Realty; RF272-74477  
C.H. Sorensen & Sonner A/S; RF272-43834  
C.W. Peacock; RF300-9441  
Campbell Sixty-Six Express; RF272-69182  
Canal and Broad Gulf; RF300-10200  
Canal and Scott Gulf Service; RF300-7186  
Canatella's Gulf; RF300-10199  
Chesapeake & Potomac Telephone; RF272-67190  
City of Miami Beach; RF272-51968  
Colonial Tank Transport; RF272-67191  
Colvins Glass Shop; RF300-9443  
Comer Oil Co.; RF300-3782  
Container Transport; RF272-67193  
County of Riverside; RF272-73033  
Curtis Beard Service, Inc.; RF300-2686  
Dees Automotive Service; RF300-9448  
Dick Walker Gulf Service; RF300-7275  
Dollars Exxon No. #2; RF307-3930  
E&M Exxon; RF307-175  
Ed Beck's Exxon; RF307-246  
Empire Gas Corp.; RF300-10243  
Evezich Oil Co.; RF300-9451  
Film Transit, Inc.; RF272-69216  
Francis Ciampi/Ciampi's Holiday Gulf; RF300-8243  
Fredonia Coop Oil; RF272-60425  
G&G Car Wash & Gas; RF300-8449  
Garner Wholesale; RF300-9889  
Garrison Gulf Service; RF300-163  
Golden Flake Snack Foods, Inc.; RF300-9655  
Herman's Service Station; RF300-9458

Hicks Plaza, Inc.; RF300-9459  
Horn's Motor Express; RF272-67297  
ITT Continental Baking Co.; RF272-67298  
Jack's Service Center; RF300-9466  
Jefferson County Highway Department; RF300-10118  
Lodi Truck Service, Inc.; RF272-67299  
Louis J. Kennedy Trucking; RF272-67300  
Lykes Brothers Steamship Co.; RF272-65096  
Lyke Brothers Steamship Co.; RF300-8448  
Marsh's APCO; RF310-40  
McLean Trucking Co.; RF300-9481  
Mercury Aviation Companies; RF300-9483  
Miller's Gulf Service; RF300-8100  
Minoletti Farms; RF272-67772  
Modern Oil Company, Inc.; RF300-9485  
Monarch Gas Co.; RF265-2735  
Needham Gulf Service Center; RF300-10175  
Oy Henry Nielsen Ab; RF272-63890  
P. Wajer & Sons Express; RF300-9491  
Pittsboro Gulf Service; RF300-8108  
Poole Truck Line, Inc.; RF272-67303  
Potomac Electric Co.; RF272-67304  
R.W. McKinney Co.; RF272-43743  
Raleigh Plaza Gulf; RF300-8947  
Ralph C. Uzzle; RF300-9498  
Rego Stan Maintenance Corp.; RF272-54363  
Richard F. Wilcoxon; RF300-9502  
Robert C. Senko; RF300-10560  
Rogue River Paving; RF272-47862  
Ryder System, Inc.; RF300-9882  
Skaarup Shipping Corp.; RF272-63888  
Smiser Freight Service; RF272-67305  
Smiser Freight Service; RF272-67306  
Smith's Transfer Corp.; RF272-67307  
South Mountain Restoration Center; RF304-2032  
St. Johnsbury Trucking Co.; RF272-67308  
State of North Carolina; RF272-67310  
Swift Independent Packing Co.; RF300-9702  
Tananka Brothers; RF272-64924  
Tayton Freight System; RF272-67311  
Ted's Westwood Exxon; RF307-1784  
Textron Locoming, Inc.; RF272-69069  
The Henley-Lundgren Co.; RF272-67893  
Torres Gulf; RF300-10279  
Trucking ventures Associates; RF272-15418—RF272-16005

University of Maine at Farmington's; RF272-14543  
Waldensain Bakeries, Inc.; RF272-67312  
Welliver Brothers; RF272-29655

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, Room 1E-234, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, Monday through Friday, between the hours of 1:00 p.m. and 5:00 p.m., except federal holidays. They are also available in Energy Management Federal Energy Guidelines, a commercially published loose leaf reporter system.

*George B. Breznay, Director, Office of Hearings and Appeals, December 20, 1988.*  
[FR Doc. 88-29655 Filed 12-23-88; 8:45 am]  
BILLING CODE 6450-01-M

#### ENVIRONMENTAL PROTECTION AGENCY

[FRL-3497-9]

#### EPA List of Facilities Prohibited From Receiving Government Contracts

**AGENCY:** Environmental Protection Agency.

**ACTION:** EPA list of facilities prohibited from receiving Government contracts Under 40 CFR Part 15.

**SUMMARY:** 40 CFR 15.40 requires the Environmental Protection Agency (EPA) to publish in the *Federal Register* semi-annually a list of all persons and facilities prohibited under 40 CFR Part 15 from receiving federal government



contracts, grants, loans, subcontracts, subgrants, or subloans. The following list contains the names and locations of the prohibited facilities, as well as the dates they were placed on the list and the effective date of each listing.

**DATE:** This list is current as of December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Alex Varela, Listing Official, Office of Enforcement and Compliance Monitoring, Environmental Protection Agency, Rm. 112 NE Mall (LE-130A), 401 M Street, SW., Washington, DC 20460. Telephone (202) 475-8777.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 306 of the Clean Air Act (42 U.S.C. 1857 et seq., as amended by Pub. L. 91-604), section 508 of the Clean Water Act (33 U.S.C. 1251 et seq., as amended by Pub. L. 92-500), and E.O. 11738, EPA has been authorized to provide certain prohibitions and requirements concerning the administration of the Clean Air Act and the Clean Water Act with respect to federal contracts, grants, loans, subcontracts, subgrants, and subloans. On April 16, 1975, regulations implementing the requirements of the statutes and the Executive Order were promulgated in the *Federal Register* (see 40 CFR Part 15, 40 FR 17124, April 16, 1975, as amended at 44 FR 6911, February 5, 1979). On September 5, 1985, revisions to those regulations were promulgated in the *Federal Register* (see 50 FR 36188, September 5, 1985). The regulations provide for the establishment of a List of Violating Facilities which reflects those facilities ineligible for use in nonexempt federal contracts, grants, loans, subcontracts, subgrants, or subloans.

The List of Violating Facilities is comprised of two sublists. Sublist 1, mandatory listing (40 CFR 15.10), includes those facilities listed on the basis of a conviction under section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act. Sublist 2, discretionary listing (40 CFR 15.11), includes those facilities listed on the basis of continuing or recurring noncompliance with clean air or clean water standards, and:

1. A conviction by a federal court under section 113(c)(2) of the Clean Air Act, or
2. Any injunction, order, judgment, decree (including consent decrees), or other form of civil ruling by a federal, state or local court issued as a result of noncompliance with clean air or water standards, or
3. A conviction by a state or local court of a criminal offense on the basis

of noncompliance with clean air standards or clean water standards, or

4. Violation of an administrative order issued under sections 113(a), 113(d), 167, or 303 of the Clean Air Act or section 309(a) of the Clean Water Act, or

5. A Notice of Noncompliance issued by EPA under section 120 of the Clean Air Act, or

6. An enforcement action filed by EPA in federal court under sections 113(b), 167, 204, 205, or 211 of the Clean Air Act or section 309(b) of the Clean Water Act due to noncompliance with clean air or water standards.

This Notice reflects:

- The removal of the Will and Baumer, Inc., Liverpool, NY, facility from Sublist 1 of the List of Violating Facilities. The Will and Baumer facility was added to the List of Violating Facilities on June 10, 1986, based on a conviction obtained against the company under section 309(c)(1) of the Clean Water Act.

Pursuant to 40 CFR 15.20, a facility may be removed from Sublist 1 if the Assistant Administrator certifies that the condition giving rise to the listing has been corrected. The Assistant Administrator for Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, certifies that the Will and Baumer Liverpool facility has corrected the condition which gave rise to listing, and has removed the facility from the List of Violating Facilities as of January 10, 1987.

- The removal of the U.S.M. Corporation (subsequently Emhart Industries), New Bedford, Massachusetts, facility from Sublist 1 of the List of Violating Facilities. The USM New Bedford facility was added to the List of Violating Facilities on December 31, 1986, based upon a criminal conviction of violating section 309(c) of the Clean Water Act. Pursuant to 40 CFR 15.20, the Assistant Administrator for Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, certified that the USM New Bedford facility has corrected the condition which gave rise to listing, and has removed the facility from the List of Violating Facilities as of December 17, 1987.

- The addition to and removal from sublist 1 of the List of Violating Facilities of the Central Valley Water Reclamation facility of Salt Lake City, Utah.

This facility was subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility was placed on the List as of the date of conviction, May 31,

1988, and removed from the List at the same time on the basis of the determination, by the Assistant Administrator for Enforcement and Compliance Monitoring, that the Central Valley Water Reclamation Board had corrected, by the time the conviction was filed, the condition which gave rise to the listing.

- The removal of the Johnson & Towers, Inc., Mount Laurel, New Jersey, facility from Sublist 1 of the List of Violating Facilities. The Johnson & Towers facility was added to the List of Violating Facilities on June 17, 1986, based upon a criminal conviction of violating section 309(c) of the Clean Water Act. Pursuant to 40 CFR 15.20, the Assistant Administrator for Enforcement and Compliance Monitoring, U.S. Environmental Protection Agency, certified that the Johnson & Towers facility has corrected the condition which gave rise to listing, and has removed the facility from the List of Violating Facilities as of August 26, 1988.

- The addition of the Chemical Transfer Company/California Tank Lines facilities of Los Angeles, California, to sublist 1 of the List of Violating Facilities. These facilities are subject to Listing on the basis of a criminal conviction obtained against the facilities under section 309(c)(1) of the Clean Water Act. These facilities are placed on the List as of the date of conviction, May 18, 1987.

- The addition of the Reidy Terminal and Wisconsin Barge Lines facilities in St. Louis, Missouri, to sublist 1 of the List of Violating Facilities. These facilities are subject to Listing on the basis of a criminal conviction obtained against the facilities under section 309(c)(1) of the Clean Water Act. This facility is placed on the List as of the date of conviction, August 14, 1987.

- The addition of the Protex Industries facility in Denver, Colorado, to sublist 1 of the List of Violating Facilities. This facility is subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility is placed on the List as of the date of conviction, February 4, 1988.

- The addition of Gulf States Oil Facility in Houston, Texas, to sublist 1 of the List of Violating Facilities. This facility is subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility is placed on the List as of the date of conviction, July 22, 1987.

- The addition of Valley Feeds, Inc., of Van Buren, Arkansas, to sublist 1 of the List of Violating Facilities. This facility is subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility is placed on this List as of the date of conviction, September 16, 1987.

- The addition of Wilgenburg Dairy in San Marcos, California, to sublist 1 of the List of Violating Facilities. This facility is subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility is placed on the List as of the date of conviction, November 16, 1987.

- The addition of the Colorado River Sewage Treatment Joint Venture facility in Phoenix, Arizona, to sublist 1 of the List of Violating Facilities. This facility is subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility is placed on the List as of the date of conviction, August 31, 1987.

- The addition of the Shenango Steel, Inc., facility in Neville Island (Pittsburgh), Pennsylvania, to sublist 1 of the List of Violating Facilities. This facility is subject to Listing on the basis of a criminal conviction obtained against the facility under section 309(c)(1) of the Clean Water Act. This facility is placed on the list as of the date of conviction, March 22, 1988.

Other additions to and deletions from the List of Violating Facilities will be published periodically as they occur. Facilities on the List also are included in the General Services Administration's "Consolidated List of Debarred, Suspended, and Ineligible Contractors." Subscriptions to this document may be obtained from the U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

#### LIST OF VIOLATING FACILITIES

Name and effective date	Location and basis for listing
Sublist 1: Mandatory listing: Chemical Formulators, Jan. 29, 1981.	Nitro, WV, facility, Clean Water Act sec. 309(c)(1).
Waterbury House Wrecking Co., Dec. 19, 1985.	Waterbury, CT, facility, Clean Air Act sec. 113(c)(1).
Fleischman's Yeast, Inc., Division of Burns, Philp and Co., Ltd., May 14, 1986, effective date of listing, Nov. 14, 1986, effective date of facility's transfer from Nabisco to Burns, Philp.	Sumner, WA, facility, Clean Water Act sec. 309(c)(1).

#### LIST OF VIOLATING FACILITIES—Continued

Name and effective date	Location and basis for listing
Hope Resource Recovery, Inc., Sept. 16, 1986.	Long Island, NY, facility, Clean Air Act sec. 113(c)(1).
Sea Gleaner Marine, Inc., Oct. 6, 1986.	Bellevue, WA, facility, Clean Water Act sec. 309(c)(1).
Sea Port Bark Supply, Oct. 21, 1986.	Tacoma, WA, facility, Clean Water Act sec. 309(c)(1).
Ocean Reef Club, Inc., Oct. 22, 1986.	Key Largo, FL, facility, Clean Water Act sec. 309(c)(1).
Irwin Pearlman, Dec. 30, 1986.	Pittsburgh, PA, facility, Clean Air Act sec. 113(c)(1).
Salvatore C. Williams, Dec. 30, 1986.	Pittsburgh, PA, facility, Clean Air Act sec. 113(c)(1).
Protex, Inc. Feb. 4, 1988.	Denver, CO, facility, Clean Water Act sec. 309(c)(1).
Reidy Terminal/Wisconsin Barge Lines, Aug. 14, 1987.	St. Louis, MO, facility, Clean Water Act sec. 309(c)(1).
California Tank Lines/Chemical Transfer Co., May 18, 1987.	Los Angeles, CA, facility, Clean Water Act sec. 309(c)(1).
Gulf States Oil Co., July 22, 1987.	Houston, TX, facility, Clean Water Act sec. 309(c)(1).
Colorado River Sewage, joint venture, Aug. 31, 1987.	Phoenix, AZ, facility, Clean Water Act sec. 309(c)(1).
Shenango Steel Co., Mar. 22, 1988.	Neville Island, PA, facility, Clean Water Act sec. 309(c)(1).
Valley Feeds, Inc., Sept. 16, 1987.	Van Buren, AR, facility, Clean Water Act sec. 309(c)(1).
Wilgenburg Dairy, Nov. 16, 1987.	San Marcos, CA, facility, Clean Water Act sec. 309(c)(1).
Sublist 2: Discretionary listing: None.	

Dated: November 30, 1988.

Thomas L. Adams, Jr.,  
Assistant Administrator for Enforcement and Compliance Monitoring.

[FR Doc. 88-29593 Filed 12-23-88; 8:45 am]

BILLING CODE 6560-50-M

#### [FRL-3497-8]

#### Chesapeake Executive Council; Open Meeting

Under Pub. L. 94-263, notice is hereby given that a meeting of the Chesapeake Executive Council will be held at the Ramada Hotel, 901 North Fairfax Street, Alexandria, Virginia 22314 on January 5, 1989. The meeting will begin at 12:30 p.m. and end at 2:30 p.m. Public notification of this meeting is late because scheduling conflicts of the governors precluded an earlier decision.

The Honorable Gerald Baliles, Governor of the Commonwealth of Virginia, will convene the meeting at 12:30 p.m. The agenda follows:

- Summary of 1988 Achievements by each member of the Executive Council,
- Presentation of the Progress Report, Access Guide, and Development Policies and Guidelines,
- Endorsement of the December 1988 Commitments from the 1987 Chesapeake Bay Agreement and signing of Agreement Commitments,
- Presentation of the Year 2020 Panel Report by the Panel Chairman, Robert Gray,
- Recommendations from the Advisory Committees to the Executive Council,
- Local Government Advisory Committee, Gerald Hyland
- Citizens Advisory Committee, Gerald McCarthy
- Scientific and Technical Advisory Committee, Maurice Lynch
- Election of Chairman, and Approval of the 1989 Chesapeake Bay Agenda

The meeting is open to the public; however, seating is limited. Any member of the public wishing to attend or obtain additional information should contact Mr. Charles S. Spooner, Director, Chesapeake Bay Liaison Office (301) 266-6873.

Patricia Bonner,  
Acting Director, Chesapeake Bay Liaison Office.  
[FR Doc. 88-29592 Filed 12-23-88; 8:45 am]

BILLING CODE 6560-50-M

#### FEDERAL EMERGENCY MANAGEMENT AGENCY

#### Agency Information Collection Submitted to the Office of Management and Budget for Clearance

The Federal Emergency Management Agency (FEMA) has submitted to the Office of Management and Budget the following information collection package for clearance in accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Type: Extension of 3067-0161.

Title: National Fire Incident Reporting System (NFIRS).

Abstract: The National Fire Incident Reporting System (NFIRS) Data is used at the local, State and Federal level, as a "standard" method of collecting information of fire incidents, which is in turn employed to quantify the National Experience and to formulate intervention strategies which target loss reduction from fire.

Type of Respondents: State or Local Governments, Non-profit institutions.  
Estimate of Total Annual Reporting and Recordkeeping Burden: 243,720.



*Number of Respondents:* 13,540.  
*Estimated Average Burden Hours Per Response:* 4.

*Frequency of Response:* On occasion; Quarterly; Annually.

Copies of the above information collection request and supporting documentation can be obtained by calling or writing the FEMA Clearance Officer, Linda Shiley, (202) 646-2624, 500 C Street, SW., Washington, DC 20472.

Direct comments regarding the burden estimate or any aspect of this information collection, including suggestions for reducing this burden, to the FEMA Clearance Officer at the above address; and to Francine Picoult, (202) 395-7231, Office of Management and Budget, 3235 NEOB, Washington, DC 20503 within two weeks of this notice.

Date: December 19, 1988.

Wesley C. Moore,  
Director, Office of Administrative Support.  
[FR Doc. 88-29576 Filed 12-23-88; 8:45 am]  
BILLING CODE 6710-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Social Security Administration

#### Removal of Reservation of Authority Concerning Section 218(s) of the Social Security Act

The Secretary of Health and Human Services (the Secretary) has the authority under section 218(s) of the Social Security Act (the Act), as in effect prior to the enactment of section 9002 of Pub. L. No. 99-509 (the Omnibus Budget Reconciliation Act of 1986), to review an appeal filed by a State<sup>1</sup> concerning an assessment of an amount due by the State, a disallowance of the State's claim for a credit or refund of an overpayment, or an allowance to the State of a credit or refund of an overpayment. These decisions arise under the agreement between the State and the Secretary, under section 218 of the Act, providing for Social Security coverage of specified State and local Government employees. Under section 218(s), the Secretary also has authority to allow additional time for the State to file the request for review. On the basis of evidence obtained by, or submitted to, the Secretary, the Secretary shall render a decision affirming, modifying or reversing the assessment, disallowance or allowance being appealed by the State.

<sup>1</sup> For purposes of section 218 of the Act, an interstate instrumentality is treated, to the extent practicable, as a "State."

On April 16, 1968 (33 FR 5836-37), the authority and responsibility conferred upon the Secretary by section 218(s) was delegated to the Commissioner of Social Security (the Commissioner), with the reservation that section 218(s) review authority shall be exercised only by the Commissioner. Notwithstanding this limitation pertaining to section 218(s) review authority, the Commissioner was authorized to redelegate, without restriction, the authority to grant extensions of time to a State for filing additional information or argument in connection with a request for review under section 218(s). On February 3, 1981, the then Acting Commissioner redelegated authority for granting such extensions to appropriate Social Security Administration (SSA) management positions.

It has been found that the reservation against redelegation of section 218(s) review authority is not in the best interests of the timely, economical and effective management and administration of the section 218(s) appeals process. For this reason, I hereby remove the reservation of authority under which the authority conferred by section 218(s) shall be exercised only by the Commissioner. The removal of this reservation of authority is effective on the date that it is published in the Federal Register. With the removal of this reservation, the Commissioner is authorized, under the delegations of authority published on April 16, 1968 (33 FR 5836-37), to redelegate to appropriate SSA positions the authority to review and decide an appeal filed by a State pursuant to section 218(s) of the Act.

Dated: November 28, 1988.

Otis R. Bowen,  
Secretary.  
[FR Doc. 88-29580 Filed 12-23-88; 8:45 am]  
BILLING CODE 4190-11-M

### Alcohol, Drug Abuse, and Mental Health Administration

#### Coordinating Center for Collaborative Studies on the Genetics of Alcoholism

**AGENCY:** National Institute on Alcohol Abuse and Alcoholism.

**ACTION:** Notice of limited eligibility.

**SUMMARY:** The National Institute on Alcohol Abuse and Alcoholism (NIAAA) is soliciting applications for a multisite, multidisciplinary collaborative study to identify the genes which influence the predisposition to alcoholism. This collaborative genetic

study of alcoholics and their relatives will involve the acquisition of immortalized lymphocytes or DNA for analysis of genetic markers and mapping studies, and support investigations of the association of potential genetic and phenotypic markers with the expression of the alcoholic phenotype(s) within the families being studied.

The NIAAA FY 1989 appropriation includes \$3,500,000 to begin this multiphasic study, using the cooperative agreement as the support mechanism. It is anticipated that NIAAA will have a substantial programmatic involvement in this collaborative project and scientific input both in the planning and in the conduct of the study. The awards will be made under the authority of section 301 of the Public Health Service Act (42 USC 241), and the Catalog of Domestic Assistance Number is 13.273. The study will involve the cooperation of scientists from (1) a single Coordinating Center, (2) multiple Extramural Research Groups, (3) an NIAAA Intramural Research Group, and (4) the NIAAA Extramural Program. This study will have an approximate total duration of 5 years.

A Coordinating Center will be needed to provide overall study coordination and management; development, refinement, testing and/or training in common diagnostic protocols, as required; a DNA and cell repository; a common data repository; data analysis capabilities; and executive secretariat functions. The Coordinating Center may involve a single institution or a multi-institution collaboration.

Applications for the Coordinating Center will be accepted only from domestic institutions, because it would be logistically very difficult for a foreign institution to perform the coordinating functions requested from the Center and to manage the six meetings of the Steering Committee planned for the first year of the project. Furthermore, the policies regulating the international shipment of biological samples are in some instances very restrictive, which would seriously hinder the establishment of a lymphocyte repository and handling of the recombinant DNA materials.

**FOR FURTHER INFORMATION CONTACT:** For additional program guidance, potential applicants should contact: W. Sue Badman Shafer, Ph.D., Acting Director, Division of Basic Research, NIAAA, 14C-10 Parklawn Building, 5600

Fishers Lane, Rockville, Maryland 20857, (301) 443-2530.

Frederick K. Goodwin,  
Administrator, Alcohol, Drug Abuse, and Mental Health Administration.  
[FR Doc. 88-29599 Filed 12-23-88; 8:45 am]  
BILLING CODE 4160-20-M

### Centers for Disease Control

#### Meetings: Vital and Health Statistics National

**Action:** Notice of meeting.

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given that the National Committee on Vital and Health Statistics established pursuant to 42 U.S.C. 242k, section 306(k)(2) of the Public Health Service Act, as amended, announces the following meeting.

**Name:** National Committee on Vital and Health Statistics.

**Time and Date:** 1:00 pm-5:00 pm, February 8, 1989; 9:00 am-5:00 pm, February 9, 1989; 9:00 am-1:00 pm, February 10, 1989.

**Place:** Hubert H. Humphrey Building, Room 703A, 200 Independence Avenue SW., Washington, DC 20201.

**Status:** Open.

**Purpose:** The purpose of this meeting is for the Committee to receive and consider reports from each of its subcommittees and to address new business as appropriate.

**Contact person for more information:** Substantive program information as well as summaries of the meeting and roster of Committee members may be obtained from Gail F. Fisher, Ph.D., Executive Secretary, National Committee on Vital and Health Statistics, Room 2-12, Center Building, 3700 East West Highway, Hyattsville, Maryland 20782, telephone (301) 436-7050.

Dated: December 20, 1988.

Elvin Hilyer,  
Associate Director for Policy Coordination, Centers for Disease Control.  
[FR Doc. 88-29584 Filed 12-23-88; 8:45 am]  
BILLING CODE 4160-18-M

#### Meetings: Vital and Health Statistics National Committee

**Action:** Notice of meeting.

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given that the National Committee on Vital and Health Statistics Subcommittee on Medical Classification Systems established pursuant to 42 U.S.C. 242k, section 306(k)(2) of the Public Health Service

Act, as amended, announces the following Subcommittee meeting (working session).

**Name:** National Committee on Vital and Health Statistics Subcommittee on Medical Classification Systems (Work Group).

**Time and Date:** 10:30 am-3:30 pm, January 11, 1989.

**Place:** Hubert H. Humphrey Building, Room 337A, 200 Independence Avenue SW., Washington, DC 20201.

**Status:** Open.

**Purpose:** The purpose of this meeting (working session) is for the Subcommittee (Work Group) to address issues related to the use of the ICD-9-CM coding in nursing homes and other long-term care situations.

**Contact Person For More Information:** Substantive program information as well as summaries of the meeting and roster of Committee members may be obtained from Richard J. Havlik, M.D., Staff, National Committee on Vital and Health Statistics, Room 2-12, Center Building, 3700 East West Highway, Hyattsville, Maryland 20782, telephone (301) 436-7050.

Dated: December 20, 1988.

Elvin Hilyer,  
Associate Director for Policy Coordination, Centers for Disease Control.  
[FR Doc. 88-29585 Filed 12-23-88; 8:45 am]  
BILLING CODE 4160-18-M

#### Meeting: Vital and Health Statistics National Committee

**Action:** Notice of Meeting.

In accordance with the Federal Advisory Committee Act (Pub. L. 92-463), notice is hereby given that the National Committee on Vital and Health Statistics Subcommittee on Ambulatory Care Statistics established pursuant to 42 U.S.C. 242k, section 306(k)(2) of the Public Health Service Act, as amended, announces the following meeting.

**Name:** National Committee on Vital and Health Statistics Subcommittee on Ambulatory Care Statistics.

**Time and Date:** 9:00 am-5:00 pm, January 12 and 13, 1989.

**Place:** Hubert H. Humphrey Building, Room 337A-339A, 200 Independence Avenue, SW., Washington, DC 20201.

**Status:** Open.

**Purpose:** The purpose of this meeting is for the Subcommittee to continue the review and revision of the Uniform Ambulatory Medical Care Minimum Data Set.

**Contact Person for More Information:** Substantive program information as well as summaries of the meeting and roster of Committee members may be obtained

from Gail F. Fisher, Ph.D., Executive Secretary, National Committee on Vital and Health Statistics, Room 2-12, Center Building, 3700 East West Highway, Hyattsville, Maryland 20782, telephone (301) 436-7050.

Dated: December 20, 1988.

Elvin Hilyer,  
Associate Director for Policy Coordination, Centers for Disease Control.  
[FR Doc. 88-29586 Filed 12-23-88; 8:45 am]  
BILLING CODE 4160-18-M

### Centers for Disease Controls

#### Vessel Sanitation Program Operations Manual; Meeting

**Action:** Notice of public meeting regarding a review of the Vessel Sanitation Program Operations Manual.

**Time and Date:** 8:30 a.m.-5:00 p.m., Monday, January 30, 1989.

**Place:** Auditorium A, Centers for Disease Control, 1600 Clifton Road, NE., Atlanta, Georgia.

**Status:** Open to the public for observation and comment, limited only by space available.

**Supplementary Information:** In June 1987 the Center for Environmental Health and Injury Control (CEHIC) held the first in a series of public meetings concerning the Vessel Sanitation Activity. Items discussed have included issues of concern to the public and the passenger cruise line industry. At that first meeting, a commitment was made to make no changes in the Vessel Sanitation Program for a period of at least 1 year and to continue to use the existing *Vessel Sanitation Program Operations Manual* as the basis for conducting sanitation inspections.

CDC has determined that a reasonable period of time has elapsed and there has been sufficient experience to date with conducting the program under the current *Operations Manual* to warrant a review of the *Manual*. Therefore, appropriate individuals have been asked to review the *Vessel Sanitation Program Operations Manual* and to provide to CDC their individual recommendations regarding appropriate revisions and/or changes to the *Manual*.

The meeting will be open to the public, limited only by the space available. The meeting room accommodates approximately 75 people. Interested parties in attendance will have two opportunities to provide comments to the record during the meeting; once at the conclusion of the morning session and again at the conclusion of the afternoon session.

BEST COPY AVAILABLE



For a period of 15 days following the meeting, through February 14, 1989, the official record of the meeting will remain open so that written comments may be submitted to be made part of the record of the meeting.

**Address:** Comments may be mailed to Director, Center for Environmental Health and Injury Control, CDC, 1600 Clifton Road, NE, Atlanta, Georgia 30333.

**Contact Person For More Information:** Linda Anderson, Chief, Special Programs Group, Center for Environmental Health and Injury Control, CDC, Atlanta, Georgia 30333. Telephone: FTS: 236-4595; Commercial: (404) 488-4595.

Dated: December 20, 1988.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 88-29583 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-18-M

#### Food and Drug Administration

##### Imported Merchandise Returned to Customs' Custody; Compliance Policy Guide; Revocation

**AGENCY:** Food and Drug Administration.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the revocation of Compliance Policy Guide (CPG) 7135.06 "Imported Merchandise Returned to Customs' Custody—July 22, 1987."

**FOR FURTHER INFORMATION CONTACT:** Ernest L. Brisson, Division of Compliance Policy (HFC-230), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2390.

**SUPPLEMENTARY INFORMATION:** CPG 7153.06 provided guidance to FDA field offices regarding the return of imported violative merchandise to the custody of the U.S. Customs Service. This procedure allowed importers to reexport imported violative merchandise in certain limited situations prior to FDA's initiation of a seizure action.

This procedure has had only limited utility and is therefore being revoked.

Dated: December 16, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-29628 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-01-M

#### Public Health Service

##### Grants for Treatment Drugs for Acquired Immune Deficiency Syndrome

**AGENCY:** Health Resources and Services Administration, PHS, DHHS.

**ACTION:** Notice of availability of funds.

**SUMMARY:** Pub. L. 100-471 authorized \$15,000,000 to cover the cost of Zidovudine (AZT), and any other drug which has been determined by the Food and Drug Administration to prolong the life of a person with Acquired Immune Deficiency Syndrome (AIDS). This authority to make grants for treatment drugs for AIDS is effective until March 31, 1989.

A total of \$15,000,000 is available for AZT grants to States. Of the total amount, \$10,000,000 was made available through funds appropriated for AIDS activities within the Department of Health and Human Services (DHHS). The additional \$5,000,000 was provided to DHHS by Burroughs Wellcome Co., the manufacturer of AZT. The entire \$15,000,000 will be awarded by the Health Resources and Services Administration.

The \$15,000,000 will be allocated to States according to a formula based on the number of AIDS patients residing in each State as reported to the Centers for Disease Control on September 28, 1988. No State will receive less than \$15,000. The money is to be made available by the States for low-income individuals not covered by the State Medicaid program or another third-party payor, or whose State Medicaid program does not provide this drug coverage.

If a State covered AZT and other life-prolonging drugs under the State Medicaid program as of September 15, 1988, and subsequent to that date, the State's Medicaid policy is changed to discontinue such coverage, the Federal Government reserves the right to withdraw the funds allocated to the State as part of this program.

These funds are to be used only for drug procurement and not for Federal or State administrative expenses associated with the program.

States participating in the grants for treatment drugs for AIDS must agree in writing to comply with the following provisions:

- Define low-income for the purposes of this program. Provision may be made for copayment by patients.
- Use the AZT grant to assist in financing AZT for low-income individuals not covered under the State Medicaid program or another third-party payor, or to individuals covered by the

Medicaid program if the State Medicaid program does not provide this drug coverage.

- Give priority to qualified individuals who meet the low-income definition and who received AZT under the treatment investigational new drug program.

- Maintain the confidentiality of patients who apply for eligibility under this program.

- Provide, on request, a report on the status of the funds and projections for the remainder of the budget period. This information will be requested midway through the budget period. Based on the information provided, unused funds will be redistributed to those States with a projected deficit.

- Ensure that funds are only used for the payment for AZT. Funds may not be used to cover administrative costs associated with this program, but may be used to cover the costs of reasonable dispensing fees. (If in the future other drugs are determined by the Food and Drug Administration to prolong the life of AIDS patients, appropriate adjustments will be made.)

- Comply with the nondiscrimination requirements of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973 dealing with handicapped individuals, and pertinent DHHS regulations governing discrimination based on age or sex.

Individuals interested in the grants for treatment drugs for AIDS should contact the appropriate office in their State and may obtain information on their State contact by calling Mr. Richard Schulman, Project Officer, at 301 443-0652.

##### Executive Order 12372

The grants for treatment drugs for AIDS has been determined to be a program which is not subject to the provisions of Executive Order 12372 concerning intergovernmental review of Federal programs.

Dated: December 20, 1988.

John H. Kelso,

Acting Administrator.

[FR Doc. 88-29629 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-15-M

##### Centers for Disease Control; General Powers and Duties Under Title III of the Public Health Service Act, as Amended; Delegation of Authority

Notice is hereby given that in furtherance of the delegation of November 25, 1988, from the Director, Centers for Disease Control (CDC), to the Director, National Center for Health

Statistics, CDC, the Director, National Center for Health Statistics, has delegated to the Director, Office of Program Planning and Evaluation, CDC, the following authorities under title III of the Public Health Service Act (42 U.S.C. 241 *et seq.*), as amended:

**Section 304—General Authority Respecting Research, Evaluations, and Demonstrations in Health Statistics, Health Services, and Health Care Technology Assessment,** where such activities of CDC are not duplicative of other activities of the Department, and when the Director, Office of Program Planning and Evaluation, CDC, determines that the authority to give assurances of confidentiality based upon section 308(d) is necessary for the successful conduct of these statistical and epidemiological activities. This excludes the authority under section 304(b)(4).

**Section 306—National Center for Health Statistics,** to collect information through health statistical or epidemiological activities, where such activities of CDC are not duplicative of other activities of the Department, and when the Director, Office of Program Planning and Evaluation, CDC, determines that the authority to give assurances of confidentiality based upon section 308(d) is necessary for the successful conduct of these statistical and epidemiological activities. This excludes the authorities under sections 306(j) and 306(k).

These authorities may be redelegated to Directors of Centers/Institute/Program Offices within CDC.

The delegation to the Director, Office of Program Planning and Evaluation, CDC, became effective on December 9, 1988.

Date: December 12, 1988.

Glenda S. Cowart,

Director, Office of Program Support, Centers for Disease Control.

[FR Doc. 88-29581 Filed 12-23-88; 8:45 am]

BILLING CODE 4160-10-M

#### Social Security Administration

##### Finding Regarding Foreign Social Insurance or Pension System; Suriname

**AGENCY:** Social Security Administration, HHS.

**ACTION:** Notice of finding regarding Foreign Social Insurance or Pension System—Suriname.

**FINDING:** Section 202(t)(1) of the Social Security Act (42 U.S.C. 402(t)(1)) prohibits payment of monthly benefits to any individual who is not a United States citizen or national for any month after he or she has been outside the United States for 6 consecutive months. This prohibition does not apply to such an individual where one of the exceptions described in section 202(t)(2) through 202(t)(5) of the Social Security

Act (42 U.S.C. 402(t)(2) through 402(t)(5)) affects his or her case.

Section 202(t)(2) of the Social Security Act provides that, subject to certain residency requirements of section 202(t)(11), the prohibition against payment shall not apply to any individual who is a citizen of a country which the Secretary of Health and Human Services finds has in effect a social insurance or pension system which is of general application in such country and which:

- (A) Pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death; and
- (B) Permits individuals who are United States citizens but not citizens of that country and who qualify for such benefits to receive those benefits, or the actuarial equivalent thereof, while outside the foreign country regardless of the duration of the absence.

The Secretary of Health and Human Services has delegated the authority to make such a finding to the Commissioner of Social Security. The Commissioner has redelegated that authority to the Director of the Office of International Policy. Under that authority, the Director of the Office of International Policy has approved a finding that Suriname, beginning July 1, 1973, has a pension system of general application in effect which pays periodic benefits, or the actuarial equivalent thereof, on account of old age, retirement, or death, but that under this pension system, citizens of the United States who are not citizens of Suriname and who leave Suriname, are not permitted to receive such benefits, or their actuarial equivalent, at the full rate without qualification or restriction while outside that country.

Accordingly, it is hereby determined and found that Suriname has in effect, beginning July 1, 1973, a pension system which meets the requirements of section 202(t)(2)(A) of the Social Security Act (42 U.S.C. 402(t)(2)(A)), but not the requirements of section 202(t)(2)(B) of the Act (42 U.S.C. 402(t)(2)(B)).

This finding also affects the application of subparagraphs (A) and (B) of section 202(t)(4) of the Social Security Act (42 U.S.C. 402(t)(4)(A) and (B)). That section provides that, subject to certain residency requirements of section 202(t)(11), section 202(t)(1) shall not be applicable to benefits payable on the earnings record of an individual who has 40 quarters of coverage under Social Security or who has resided in the United States for a period or periods aggregating 10 years or more. However, the provisions of subparagraphs (A) and (B) of section 202(t)(4) shall not apply to an individual who is a citizen of a

foreign country that has in effect a social insurance or pension system which is of general application in such country and which satisfies the provisions of subparagraph (A) of section 402(t)(2) but not the provisions of subparagraph (B) of section 202(t)(2).

By virtue of the finding with respect to section 202(t)(2) herein, the provisions of subparagraph (A) and (B) of section 202(t)(4) do not apply to citizens of Suriname beginning July 1, 1973.

**FOR FURTHER INFORMATION CONTACT:** J. Joseph Rausch, Room 1104, West High Rise Building, 6401 Security Boulevard, Baltimore, MD 21235, (301) 965-3567.

(Catalog of Federal Domestic Assistance Programs No. 13.802 Social Security—Disability Insurance; 13.803 Social Security—Retirement Insurance; 13.805 Social Security Survivors Insurance)

Dated: December 9, 1988.

Elizabeth K. Singleton,

Director, Office of International Policy.

[FR Doc. 88-29609 Filed 12-23-88; 8:45 am]

BILLING CODE 4190-11-M

#### DEPARTMENT OF THE INTERIOR

##### Office of the Secretary

##### Privacy Act of 1974—Revision of Systems of Records

Pursuant to the provisions of the Privacy Act of 1974, as amended (5 U.S.C. 552a), notice is hereby given that the Department of the Interior proposes to revise three notices describing systems of records maintained by the Office of Surface Mining Reclamation and Enforcement. Except as noted below, all changes being published are editorial in nature, and reflect minor administrative revisions which have occurred since the previous publication of the material in the *Federal Register*. The three notices being revised, which are published in their entirety below, are:

1. INTERIOR/OSMRE-2 (formerly OSM-2); Travel Advance File-Interior, OSMRE-2; previously published on October 31, 1983 (48 FR 50171).

2. INTERIOR/OSMRE-3 (formerly OSM-3); Travel Vouchers and Authorizations—Interior, OSMRE-3; previously published on October 31, 1983 (48 FR 50172).

3. INTERIOR/OSMRE-4 (formerly OSM-4); Property Control—Interior, OSMRE-4; previously published on October 31, 1983 (43 FR 50173).

In all three notices, new compatible routine uses are added to permit disclosures to other Federal agencies for debt collection purposes and computer



matching to eliminate fraud and abuse. Also, in all three notices the existing routine disclosure statements for litigation purposes are revised to incorporate the clarification on such disclosures prescribed by the Office of Management and Budget in its supplementary guidelines dated May 24, 1985, for implementing the Privacy Act. An additional new compatible routine use is added to the notice describing property control records (OSMRE-4) to permit disclosures to members of Congress when responding to inquiries made by the individuals of record.

5 U.S.C. 552a(e)(11) requires that the public be provided a 30-day period in which to comment on proposed new routine uses. Therefore, written comments on these proposed changes can be addressed to the Department Privacy Act Officer, Office of the Secretary (PMI), Room 2242, Main Interior Building, U.S. Department of the Interior, Washington, D.C. 20240

Comments received on or before January 28, 1989, will be considered. The notices shall be effective as proposed without further notice at the end of the comment period, unless comments are received which would require a contrary determination.

Oscar W. Mueller, Jr.,  
Director, Office of Management Improvement.  
Date: December 16, 1988.

#### INTERIOR/OSMRE-2

##### SYSTEM NAME:

Travel Advance File—Interior, OSMRE-2.

##### SYSTEM LOCATION:

U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSMRE), Division of Financial Management, Building 20, Denver Federal Center, Denver, Colorado 80225.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Office of Surface Mining Reclamation and Enforcement employees who have outstanding or repaid travel advances.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

File consists of signed forms whereby employees request fund advances for the purpose of paying travel expenses incurred in the performance of official government business. An automated computer system lists all outstanding advances and records repayments whether by offset against travel vouchers or remittances by checks, money orders, etc.

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. Secs. 4111(b), 5701-5709, 5721-5733, 5742(b).

##### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary uses of the records are: (a) To provide an accounting record of obligations due to the U.S. Government from employees' authorized cash advances to defray expenses incurred in official travel. Payments to the traveler and repayments to the Government are reflected in this record; (b) to serve as a backup authority to the entries for travel expenses in the automated Finance system; (c) computer data are reported to each OSMRE office as part of the detailed composition of monthly expense reports applicable to charges made to cost accounts within the Finance system. Only data pertinent to individual OSMRE offices are available to that office. Disclosures outside the Department of the Interior may be made: (1) To the U.S. Department of Justice or in a proceeding before a court or adjudicative body when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the Department of the Interior determines that the disclosure is relevant or necessary to the litigation and is compatible with the purpose for which the records were compiled; (2) of information indicating a violation or potential violation of statute, regulation, rule, order or license, to appropriate Federal, State, local or foreign agencies responsible for investigating or prosecuting the violation, or for enforcing or implementing the statute, rule, regulation, order or license; (3) to a congressional office from the record of an individual in response to an inquiry the individual has made to the congressional office; (4) to a Federal agency which has requested information relevant to its hiring or retention of an employee, or issuance of a security clearance, license, contract, grant, or other benefit; (5) to Federal, State, or local agencies where necessary to obtain information relevant to the hiring or retention of an employee, or the issuance of a security clearance, contract license, grant, or other benefit; (6) to a Federal agency for the purpose of collecting a debt owed the Federal government through administrative or salary offset and to other Federal agencies conducting computer matching programs to help eliminate fraud and

abuse and to detect unauthorized overpayments made to individuals.

##### DISCLOSURE TO CONSUMER REPORTING AGENCIES:

*Disclosures pursuant to 5 U.S.C. 552a(b)(12).* Pursuant to 5 U.S.C. 552a(b)(12), disclosures may be made to a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)).

##### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

##### STORAGE:

Currently, active travel advance requests are maintained in file boxes by name of traveler; inactive records are maintained in travel folders by name of traveler; computer printouts are maintained in binders.

##### RETRIEVABILITY:

Files are stored alphabetically by name of travelers.

##### SAFEGUARDS:

Files are maintained in a locked room during periods of non-work and are accessible during working hours only to personnel from the Division of Financial Management, Office of Surface Mining.

##### RETENTION AND DISPOSAL:

Records retained for 3 years, then destroyed. Disposition is in accordance with General Records Schedule, FPMR 101-11.4.

##### SYSTEM MANAGER AND ADDRESS:

Chief, Division of Financial Management, Office of Surface Mining, Building 20, Denver Federal Center, Denver, Colorado 80225. *Mailing address:* Office of Surface Mining, P.O. Box 25065, Denver Federal Center, Denver, Colorado 80225.

##### NOTIFICATION PROCEDURE:

Inquiries regarding the existence of records should be addressed to the System Manager. A written, signed request stating that the requester seeks information concerning records pertaining to him is required (see 43 CFR 2.60).

##### RECORD ACCESS PROCEDURES:

A request for access may be addressed to the System Manager. The request must be in writing and be signed by the requester. The request must meet the content requirements of 43 CFR 2.63.

##### CONTESTING RECORD PROCEDURES:

A petition for amendment should be addressed to the System Manager and must meet the content requirements of 43 CFR 2.71.

##### RECORD SOURCE CATEGORIES:

Information for this system originates with the traveler who specifies the need of a travel advance. The request is concurred in by signature of a responsible supervisory official. All entries on the file are as a result of actions taken by the individual to liquidate his/her travel advance.

##### INTERIOR/OSMRE-3

##### SYSTEM NAME:

Travel Vouchers and Authorizations—Interior, OSMRE-3.

##### SYSTEM LOCATION:

U.S. Department of the Interior, Office of Surface Mining, Reclamation and Enforcement (OSMRE), Division of Financial Management, Building 20, Denver, Federal Center, Denver, Colorado 80225.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons traveling for or in behalf of OSMRE on official business.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Voucher file consists of paid travel vouchers which reimburse travelers for expenses incurred in connection with official travel. Travel authorization file consists of record copies of authorizations for travel for which no travel vouchers have been submitted for payment.

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. Sec. 5701 et seq.

##### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(a) As backup entry data for obligations and disbursements in the automated Finance system of OSMRE; (b) computer data are reported to each OSMRE office as part of the detailed composition of monthly expense reports applicable to charges made to cost accounts within the Finance system. Only data pertinent to individual OSMRE offices are available to that office; (c) vouchers are used to determine allowability of expenses within the law, authorizing payment of travel expenses. The documents are used to determine which expenses incurred by the traveler can be paid and are sometimes used to report to other Federal agencies summarizations of those types of allowable expenses.

Usually, the individual's name is not used in outside reporting but the data is. Disclosures outside the Department of the Interior may be made: (1) To the U.S. Department of Justice or in a proceeding before a court or adjudicative body when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the Department of the Interior determines that the disclosure is relevant or necessary to the litigation and is compatible with the purpose for which the records were compiled; (2) of information indicating a violation or potential violation of a statute, regulation, rule Order or license, to appropriate Federal, State, local or foreign agencies responsible for investigating or prosecuting the violation or for enforcing or implementing the statute, rule, regulation, order or license; (3) to a congressional office from the record of an individual in response to an inquiry the individual has made to the congressional office; (4) to a Federal agency which has requested information relevant or necessary to its hiring or retention of an employee, or issuance of a security clearance, license, contract, grant, or other benefit; (5) to Federal, State or local agencies where necessary to obtain information relevant to the hiring or retention of an employee, or the issuance of a security clearance, contract, license, grant, or other benefit; (6) to a Federal agency for the purpose of collecting a debt owed the Federal government through administrative or salary offset and to other Federal agencies conducting computer matching programs to help eliminate fraud and abuse and to detect unauthorized overpayments made to individuals.

##### DISCLOSURE TO CONSUMER REPORTING AGENCIES:

*Disclosures pursuant to 5 U.S.C. 552a(b)(12).* Pursuant to 5 U.S.C. 552a(b)(12), disclosures may be made to a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)).

##### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

##### STORAGE:

Records are maintained in steel filing cabinet in the Division of Financial Management, Office of Surface Mining.

##### RETRIEVABILITY:

Vouchers are filed by travel authorization number. Authorizations are filed alphabetically by traveler awaiting payment of the travel voucher. Authorization becomes part of the voucher packet at the time of payment.

##### SAFEGUARDS:

Files are maintained with safeguards meeting the requirements of 43 CFR 2.51, and are available only to personnel of the Division of Financial Management, Office of Surface Mining.

##### RETENTION AND DISPOSAL:

Records retained for 3 years, then destroyed. Disposition is in accordance with General Records Schedule, FPMR 101-11.4.

##### SYSTEMS MANAGER AND ADDRESS:

Chief, Division of Financial Management, Office of Surface Mining, Building 20, Denver Federal Center, Denver, Colorado 80225. *Mailing address:* Office of Surface Mining, P.O. Box 25065, Denver Federal Center, Denver, Colorado 80225.

##### NOTIFICATION PROCEDURES:

Inquiries regarding the existence of records should be addressed to the System Manager. A written, signed request stating that the requester seeks information concerning records pertaining to him is required (see CFR 2.60).

##### RECORD ACCESS PROCEDURES:

A request for access may be addressed to the System Manager. The request must be in writing and be signed by the requester. The request must meet the content requirements of 43 CFR 2.63.

##### CONTESTING RECORD PROCEDURES:

A petition for amendment should be addressed to the System Manager and must meet the content requirement of 43 CFR 2.71.

##### RECORD SOURCE CATEGORIES:

Information for these files is based on an authorization signed by the traveler in the form of a request. Travel vouchers are submitted by the traveler after incurring expenses for official travel and are a request for payment based on his record of official expenses.

##### INTERIOR/OSMRE-4

##### SYSTEM NAME:

Property Control—Interior, OSMRE-4.

##### SYSTEM LOCATION:

U.S. Department of the Interior, Office of Surface Mining, Reclamation and Enforcement (OSMRE), 1100 L Street,



NW., Washington, D.C. 20005, and its field facilities. *Mailing address:* Office of Surface Mining, South Interior Building, Room 10, 1951 Constitution Avenue, NW., Washington, D.C. 20240.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Employees who have custody or responsibility for OSMRE property.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Contains information indicating what property, including equipment, motor vehicle operator's license, keys, motor pool vehicles, transportation request books, and parking spaces, for which the employee has custody or responsibility. A list is maintained of inventory by name as a cross-reference to case numbers. In addition, all other records directly related to the property control function.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. Section 483(b)(1); 5 U.S.C. 301.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The primary uses of the records are: (a) Identification, assignment, and control of OSMRE property; (b) assistance in locating carpools. Disclosures outside of the Department of the Interior may be made: (1) To the U.S. Department of Justice or in a proceeding before a court or adjudicative body when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the Department of the Interior determines that the disclosure is relevant or necessary to the litigation and is compatible with the purpose for which the records were compiled; (2) of information indicating a violation or potential violation of a statute, regulation, rule, order or license, to appropriate Federal, State, or local or foreign agencies responsible for investigating or prosecuting the violation, or for enforcing or implementing the statute, rule, regulation, order or license; (3) to a congressional office from the record of an individual in response to an inquiry the individual has made to the congressional office; (4) to a Federal agency for the purpose of collecting a debt owed the Federal government through administrative or salary offset and to other Federal agencies

conducting computer matching programs to help eliminate fraud and abuse and to detect unauthorized overpayments made to individuals.

#### DISCLOSURE TO CONSUMER REPORTING AGENCIES:

*Disclosures pursuant to 5 U.S.C. 552a(b)(12).* Pursuant to 5 U.S.C. 552a(b)(12), disclosures may be made to a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)).

#### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

##### STORAGE:

Maintained in manual form in file folders or card indexes, a limited quantity is stored on computer tape.

##### RETRIEVABILITY:

Indexed by employee name or control number.

##### SAFEGUARDS:

Security is provided to meet the requirements of 43 CFR 2.51.

##### RETENTION AND DISPOSAL:

Records maintained as long as property remains with the agency. Upon completion of the use period, vital records are transferred to the Official Personnel Folder or Federal Records Center, and all other records are destroyed.

##### SYSTEM MANAGER AND ADDRESS:

Chief, Division of Management Services, Office of Surface Mining, 1100 L Street, NW., Washington, D.C. 20005. *Mailing address:* Office of Surface Mining, South Interior Building, Room 10, 1951 Constitution Ave., NW., Washington, D.C. 20240.

##### NOTIFICATION PROCEDURES:

Contact the System Manager, or with respect to records maintained at field facilities, the administrative officer of the facility. A written and signed request stating that the requester seeks information concerning records pertaining to him is required. See 43 CFR 2.60.

##### RECORD ACCESS PROCEDURES:

A request for access may be addressed to the System Manager, or with respect to records maintained at field facilities, the administrative officer of the facility. The request must be in writing and signed by the requester. The request must meet the content requirements of 43 CFR 2.63.

#### CONTESTING RECORD PROCEDURES:

A petition for amendment shall be addressed to the System Manager and must meet the content requirements of 43 CFR 2.71.

#### RECORD SOURCE CATEGORIES:

Employees. Property control information required for accountability purposes.

[FR Doc. 88-29597 Filed 12-23-88; 8:45 am]

BILLING CODE 4310-05-M

#### Fish and Wildlife Service

#### Moratorium on Importation of Raw and Worked Ivory From CITES Nonparty Producing and Intermediary Countries

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice.

**SUMMARY:** The African Elephant Conservation Act, Title II of the Endangered Species Act Amendments of 1988 directs the Secretary of the Interior to establish a moratorium on the import of raw and worked African elephant ivory from any ivory producing or intermediary country immediately upon making a determination that the producing or intermediary country is not a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This notice announces a moratorium on the importation of raw and worked ivory from all producing and intermediary countries that are not parties to CITES.

**DATES:** The effective date of the moratoria established by this notice is December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Marshall P. Jones, Chief, Office of Management Authority, U.S. Fish and Wildlife Service, P.O. Box 27329, Washington, DC 20038-7329, (202) 343-4968.

**SUPPLEMENTARY INFORMATION:** On October 7, 1988, the President signed into law the African Elephant Conservation Act ("Act"), the purpose of which is to "perpetuate healthy populations of African elephants" (Pub. L. 100-478, 102 Stat. 2306, 16 U.S.C. 4201-4245). Part II of the Act, 16 U.S.C. 4221-4225, instructs the Secretary of the Interior to impose a moratorium on the import of raw and worked ivory from an ivory producing country if the Secretary finds that it is not a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (TIAS 8249), hereinafter referred to as CITES. Further, the Secretary must

impose a moratorium on the importation of raw and worked ivory from an intermediary country if the Secretary finds that it is not a Party to CITES.

Section 2305 of the Act, 16 U.S.C. 4244, defines the following terms: "Raw ivory" means any African elephant tusk and any piece thereof, the surface of which, polished or unpolished, is unaltered or minimally carved;

"Worked ivory" means any African elephant tusk and any piece thereof, which is not raw ivory;

"Ivory producing country" means any African country within which is located any part of the range of a population of African elephants; "Intermediary country" means a country that exports raw or worked ivory that does not originate in that country.

#### Establishment of Moratoria

Since all countries of the world are ivory producing countries and/or actual or potential intermediary countries, the Secretary hereby establishes a moratorium on the import of raw and worked ivory from any country that is not a party to CITES. However, legally taken sport-hunted trophies taken in nonparty ivory producing countries that have submitted a CITES ivory quota (indicated by an asterisk in the list of nonparty countries below) are not subject to this moratorium.

#### Determination of Nonparty Status

A moratorium on trade in African elephant ivory has been established with each country or entity that is not a party to CITES, including the following (legally taken sport-hunted trophies taken from countries indicated by an asterisk (\*) are not subject to this moratorium):

Albania	Haiti
Andorra	Iceland
Angola	Iraq
Antigua and Barbuda	Ireland
Aruba	*Ivory Coast
Bahrain	Jamaica
Barbados	Kiribati
Bhutan	North Korea
Brunei	South Korea
Bulgaria	Kuwait
Burkina Faso	Laos
Burma	Lebanon
Cambodia	Lesotho
Cape Verde	Libya
*Chad	Maldives
Comoros	Mal
Cook Islands	Malta
Cuba	Mauritania
Czechoslovakia	Mexico
Djibouti	Mongolia
Dominica	Namibia
Equatorial Guinea	Nauru
*Ethiopia	Netherlands
Fiji	Antilles
Gabon	New Zealand
Greece	Oman
Grenada	Poland
Guinea-Bissau	Qatar

Romania	Turkey
St. Christopher and Nevis	Tuvalu
St. Vincent and the Grenadines	*Uganda
San Marino	United Arab Emirates
Sao Tome and Principe	Vanuatu
Saudi Arabia	Vatican City
*Sierra Leone	Vietnam
Solomon Islands	Western Samoa
Swaziland	Yemen Arab Republic
Syria	Yemen, People's
Taiwan	Democratic Republic of
Tonga	Yugoslavia

#### Prohibitions and Penalties

Section 2203 of the Act, 16 U.S.C. 4223, makes it unlawful for any person to import raw or worked ivory from a country for which a moratorium is in effect. Section 2204, 16 U.S.C. 4224, provides for the imposition of criminal or civil penalties and forfeiture of unlawfully imported ivory. Criminal penalties consist of a fine of not more than \$200,000 for corporate violators and \$100,000 for individual violators or imprisonment for not more than one year or both. The Secretary may assess a civil penalty of not more than \$5,000 for each violation.

This notice was prepared by Arthur W. Lazarowitz, U.S. Fish and Wildlife Service, Office of Management Authority.

Date: December 14, 1988.

**Director.**

Frank Dunkle,

[FR Doc. 88-29529 Filed 12-23-88; 8:45 am]

BILLING CODE 4310-55-M

#### Bureau of Reclamation

#### AB Lateral Hydropower Facility, Uncompahgre Hydropower Project, Colorado

**AGENCY:** Bureau of Reclamation (USBR).

**ACTION:** Notice of intent to prepare a draft environmental impact statement.

**SUMMARY:** Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 (as amended), the Bureau of Reclamation (Reclamation) intends to prepare a Draft Environmental Impact Statement (DEIS) for the AB Lateral Hydropower Facility, Uncompahgre Hydropower Project, Colorado. The primary purpose of the facility would be to generate power without adversely affecting the operation of the Uncompahgre Project irrigation works.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gordon Lind, Bureau of Reclamation, Upper Colorado Region, Federal Building, 125 South State Street, P.O. Box 11568, Salt Lake City, Utah 84147, telephone (801) 524-5463.

#### SUPPLEMENTARY INFORMATION:

The AB Lateral Hydropower Facility would be funded, built, and operated by the Uncompahgre Valley Water Users Association and the Montrose Partners. These organizations plan to construct the facility using, in part, existing features of the Uncompahgre Project, a Reclamation irrigation project. They are seeking a contract with Reclamation, which would permit use of Uncompahgre Project features.

The facility would be located in Montrose County in west-central Colorado. The proposed project would use the existing Gunnison Diversion Dam and Gunnison Tunnel to divert water year round from the Gunnison River for the purpose of generating hydroelectric power.

Reclamation would serve as the lead Federal agency responsible for NEPA compliance on the proposed project. The DEIS will address alternative penstock and powerplant locations, as well as alternative operational plans. A no-action alternative will also be presented.

Environmental scoping meetings on the facility were held in Denver and Montrose, Colorado, in October 1987. An environmental assessment was released to the public, government agencies, and others in May 1988. Based on the assessment and on comments received, Reclamation determined that an environmental impact statement should be prepared.

No further formal scoping activities are planned. Interested public entities and individuals may obtain information on the project and provide input to the DEIS. The DEIS is expected to be completed and available for review and comment in the spring of 1989.

Date: December 16, 1988.

Joe D. Hall,

Deputy Commissioner.

[FR Doc. 88-29582 Filed 12-23-88; 8:45 am]

BILLING CODE 4310-09-M

#### INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31301]

**Norfolk and Western Railway Co.; Lease Exemption; Chicago and Western Indiana Railroad Co.**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of exemption.

**SUMMARY:** The Interstate Commerce Commission exempts Norfolk and Western Railway Company (N&W) and Chicago and Western Indiana Railroad Company (CWI) from the prior approval



requirements of 49 U.S.C. 11343-11345: (1) To allow the carriers to extend the term of an agreement, already exempted, under which N&W leases 5.5 miles of CWI track in Chicago, IL; and (2) to permit N&W to lease from CWI an additional .87 mile of track also in Chicago, IL.

**DATES:** The exemption will be effective on January 26, 1989. Petitions for stay must be filed by January 6, 1989 and petitions for reconsideration must be filed by January 17, 1989.

**ADDRESSES:** Send pleadings referring to Finance Docket No. 31301 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

(2) Petitioners' representatives: For Norfolk and Western Railway Company: R. Allan Wimbish, Norfolk Southern Corporation, One Commercial Place, Norfolk, Virginia 23510-2191.

For Chicago and Western Indiana Railroad Company:

J.H. Park, 428 West 47th Street, Chicago, Illinois 60609.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 275-7245. (TDD for hearing impaired (202) 275-1721.)

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359. (Assistance for the hearing impaired is available through TDD services (202) 275-1721.)

Decided: December 13, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

Noreta R. McGee,  
Secretary.

[FR Doc. 88-29562 Filed 12-23-88; 8:45 am]  
BILLING CODE 7035-01-M

## DEPARTMENT OF JUSTICE

### Bureau of Justice Assistance

#### Criminal Justice Formula Grants

**AGENCY:** Bureau of Justice Assistance, Justice.

**ACTION:** Final Notice.

**SUMMARY:** The Bureau of Justice Assistance is publishing this notice of program guidance for implementation of the Drug Control and System Improvement Formula Grant Program. The notice deals with procedures and

requirements for formula grant applications and grant administration.

**EFFECTIVE DATE:** This program guidance is effective December 17, 1988.

**FOR FURTHER INFORMATION CONTACT:** Eugene H. Dzikiewicz, Bureau of Justice Assistance, 633 Indiana Avenue NW., Washington, DC 20531 (202-724-6838). (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** The Bureau of Justice Assistance is publishing program guidance for implementation of the Drug Control and System Improvement Formula Grant Program. The Anti-Drug Abuse Act of 1988, Title VI, Subtitle C, of Pub. L. 100-690 authorizes the Bureau of Justice Assistance to provide funds to eligible states for the purpose of making subgrants to state agencies, units of local government and private, nonprofit organizations.

The purpose of the Drug Control and System Improvement Formula Grant Program is to provide funds to states for financial assistance to state agencies and local units of government to address the most pressing drug control and criminal justice system improvement problems as determined through the statewide strategic planning process to be implemented by the states. Grant funds are provided to the states to support specific programs which offer a high probability of improving the functioning of the criminal justice system, with a special emphasis placed on multilevel and multijurisdictional drug control efforts. Programs and projects are to be developed to assist state and local drug control efforts and to support national drug control priorities.

The states may award formula grant funds to state agencies and local units of government for the purpose of enforcing state and local laws which establish offenses similar to offenses established in the Controlled Substances Act (21 U.S.C. 801 *et seq.*) and to improve the functioning of the criminal justice system with emphasis on violent and serious offenders. Grants may provide personnel, equipment, training, technical assistance and information systems for the more widespread apprehension, prosecution, adjudication, detention and rehabilitation of persons who violate such laws and to assist the victims of such crime, other than compensation. No program may be funded that is not contained in a state strategy that has been approved by the Bureau of Justice Assistance. The program guidance lists 21 purpose areas for which programs can be funded under the Act.

The program guidance describes a general process the states must follow to

develop the required statewide strategy to qualify for funding under this Act. This process is consistent with the application and strategy process required under the Anti-Drug Abuse Act of 1988. Specific deadlines for application submission and award of subgrants are identified as required by the Act. In distributing the funds, states shall give priority to those jurisdictions with the greatest documented need. The state strategy should include goals and objectives to address the drug control and system improvement priorities and include identification of programs, needed legislative and administrative changes and establish mechanisms to improve the coordination of efforts at the state and local level.

Charles P. Smith,

Director, Bureau of Justice Assistance.

#### Introduction

This program guidance document was prepared by the Bureau of Justice Assistance (BJA), Office of Justice Programs (OJP), to establish program policy and administrative guidance for implementation of the Drug Control and System Improvement Grant Program authorized by the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, Title VI, Subtitle C. This guidance document describes procedures and requirements to apply for and administer formula grant funds.

The statutory authority for the guidance is the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. 3711, *et seq.*, (Pub. L. 90-351), as amended by Pub. L. 91-644, Pub. L. 93-83, Pub. L. 93-415, Pub. L. 94-430, Pub. L. 94-503, Pub. L. 95-115, Pub. L. 96-157, Pub. L. 98-473, Pub. L. 99-570 and Pub. L. 100-690.

#### Purpose of Formula Grant Funds

The purpose of the Drug Control and System Improvement Grant Program is to assist states and units of local government in carrying out specific programs which offer a high probability of improving the functioning of the criminal justice system. Special emphasis is placed on a nationwide and multilevel drug control strategy. Programs and projects are to be developed to assist multijurisdictional and multistate organizations in the drug control problem and to support national drug control priorities. Section 501(a) of the Act.

In accordance with section 501(b) of the Act, the states may award formula grant funds to state agencies and units of local government for the purpose of enforcing state and local laws which establish offenses similar to offenses established in the Controlled

Substances Act (21 U.S.C. 801 *et seq.*) and to improve the functioning of the criminal justice system, with emphasis on violent crime and serious offenders. Grants may provide personnel, equipment, training, technical assistance and information systems for the more widespread apprehension, prosecution, adjudication and detention and rehabilitation of persons who violate such laws, and to assist the victims of such crimes (other than compensation), including the following programs:

1. Demand reduction education programs in which law enforcement officers participate;
2. Multijurisdictional task force programs that integrate Federal, state and local drug law enforcement agencies and prosecutors for the purpose of enhancing interagency coordination and intelligence and facilitating multijurisdictional investigations;
3. Programs designed to target the domestic sources of controlled and illegal substances, such as precursor chemicals, diverted pharmaceuticals, clandestine laboratories and cannabis cultivations;
4. Providing community and neighborhood programs that assist citizens in preventing and controlling crime, including special programs that address the problems of crimes committed against the elderly and special programs for rural jurisdictions;
5. Disrupting illicit commerce in stolen goods and property;
6. Improving the investigating and prosecution of white-collar crime, organized crime, public corruption crimes and fraud against the government with priority attention to cases involving drug-related official corruption;
7. a. Improving the operational effectiveness of law enforcement through the use of crime analysis techniques, street sales enforcement, schoolyard violator programs, gang-related and low-income housing drug control programs. b. developing and implementing antiterrorism plans for deep draft ports, international airports and other important facilities;
8. Career criminal prosecution programs, including the development of model drug control legislation;
9. Financial investigative programs that target the identification of money laundering operations and assets obtained through illegal drug trafficking, including the development of proposed model legislation, financial investigative training and financial information sharing systems;
10. Improving the operational effectiveness of the court process, such

as court delay reduction programs and enhancement programs;

11. Programs designed to provide additional public correctional resources and improve the corrections system, including treatment in prisons and jails, intensive supervision programs and long-range corrections and sentencing strategies;
12. Providing prison industry projects designed to place inmates in a realistic working and training environment which will enable them to acquire marketable skills and to make financial payments for restitution to their victims, for support of their own families and for support of themselves in the institution;
13. Providing programs which identify and meet the treatment needs of adult and juvenile drug-dependent and alcohol-dependent offenders;
14. Developing and implementing programs which provide assistance to jurors and witnesses and assistance (other than compensation) to victims of crime;
15. a. Developing programs to improve drug control technology, such as pretrial drug testing programs, programs which provide for the identification, assessment, referral to treatment, case management and monitoring of drug-dependent offenders and enhancement of state and local forensic laboratories. b. Criminal justice information systems to assist the law enforcement, prosecution, courts and corrections organizations (including automated fingerprint identification systems);
16. Innovative programs which demonstrate new and different approaches to enforcement, prosecution and adjudication of drug offenses and other serious crimes;
17. Addressing the problems of drug trafficking and the illegal manufacture of controlled substances in public housing;
18. Improving the criminal and juvenile justice system's response to domestic and family violence, including spouse abuse, child abuse and abuse of the elderly;
19. Drug control evaluation programs which state and local units of government may utilize to evaluate programs and projects directed at state drug control activities;
20. Providing alternatives to prevent detention, jail and prison for persons who pose no danger to the community; and
21. Programs of which the primary goal of is to strengthen urban enforcement and prosecution efforts targeted at street drug sales.

#### Allocation of Funds to the States

Section 506(a) of the Act provides that 80 percent of the total amount

appropriated for this part shall be allocated for formula grants. Each participating state shall receive a base amount of \$500,000 with the remaining funds allocated to each state on the basis of the state's relative share of total U.S. population.

For the purposes of this Section, American Samoa, Guam and the Northern Mariana Islands shall be considered as one state, and 33 percent of the amounts allocated shall be given to American Samoa, 50 percent to Guam and 17 percent to the Northern Mariana Islands. Section 901(a)(2) of the Act.

If BJA determines, on the basis of information available during any fiscal year, that a portion of the funds allocated to a state for that fiscal year will not be required or that a state will be unable to qualify or receive funds under the Formula Grant Program or that a state chooses not to participate in the program, then the state's portion of the funds shall be awarded by the Director of BJA to urban, rural and suburban units of local government or combinations thereof within the state, giving priority to those jurisdictions with the greatest need. Section 506(e). Any funds allocated under the Formula Grant Program which are not distributed in accordance with Section 506 (a) and (b) shall be available for obligation under the Discretionary Grant Program. Section 506(f) of the Act.

#### State Administrative Program Requirements

##### Designation of a State Office

Section 507(a) of the Act provides that the chief executive of each participating state shall designate a State Office for the purposes of:

- Preparing an application to obtain funds;
- Administering funds received from BJA, including receipt, review, processing, monitoring, progress and financial report review, technical assistance, grant adjustments, accounting, auditing and fund disbursements; and
- Coordinating the distribution of funds provided under this part with state agencies receiving Federal funds for drug abuse education, prevention, treatment and research activities and programs.

An office of agency performing other functions within the state's executive branch may be designated as the State Office. Section 507(b) of the Act.

Up to 10 percent of the formula grant funds allocated to a state may be used to pay for costs incurred in



administering the formula grant program. Section 504(B) of the Act.

#### Matching Requirements

##### For Fiscal Year 1989 Appropriations

Federal funds may be used to pay up to 75 percent of the cost of a program or project. The remaining non-Federal share shall be in cash. Section 504(a) of the Act.

##### For Fiscal Year 1990 and Subsequent Years Appropriations

Federal funds may be used to pay up to 50 percent of the cost of a program or project. Section 504(a)(2) of the Act. The graduated matching funds approach reflects the purpose of this grant program to use Federal monies to promote innovation and information sharing among the states, thereby enabling the states to assume the funding of those activities most effective within that state.

#### Cash Match

The non-Federal share of expenditures shall be paid on cash. Section 504(e) of the Act. Funds required to pay the non-Federal portion of the cost of each program and project for which a grant is made shall be in addition to funds that would otherwise be made available by the recipients of the grant funds. Section 503(a)(3) of the Act.

#### Waiver of Matching Requirement for Indian Tribes

Funds subgranted to an Indian tribe which performs law enforcement functions (as determined by the Secretary of the Interior) shall be used to pay 100 percent of the cost of a program or project. Section 504(a)(2) of the Act.

#### Match on a Project-by-Project Basis

Match will be provided on a project-by-project basis.

However, states may request BJA to approve exceptions, such as match on a program-by-program basis, statewide basis, unit-of-government basis or a combination of the above. States must include requests for approval of other than project-by-project match in their applications to BJA.

#### Use of Proceeds Received under the Equitable Sharing Program as Match

State and local units of government may use cash they received under the equitable sharing program to cover the non-Federal portion of costs of any OJP project or program.

#### Use of Proceeds from Asset Forfeitures as Match

Program income, under some circumstances, may be used to meet the matching requirement of the grant. A state or local unit of government, under the Drug Control and System Improvement Grant Program, can use forfeiture funds as match if state and local statutes allow for the collection and retention of such funds.

#### Distribution of Formula Funds Within The State

##### Variable Pass-through

Funds granted to the state are further subgranted by the state to state agencies and units of local government to carry out programs and projects contained in an approved application. Each state shall distribute to its local units of government, in the aggregate, a portion of the state's formula grant funds equal to the local government share of total state and local criminal justice expenditures for the previous fiscal year. Section 506(b)(1) of the Act. In determining the portion to be distributed to local units, the most recent and complete data available from the Bureau of Justice Statistics (BJS), OJP, of the U.S. Department of Justice shall be used unless the use of other data has been approved in advance by BJA.

To request approval of a distribution ratio other than that announced by BJA, the head of the State Office must certify in writing to BJA that the ratio it proposes is a correct reflection of the local share of total state and local criminal justice expenditures and that the state has notified its major local governments of the request and informed them of the opportunity to contact BJA within 30 days if they have any objections. The written request must also cite the expenditure data used to substantiate the proposed change, which data shall be reviewed by BJS.

#### Distribution of Funds to State Agencies

Any funds not required to be passed through to local units of government may be used for programs administered by state agencies. Section 506(b)(3) of the Act. States may exceed the variable pass-through providing funds not used at the state level to local units of government.

#### Priority to Jurisdictions with the Greatest Need

In distributing funds, the state shall give priority to those jurisdictions with the greatest need. Section 506(b)(2) of the Act. Please refer to Appendix A for information on determining jurisdictions of greatest need.

#### 45-Day Rule for Review of Local Government Applications

The state must make a decision on each complete application made by a local unit of government, or a combination of units of local government, within 45 days of receipt. An application shall be deemed approved by the state unless the state informs the applicant in writing within 45 days of the specific reasons for disapproval. The state shall not finally disapprove any application without first affording the applicant reasonable notice and opportunity for reconsideration. Section 506(a) of the Act. The state may establish program priorities for submission of the applications based on their strategy and criteria. The failure of an application to conform to the program priorities or to meet the criteria may constitute reason for disapproval.

#### 45-Day Rule for Making Funds Available to Local Units of Government

Within 45 days following BJA's approval of a state's formula grant application and notice to and acceptance of conditions by the state, the state shall make funds available to local units of government, or combinations thereof, whose applications have been submitted to, approved and awarded by the state. The Director of BJA shall have the authority to waive the 45-day requirement upon a finding that the state cannot satisfy the requirement consistent with state statutes. Section 506(b) of the Act. In order to meet this requirement, the states should consider soliciting applications from local units of government prior to or simultaneously with the submission of the state's application to BJA.

#### Period of Project Support

Projects funded under this title may be funded for a maximum of four years (48 months) in the aggregate, including any period occurring before the effective date of this Act. The limitation on funding applies to all projects which have received four years of formula and/or discretionary grant funding under the Omnibus Crime Control and Safe Streets Act as amended, including the Justice Assistance and the State and Local Law Enforcement Assistance programs or combination of programs. Section 504(f) of the Act.

Because funding beyond the initial award is not guaranteed, projects should be designed with objectives achievable within the grant period.

#### Expenditures for Purchase of Evidence and Purchase of Information

Confidential expenditures are defined as funds used for the purchase of services, purchase of physical evidence and purchase of information including buy money, flash rolls etc. Guidelines related to confidential expenditures are found in OJP M7100.1, Financial and Administrative Guide for Grants (current edition). BJA has delegated to the State Office which administers the formula grant program authority to approve the allocation, use and expenditure of formula subgrant funds for confidential expenditures. Thus, the use of the term "Grantor Agency" as used in M7100.1 means the State Office for subgrants. All state applications containing projects which will utilize funds for confidential expenditures must contain an assurance that the guidelines found in M7100.1 will be followed.

#### Identification of Sensitive Projects

State applications which request funds for any confidential program, such as "STING" operations, should not state the location of the project. The application should only include the program title, description, the funds involved and the number of projects. The name of the state agency or unit of local government implementing the project shall be made available to BJA upon request or completion of the project.

#### Clandestine Laboratory Enforcement Projects

A monograph on clandestine laboratory investigation and officer safety is being developed and will be available by early 1989. All applications containing clandestine laboratory enforcement projects must contain an assurance that the *Clandestine Laboratory Monograph* requirements will be followed, or the state must provide justification for deviation. Deviation from the monograph requirements must be approved by BJA prior to implementation of the project.

#### Eradication Projects

A program brief entitled *Marijuana Eradication Program* has been developed as a cooperative effort between BJA and the Drug Enforcement Administration (DEA). All applications containing eradication projects must contain an assurance that the *Marijuana Eradication Program Brief* requirements will be followed, or the state must provide justification for deviation. Deviation from the program brief requirements must be approved by BJA prior to start of the project.

#### Drug-Free Workplace

Title V, Section 5153 of the Anti-Drug Abuse Act of 1988 provides that all grantees of Federal funds, other than an individual, shall certify to the granting agency that it will provide a drug-free workplace by:

- Publishing a statement notifying employees that the unlawful manufacturing, distribution, dispensation, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
  - Establishing a drug-free awareness program to inform employees about:
    - The dangers of drug abuse in the workplace,
    - The grantee's policy of maintaining a drug-free workplace,
    - Any available drug counseling, rehabilitation and employee assistance programs, and
    - The penalties that may be imposed upon employees for drug abuse violations;
  - Making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement of notification prohibiting controlled substances in the workplace;
  - Notifying the employee that as a condition of employment in such grant, the employee will:
    - Abide by the terms of the statement, and
    - Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;
  - Notifying the granting agency within 10 days after receiving notice of a conviction from an employee or otherwise receiving actual notice of such conviction;
  - Imposing a sanction on or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by any employee who is so convicted; and
  - Making a good faith effort to continue to maintain a drug-free workplace.
- The U.S. Office of Management and Budget in collaboration with other Federal executive agencies, including the Department of Justice, will develop regulations under section 5156 of the Act to implement these new drug-free workplace requirements. These regulations, which will be binding on BJA grantees, must be issued by February 17, 1989, and will be effective on March 18, 1989. All applications must contain an assurance that the

prospective grantee will comply with the drug-free workplace requirements.

#### Civil Rights

No person in any state shall on the grounds of race, color, religion, national origin or sex be excluded from participation in, be denied the benefits of, be subjected to discrimination under or denied employment in connection with any programs or activity funded in whole or in part with funds made available under this title. Section 809(c)(1) of the Act. Recipients of funds under the Act are also subject to the provisions of Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1974, as amended; Title IX of the Education Amendments of 1972; the Age Discrimination Act of 1974; and the Department of Justice Non-Discrimination Regulations, 28 CFR Part 42, Subparts C, D, E, and G.

Applications from the state must include the name of a civil rights contact person who has lead responsibility for ensuring that all applicable civil rights requirements are met and who shall act as liaison in civil rights matters with the Office for Civil Rights (OCR) or OJP.

#### Compliance With Executive Order 12372, "Intergovernmental Review of Federal Programs"

In accordance with Executive Order 12372, "Intergovernmental Review of Federal Programs," and the Department of Justice's implementing regulation 28 CFR Part 30, states must submit formula grant applications to the state "Single Point of Contact," if one exists. If this program has been selected for coverage by the state process, the state must submit its application at the same time the application is submitted to BJA. The state may take up to 60 days from the application submission date to comment on the application. The date which the application was submitted to the Single Point of Contact should be shown on page one of the application form. If, at the time that BJA approves the state's application, the Single Point of Contact has not commented on the application and the 60-day comment period has not expired, the award will be special conditioned to allow for comment prior to the award of subgrants by the state.

#### General Financial Requirements

Grants funded under the Formula Grant Program are governed by the provisions of 28 CFR Part 66, Common Rule, Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Government and the Office of Management and Budget (OMB)



Circulars applicable to financial assistance. These Circulars along with additional information and guidance are contained in M7100.1, available from the Office of Justice Programs. This guideline manual provides information on cost allowability, methods of payment, audit, accounting systems and financial records.

#### Audit Requirement

OMB Circular A-128, "Audits of State and Local Governments," outlines the requirements for organizational audits. Applications from the state must include the date of the State Office's last audit and the anticipated date of the next audit, which complies with these requirements.

#### Suspension of Funding

BJA shall, after reasonable notice and opportunity for a hearing, terminate or suspend funding for a state that implements programs or projects which fail to conform to the requirements or statutory objectives of the Act or which fail to comply substantially with the Act, the regulations or the terms and conditions of its grant award. Hearing and appeal procedures are set forth in Department of Justice regulations 28 CFR Part 18.

#### Title to Property

Sec. 808 of the Act provides that notwithstanding any other provision of law, title to all expendable and nonexpendable personal property purchased with funds made available under this title, including property purchased with funds made available under this title before the effective date of this Act, shall vest in the criminal justice agency or nonprofit organization that purchased the property if it certifies to the State Office that it will use the property for criminal justice purposes. If such certification is not made, title to the property shall vest in the State Office which shall seek to have the property used for criminal justice purposes elsewhere in the state prior to using it or disposing of it in any other manner. If a State Office does not exist, certification will be made directly to BJA.

#### Construction Projects

The Act permits the use of formula grant funds for construction of penal and correctional institutions. Section 505(c) of the Act. Correctional institutions refer to prisons, jails, juvenile correctional institutions and residential community corrections facilities. BJA will adopt the legislative requirements outlined in the Omnibus Crime Control and Safe Streets Act of

1968 as amended, Part F, Criminal Justice Facility Construction: Pilot Project (except funding limitations), for use in review of applications containing construction projects. A copy of Part F of the Act is found in Appendix B. The application should also describe drug treatment and other programs which will be available to the offenders incarcerated in this facility. In addition, any proposals for construction projects should certify that the applicant has reviewed all potential Federal surplus and excess real property and ascertained whether such Federal property is available or suitable for the project.

#### Allowable/Unallowable Expenses

##### Equipment and Hardware

Equipment and hardware expenses which are part of an approved program or project are allowable expenses. Section 501(b) of the Act.

##### General Salaries and Personnel Costs

Payment of personnel costs with grant funds is permitted if the costs are a part of an approved program or project. Section 501(b) of the Act.

#### Allowable/Unallowable Costs

State and Local Governments should follow OMB Circular A-87, Cost Principles for State and Local Governments which covers both allowable and unallowable costs under grant programs.

##### Construction

Use of formula grant funds for construction projects is prohibited except when facilities to be constructed are penal or correctional institutions. section 505(c) of the Act.

##### Land Acquisition

Acquisition of land with grant funds is prohibited. Section 505(c) of the Act.

##### Administrative Costs

Not more than 10 percent of grant funds may be used to pay for costs incurred in administering the formula grant program. Section 504(b) of the Act. When the application for Federal funds, which includes the statewide strategy, is prepared by the state and the grant funds are administered by the state, there shall be a presumption that funds specifically designated for administration of the award are being used for the benefit of both state and local agencies and are expended in accordance with the variable passthrough requirement.

#### Evaluation Costs

Expenses associated with conducting evaluations of programs/projects funded with formula grant funds are allowable expenses. Section 504(d) of the Act.

#### Participation in Drug Enforcement Administration Task Forces

Formula grant funds may be used for expenses associated with participation of the state or units of local government, or combinations thereof, in the State and Local Task Force Program established by the Drug Enforcement Administration. Section 504(c) of the Act.

#### State Application Requirements

Applications from the states for formula grants must be submitted on Standard Form (SF) 424, Application for Federal Assistance. BJA provides the states with an application kit which includes SF 424, a list of assurances to which the applicant must agree, a table of fund allocations and instructions on how to prepare and submit a formula grant application.

#### Eligible Applicants

##### State Government

All states are eligible to apply for and receive formula grants. Sec. 502 of the Act. State, as defined in the statute, means any state of the United States and includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands and American Samoa. Section 901(a)(2) of the Act.

##### Units of Local Government

Units of local government are eligible to receive subgrants from a participating state. Units of local government means any city, county, town, township, borough, parish, village or other general purpose political subdivision of a state and includes Indian tribes which perform law enforcement functions as determined by the Secretary of the Interior. Section 901(a)(3) of the Act.

#### Application Submission Date

Applications for Fiscal Year 1989 formula grant funds must be submitted by February 16, 1989, which is 60 days after the promulgation of regulations. The Act requires that applications for Fiscal Year 1990 and subsequent fiscal year funds will be due within 60 days after the date that the appropriation for the program is enacted. Section 503(a) of the Act.

If a state fails to submit an application by the submission deadline as defined by the Act, BJA will provide the state

with written notice that it intends to begin the process of making funds available to local units of government, or combinations thereof, within the state, within 30 days of the date of the notice. The state will be provided with an opportunity to submit its application and a justification for the late submission within the 30-day period. The Director of BJA will make a determination on adequacy of the justification prior to initiating review of the application.

BJA recommends that the states use July 1 of each year as the target due date to submit applications for funds for the coming fiscal year. This will provide sufficient time for the review, modification, if needed, and award of applications so that the states may begin to fund programs by the beginning of the fiscal year or as soon as an appropriation is enacted. If the appropriation for the fiscal year is not known at the time of submission of the application, programs should be prioritized in the application, and the Attachment A, which shows the allocation of funds, should be submitted when the appropriation is enacted.

#### Statewide Strategy for Drug and Violent Crime Control

Each state is required to develop a statewide strategy to improve the functioning of the criminal justice system, with an emphasis on drug trafficking, violent crime and serious offenders. The strategy shall be prepared after consultation with state and local officials, particularly those whose duty it is to enforce drug and criminal laws and direct the administration of justice. The strategy, described in Section 503(a)(1) of the Act, shall contain:

- A definition and analysis of the drug and violent crime problem in the state and an analysis of the problems in each of the counties and municipalities with major drug and violent crime problems;
- An assessment of the criminal justice resources being devoted to crime and drug control programs at the time of the application;
- A description of how the state is complying with coordination requirements;
- Identification of resource needs;
- The establishment of statewide priorities for crime and drug control activities and programs;
- An analysis of the relationship of the proposed state efforts to the national drug control strategy; and
- A plan for coordinating the programs to be funded under this program with other Federally funded programs, including state and local drug

abuse education, treatment and prevention programs.

• A recommended format to facilitate the development of the statewide strategy and data summary is provided in Appendix A.

#### Programs to be Funded

Applications must set forth programs and projects which meet the purposes and criteria outlined in the Act. Section 506(c) of the Act. The Act defines 21 purpose areas which may be funded with formula grant funds. Because Congress does not identify all criminal justice areas for funding under this Act, BJA does not deem all criminal justice system improvement areas as appropriate for Federal funding (e.g. services for criminal defense and furlough programs for offenders who pose dangers to the community).

The application must designate which statutory purpose each program or project is intended to address and provide the name of the subgrantee, if known, and the estimated funding level for the program or project, including the amount and source of cash matching funds. The application must also include a description of the program and how it contributes to the statewide drug strategy's implementation.

BJA develops program briefs that describe programs which have been found, based on research and evaluation, to be effective in drug and violent crime control. States are encouraged to consider the applicability of these programs in their statewide drug strategy. If these programs are included in the application and the applicant agrees to include in the program design all the critical elements as outlined in the program brief, the applicant need only identify the program, which statutorily authorized purpose it is intended to achieve, the title of the BJA program brief being implemented and the funding level (including amount and source of match).

#### Input Into and Review of the Strategy

The Act requires that the state strategy be prepared after consultation with state and local officials, particularly those whose duty it is to enforce drug and criminal laws and direct the administration of justice. Section 503(a)(1) of the Act. It also requires that the application be made public before submission to BJA and that, as provided by state law or procedures, citizens and neighborhood and community groups be provided an opportunity to comment on the application. Section 503(a)(5) of the Act. The state is encouraged to provide a copy of the application or a summary

which includes an analysis of the area of greatest need, the allocation of funds and the impact of the state strategy on major jurisdictions, at a minimum, to jurisdictions with populations of 250,000 or more for review and comment. The distribution of the application or summary to large jurisdictions may occur simultaneously with the submission of the application to BJA. The application should describe the mechanisms for obtaining input and review, the jurisdictions which participated and how the information was used.

#### Application Assurances

The Chief Executive Officer of the state or his/her designee must make the following assurances as a part of the state application:

##### Non-supplanting

The applicant assures that Federal funds made available under the formula grant of this subpart will not be used to supplant state or local funds, but will be used to increase the amounts of such funds that would, in the absence of Federal funds, be made available for law enforcement activities. Section 503(a)(2) of the Act.

##### Matching funds

The applicant assures that matching funds required to pay the non-Federal portion of the cost of each program and project, for which grant funds are made available, shall be in addition to funds that would otherwise be made available for the recipients of grant funds. Section 503(a)(3) of the Act.

Matching funds should be provided on a project-by-project basis. However, the state may request BJA to approve exceptions, such as match on a program-by-program basis, statewide basis, unit-of-government basis or a combination of the above. The state must include any requests for approval of other than project-by-project match in its application to BJA.

##### Legislative review

The applicant assures that the state application described in this section and any amendment thereto has been submitted for review to the state legislature or its designated body. For purposes of this section, the application or amendment shall be deemed to be reviewed if the state legislature, or its designated body, does not review the application or amendment within 30 days from the date of submission. Section 503(a)(4) of the Act.



**Public comment**

The applicant assures that the state application and any amendment to it are made public before submission to BJA and, to the extent provided under state law or established procedure, an opportunity for public comment was provided to citizens and to neighborhood and community groups. Section 503(a)(5) of the Act.

**Evaluation**

The applicant assures that following the first fiscal year covered by an application and for each fiscal year thereafter, a performance evaluation and assessment report concerning the activities carried out under this program will be submitted to BJA. Section 503(a)(6) of the Act.

**Recordkeeping**

The applicant assures that fund accounting, auditing, monitoring, evaluation procedures and such records as BJA shall prescribe shall be provided to assure fiscal control, proper management and efficient disbursement of funds received under the Act. Section 503(a)(7) of the Act.

**Reporting**

The applicant assures that it shall maintain such data and information and submit such reports in such form at such times and containing such information as BJA may reasonably require to administer the program. Section 503(A)(8) of the Act.

**Compliance with the Act**

The applicant certifies that the programs contained in its application meet all the requirements, that all the information is correct, that there has been appropriate coordination with affected agencies and that the applicant will comply with all provisions of the Act and all other applicable Federal laws, regulations and guidelines. Section 503(a)(9) of the Act.

**User Accountability**

The applicant assures that the state is undertaking initiatives to reduce, through the enactment of innovative penalties or increasing law enforcement efforts, the demand for controlled substances by holding accountable those who unlawfully possess or use such substances. Section 503(a)(10) of the Act.

**Drug-Free Workplace**

The applicant assures that it will comply with Title V of the Anti-Drug Abuse Act of 1988 and regulations promulgated by the Federal Government to maintain a drug-free workplace.

**Debarment**

The applicant assures that it will require all subgrant applicants to complete a "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion, Lower Tier Covered Transactions," in accordance with Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, Section 85.510, Participants' Responsibilities.

**Civil Rights**

The applicant assures that it will comply, and all its subgrantees and contractors will comply, with the nondiscrimination requirements of the Omnibus Crime Control and Safe Streets Act of 1968, as amended; Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1973, as amended; Title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975; the Department of Justice Nondiscrimination Regulations 28 CFR Part 42, Subparts C, D, E, and G; and Executive Order 11248, as amended by Executive Order 11375, and their implementing regulations, 41 CFR 60.1 et seq., as applicable to construction contracts.

**Findings of Discrimination**

The applicant assures that in the event a Federal or state court or administrative agency makes a finding of discrimination after a due process hearing on the grounds of race, color, religion, national origin or sex against a recipient of funds, the recipient will forward a copy of the finding to the OCR, OJP.

**Equal Employment Opportunity Program**

The applicant assures that if required to formulate an Equal Employment Opportunity Program (EEOP), in accordance with 28 CFR 42.301 et seq., it will maintain a current one on file. Further, the applicant will require every fund recipient required to formulate an EEOP, in accordance with the previously cited regulation and to submit a certification to the applicant that it has a current EEOP on file which meets the applicable requirements.

The applicant assures that if required to maintain an EEOP and the applicant agency will directly utilize \$500,000 or more in grant funds, it will submit a copy of the EEOP with its application. The statewide application for funds may not be awarded prior to approval of the applicant's EEOP by the OCR, OJP. In those instances where a subgrantee is required to maintain an EEOP and the proposed subgrant is for \$500,000 or

more, the applicant will provide a copy of the EEOP to BJA and will not make the subgrant award until the subgrantee's EEOP has been approved by OCR, OJP.

**Financial and Administrative Guide**

The applicant assures that it will comply with the provisions of OJP's M7100.1.

**Compliance with Federal Procedures**

The applicant assures that it will comply with the provisions of 28 CFR applicable to grants and cooperative agreements, including Part II, Applicability of Office of Management and Budget Circulars; Part 18, Administrative Review Procedures; Part 20, Criminal Justice Information Systems; Part 22, Confidentiality of Identifiable Research and Statistical Information; Part 23, Criminal Intelligence Systems Operating Policies; Part 30, Intergovernmental Review of Department of Justice Programs and Activities; Part 42, Nondiscrimination Equal Employment Opportunity Policies and Procedures; Part 61, Procedures for Implementing the National Environmental Policy Act; and Part 63, Floodplain Management and Wetland Protection Procedures.

**Drug and Violent Crime Policy Board**

Each state is strongly encouraged to establish a Drug and Violent Crime Policy Board to serve as a forum for communication and a structure for coordination. The Board should be responsible for the development of the state strategy and should facilitate coordination within the state. The Board members should represent state and local officials, all components of the criminal justice system (e.g., law enforcement, prosecution, courts and corrections), education and treatment. The United States Attorney or the Chair of the Law Enforcement Coordinating Committee should also be included on the Board to facilitate coordination with Federal drug control efforts. Federal employees who serve as members of the Board should be nonvoting members relative to state grant funding decisions. The Board should be appointed by the Governor to establish its credibility as the Policy Board within the state and the importance of its mission. If a Board is established, the application for formula grant funds should include a list of Board members, their agency and level of government and their criminal justice function and/or other discipline (e.g., education or drug treatment) they represent.

Up to 10 percent of the state's total allocation under the Drug Control and System Improvement Grant Program may be used for administration of the program. Payment of the costs associated with the operation of the Drug and Violent Crime Policy Board is an allowable use for the administrative funds.

**Review of State Applications****45-Day Rule**

BJA shall approve or disapprove applications or amendments within 45 days of official receipt. The application or amendment shall be considered approved unless BJA informs the applicant in writing of specific reasons for disapproval prior to the expiration of the 45-day period. Applications which are incomplete, as determined by BJA, shall not be considered officially received for purposes of the 45-day rule. Section 505(b) of the Act.

**Written Notification and Reason for Disapproval**

BJA shall notify the applicant in writing of the specific reasons for the disapproval of the application or amendment, in whole or in part. The applicant will be afforded an opportunity for reconsideration before a final determination of disapproval is made. Section 505(d) of the Act.

**Affirmative Finding**

BJA, prior to approval of the application or amendments, must make an affirmative finding in writing that the program or project has been reviewed in accordance with the Act. Section 505(a)(2) of the Act.

**State Program and Project Evaluation**

Each program funded by the state shall contain an evaluation component. The National Institute of Justice (NIJ), in consultation with BJA, will establish guidelines for the evaluation of programs funded by the states under the Formula Grant Program. Section 501(c) of the Act.

To meet this requirement, BJA recommends that the states:

- Follow closely the evaluation guidance provided by NIJ;
- Establish an evaluation capability within the State Office;
- Analyze the Annual Project Report Forms completed at the project level for evaluative purposes;
- Conduct intensive evaluations of programs or projects of particular importance, particularly those related to the strategy; and
- Integrate the evaluation results into the strategy development process.

The purpose of evaluating each program is to assess how well it has been implemented and to assess the extent to which the activities funded have achieved the program's goals. Such assessments should be designed to provide administrators and policy makers with an improved understanding of whether specific activities accomplish their desired results of furthering the state strategy.

The reporting provisions outlined in section 522(a) of the act, require that the states provide evaluation results of programs and projects and analyze formula grant activities at several levels. The states should conduct evaluations designed to assess the effectiveness of individual projects (e.g., a particular task force in jurisdiction "X"). Broader evaluations should also be conducted. These might include comparisons of differently designed projects within a single program area, or evaluations of whether one type of program (e.g., demand reduction education) is more or less effective than other programs as a means to address the drug problem. The states should also assess the impact programs and project activities have on meeting the needs identified in the state strategy.

**Evaluation Capability at the State Level**

BJA recommends that an evaluation capability be established at the state level to coordinate and economize evaluation activities. This could be achieved by: expanding the functions of the state's statistical analysis center (SAC) if it contains evaluation expertise; creating an evaluation unit within the State Office; or by contracting for evaluation services.

The establishment of a state level capability will facilitate evaluations involving assessments of more than one project. Such evaluations require collecting consistent information about projects as well as making comparisons among projects. Evaluations contemplating rigorous controls, such as experimental or quasi-experimental designs, require the assistance of trained research professionals. States may find it advisable to position such research professionals at the state level rather than at the project level.

Administrative funds, program funds or a combination of the two may be used for the evaluation activities. For purposes of computing the pass-through of funds to local units of government, program funds used for evaluation are assumed to be used in the same proportion as the funds used for evaluation of projects implemented by state agencies and local units of government.

**Annual Project Report Forms**

To facilitate the collection of uniform performance data and to ease the administrative burden on the states, BJA will develop a performance reporting system designed to collect information from the operational units closest to the data. An Annual Project Report Form will be developed for each of the legislatively authorized purpose areas to collect information on activities undertaken and the results achieved for each project funded. The Annual Project Report Forms will be reviewed by NIJ to ensure that the requested information is both appropriate and sufficient to meet project and program evaluation requirements. If the states determine that additional information is required from their projects, they may supplement the Annual Project Report Forms with a request for additional information.

A form must be completed annually for each project or within 45 days of termination of the project. Project personnel will be required to send the forms to the State Office where they will be available for an assessment of project and program effectiveness. The state shall make copies of the forms and send them to BJA within 30 days of receiving them from the projects. The state may want to request this information from the projects more frequently, such as quarterly. For many projects, analysis of the data contained in the Annual Project Report Forms will be relied upon to meet the evaluation requirements in the Act.

If a state awards grant funds prior to the development of guidelines for the evaluation of programs by NIJ, the state should special condition the award to require compliance with the evaluation requirements once they are developed.

**Intensive Evaluations of Selected Programs or Projects**

The states may wish to conduct more intensive evaluations of selected programs or projects, and are encouraged to do so. States may choose from among many different assessment methods in designing their evaluation efforts. For studies of single projects, they may choose to employ such methodologies as: case studies; before and after or other time-series studies; tracking of specified cohorts (e.g., suspects, defendants or offenders) to learn how a particular project affects the system's response to the respective cohort; or any of several other available methodologies. They may choose rigorously designed evaluations.



including controlled experiments and quasi-experimental statistical analyses.

The choice of evaluation activities to be undertaken by the states should reflect some consideration of the strategic importance of the projects and programs to be assessed. States may concentrate their evaluation resources on those programs that constitute major components of the state's strategy. They may also choose to focus their resources on programs or projects that test new concepts or practices.

Generally, non-experimental methods can be useful for: exploratory analyses of how and why particular interventions work or do not work; for developing hypotheses about the causal relationships and outcomes; and for developing measurements of activities and outcomes. Experimental designs are called for when strict tests of hypotheses are needed. The guidelines to be developed by the NIJ will discuss these different methods, and will provide criteria for determining which types are appropriate.

BJA and NIJ may also conduct intensive evaluations of selected programs or projects being implemented in the states. These activities will be coordinated with or conducted in cooperation with the State Offices.

#### Integration of Evaluation Results Into the Strategy Development Process

Program and project activities should be evaluated to provide state and local officials with information on the effectiveness of the activities and to assist decision makers in developing and modifying the state strategy. The strategy development process requires a definition of the drug and violent crime problems in the state and the resource needs to address the problem. The strategy that is developed to address the problem and resource needs should be continually reviewed and assessed to determine if it is the most effective strategy. The results of the evaluations should be used to modify and improve the strategy to more effectively address the problems in the state.

#### Waiver of Evaluation Requirements

The Director of BJA may waive this requirement when, in the opinion of the Director, the program is not of sufficient size to justify a full evaluation report, or the program is designed primarily to provide material resources and supplies, such as laboratory equipment, that would not justify a full evaluation report. Section 501(c) of the Act.

A request for a waiver can be included in the state's application for formula grant funds or may be submitted as a separate request. It

should include a description of the program, the amount of the award and the justification for the waiver of the evaluation requirement. BJA will review the request and provide the state with a formal response waiving the requirements, modifying the requirements for this program or denying the waiver. BJA will generally not waive the Annual Project Report Forms requirement.

#### State Reporting Requirements

##### Individual Project Reports

States are required to provide to BJA within 30 days after the award of a subgrant an initial project report which provides information on the subgrant recipient (name, address, contact person), the subgrant period, the type of award (new or renewal), the subgrant funding level and the general target area (geographic area, population group) to be impacted. BJA will provide a form to assist the states in reporting this information.

##### Annual Report

Section 522(a)(1) of the Act requires that the state, or a local unit of government in the case of a non-participating state, annually submit to BJA a report concerning the activities carried out under the formula grant. These performance reports will provide the basis for the annual report from BJA to the President and the Congress as required by section 522(b) of the Act. The reports from the states must contain:

- A summary of the activities carried out under the formula grant program and an assessment of the impact of such activities on meeting the needs identified in the state strategy;
- A summary of the activities carried out during the year under any discretionary grants received by the state;
- The evaluation results of programs and projects;
- An explanation of how the Federal funds provided under this program were coordinated with state agencies receiving Federal funds for drug abuse education, prevention, treatment and research activities; and
- Such other information as BJA may require by rule.

The report required by the Act will contain information which will be useful for making informed decisions regarding drug control and criminal justice policy and strategies at the Federal, state and local levels. In order to encourage the states to use this information for planning and program development, the annual report will be incorporated into

the strategy development process as discussed in Appendix A, which includes a recommended format for development of the statewide strategy. The states will fulfill the legislative requirement for an annual report by providing to BJA copies of the Annual Project.

Report Forms discussed in the previous section on evaluation requirements and by following the recommended format for the development of a statewide strategy as outlined in Appendix A.

#### Appendix A

##### Development of a Statewide Strategy

The statewide strategies developed by the states will be instrumental in shaping and determining the success of the Drug Control and System Improvement Grant Program. As part of the Anti-Drug Abuse Act of 1988, the Drug Control and System Improvement Grant Program provides assistance to improve the functioning of the criminal justice system and to enhance the capabilities at the state and local levels to effectively control violent crime and drug offenses and treat drug offenders.

The strategy should serve as a comprehensive blueprint for the coordination of drug and violent crime control efforts and the targeting of Federal, state and local resources within the state. A thorough analysis of the nature and extent of the problem will improve the state's ability to develop a response which results in the greatest impact on the problem.

Increased efforts by one component of the system must be considered in the larger context of its impact on the criminal justice system as a whole. For example, increased enforcement efforts will have little effect without adequate prosecution, adjudication, detention and treatment resources to respond to the increased numbers of drug offenders.

The strategy should also address the problems and resource needs of the various jurisdictions throughout the state. A comprehensive effort is necessary to avoid simply displacing the problem from one jurisdiction to another due to the concentration of drug control efforts in one jurisdiction. The state should establish procedures which afford local jurisdictions the opportunity to provide input into the development of the strategy and the establishment of program priorities.

A thorough understanding of the problem also requires an analysis of the extent and nature of the problem over time. For example, if a new drug is emerging as the drug of preference in the state, control efforts and treatment services may require reorientation. It is also important to identify areas of the state with major drug and violent crime problems, such as large cities and border areas.

The strategy should include goals and objectives to address the problems and resource needs. A plan for implementation of the strategy should include the identification of programs, changes in legislation and

administrative procedures and methods to improve coordination and cooperation.

#### Section I—Overview of the State

##### Nature and Extent of the Problem

In order to develop an effective drug control and criminal justice system improvement strategy, the state must first define the nature and extent of the drug and violent crime problems in the state and analyze how efficiently and effectively the criminal justice system handles drug and violent crime cases. Definition of the problem should include:

- An assessment of the types and amount of drugs available within the state. Price and purity of the drugs seized should be analyzed as indicators of drug availability;
- The level, types, methods and sources of drugs transported into or out of the state;
- A definition of the patterns of usage and crime associated with drug use;
- Identification of drug distribution networks;
- An assessment of the role of organized crime organizations, ethnic groups, youth gangs and other groups in drug trafficking; and
- The nature, amount and causes of violent crime (e.g. drug-related).

The drug and violent crime problems are likely to vary across the state. The problems should be defined for the state as a whole and for areas of the state most likely to be experiencing the greatest problem, such as large cities and border areas. At a minimum, a separate analysis should be completed for jurisdictions of 250,000 and border areas. Other areas of the state with major drug and violent crime problems should be identified by the state and analyzed separately. Changes in the nature and extent of the problem should be reviewed over time to identify shifting patterns of crime and to assess the impact of the state strategy on the problem.

##### Current Efforts

Before making decisions on new programs to address the drug and violent crime problems, the state should identify current efforts within the state. How effectively and efficiently are drug and violent crime cases processed by the criminal justice system? Are correctional and treatment services adequate to protect the public and to meet the needs of violent and drug-dependent offenders? Are current laws and administrative procedures related to drug and violent crime cases adequate? This section should include an assessment of available resources in law enforcement, prosecution, adjudication, corrections and treatment. The analysis should contain a list of the qualifying initiatives undertaken to assure user accountability as well as a listing of the specific state budget information to support the non-supplanting certification.

##### Resource Needs

This section of the statewide strategy should identify gaps in services and areas where additional resources are needed to develop a system-wide capability to address the drug and violent crime problems in the state. This section should also include a review of the need for changes in legislation,

procedures or interagency cooperation which would increase the effectiveness of drug control and violent crime efforts. The resource needs of each component of the criminal justice and juvenile justice systems should be addressed to include enforcement, prosecution, adjudication, corrections and treatment. This section should also address the need for multijurisdictional efforts, including Federal, state and local cooperation and interstate efforts.

##### Areas of Greatest Need

The Act states that "in distributing funds received under this part among urban, rural and suburban units of local government and combinations thereof, the state shall give priority to those jurisdictions of the greatest need." The states should establish criteria and a process for determining areas of greatest need, make them available to local units of government and include a copy in their application to BJA. To assist with the identification of jurisdictions of the greatest need and to define the problem and resource needs in these jurisdictions, states should complete or request that selected jurisdictions complete the data summary forms for the jurisdiction. The strategy submitted with the state's application should contain the data and analysis for the jurisdictions of greatest need, in addition to summary data forms and analysis for the entire state.

In addition to assisting the state with the development of the state strategy, the information on areas of greatest need will be provided to the Office of National Drug Control Policy for use in identifying areas of high intensity drug trafficking. The Office of National Drug Control Policy may use the information in designating areas of the United States as high intensity drug trafficking areas and directing the reassignment of Federal resources to such areas. The states may find the following criteria, which the Director of the Office of Drug Control Policy is legislatively directed to consider in determining high intensity drug trafficking areas, useful in developing criteria for areas of greatest need:

- The extent to which the areas is a center of illegal drug production, manufacturing, importation or distribution;
- The extent to which state and local law enforcement agencies have committed resources to respond to the drug trafficking problem in the areas, thereby indicating a determination to respond aggressively to the problem;
- The extent to which drug-related activities in the area are having a harmful impact on other areas of the country; and
- The extent to which a significant increase in allocation of Federal resources is necessary to respond adequately to drug-related activities in the area.

##### Impact of the Strategy on the Drug and Violent Crime Problem

As the state's current strategy is reviewed and modified or a new strategy is developed, it is important to assess the impact of the current strategy on the problem. Is the current strategy reducing the availability and usage of drugs and the occurrence of violent crime in the state?

The Act requires that each state submit an annual report containing a summary of activities carried out with formula and discretionary grant funds and the impact of such activities on meeting the need identified in the state strategy. The report should also contain the evaluation results of programs and projects implemented as a part of the strategy. The results of the evaluations of projects, programs and the impact of the state strategy on the drug problem and the functioning of the criminal justice system should serve as the basis for modifying or augmenting the strategy to make it more effective in addressing the drug problem and improving the functioning of the criminal justice system.

The state will meet the requirement for an annual report by implementing the Annual Project Reporting system, discussed on page 15 of this document, and including a section in the strategy which analyzes the evaluation results of previously implemented projects, programs and the impact on the strategy.

#### Section II—Description of the Strategy Strategy for Addressing the Problems

The information and data gathered and analyzed in the definition of the problem, identification of current efforts and gaps in services, identification of jurisdictions of greatest need and analysis of the impact of the current strategy will serve as the basis for the strategy to address the drug problem in the state.

The statewide strategy should include a number of goals to address various aspects of the problem or problems being addressed. These various goals, resource needs and objectives established to implement the strategy should be clearly stated. The clear statement of the goals and objectives which the state will pursue facilitates the understanding of the strategy and the assignment of responsibility for implementation.

The strategy should also identify the financial or personnel resources needed to meet the objectives, set priorities for implementing the objectives and allocating resources and establish time frames for accomplishing the objectives.

Program priorities for the use of the formula grant funds will flow from the development of this strategy. The strategy should also address the use of other state, local and private resources and plans for legislative and administrative changes needed to implement the statewide strategy.

A comprehensive strategy should contain broad-based goals in the areas of prevention and education, enforcement and intelligence, prosecution, adjudication, corrections, treatment and information systems. For each goal the state should establish objectives and an implementation plan. The following example of the National Investigations Strategy from the National Drug Strategy and Implementation Plans developed by the National Drug Policy Board is provided to illustrate this point:

*National Investigation Goal.* To reduce the supply of illegal drugs by immobilizing drug trafficking organizations.



### First Objective. To Immobilize Drug Trafficking Organizations.

#### Implementation Plan:

- Increase the time spent by DEA on Organized Crime Drug Enforcement Task Forces (OCDEF) cases by five percent;
- Increase FBI resources devoted to OCDEF and focus 80 percent of their effort on major Colombian, South American, Mexican and Italian drug organizations. Devote remaining resources to investigation emerging ethnic drug organizations;
- Identify and investigate major drug trafficking organizations involved in domestic and international corruption; and
- Make full use of immigration statutes against drug traffickers and reinforce efforts to disrupt emerging ethnic drug groups, backfill 100 INS positions and add 50 INS special agents.

#### User Accountability

The Act requires each state to certify that it is undertaking initiatives to reduce, through the enactment of innovative penalties or increasing law enforcement efforts, the demand for controlled substances by holding accountable those who unlawfully possess or use such substances. The strategy should describe what mechanisms the state has or will establish to hold drug users accountable.

#### Coordination of Drug Control Efforts Within the State

A coordinated response by Federal, state and local criminal justice, education and treatment agencies is required to effectively address the drug abuse problems in this country. This section should describe efforts made by the state to coordinate criminal justice efforts within the state. It should also describe efforts to coordinate program activities initiated under the Narcotics Control, Prevention and Treatment Programs of the Anti-Drug Abuse Act of 1988. Coordination of the three efforts is also required under the prevention program (Drug-Free Schools and Communities Act) and the treatment program (Emergency Substance Abuse Treatment and Rehabilitation Block Grant Program).

#### Coordination of State and Local Drug Control Efforts With Federal Efforts

The Office of National Drug Control Policy, created by the Anti-Drug Abuse Act of 1988, is required to annually develop a National Drug Control Strategy. In preparing the strategy, this office is required to consult with state and local governments and to review state and local drug control activities to ensure that the United States pursues well-coordinated and effective drug control at all levels of government. Title 1, section 1005 of the Anti-Drug Abuse Act of 1988. The Director of BJA is required to prepare and submit recommendations on the state and local drug enforcement component of the National Drug Control Strategy to the Office of National Drug Control Policy. In making such recommendations, the Director shall review the statewide strategies submitted by the states and obtain input from the state and local drug enforcement officials. Section 402(7) of the Act.

In order to avoid duplication of effort and

to facilitate coordination among Federal, state and local agencies, the national strategy should be reviewed relative to state efforts, and the state should provide input and make recommendations relative to the enhancement or modification of Federal efforts to assist the efforts within the state. The strategy should describe the relationship of drug control efforts in the state to the national efforts and should provide input for modification of the National Drug Control Strategy *Toward a Drug-Free America: The National Drug Strategy and Implementation Plans* prepared by the National Drug Policy Board in 1988 should be used for preparation of the state's Fiscal Year 1989 strategy. The National Drug Control Strategy which will be prepared by the Office of National Drug Control Policy should be used for preparation of the Fiscal Year 1990 and subsequent strategies. BJA will provide the states with copies of the national strategies as they become available. The state should also become familiar with and coordinate its efforts with Federal drug control efforts within the state. Federal agencies involved in drug control include the Drug Enforcement Administration, the Federal Bureau of Investigation, U.S. Customs Service, Immigration and Naturalization Service, the Border Patrol and the Bureau of Alcohol, Tobacco and Firearms. The Law Enforcement Coordinating Committees associated with each United States Attorney's Office are required to develop an annual drug control strategy which should be reviewed as it may be of assistance in the development of the state strategy. This section should describe how the statewide strategy enhances cooperation and avoids duplication of effort.

#### Evaluation of the Strategy

The state should describe the mechanisms and procedures it has or will establish to evaluate the impact of the strategy on the drug and violent crime problems in the state and to evaluate the programs and projects funded to implement the strategy.

#### Section III—Data Requirements

The development of a statewide strategy and an assessment of the impact of the strategy on the drug and violent crime problems in the state and Nation will require the collection of certain information. BJA has developed a data summary format to assist the states with the definition of data needs and to facilitate consistency of data for analysis of program impact within the states and Nation. The recommended data summary format for the state as a whole and for the jurisdictions of greatest need should be included as part of the application for Federal funds. The format begins on page 25 of this Appendix. The states may find it necessary to collect additional information related to specific issues of concern to the state. This additional information should also be included in the strategy.

The data included in the data summary will be updated with each annual application and can be used to compare progress made toward addressing the drug and violent crime problem in the state the previous year and to aid in evaluating the need to modify the strategy for the coming year.

The availability of data will vary among the states, and some of the recommended data may be unavailable. The development of this data for strategy development and decision making within the state should be adopted as a long-term goal, and mechanisms should be established to gather this information in the future. Possible sources of currently available data which should be explored include: State Statistical Analysis Centers, Uniform Crime Reports, the Law Enforcement Coordinating Committees (associated with each U.S. Attorney's Office), Drug Enforcement Administration, U.S. Coast Guard, U.S. Customs Service, state and local criminal justice and treatment agencies, State Drug or Organized Crime Task Forces and statewide criminal justice and treatment associations.

If data is not available on a statewide basis or in a central repository, surveys of criminal justice agencies and/or sampling representative jurisdictions should be considered. Technical assistance on identifying and developing data sources or data collection methods, such as survey development or sampling techniques, can be obtained by contacting BJA.

The available data may not fit neatly into the categories provided on the forms included in this document. An attempt should be made to follow the format as closely as possible to facilitate the aggregation of data from the various states.

However, in some cases a state may have to show one figure to reflect two or more categories because the level of detail requested is not available. When detailed data is available for some jurisdictions but not for all, two forms may be submitted, one showing the detail and one showing the broader total figures. An explanation of any variations to the recommended format should be provided. If information included in the data summary by a state is based on estimates rather than actual data, an explanation of the method for determining the estimate should be included.

The statewide strategy incorporated into the state's application for formula grant funds should include the completed data summary. Narrative information which analyzes and explains the information contained in the forms or which addresses specific issues of concern to the state should also be included.

No application from a state will be denied simply because the recommended data is not available. However, the state should describe its efforts to identify available data and how a determination of the nature and extent of the drug problem was made in the absence of complete data. If the data is incomplete, the application should describe the mechanisms which have been set up or will be established to collect the recommended data in the future.

[FR Doc. 88-29672 Filed 12-23-88; 8:45 am]

BILLING CODE 4410-10-M

## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Application No. D-7421-7422 et al.]

#### Proposed Exemptions; Retirement Plan for Sales and Administrative Employees of M.L. Claster & Sons, Inc., et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

#### Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Pendency, within 45 days from the date of publication of this *Federal Register* Notice. Comments and requests for a hearing should state the reasons for the writer's interest in the pending exemption.

**ADDRESS:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Regulations and Interpretations, Room N-5669, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Pendency. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefit Programs, U.S. Department of Labor, Room N-4677, 200 Constitution Avenue, NW., Washington, DC 20210.

#### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the *Federal Register*. Such notice shall include a copy of the notice of pendency of the exemption as published in the *Federal Register* and shall inform interested persons of their right to

comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of pendency are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

**Retirement Plan for Sales & Administrative Employees of M.L. Claster & Sons, Inc. (the S. & A. Plan) and Retirement Plan for Hourly Employees of M.L. Claster & Sons, Inc. (the Hourly Plan) (collectively, the Plans) Located in Bellefonte, Pennsylvania**

[Application Nos. D-7421 and D-7422]

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 408(a), 408(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the continuing leases (the Leases) and proposed sales (the Sales) of two parcels of real property, located, respectively, in Altoona, Pennsylvania (the Altoona Property) and in Lewistown, Pennsylvania (the Lewistown Property), (collectively, the Properties) by the Plans to M. L. Claster & Sons, Inc. (the Employer), the sponsoring employer and a party in interest with respect to the Plans, provided that the terms of the Leases are at least as favorable to the Plans as those obtainable in an arm's-length transaction with an unrelated party and provided that the consideration paid for the Properties is not less than the greater of either the sum of \$376,000 or

the fair market value of the Properties on the date of the Sales.

**Effective:** If granted, the proposed exemption will be effective on July 1, 1988.

#### Summary of Facts and Representations

1. The S. & A. Plan is a defined benefit plan with 144 participants and total assets of \$2,092,116, as of February 29, 1988. The Hourly Plan is also a defined benefit plan with 112 participants and total assets of \$1,521,197, as of February 29, 1988. Each of the Plans have an administrative committee comprising of the same three individuals: Messrs. Jay B. Claster, Robert B. Mason, and John Leeson, all of whom are officers of the Employer. The administrative committees, which have no authority or control over investments of Plan assets, were appointed by the Employer's board of directors to control and manage the operation and administration of the Plans, including payment of benefits. The Mellon Bank (Central) National Association (the Trustee) is represented to have, since July 1, 1988, complete discretionary authority and control over the Properties. The Trustee, located in State College, Pennsylvania, is a national banking association organized under the laws of United States and subject to the rules and regulations promulgated by the U.S. Comptroller of the Currency and is a wholly owned subsidiary of Mellon Bank Corporation, a bank holding corporation incorporated in Pennsylvania and located in Pittsburgh, which in 1984 acquired the Trustee's predecessor, Central Counties Bank, a Pennsylvania corporation.

2. The Employer, a Pennsylvania corporation, is a retailer of lumber and building supplies. Its principal office is located in Bellefonte, Pennsylvania and has retail store and warehouse facilities in eleven different locations throughout central Pennsylvania. As of February 29, 1988, the Employer had 207 employees working full time and 33 employees working part time. The Employer is a closely held corporation with all of its shares of stock that are issued and outstanding distributed as follows: 78 percent owned by Jay B. Claster, a member of the administrative committees for the Plans, and an additional 12 percent owned by his family; 4.8 percent owned by Robert B. Mason, also a member of the administrative committees for the Plans; and the remaining 5.2 percent owned by Edward Benner, an employee and officer of the Employer.

3. During 1988 the S. & A. Plan acquired for \$77,135 the Altoona Property, located at 1720-36 Margaret



Avenue in the City of Altoona, Blair County, Pennsylvania. This property contains approximately 52,175 square feet with improvements consisting of a two story building with 10,757 square feet on its first floor and 6,400 square feet on its second floor, providing the Employer since 1952 with a showroom, storage, offices, and restrooms.

Upon acquisition of the Altoona Property by the S. & A. Plan, the prior owner assigned the lease agreement of the Altoona Property with the Employer to the former trustees of the S. & A. Plan. The terms of the lease agreement included an expiration date on November 30, 1980, with two successive five year options for renewal, which have been exercised by the Employer. Also, the lease agreement provided for a monthly rent which was adjusted annually in accordance with the cost of living index. The lease agreement is a "triple net lease", requiring the Employer to pay all taxes and expenses incurred by the Altoona Property.

Also during 1988, the Hourly Plan acquired for \$61,380 the Lewistown Property, located at South Grand Street and Susquehanna Avenue in Lewistown Borough, Mifflin County, Pennsylvania. The Lewistown Property contains approximately 48,106 square feet with improvements consisting of a building of masonry construction, providing the Employer since 1946 with 4,700 square feet of commercial store and 12,000 square feet of warehouse space, plus 3,900 square feet of pole shed storage.

Upon acquisition of the Lewistown Property by the Hourly Plan, the prior owner assigned the lease agreement of the Lewistown Property with the Employer to the former trustees of the Hourly Plan. The terms of the lease agreement included an expiration date on November 30, 1980, with two successive five year options for renewal, which have been exercised by the Employer. The lease agreement also provided for a monthly rent which was adjusted annually in accordance with the cost of living index. The lease agreement is a "triple net lease", requiring the Employer to pay all taxes and expenses incurred by the Lewistown Property.

4. The applicant requests exemptive relief for the continued leasing of the Properties by the Plans to the Employer from July 1, 1986, until the cash Sales of the Properties to the Employer. The Leases and Sales are represented to be in the best interests of the Plans and their participants and beneficiaries because of the favorable rate of return on the Leases and Sales. In addition, all taxes and expenses are being paid by the Employer.

The Leases are represented by the applicant to be exempt from the prohibited transaction provisions of the Act until June 30, 1984, because of the relief provided under section 414(c)(2) of the Act.<sup>1</sup> The Trustee also represented that at the time of receiving discretionary authority and control over the Properties, it determined that the Leases have been in the best interests of the Plans and their participants and beneficiaries and that the Plans under the Leases have been receiving fair market rental values as determined by independent appraisers during the period commencing July 1, 1984 through June 30, 1986, and would continue to receive fair market rental values.

In 1986 the Trustee engaged an independent real estate broker, Keystone Real Estate Group, to sell the Properties. However, there has been no bona fide demonstration of interest in the Properties by any prospective purchaser, resulting in the Trustee informing the Employer of its desire to sell the Properties to the Employer. In this connection, the Employer has agreed to purchase the Properties, upon the issuing of an exemption from the prohibited transaction provisions of the Act, for a cash consideration as determined at the time of the Sales by two independent appraisers selected by the Trustee. The Employer has agreed to pay the higher of the two appraisals.

5. After several periodic appraisals of the Altoona Property by Clyde E. Yon & Associates, Inc., and independent appraisal company located in Altoona, Pennsylvania, the appraisal company determined that the Altoona Property had a fair market value of \$220,000, as of July 14, 1988.

Similarly, after previous appraisals of the Lewistown Property by Mr. Philip E. Gingerich, M.A.I., S.R.P.A., an independent appraiser located in Lewistown, Pennsylvania, Mr. Gingerich determined that the Lewistown Property has a fair market value of \$156,000, as of March 1, 1988.

6. The Trustee represents that as a national bank with trust powers, it is fully experienced in all aspects of real estate and possesses broad experience in all matters concerning the Act. The trustee further represents that as of July

<sup>1</sup> The Department expresses no opinion as to the applicability of section 414(c)(2) of the Act to the Leases. However, the Department is not proposing an exemption for the Leases of the Properties by the Plans to the Employer prior to July 1, 1986. In this regard, the applicant has represented that Form 5330 will be filed with the Internal Revenue Service and the excise taxes owing for the leasing of the Properties by the Plans to the Employer prior to July 1, 1986, will be paid within 60 days of publication in the Federal Register of the grant of the proposed exemption.

1, 1986, it accepted the duties, responsibilities, and liabilities of an independent fiduciary under the Act on behalf of the Plans. The relationship of the Trustee with the Employer is represented to be limited to four checking accounts which are insignificant when compared to the total commercial activities of the Trustee.

The Trustee represents that the Leases have been and will continue to be in the best interests of the Plans and their participants and beneficiaries because (a) the rates of return on the investments have been and will continue to be comparable to rates of return on similar real estate investments; (b) the terms of the Leases have been and will continue to be as favorable to the Plans as those obtainable in an arm's-length transaction with unrelated parties; and (c) the transactions have been and will continue to be appropriate for the investment portfolio of the Plans, including their respective requirements for liquidity and diversification.

The Trustee represents that sufficient safeguards with respect to the Leases and Sales are in place to protect the rights of the participants and beneficiaries of the Plans and that the financial statements of the Employer indicate the ability of the Employer to satisfy its financial obligations and make rental payments when due under the Leases. Also, the Trustee represents that it will monitor and collect rental payments for the duration of the Leases, and will enforce at its sole discretion, by suit or otherwise, all provisions and any amendments of the Leases. The Trustee further represents that it was responsible in the Spring of 1986 for the engagement of both independent appraisers of the Properties. Finally, the Trustee will continue to have the right to select independent appraisers to appraise the Properties on February 28 of each year, or at such other times as may be necessary and will enforce any rental adjustments resulting from subsequent appraisals.

7. In summary, the applicant represents that the proposed exemption satisfies the criteria for an exemption under section 408(a) of the Act because (a) the rentals from the Leases will continue to be equal to or better than the fair market rental value of the Properties as determined by qualified, independent appraisers; (b) the consideration paid for the Properties will be not less than the greater of either the sum of \$376,000 or the fair market value of the Properties as determined by an independent appraiser on the date of the Sales; (c) since July 1, 1986, the

Trustee, a qualified, independent fiduciary, has reviewed the terms and conditions of the Leases and the proposed Sales and the needs of the Plans and will continue to perform its fiduciary duties to the Plans for the duration of the Leases and at the time of the proposed Sales; and (d) the Trustee has determined that the Leases and proposed Sales are administratively feasible, in the interest of the Plans and their participants and beneficiaries, and there are sufficient protections of the rights of the participants and beneficiaries.

**FOR FURTHER INFORMATION CONTACT:** Mr. C. E. Beaver of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**General Motors Retirement Program for Salaried Employees; General Motors Hourly-Rate Employees Pension Plan; and G.M. Special Pension Plan (together, the Plans)**

(Application No. D-7553, D-7554, and D-7555)

#### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to: (1) the use of assets from the Plans for long-term mortgage loans to the Trammell Crow Companies and their affiliates (Crow), where the loan proceeds are used to pay off construction loans originated by construction lenders (the Construction Lenders), in situations where such Construction Lenders are parties in interest with respect to the Plans but are not related to, or affiliated with, the General Motors Corporation (GMC), the sponsor of the Plans; and (2) the execution and consummation of tri-party buy-sell agreements for such mortgage loans by the Plans with Crow and the Construction Lenders, and the subsequent assignment of mortgage notes by the Construction Lenders to the Plans pursuant to such agreements, provided that:

(a) Aldrich, Eastman & Walth, Inc. (AEW), an independent real estate investment manager for and a fiduciary with respect to the Plans, expressly approves each long-term mortgage loan and recommends approval of the loan to the Pension Investment Committee of General Motors Corporation (the PIC), a fiduciary of the Plans which is

independent of both Crow and the Construction Lender, which retains final approval authority over any investments proposed by AEW;

(b) The terms of each such transaction are not less favorable to the Plans than the terms generally available in an arm's-length transaction between unrelated parties;

(c) The long-term mortgage loans represent in the aggregate no more than two percent (2%) of the total assets of the Plans as of the date of approval of each such transaction by the PIC; and

(d) No investment management fee, advisory fee, underwriting fee, or similar compensation is paid to the Construction Lender by the Plans with regard to the transaction.

**Effective Date:** If the proposed exemption is granted, the exemption will be effective May 22, 1987.

**Temporary Nature of Exemption:** This exemption, if granted, will be effective for all long-term mortgage loans and agreements for such loans entered into by the parties described herein since May 22, 1987. However, this proposed exemption will not apply to any loans which are originated after five years from the date on which the Final Grant of this proposed exemption is published in the Federal Register.

#### Summary of Facts and Representations

1. The Plans were established by GMC to provide retirement benefits for eligible hourly and salaried employees of GMC and its affiliates. The aggregate fair market value of the assets of the Plans as of December 31, 1987, was approximately \$30,920,900,000. The Plans covered a total of approximately 575,372 active participants as of December 31, 1987. In addition, there were approximately 302,886 retirees and beneficiaries of former employees who were receiving benefits under the Plans as of December 31, 1987.

The Finance Committee of the Board of Directors of General Motors Corporation, as named fiduciary of the Plans, has delegated to the PIC the responsibilities of investment manager selection and the allocation of funds among managers, including reallocations based on periodic reviews of investment performance. The PIC has appointed AEW as an ongoing real estate investment manager for the Plans. However, the PIC, or its delegate, retains final approval authority for any investment proposed by AEW.

Bankers Trust Company of New York City (Bankers Trust) is the trustee of each of the Plans. Bankers Trust has no discretionary authority over the investment management of the assets held in the Plans relating to the subject transactions.

2. Upon the recommendation of AEW and approval by the PIC, the Plans propose to provide long-term mortgage financing for certain multi-family residential projects (the Projects) being developed by Crow. The applicant seeks exemptive relief for the following transactions contemplated by the proposed financing program: (i) The use of assets from the Plans for long-term mortgage loans to Crow, where the loan proceeds are used to pay off construction loans originated by the Construction Lenders, and (ii) the execution and consummation of tri-party buy-sell agreements for such mortgage loans by the Plans with Crow and the Construction Lenders, and the subsequent assignment of mortgage notes by the Construction Lenders to the Plans.

The applicant represents that Crow is not a party in interest with respect to the Plans at the present time.<sup>2</sup> However, some of the Construction Lenders will be parties in interest with respect to the Plans as fiduciaries and service providers for other assets of the Plans which are not managed by AEW. Neither Crow nor the Construction Lender will be involved in the decision to cause the Plans to engage in the proposed transactions or otherwise act in a fiduciary capacity with respect to the assets of the Plans involved in the transactions. In addition, neither Crow nor the Construction Lender will be an "affiliate" of, nor "related" to, GMC or AEW.

3. Each of the Plans proposed long-term mortgage loans will generally begin when Crow submits an application to AEW for financing a particular Project. AEW will conduct a thorough analysis of the Project as an investment for the Plans. In performing its analysis, AEW will consider, among other things, the following:

- (a) The past performance with residential projects of the Crow entities developing the proposed Project;
- (b) The preliminary plans and specifications for the Project;
- (c) A market analysis of the region in which the Project is located;
- (d) Economic projections for the Project as completed; and

<sup>2</sup> The applicant states that because of the nature of Crow's business activities and the size of the Plans, Crow may become a party in interest with respect to the Plans in the future. However, because Crow is not a party in interest with respect to the Plans at the present time, the Department is not providing any relief in this proposed exemption for the additional prohibited transactions which may occur as a result of the provision of long-term mortgage loans by the Plans to Crow.

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(e) The projected return to the Plans based on the economic projections.

Once AEW has determined that the Project is a desirable one for a long-term mortgage loan by the Plans, AEW will negotiate the appropriate financing structure and the terms of the proposed investment. If the investment is approved by AEW's internal investment committee, AEW will submit its recommendations to the PIC with background information containing the results of AEW's analysis and assessment of the Project. The PIC will assess the desirability of the Project as an investment for the Plans and will either approve or disapprove of the proposed transaction. AEW will not bind the Plans to invest in any long-term mortgage loan until the PIC has approved the transaction. AEW will negotiate the terms of the particular transaction and will handle the specific loan documentation for the transaction.

4. At the present time, the construction loans for four of the Projects (the four Projects) involve Citicorp Real Estate, Inc. (Citicorp) as the Construction Lender. Citicorp is a party in interest with respect to the Plans as a result of Citicorp's affiliation with Citibank, which is a trustee and service provider to the Plans for certain assets not managed by AEW that are unrelated to the proposed transactions involving Crow. The Four Projects are (i) the "Chase at Bethesda Project" in Bethesda, Maryland, (ii) the "Sherwood Forest Project" in Coral Springs, Florida, (iii) the "Vining II Project" in Boca Raton, Florida, and (iv) the "Wood Green Project" in Atlanta, Georgia.

The applicant represents that Crow may continue to choose Citicorp as the Construction Lender for other Projects. However, there is no commitment that requires Citicorp to be the Construction Lender for all of the Projects and Crow may choose a different Construction Lender. The applicant states that the Plans are indifferent as to whether Citicorp, or some other Construction Lender, is chosen by Crow for a particular Project in the future. Neither the Construction Lender nor Crow has had or will have any involvement in the recommendation made by AEW to the PIC or in the approval of the investment by the PIC for the Plans. Thus, the applicant represents that there is not now, nor will there be, any scheme or arrangement between AEW, Crow, and Citicorp or any other Construction Lender, other than the arm's-length tri-party agreements described below, regarding the proposed construction and permanent loan financing for the Projects.

5. The Crow entity involved in any particular Project will obtain interim or construction financing on its own without any participation by AEW, the PIC or any other person acting for the Plans. At the time of closing of the construction loan, the borrowing Crow entity, the Construction Lender and the Plans will typically enter into a buy-sell agreement, pursuant to which the Construction Lender will agree to sell and the Plans will agree to buy the particular mortgage loan, subject to the satisfaction of certain conditions described below, upon completion of construction of the Project. The buy-sell agreement will commit the Plans to provide long-term financing for the particular Project. The applicant states that the buy-sell agreements are beneficial to the Plans because they provide the Plans with assurances at the time of the closing of the construction loan that the Plans will only be required to provide the long-term mortgage financing for the Project if the conditions set forth in the buy-sell agreements are met. Such agreements provide for the assignment of the loan documents to the Plans by the Construction Lender at the time the conditions for the long-term financing by the Plans are satisfied.

6. The applicant states that the Plans' commitment to fund the long-term loan under any buy-sell agreement will remain contingent upon satisfaction of various conditions which are designed to protect the interests of the Plans from the economic risks involved in the construction of the Projects. The Plans' commitment to advance funds for the long-term loans will require, as determined by AEW and the PIC, that the following conditions must be satisfied:

(a) Receipt of title insurance policies regarding the Plans' lien interest in the Project with insurance coverage equal to the amount of the long-term loan;

(b) Receipt of legal opinions regarding the enforceability of the loan documents and the Project's compliance with zoning and environmental laws and regulations;

(c) Receipt of certificates of architectural and engineering professionals regarding completion of the Project in accordance with the approved plans and specifications;

(d) Evidence that certificates of occupancy, or similar occupancy permits, have been issued by the appropriate governmental authority;

(e) Receipt of certificates of insurance coverage for the Project including all-risk casualty insurance naming the Plans as mortgagees;

(f) Receipt of an appraisal of the fair market value of the Project; and

(g) Receipt of an as-built survey of the Project certified to the Plans.

In addition, AEW represents that each of the Projects has or will have, when completed, a fair market value, as established by an independent appraisal, which is substantially in excess of the particular Project's construction costs. AEW states that generally a particular Project's construction costs will equal approximately 84-88% of the Project's fair market value at the time the Project is completed.

Upon the satisfaction of the conditions in the buy-sell agreement, the Plans will be obligated to advance the committed loan funds in exchange for an assignment of the mortgage notes and other loan documents. Generally, the Plans will fund the long-term loan by paying the loan proceeds to the Construction Lender. After the closing of the long-term loan, the Construction Lender will have no continuing role in either the financing of the Project or the servicing of the loan.

AEW will service the long-term loans as part of its overall real estate investment management agreement with the Plans.<sup>3</sup> All such services are disclosed to the Plans and approved by the PIC. AEW will make certain that all payments on the long-term loans are timely made and will take all actions necessary to safeguard the Plan's interests and insure Crow's compliance with the terms and conditions of the long-term loans. All the payments on the long-term loans will be sent directly to Bankers Trust, the trustee of the Plans for the assets involved in the proposed transactions.

7. The applicant represents that buy-sell agreements have been entered into for the Four Projects involving the Plans, Crow and Citicorp (together, the Agreements). The applicant requests that the proposed exemption be effective as of May 22, 1987, the date of execution of the Agreement relating to the Plans' commitment to provide the long-term loan for the "Chase at Bethesda Project" in Bethesda, Maryland. The Plans' commitments under the Agreements to fund the long-term mortgage loans for three of the Four Projects are contingent upon the satisfaction of various conditions which remain outstanding at the present time.

<sup>3</sup> In this proposed exemption, the Department is not proposing any exemptive relief for AEW's servicing of the long-term loans beyond that provided by section 408(b)(2) of the Act and the regulations thereunder.

The applicant states that the Plans funded the long-term loan for the "Sherwood Forest Project" in Coral Springs, Florida, on September 1, 1988.

The Plans' investment in the Four Projects will involve a total of approximately \$112 million. Each investment will take the form of two notes secured by separate mortgages—a first mortgage interest in the property (the First Note) for approximately 60 percent of the development cost and a second mortgage interest in the property (the Second Note) for the remaining 40 percent. Under the First Note, the Plans will receive interest only payable monthly during its 10 year term at a fixed rate which will be consistent with the prevailing rate for such mortgage loans. Under the Second Note, the Plans will receive interest only monthly during its 15 year term at a fixed interest rate comparable to the First Note. Payment of interest under the Second Note will be derived in part from a portion of the adjusted gross receipts from the property as well as a minimum annual payment of 5% of the second mortgage amount. If these annual interest payments do not equal the fixed per annum base interest (approximately 9% per annum), the borrowing Crow entity has the right to defer the remaining interest per annum subject to certain limitations. These limitations are that (i) the borrowing Crow entity is not then in default under the terms of either the first or second mortgage loan, (ii) the aggregate of all accrued and unpaid portions of base interest does not at any time exceed 15% of the second mortgage loan amount, and (iii) the total loan balance at no time exceeds 90% of the fair market value of the underlying property, as of the most recent appraisal. All amounts of the fixed per annum base interest which are deferred by Crow will be compounded monthly. If the annual interest payments equal or exceed the agreed upon fixed base interest (i.e. approximately 9% per annum), the Plans are entitled to a portion of the gross receipts on the property as "additional interest payments." However, the Plans' receipt of these "additional interest payments" will be subject to an interest rate ceiling calculated to yield to the Plans an overall annual internal rate of return of no more than 15% on the Second Note. In addition, upon payment of the outstanding principal balance of the Second Note, or upon any default or prepayment of the Second Note, the Plan will receive a portion (at least 50%) of any appreciation of the property, based on the fair market value of the property as determined either by a sale of the

property to an unrelated party or an independent appraisal. The Plans will have the right to approve in advance any sale of the property during the term of the Second Note.

AEW states that the shared appreciation interest, which the Plans will have in the underlying properties along with Crow, will allow the Plans an opportunity to receive a better return on these investments than more conventional debt financing. AEW states further that Crow's right to defer the payment of interest in the transactions has allowed the Plans to negotiate other terms in the transactions which will benefit the Plans—principally the participation in cash flow (i.e. the "additional interest payments") and the shared appreciation interest in the underlying properties.

8. The applicant states that the aggregate amount to be committed for investment in the Projects by the Plans will not exceed two percent (2%) of the assets of the Plans, as of the date of approval of each investment by the PIC.

9. In summary, the applicant represents that the proposed transactions will satisfy the statutory criteria contained in section 408(a) of the Act because: (a) The Plans' investment in each of the Projects has been and will be reviewed by AEW and, in each case, has been or will be subject to the approval of the PIC, to ensure that the quality and potential profitability of the Projects has met or will meet the investment objectives of the Plans and that each long-term mortgage loan has been and will be in the best interests of the Plans; (b) the terms of the long-term mortgage loans have been and will be negotiated by AEW pursuant to arm's-length negotiations with Crow; (c) neither AEW nor the PIC has dealt or will deal with the Construction Lender in the review, analysis and approval of the long-term mortgage loans by the Plans; (d) neither Crow nor the Construction Lender has or will have the power to act as a fiduciary with respect to the assets of the Plans involved in the proposed transactions; (e) no investment management fee, advisory fee, underwriting fee, or similar compensation has been or will be paid to the Construction Lender by the Plans with regard to the proposed transactions; and (f) no more than two percent (2%) of the Plans' total assets will be invested in the Projects.

For Further Information Contact: Mr. E.F. Williams of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

**William E. Pearson, P.S.C. Defined Benefit Pension Plan (the Plan) Located in Owensboro, KY**

[Application No. D-7620]

#### *Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 408(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to: (1) The contribution, on March 15, 1988, to the Plan of certain agricultural real property (the Property) by William E. Pearson, P.S.C. (the Employer), the sponsor of the Plan, provided the Property was valued at no greater than its fair market value at the time of the contribution; and (2) the proposed guarantee by the Employer and Dr. William E. Pearson (Dr. Pearson) of the Plan's full recoupment of the contribution value of the Property, plus all acquisition and holding costs associated with such land upon its sale to an unrelated party, provided the terms of the guarantee are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

Effective Date: If granted, this proposed exemption will be effective as of March 15, 1988 with respect to the Employer's contribution of the Property to the Plan.

#### *Summary of Facts and Representations*

1. The Plan is a defined benefit plan with three participants and total assets having a fair market value of \$1,461,128 as of June 30, 1988. The trustee of the Plan (the Trustee) is the Owensboro National Bank located in Owensboro, Kentucky. Investment decisions for the Plan are made jointly by the Trustee and by Dr. Pearson. Dr. Pearson, who owns 100 percent of the outstanding stock of the Employer, is a neurosurgeon maintaining his medical practice in Owensboro, Kentucky.

2. On August 1, 1986, the Employer acquired 124.36 acres of agricultural real estate located at 1230 Dodd Road, Richmond, Kentucky. The Property consists of three tracts of land and a residence, all of which are leased to Messrs. Dan and John Maupin (the Maupins) who are unrelated parties. The Employer acquired the Property from Dr. Pearson on August 1, 1986 for \$126,400.



The Property is presently unencumbered by a mortgage. Following the expiration of the Employer's lease with the Maupins in 1989, the Property will continue to be leased to unrelated parties under the provisions of an agricultural lease.

3. In an appraisal report dated May 19, 1987, Mr. Russell E. Major (Mr. Major), S.R.A., an independent appraiser from Richmond, Kentucky, valued the tracts comprising the Property. Based upon his personal inspection of the Property and market conditions as of May 5, 1987, Mr. Major determined that the Property had a total fair market value of \$141,000.

4. On March 13, 1988, the Employer contributed the Property to the Plan. The contribution was made at a value of \$128,000.\* A corresponding deduction of \$128,000 was taken by the Employer. The Plan paid no real estate fees or commissions in connection with the transaction. Following the contribution, the deed to the Property was recorded to reflect the Plan's exclusive ownership of such real estate. In addition, the Trustee acted on behalf of the Plan as the independent fiduciary with respect to the contribution. Because the applicant is aware that the Employer's contribution to the Plan of the Property has resulted in the commission of a prohibited transaction in violation of section 406 of the Act, an administrative exemption is requested from the Department.

5. To insulate the Plan from loss, Dr. Pearson and the Employer will guarantee that the Plan may recoup in full the contribution value of the Property plus all acquisition and holding costs incurred with respect to such property upon its sale to an unrelated party. For purposes of insuring their ability to perform under their guaranty agreement with the Plan, the applicant represents that Dr. Pearson and the Employer had combined net worths in excess of \$300,000 as of April 29, 1988.

6. As stated above, the Trustee agreed to monitor and represent the interests of the Plan as the independent fiduciary at the time of the contribution. Similarly, the Trustee agrees to monitor and represent the interests of the Plan with respect to the enforcement of the proposed guarantee. The Trustee states that it is a national bank located in an agricultural area and that, in its fiduciary capacity, it operates numerous farms and agricultural properties. The Trustee states that it maintains over \$200 million in assets under

management of which \$70 million is held in ERISA accounts. The Trustee also represents that its trust officers have considerable experience under the Act as fiduciaries of plan accounts. In this regard, the Trustee explains that it understands and acknowledges its duties, responsibilities and liabilities as a fiduciary under the Act.

The Trustee represents that it is not related in any way to the Employer or its principals through ownership, common officers or directors or through family relationships. The Trustee states that it maintains a commercial relationship with the Employer and its principals through deposits and loans. As of July 31, 1988, the deposits of the Employer and its principals that were held by the Trustee represented .04 percent of the Trustee's total deposits. Also as of July 31, 1988, the outstanding loans made by the Trustee to the Employer and its principals represented .12 percent of the Trustee's outstanding loans.

The Trustee believes the Employer's contribution to the Plan of the Property was in the best interest of the Plan and its participants and beneficiaries. The Trustee explains that the subject property is productive farmland that is located in an agricultural community where property values have remained relatively stable and marketability is high. Due to the marketable nature of the real estate, the Trustee believes there is substantially more than adequate liquidity in the Plan to cover the other participants' interests. As for the proposed guarantee transaction, the Trustee asserts that its terms are appropriately stated and serve to reinforce the commitment of Dr. Pearson and the Employer to safeguard the interests of the Plan.

The Trustee represents that before the contribution took place, it examined the Plan's overall investment portfolio. In addition, the Trustee states that it considered the Plan's liquidity and diversification requirements. Based upon these considerations, the Trustee believes that the contribution did not contravene the Plan's investment objectives or policies.

7. In summary, it is represented that the transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act because: (a) The Property represents less than 25 percent of the assets of the Plan; (b) the Property was appraised by a qualified independent appraiser; (c) the Plan did not pay any real estate fees or commissions in connection with the contribution; (d) the Employer and Dr. Pearson will guarantee that the Plan

may recoup in full the contribution value of the Property plus all acquisition and holding costs incurred with respect to such real estate upon its sale to an unrelated party; and (e) the Trustee, which has been and will continue representing the interests of the Plan as the independent fiduciary, has approved and monitored the Employer's contribution to the Plan of the Property, and similarly, approves and agrees to monitor the enforcement of the proposed guarantee.

*For Further Information Contact:* Ms. Jan D. Broady of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**Profit Sharing Plan and Trust for Thermo Industries, Inc. (the Plan) Located in Charlotte, NC**

[Application No. D-7629]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975(c)(1) (A) through (E) of the Code shall not apply to the continued leasing beyond June 30, 1989, of certain improved real property by the Plan to Thermo Industries, Inc. (the Employer), provided the terms of the transaction are not less favorable to the Plan than those available in an arm's-length transaction with an unrelated third party.

*Effective Date:* If granted, the exemption will be effective July 1, 1989.

**Summary of Facts and Representations**

1. The Plan is a Profit Sharing Plan which had 108 participants and net assets of approximately \$7,212,654 as of September 30, 1987. The trustee (the Trustee) of the Plan and the decisionmaker with respect to Plan investments is Mr. E. C. Hunt, Jr., who is also an officer and shareholder of the Employer. The Employer is a wholesale distributor of air conditioner products.

2. Among the Plan's assets is a parcel of improved real property (the Property) located at 1424 South Bloodworth Street, Raleigh, North Carolina. The Property consists of approximately 125,000 square feet of land and is improved by an office building and warehouse. The Property has been leased to the Employer since February 23, 1970 and is currently being

leased to the Employer pursuant to a binding lease agreement which was executed on July 1, 1984. The Department granted a previous exemption to the applicant effective July 1, 1984 (Prohibited Transaction Exemption (PTE) 84-171, 49 FR 44821, November 9, 1984), to permit the continued leasing of the Property to the Employer for a period of 5 years, ending June 30, 1989.

3. The Plan proposes to enter into a new lease (the New Lease) with the Employer which will take effect on July 1, 1989. The New Lease is for a five year term ending on June 30, 1994 with an option to extend, at the discretion of the Plan's independent fiduciary (see representation #5), for an additional period of five years. The New Lease provides for an initial rental rate of the greater of \$7,875 per month or the appraised fair rental value on July 1, 1989. For each plan year thereafter, the rental will be adjusted upward only, to reflect any increase in the fair market rental value of the Property as determined annually by an MAI appraiser selected by an independent fiduciary on behalf of the Plan. The terms of the New Lease are triple net, providing that the Employer, as Lessee, will pay for all utilities, maintenance, taxes and insurance on the Property.

4. On October 8, 1987, Mr. W. Martin Winfree, Jr., MAI, and Ms. Nancy Smith, Associate Appraiser, of Worthy & Wachtel, an independent appraisal, consulting, construction and brokerage firm in Raleigh, North Carolina, determined that the fair market value of the Property, as of September 30, 1987, was \$900,000. This amount represents approximately twelve percent of the Plan's current assets. On October 8, 1987, Mr. Winfree and Ms. Smith determined that the fair market rental value of the Property, as of September 30, 1987, was \$7,875 per month, or \$94,500 per annum.

5. Mr. John D. Richards (Mr. Richards), of Shearson, Lehman, Hutton, Inc. (Shearson) with offices in Charlotte, North Carolina, has been appointed to act as an independent fiduciary for the Plan with respect to the New Lease. Mr. Richards, who is also the President and Chief Executive Officer of Plan Administration, Inc., a corporation whose principal business is the administration of qualified retirement plans, states that he has extensive experience with the administration of retirement plans under the Act. As an employee of Shearson, he is currently involved with the investment of assets of qualified employee benefit plans totalling approximately one hundred

million dollars. Mr. Richards represents that he is independent of the Employer, other than his previous service as independent fiduciary under PTE 84-171, and is well acquainted with the liabilities and responsibilities of an independent fiduciary under the Act.

Mr. Richards represents that all of the terms of the prior exemption were complied with and that the lease of the Property was and continues to be in the Plan's best interest. Prior to the execution of the New Lease, Mr. Richards reviewed the plan's investment portfolio, the appraisal of the Property, the terms and conditions contained in the New Lease and determined that the retention of the Property by the Plan and the leasing of the Property to the Employer under the terms and conditions of the New Lease are in the best interest of the Plan's participants and beneficiaries. Mr. Richards notes specifically that the Property is the only real estate owned by the Plan, that all other investments of the Plan are very liquid, and that the New Lease will provide the Plan with a fair rate of return based upon annual independent appraisals and that the Property constitutes an excellent investment for the Plan with substantial opportunity for capital appreciation, as well as continued rental. Mr. Richards will monitor all terms and conditions of the New Lease and make any decision for the Plan with respect to the New Lease, including supervising the retention of an independent appraiser to provide appraisals for the fair market rental value of the Property annually and will take any enforcement action necessary to protect the rights of the Plan with respect to the Property.

6. In summary, the applicant represents that the proposed transaction meets the statutory criteria of Section 408(a) of the Act because: (1) The New Lease was approved prior to its execution and will be monitored and enforced by Mr. Richards, the independent fiduciary for the Plan; (2) the terms of the New Lease insure that the Plan will receive at least the fair market rental value of the Property as determined annually by an MAI appraiser selected under the supervision of the independent fiduciary for the Plan; (3) the current fair market value of the Property represents approximately twelve percent of Plan assets and the Property is the only real estate investment held by the Plan; and (4) the independent fiduciary for the Plan has represented that the retention of the Property by the Plan and the leasing of the Property to the Employer under the terms of the New Lease are in the best

interest of the Plans participants and beneficiaries and will allow the Plan to maintain a sufficient liquid and diversified investment portfolio.

*For Further Information Contact:* Mr. Alan Levitas of the Department, telephone (202) 523-8194 (this is not a toll-free number).

**Continental Illinois National Bank and Trust Company of Chicago (Continental) Located in Chicago, Illinois**

[Application No. D-7633]

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted, the restrictions of section 406(a), (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the proposed sale (the Sale) of a mortgage loan participation (the Participation) by Continental as trustee (the Trustee) for its collective fund, Continental Illinois Investment Trust for Employee Benefit Plans (CIIT), to Continental in its individual capacity (the Bank), a party in interest with respect to CIIT; provided that the price paid for the Participation is the greater of either the outstanding principal balance of the Participation or the fair market value of the Participation on the date of the Sale.

**Summary of Facts and Representations**

1. The Bank is a national, multiple service banking institution which conducts general commercial, retail and fiduciary banking operations. Continental's trust department provides a variety of services to employee benefit plans and other customers, including the collective or pooled investment of funds from such plans.

2. On June 14, 1955, Continental established CIIT for the exclusive investment and reinvestment of moneys from employee benefit accounts. The applicant represents that CIIT is operated in conformity with Regulation 9 of the Comptroller of the Currency, 26 CFR 9.18(a)(2) and Revenue Ruling 81-100. Continental is the sole trustee of CIIT. Only accounts for which Continental acts as trustee, co-trustee, agent for the trustee(s) or investment manager are eligible to participate in CIIT (the Participating Trusts).



There are currently seven operating sub-funds under CIIT, one of which is Real Estate Fund No. 1 (the Fund). There are fifty-two (52) Participating Trusts in the Fund.<sup>8</sup> Under the terms of the governing document and from the inception of the Fund on February 22, 1971, the Trustee invested in a variety of equity properties, mortgage loans, leasebacks and other real estate related investments. Eleven years later, on May 31, 1982, the Trustee determined that, due to downward trends in economic conditions affecting the real estate market, it would be in the best interest of the Participating Trusts to terminate the Fund. Therefore, in accordance with the governing document, the Trustee segregated and placed into a liquidating fund (the Liquidating Fund) all properties held in the Fund at that time. Under the terms of the CIIT trust, Participating Trusts may not withdraw their interests in any Liquidating Fund.

Promptly after the Liquidating Fund was established, the Trustee commenced its program of selling Fund assets and distributing cash to Participating Trusts. As of September 30, 1984, all properties had been sold by the Trustee, except for one, the Participation.

3. The Trustee has attempted unsuccessfully to sell the Participation, first to its co-participants and then in the secondary market.<sup>9</sup> As a result, the Bank has offered to purchase the Trustee's remaining interest in the Participation. Accordingly, the Trustee has requested that the Department grant an exemption with respect to the Trustee's sale of the Participation to the Bank.

4. The Participation, originally purchased in 1972, is represented by two notes (the Notes) with face amounts of \$2,850,000 (Note A) and \$50,000 (Note B). Notes A and B are secured by first and second mortgages, respectively, on a 147-room Holiday Inn motel located at

4859 McKnight Road, Pittsburgh, Pennsylvania. Under a Participation agreement with two other lenders, a bank and a savings and loan association unrelated to the Bank, the Trustee purchased 10% of Note A and 44% of Note B. The Notes provide for level monthly payments of \$19,000 (Note A = \$18,667.50 and Note B = \$332.50) including principal and interest at 7%. The Notes mature with a balloon payment on September 1, 1990. The borrower is also required to pay 12 1/2% of adjusted gross revenues in excess of \$400,000 on a quarterly basis. These payments are used to increase the yield to a maximum of 10 1/4%, with the excess, if any, applied to reduce principal. The applicant represents that the present borrower has never been in default on any payment of principal or interest.

5. On March 17, 1988, the Trustee engaged the services of Appraisal Research Counselors, Ltd. (ARC) of Chicago, Illinois, to value the Participation and negotiate the Sale between the Trustee and the Bank. ARC specializes in providing real estate valuation and counseling advice to corporations, financial institutions and fiduciaries and has assumed major responsibilities with respect to the valuation of real estate and real estate-related assets. Its assignments have required consideration of investment criteria, sales strategies and valuations for mortgage lending and corporate planning, among others. The applicant represents that ARC is not affiliated with either the Bank or the Trustee and that ARC received an average annual billing from the Bank and the Trustee of less than 1% over the past five years (1983 through and including 1987). ARC appraised the fair market value of the Participation as of April 18, 1988 and updated such report on August 22, 1988, determining the Participation's fair market value to be \$560,000.

Based upon its appraisal, ARC will negotiate with the Bank the discount rate to be used in valuing the remaining mortgage payments (and, thus, the "purchase price" of the asset) to be applied at the time of the actual sale. The rate will, in ARC's opinion, satisfy the requirements of section 404(a)(1) of the Act. The applicant represents, however, that in any event, the Fund will receive the greater of the outstanding principal balance of the Participation of its fair market value on the date of the Sale. The applicant further represents that the Fund will pay no fees or commissions in connection with the Sale.

6. In summary the applicant represents that the proposed transaction will satisfy the statutory criteria of section 408(a) of the Act because: (a) The Trustee's sale of the Fund's Participation to the Bank will be a one-time transaction; (b) The Sale will be consummated for cash; (c) The Fund will receive a price for the Participation equal to the greater of either the outstanding principal balance or the fair market value of the Participation, as established by a qualified, independent appraiser, as of the date of the transaction; (d) The Fund will pay no fees or commissions in connection with the transaction; and (e) The transaction will facilitate the liquidation of the Fund's sole remaining asset and the distribution of Fund proceeds to the Participating Trusts.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Betsy Scott of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**Dr. Leroy Young, Inc., Profit Sharing Plan and Trust (the Plan), Located in Moore, Oklahoma**

[Application No. D-7731]

#### *Proposed exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). If the exemption is granted the restrictions of section 408(a) and 408(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the proposed cash sale by the Plan of two adjoining parcels (the Parcels) of unimproved real property to Dr. Leroy Young, Inc. (the Employer), the sponsor of the Plan; provided that the sale price is the greater of the total cost to the Plan of acquiring and holding the Parcels or the fair market value of the Parcels on the date of the sale.

#### *Summary of Facts and Representations*

1. The Plan is a defined contribution plan which has seven participants and approximately \$125,823 in assets, as of January 31, 1988. The trustee and administrator of the Plan is the Employer, which is located at 824 NW. 5th Street, Moore, Oklahoma. Leroy E. Young, D.O. (Dr. Young) is a shareholder, officer, director, and employee of the employer. Dr. Young's account in the Plan as of January 31, 1988, is worth \$72,952.

2. The Plan purchased the two Parcels, (Parcel A and Parcel B) from the American First Title and Trust Co., an unrelated third party, on September 26, 1985, and December 30, 1985, respectively. The aggregate purchase price for the Parcels was \$144,116. The Plan paid \$97,108 and \$47,008, respectively, for Parcel A and Parcel B. The Parcels constitute 99.35% of the assets of the Plan and 99.3% of the assets of Dr. Young's account in the Plan.

At the time the Plan acquired the Parcels it was represented that the Plan would benefit from the appreciation in the value of the Parcels and from the rental to the Employer of a building which the Plan intended to erect on the Parcels.<sup>7</sup> However, it is represented that the Plan has not erected a building nor any other form of improvement on the Parcels. Since 1985 when the Plan acquired the Parcels, the Plan has expended only \$208.90 in real estate taxes on the Parcels. It is represented that neither Dr. Young nor any other party in interest has used the Parcels in any way and that Dr. Young has permanently abandoned all plans to use the Parcels for any personal or business purpose.

In January 1987, Dr. Young listed the Parcels for sale with a real estate company for two months. However, such listing produced no inquiries and would have subjected the Plan to the expense of a commission if a sale had resulted. It is represented that economic conditions in the Oklahoma City area have depressed real estate sales, and that a large number of similar properties are being offered for sale at prices discounted from 50% to 75% of market value as the result of foreclosure proceedings. For these reasons, Dr. Young believes it is unlikely that the Plan will be able to sell the Parcels at the appraised fair market value to an unrelated third party.

3. J. Bill Little, M.A.I., (Mr. Little) in conjunction with Jim R. Artman (Mr. Artman), of J.B. Little, Inc. in Norman, Oklahoma, appraised both of the Parcels, as of February 12, 1988, at a total value of \$125,000.

Parcel A is described as Lot 13, Block 6 and consists of approximately 24,100 square feet. Parcel B, located at Lot 12, Block 6, is adjacent to Parcel A and consists of 23,500 square feet. Both parcels are zoned moderate industrial and are located in the Gateway Industrial Park in Oklahoma City.

<sup>7</sup> The Department herein is not proposing relief for any violation of Part IV of the Act which may have arisen as a result of the acquisition or holding of the Parcels by the Plan.

Oklahoma. In the opinion of Mr. Little and Mr. Artman, Parcel A, a corner site, is valued at \$84,000, and Parcel B, an interior lot, is valued at \$41,000. It is represented that neither of the parcels has any special value to parties in interest with respect to the Plan.

Mr. Little and Mr. Artman represent their independence in that neither have present or contemplated interests in the Parcels or bias with respect to the parties involved, nor was their employment contingent on the value reported. Mr. Little represents he is qualified to value the Parcels in that he is a member of the American Institute of Real Estate Appraisers and has since 1957 been engaged in the general real estate appraisal practice. Mr. Artman's qualifications include associate membership in the Society of Real Estate Appraisers and experience since 1973 as a staff appraiser or independent fee appraiser with various corporate entities.

4. The Employer proposes to purchase the Parcels from the Plan for cash in the amount of the greater of the cost to the Plan in acquiring and holding the Parcels or the fair market value of the Parcels on the date of sale. It is represented that the Plan has not and will not incur any expense in connection with the proposed sale of the Parcels to the Employer. The employer maintains that the sale of the Parcels would be in the best interest of the Plan in that it will restore liquidity to the Plan and would allow the trustee to make prudent, diversified investments which would earn a reasonable return. Further, the Employer argues that economic conditions in the Oklahoma City area may remain such that the value of the Parcels may continue to decline resulting in a greater loss in the value of the assets of the Plan than has already occurred.<sup>8</sup> It is represented that the Parcels have no special value to the Employer. The employer has stated it intends to continue attempts to sell the Parcels. If the sales effort is unsuccessful, the Employer represents that there is a remote possibility that in

<sup>8</sup> The Employer represents that its purchase of the Parcels from the Plan at the greater of the cost to the Plan to acquire and hold the Parcels or the fair market value will not cause the Plan to exceed the limitations of section 415 of the Code, because the realized gain represents Plan earnings and not an employer contribution. For the same reason, the transaction would not subject the Employer to the excess contribution penalty imposed by section 4972 of the Code. However, even if the gain on the sale is deemed to be an employer contribution, such would not violate section 415, because contributions to the Plan are discretionary and can be controlled. It is also represented that the gain on the sale will be allocated in proportion to the compensation of all participants, so as not to violate section 401(a)(4) of the Code.

the future the Parcels could be used in its business.

5. Melvin R. Camp (Mr. Camp), Vice President and Trust Officer of First National Bank and Trust Company of Stillwater, Oklahoma, has reviewed the proposed transaction. As a trust officer of a bank, Mr. Camp is aware of the depressed real estate values in the Oklahoma City area. In Mr. Camp's opinion, the purchase of the Parcels from the Plan by the Employer at no loss of principal to the participants is prudent and in their best interest.

6. In summary, the Employer represents that the proposed transaction meets the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The sale of the Parcels by the Plan to the Employer is a one time transaction for cash;

(b) The Plan will be able to improve the liquidity of the Plan's assets with the proceeds of the sale;

(c) The Plan will receive the greater of the cost to the Plan to acquire and hold the Parcels or the fair market value on the date of sale as determined by a qualified independent appraiser; and

(d) The Plan will incur no expenses as a result of the sale of the Parcels.

**FOR FURTHER INFORMATION CONTACT:** Angelena C. Le Blanc of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

#### *General Information*

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified persons from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible,



in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 21st day of December, 1988.

Robert J. Doyle,

Director of Regulations and Interpretations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 88-29577 Filed 12-23-88; 8:45 am]

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[Prohibited Transaction Exemption 88-106;  
Exemption Application No. D-7361 et al.]

**Grant of Individual Exemptions;  
Spencecliff Corporation Profit Sharing  
Plan, et al.**

**AGENCY:** Pension and Welfare Benefits  
Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1954 (the Code).

Notices were published in the Federal Register of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the

notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of pendency were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

**Spencecliff Corporation Profit Sharing  
Plan (the Plan), Located in Honolulu,  
Hawaii**

[Prohibited Transaction Exemption 88-106;  
Exemption Application No. 7361]

#### Exemption

The restrictions of sections 406(a) and 406(b) (1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the sale by the Plan of certain real property (the Property) to Spencecliff Corporation (the Employer) and the transfer of an existing lease on the Property from the Plan to the Employer, provided the Plan receives no less than fair market value for the Property at the time of sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 10, 1988, at 53 FR 21939.

**Written Comments:** The Department received a written comment on the proposed exemption from several employees of the Employer. The commentators stated that, while they do not oppose the sale of the Property to

the Employer, they are concerned as to whether the Plan will in fact receive fair market value. They asked who is selecting the appraiser and stated their dissatisfaction with a statement simply that the appraiser is unrelated to the Employer. The commentators suggested that at least two other appraisers should be selected because Hawaii's real estate market is very volatile and that an average of the appraisals should be utilized.

The commentators also asked why the lessor's interest is the relevant value in the appraisal rather than a fee simple interest and stated that they are not convinced that in this case the income approach is the relevant method of appraisal.

The applicant reviewed the comment letter and responded that the appraisal in the application was conducted by an appraiser who has worked with the Plan over a number of years, who has conducted annual valuations of the Property and who is quite familiar with the Property and its potential market. In response to the comment letter's statement concerning the volatility of the real estate market in Hawaii, the applicant states that this is applicable to the resort area of Waikiki and certain residential areas but is not true in the case of the Property.

According to the applicant, the appraised value of the Property contained in the application takes into account the fee simple value of the Property as well as the rental income presently being derived from the current tenant. In the real estate industry, the product being sold, where it is encumbered by a tenant lease and the fee ownership is available, is called a "leased fee interest." The applicant states that this type of product attracts passive real estate investors and not buyer/users, because the latter cannot put such property to their preferred use until the current lease expires. As a leased fee interest, the present fee simple value and future rental income stream from the current user were taken into account in arriving at the then present value of the Property.

The applicant notes also that the appraiser valued the Property according to market comparable and replacement cost and determined that the income approach has the most relevant value. The applicant believes that the income approach to value is also the most meaningful in terms of this kind of real estate market.

The Department has considered the entire record, including the comment letter and the applicant's response to the comment letter, and has determined to

grant the exemption as it was proposed. The Department further notes that a condition of the exemption is that the sale take place at no less than fair market value at time of sale.

**FOR FURTHER INFORMATION CONTACT:**  
Paul Kelly of the Department, telephone (202) 523-8883. (This is not a toll-free number.)

**Worrell Enterprises, Inc. Profit Sharing  
Savings Plan (the Plan), Located in  
Charlottesville, Virginia**

[Prohibited Transaction Exemption 88-107;  
Exemption Application No. D-7523]

#### Exemption

The restrictions of section 406(a), (b)(1), and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed cash sale (the Sale) by the Plan to Worrell Enterprises, Inc., the Employer, the Plan sponsor and a party in interest with respect to the Plan, of 158 rare coins for a sales price of \$701,000; provided the terms and conditions of the Sale are at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on October 26, 1988 at 53 FR 43286.

**FOR FURTHER INFORMATION CONTACT:**  
Mrs. B.S. Scott of the Department, telephone (202) 523-8194. (This is not a toll-free number.)

**Tudor Engineering Company Retirement  
Advantage Plan (the Plan), Located in  
San Francisco, CA**

[Prohibited Transaction Exemption 88-108;  
Exemption Application No. D-7630]

#### Exemption

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the cash sale (the Sale) of a certain leasehold interest (the Leasehold) by the Plan to the Tudor Engineering Company, the sponsoring employer and a party in interest with respect to the Plan, provided that the consideration paid for the Leasehold is not less than the greater of either \$130,000 or the fair market value of the Leasehold on the date of the Sale.

For a more complete statement of the facts and representations supporting the

Department's decision to grant this exemption refer to the notice of proposed exemption published on October 26, 1988 at 53 FR 43287.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. C.E. Beaver of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**Carpenters Joint Apprenticeship and  
Training Committee of Wilmington,  
Delaware, a/k/a Local Union No. 628,  
United Brotherhood of Carpenters and  
Joiners Apprenticeship Fund (the Plan),  
Located in Wilmington, Delaware**

[Prohibited Transaction Exemption 88-109;  
Exemption Application No. D-7664]

#### Exemption

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act shall not apply to the proposed purchase by the Plan of a parcel of unimproved real property (the Tract), for the total cash consideration of \$110,000, from the United Brotherhood of Carpenters and Joiners of America, AFL-CIO Local Union No. 628 of Wilmington, Delaware, a party in interest with respect to the Plan, provided the amount paid by the Plan for the Tract is not more than fair market value at the time the transaction is consummated.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on October 26, 1988 at 53 FR 43288.

**FOR FURTHER INFORMATION CONTACT:**  
Ms. Jan D. Broady of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

**Profit Sharing and Thrift Plan of  
Radiology Associates of Fort Worth (the  
Plan), Located in Fort Worth, Texas**

[Prohibited Transaction Exemption 88-110;  
Exemption Application No. D-7676]

#### Exemption

The restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to an interest-free extension of credit on April 14, 1986, to the Plan by the Interfirst Bank Fort Worth, N.A. (now NCNB Texas National Bank), a fiduciary and party in interest with respect to the Plan, provided that the terms and conditions of the extension of credit were at least as favorable to the Plan as those which the Plan would obtain in a similar transaction with an unrelated party.

For a more complete statement of the

facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption published on October 26, 1988, at 53 FR 43289.

**Effective Date:** This exemption is effective April 14, 1986.

**FOR FURTHER INFORMATION CONTACT:**  
Mr. C.E. Beaver of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 21st day of December, 1988.

Robert J. Doyle,

Director of Regulations and Interpretations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 88-29576 Filed 12-23-88; 8:45 am]

BILLING CODE 4510-29-M



# NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

## Records Schedules; Availability and Request for Comments

**AGENCY:** National Archives and Records Administration, Office of Records Administration.

**ACTION:** Notice of availability of proposed records schedules; request for comments.

**SUMMARY:** The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Records schedules identify records of sufficient value to warrant preservation in the National Archives of the United States. Schedules also authorize agencies after a specified period to dispose of records lacking administrative, legal, research, or other value. Notice is published for records schedules that (1) propose the destruction of records not previously authorized for disposal, or (2) reduce the retention period for records already authorized for disposal. NARA invites public comments on such schedules, as required by 44 U.S.C. 3303a(a).

**DATE:** Requests for copies must be received in writing on or before February 10, 1989. Once the appraisal of the records is completed, NARA will send a copy of the schedule. The requester will be given 30 days to submit comments.

**ADDRESS:** Address requests for single copies of schedules identified in this notice to the Records Appraisal and Disposition Division (NIR), National Archives and Records Administration, Washington, DC 20408. Requesters must cite the control number assigned to each schedule when requesting a copy. The control number appears in parentheses immediately after the name of the requesting agency.

**SUPPLEMENTARY INFORMATION:** Each year U.S. Government agencies create billions of records on paper, film, magnetic tape, and other media. In order to control this accumulation, agency records managers prepare records schedules specifying when the agency no longer needs the records and what happens to the records after this period. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. These comprehensive schedules provide for the eventual transfer to the National

Archives of historically valuable records and authorize the disposal of all other records. Most schedules, however, cover records of only one office or program or a few series of records, and many are updates of previously approved schedules. Such schedules also may include records that are designated for permanent retention.

Destruction of records requires the approval of the Archivist of the United States. This approval is granted after a thorough study of the records that takes into account their administration use by the agency of origin, the rights and interests of the Government and of private persons directly affected by the Government's activities, and historical or other value.

This public notice identifies the Federal agencies and their subdivisions requesting disposition authority, includes the control number assigned to each schedule, and briefly describes the records proposed for disposal. The records schedule contains additional information about the records and their disposition. Further information about the disposition process will be furnished to each requester.

### Schedules Pending:

1. Department of the Air Force (N1-AFU-88-53). Fraud and forgery investigations relating to financial claims for MIAs, KIAs, and POWs.

2. Department of the Air Force (N1-AFU-88-54). Aircraft engine maintenance records.

3. Department of the Air Force (N1-AFU-89-1). Individual fitness and weight management records.

4. United States Information Agency, Bureau of Educational and Cultural Affairs, International Youth Exchange Staff (N1-306-89-6). Working papers and chronological files. Policy documentation is scheduled for permanent retention.

5. United States Information Agency, Office of the Director, Executive, Special, Staff, and Office Assistants (N1-306-89-11). Routine facilitative records. Policy materials are scheduled for permanent retention.

Dated: December 20, 1988.

Don W. Wilson,  
Archivist of the United States.

[FR Doc. 88-29600 Filed 12-23-88; 8:45 am]

BILLING CODE 7515-01-M

# NUCLEAR REGULATORY COMMISSION

(Docket No. 50-424)

## Georgia Power Co. et al.; Consideration of Issuance of Amendment to Facility Operating License and Proposed no Significant Hazards Consideration Determination and Opportunity for Hearing

The United States Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-68, issued to Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and City of Dalton, Georgia (the licensee), for operation of the Vogtle Electric Generating Plant, Unit 1, located in Burke County, Georgia.

Georgia Power Company has prepared combined Technical Specifications (TS) for Vogtle Electric Generating Plant, Units 1 and 2. Those TS will become effective for Unit 2 when the Unit 2 Operating License is issued. The proposed amendment of December 12, 1988, requests that the Unit 1 TS be amended by replacing the Unit 1 TS with the combined Units 1 and 2 TS. The change items necessary to convert the current Unit 1 TS into the combined Units 1 and 2 TS are included in this amendment request and are described below. Following the descriptions, each change to the TS is listed by page and change item number.

Item 1 consists of editorial changes necessary to indicate combined Technical Specifications. Item 2 consists of changes necessary to show requirements that are different for each unit. Item 3 consists of editorial changes. Item 4 consists of the control room heating, ventilation, and air conditioning system (HVAC) and chlorine detection system deletion previously requested by letter dated December 6, 1988. Item 5 consists of the enlargement of TS Figure 5.1-1 and the addition of TS Figure 5.1-2 to show details of TS Figure 5.1-1. Item 6 removes the footnotes regarding Veritrac transmitter uncertainty. Item 7 adds sludge mixing pump isolation valves to TS 3.1.2.6 for consistency with TS 3.5.4. Item 8 deletes footnotes for transition to refueling water storage tank higher boron concentration that are no longer applicable. Item 9 adds instrumentation cross reference footnotes. Item 10 moves a seismic instrumentation footnote to the bases.

Item 11 adds the work "either" relative to spent fuel pools. Item 12 changes the location of a free field accelerometer. Item 13 adds Unit 2 rooms requiring area temperature monitoring. Item 14 changes Unit 1 area temperature monitoring to room D067 from room D068. Item 15 deletes high energy line break instrumentation for room RC41. Item 16 adds a footnote to allow closure of valve HV-8809A or B in Mode 3 as previously requested by letter dated August 12, 1988. Item 17 adds containment

structural integrity requirements for Unit 2 tendons. Item 18 adds a containment pressure instrument number to TS 3/4.6.1.4. Item 19 changes the diesel generator test voltage tolerance as previously requested by letter dated December 6, 1988. Item 20 deletes a temporary footnote for Unit 1 fuel testing that has expired. Item 21 clarifies the on site power distribution Action Statement. Item 22 adds a reactor coolant system hot leg sample valve to TS Table 3.8-1. Item 23 involves adding

more information to the bases. Item 24 revises the shift crew composition to meet 10 CFR 50.54 requirements for shift staffing of a two unit plant with one control room. Item 25 clarifies the shift technical advisor (STA) qualifications as previously requested by letter dated October 25, 1988. Item 26 adds references to TS Chapter 6 as previously requested by letter dated October 25, 1988. Item 27 changes the fuel handling building HVAC heater requirements for one heater.

### TS CHANGES

Page	Description and explanation	Item No.
All pages	Change the unit designator at the bottom of each page by replacing "VOGTLE—UNIT 1" with "VOGTLE UNITS—1 and 2" and if present, delete amendment numbers and change bars.	1
III	Correct the spelling of "coolant" in item 2.1.2 (Bases)	3
IV	Change the index listing for figure 3.1-1 and 3.1-2 to indicate that separate figures are used for each unit. This is done by adding two additional figures for Unit 2 and designating their applicability by adding (Unit 1) or (Unit 2) to their titles, as appropriate, and adding an "a" or "b" to the figure numbers, as appropriate.	2
VI	Add "(DELETED)" after "Chlorine Detection System"	4
VI	Change "Loose Parts" to "Loose Parts" within index item Table 3.3-8	3
VIII	Change the index listing for figures 3.4-2, 3.4-3, and 3.4-4 to indicate that separate figures are used for Unit 1 and Unit 2	2
X	Delete the spurious "j" from the title of figure 4.7-1	3
XI	Change "Motor Operated" to "Motor-Operated"	3
XII	Add "(Common System)" after item 3/4.9.12	2
XVI	Revise the index item for Table B3/4.4-1 to indicate a separate table for Unit 2	2
XXI	Add new figure 5.1-2 "Effluent Release Points" and re-number the current figure 5.1-2 as 5.1-3	5
XXIII	Change "Reports" to "Report" in 3 places under index item 8.8.1	3
2-1	Change "parenthesis" to "parentheses" in the footnote	3
2-1	Add the phrase "and apply to each unit unless specifically noted"	2
2-2	Change "PSIA" to "psia" on figure 2.1-1	3
2-5	Delete footnote *** relative to Veritrac uncertainty	6
B2-7	Add a comma after "power" in the first line of the last paragraph	3
B2-8	Add a comma after "power" in the first line of the first paragraph	3
3/4 0-1	Change "parenthesis" to "parentheses" in the footnote	3
3/4 0-1	Add the phrase "and apply to each unit unless specifically noted"	2
3/4 0-2	Add new section 3.0.5 to explain how the combined Technical Specifications apply to each unit	2
3/4 1-3	Revise Specification 3.1.1.2 to indicate separate figures for Units 1 and 2	2
3/4 1-3	Change "MODE" to "MODES" in the APPLICABILITY statement, change "the" to "an" and change "rod" to "rod(s)" in Specification 4.1.1.2a	3
3/4 1-3a; 3/4 1-3b; 3/4 1-3c; 3/4 1-3d	Add the appropriate Unit 2 figures and revise the Unit 1 figure titles to indicate that they apply to Unit 1 specifically	2
3/4 1-4	Revise Specification 3.1.1.3 to include the Unit 2 moderator temperature coefficient requirements	2
3/4 1-4	Change "core life" to "Cycle life" in the LCO. In the APPLICABILITY statement, move the period from after the "and" to after the word "only." Delete the "a" from "Limits" in ACTION a.1.	3
3/4 1-6	Change "to" to "to" in the APPLICABILITY statement and "to" to "to" in the footnote. Since two footnotes are applied to the same item, this will avoid potential confusion by using a different symbol for each footnote. Place the period after "2" in the APPLICABILITY statement.	3
3/4 1-7	Insert "and" after "72°F" in Specification 4.1.2.1a; this is consistent with Specification 4.1.2.2a	3
3/4 1-12; 3/4 1-13	Add the RWST Sludge Mixing Pump Isolation Valves as Specification 3.1.2.6.b.5 and add the associated ACTION statements and SURVEILLANCE Requirements	7
3/4 1-12	Delete the footnote which was added to allow for the initial transition from 2000 ppm to 2400 ppm boron concentration	8
3/4 1-18; 3/4 1-20; 3/4 1-21; 3/4 2-1	Replace the footnote symbol "****" with "to" to avoid confusion when the same item has two footnotes, one indicated by "and the other by "	3
3/4 1-22	Relocate the figure title	3
3/4 2-3	Relocate the figure title and change "PERCENT" to "percent"	3
3/4 2-5	Relocate the figure title	3
3/4 2-10	Place the period in the APPLICABILITY after the word "POWER" rather than after the "to"	3
3/4 3-6	"Under the voltage/under frequency" should be changed to "undervoltage/underfrequency" in table notation "i". "setpoint" should be capitalized in items e and f and a comma should be added after "and" in item g.	3
3/4 3-11	Add a footnote to item 13 of Table 4.3-1 that states "See Specification 4.3.3.6."	9
3/4 3-13	Add a period after table notation (8)	3
3/4 3-14	Add a period after the word "used" in table notation 13	3
3/4 3-17	Change "Emergency Mode" to "Emergency Filtration System" in item 1	4
3/4 3-20	Add a "to" to functional units 4.c and 4. to refer to the existing Footnote stating "See Specification 3.3.3.6."	9
3/4 3-21	Add a "to" to functional unit 5.c and the associated footnote stating "See Specification 3.3.3.6."	9
3/4 3-23	Add a "to" to functional unit 7.b and the associated footnote stating "See Specification 3.3.3.6."	9
3/4 3-23	Change "P11" to "P-11" in item 9.a	3
3/4 3-24	Add "(Common System)" after functional unit 11	2
3/4 3-24	Change functional unit 10 to "Control Room Emergency Filtration System Actuation" and change the applicable MODES for items 10.a, 10.b and 10.d to apply when either unit is in the specified MODE. Change the minimum channels operable for item 10.a to apply to either unit. Change the ACTIONS for items 10.c and 10.d to 27d and 28d respectively.	4
3/4 3-25	Change "the" to "either" in table notation I	11
3/4 3-27	Revise ACTION 26 and add new ACTIONS 27 and 28 to show the effects of two unit operation and the Control Room Emergency Filtration System.	4
3/4 3-28	Change "Emergency Mode" to "Emergency Filtration System" in item 1	4



## TS CHANGES—Continued

Page	Description and explanation	Item No.
% 3-28	Delete "****" from the trip setpoint column of item 1.d.	6
% 3-30	Change "##" to "P" for functional unit 5.b. This is not a change in footnotes; it only represents a change in the designation of the same footnote.	3
% 3-31	Remove # from the Trip Setpoint entry for items 5.b.1 and 5.b.2.	6
% 3-34	Change "Ventilation Emergency Mode Actuation" to "Emergency Filtration System Actuation."	4
% 3-34	Add "(Common System)" to item 11.	2
% 3-34	Delete the word "System" from item 11; this makes this title consistent with that used in Table 3.3-2.	3
% 3-35	Delete table notations *** and # and change table notations ## to table notation #.	6
% 3-36	Change "Emergency Mode" to "Emergency Filtration System" in item 1.	4
% 3-36	Add a "P" after "High 1" in item 1.c.	9
% 3-39	Place the "P" in item 4.d, after the word "low" and add a "P" to item 4.e.	9
% 3-40	Add "****" to item 5.c prior to "(P-14)" and a footnote stating See Specification 4.3.3.6.	9
% 3-43	Delete footnote.	9
% 3-43	Revise functional unit 10 and the associated MODE requirements of 10.a and 10.b to reflect the requirements of the combined units 1 and 2 Control Room HVAC.	4
% 3-44	Revise functional unit 10 and the MODES requirement column for 10.d to reflect the requirements for the combined units 1 and 2 Control Room HVAC.	4
% 3-44	Change "the" to "either" in footnote (2).	11
% 3-44	Add "(Common System)" to item 11.	2
% 3-46	Revise the APPLICABLE MODES column to reflect the requirements for the combined units 1 and 2 Control Room HVAC.	4
% 3-46; % 3-48	Add a footnote "****" to MODES 3 and 4 for item 1.a that states "The Provisions of this specification are not applicable to unit 2 until its initial entry into MODE 2."	2
% 3-48	Change "RE-12117" to "RE-12117" in item 3.	3
% 3-50	Add (Common System) after the section title.	2
% 3-50	Delete footnote * from Specification 3.3.3.3.	10
% 3-50	Replace "the plant" in Specification 4.3.3.2 with "unit 1."	2
% 3-51	Change "Free Field (500 ft. from containment)" to "Free Field (approximately 225 ft. from containment)" for item 1.a.	12
% 3-51	Add "unit 1" to the seismic instrumentation listed on table 3.3-5 items 2.a, 2.b, 2.c, 3.a, 5.a, and 5.b.	2
% 3-52	Change "Free Field (500 ft. from containment)" to "Free Field (approximately 225 ft. from containment)" for item 1.a.	12
% 3-52	Add "unit 1" to seismic instrumentation listed on table 4.3-5 items 2.a, 2.b, 2.c, 3.a, 5.a, and 5.b.	2
% 3-53	Add "(Common System)" to the title on this page.	2
% 3-54	Add a footnote to the title of the table that states "this instrumentation is common to units 1 and 2."	2
% 3-56	Delete "LP" which is an abbreviation of the word "loop" from item 3 of table 3.3-7 because it is redundant.	3
% 3-58	Add a footnote to APPLICABILITY MODE 3 that states "The provisions of this specification are not applicable to the unit 2 Containment Radiation Level (High Range) Monitors (loop 0005 and 0006) until its initial entry into MODE 2."	2
% 3-61	Change "Minimum Channels Operable" to "Minimum Channels OPERABLE" and change "minimum channels OPERABLE" to "Minimum Channels OPERABLE" throughout ACTION statements 30 through 33.	3
% 3-62	Change "Minimum Channels Operable" to "Minimum Channels OPERABLE" and change "minimum channels OPERABLE" to "Minimum Channels OPERABLE" throughout ACTION statements 34 through 36.	3
% 3-63	Delete the Chlorine Detection System in accordance with the Technical Specification Change requested for the Control Room HVAC.	4
3/4 3-64	Change "3/4.3.3.8" to "3/4.3.3.8."	3
3/4 3-66	Add "(Common)" to item 3.c.	2
3/4 3-72	Add "(Common)" to items 1.a and 1.b.	2
3/4 3-74	In table notation #, add a period after "Filtration." In ACTION 49-b change "if inlet" to "if the inlet." In ACTION 49-c change "remain" to "remains".	3
3/4 3-80	Add "(Common Instrumentation)" to item 1 in Table 3.3-11 and change "TE" or "FT" to "ATE" or "AFT" for the instrumentation channels.	2
3/4 3-80	Delete the instruments for room RC41.	15
3/4 3-80	Add the Unit 2 instruments and room locations for Steam Generator Blowdown Line Isolation and Letdown Line Isolation to Table 3.3-11.	2
3/4 3-80	Change "modes" to "MODES" in the Footnote.	3
3/4 4-10	Add a footnote to APPLICABILITY MODE 3 that states "The provisions of this specification are not applicable to Unit 2 until initial entry of Unit 2 into MODE 2."	2
3/4 4-16	Capitalize "Specification" in part 4.4.5.5.c.	3
3/4 4-30	Change "3.4-2 and 3.4-3" to "3.4-2a (Unit 1) and 3.4-3a (Unit 1), Figures 3.4-2b (Unit 2) and 3.4-3b (Unit 2)."	2
3/4 4-31	Figure 3.4-2 has been relabeled as 3.4-2a to indicate that it applies to Unit 1. The title is revised for clarification.	2
3/4 4-31	The Unit 2 heatup curve figure 3.4-2b has been added.	2
3/4 4-32	Figure 3.4-3 has been relabeled as 3.4-3a to indicate that it applies to Unit 1. The title is revised for clarification.	2
3/4 4-32a	Unit 2 Cooldown Curve figure 3.4.3b has been added.	2
3/4 4-34	Revise Specification 3.4.9.3 to indicate separate figures for Units 1 and 2.	2
3/4 4-34	Change "GPM" to "gpm."	3
3/4 4-34	In ACTION Statements a and b, insert the word "Specification" before "3.4.9.3.c."	3
3/4 4-35	Re-label figure 3.4-4 as figure 3.4-4a and indicate that it applies to Unit 1.	2
3/4 4-35a	The Unit 2 PORV setpoint curve has been added as figure 3.4-4b.	2
3/4 5-1	Change "6854 (64% of instrument span) gallons" to "6854 gallons (64% of instrument span)."	3
3/4 5-1	Move the period after the word "Open" in 4.5.1.1.a.2) to the end of 4.5.1.1.a.2) and move the period in 3.5.1.d to the end of 3.5.1.d.	3
3/4 5-3	Change "mode" to "MODE" in the footnote.	3
3/4 5-4	Add a footnote for valves HV-8809 A, B, that states "Either valve may be realigned in MODE 3 for testing pursuant to Specification 4.4.6.2.2."	16
3/4 5-10	Delete the footnote that states "Until concentration is initially raised to 2400 ppm from the maximum limit authorized prior to Amendment No. 11, the minimum boron concentration limit is 2000 ppm."	8
3/4 6-3	After item d.1) add the word "and" and change the comma to a period after item d.2).	3
3/4 6-8	In the LCO and in the surveillance requirements, add instrument PI-10945.	18
3/4 6-8	Correct the spelling of "acceptable" in 4.6.1.6.1.a.	3

## TS CHANGES—Continued

Page	Description and explanation	Item No.
3/4 6-8; 3/4 8-9; 3/4 8-10.	Section 3/4.6. has been revised to incorporate Unit 2. This did not result in changes to Unit 1 requirements, but, since Unit 2 has different surveillance requirements, the ACTIONS for Unit 1 were reformatted to indicate those that correlated with the surveillances that can be done only on Unit 1 and those that are applicable for both units. The changes consist of the addition of ACTION or surveillance statements that are applicable to Unit 2 and changes that clearly specify the unit or units to which the various requirements apply.	2, 17
3/4 6-9	Change "not" to "no" in 4.6.1.6.b.2.	3
3/4 6-11	Insert the word "Specification" before 3.6.1.7.b in ACTION b.	3
3/4 6-14	Delete "and" after 4.6.2.2.d.1).	3
3/4 7-1	Move the comma in ACTION a from after "provided" to before "provided."	3
3/4 7-3	Add a period after the abbreviation of inches.	3
3/4 7-4	In 4.7.1.2.1.a.2) change instrument number FI-5100 to FI-15100; this corrects a typographical error.	3
3/4 7-4	Add a footnote stating "The provisions of this specification are not applicable to Unit 2 until its initial entry into MODE 2."	2
3/4 7-12	In 4.7.4.6.2 Replace "Service Water Systems" with "NSCW."	3
3/4 7-14	Add "(Common System)" to the title of Specification 3/4.7.6.	2
3/4 7-14; 3/4 7-16	Revise Specification 3.7.6 and the associated ACTION and surveillance requirements for the Control Room Emergency Filtration System, to apply to two unit operation.	4
3/4 7-16	Delete the footnotes that are applicable only during the time before the license for Unit 2 is issued.	4
3/4 7-17	Add a footnote stating "The provisions of this specification are not applicable to Unit 2 until its initial entry into MODE 2."	2
3/4 7-19	Change "****" to "P"; this avoids confusion since two footnotes are used to refer to the same item.	3
3/4 7-26	Add the Unit 2 rooms for area temperature monitoring.	13
3/4 7-26	Change room D068 to D067 in the list of Unit 1 rooms for area temperature monitoring.	14
3/4 7-28	Change "B008" to "B008."	3
3/4 7-31	Capitalize "specification" in ACTION b.	3
3/4 7-31	Change the number 1 to 1/2 in the component designator in order to designate components of each unit.	2
3/4 7-32	In the page heading, change "3/4.7.13 (Continued)" to "PLANT SYSTEMS (Continued)".	3
3/4 8-1	Change "650 gallons (52% of instrument span) of fuel" to "650 gallons of fuel (52% of instrument span)".	3
3/4 8-3	In 4.8.1.1.2.a.4) Change "4160 + 170, -410 volts" to "4160 + 170, -135 volts".	19
3/4 8-5	In 4.8.1.1.2.g.1) change "410" to "125".	19
3/4 8-5	Delete footnote #. regarding Temporary Fuel Oil Testing requirements.	20
3/4 8-5	Add "Specification" before 4.8.1.1.2 in footnote "P" and write ".007%" as "0.007%" in footnote #.	3
3/4 8-6	Correct the spelling of "Synchronized."	3
3/4 8-6	In 4.8.1.1.2.h.5) change "410 volts" to "135 volts".	19
3/4 8-7	Change "410 volts" to "135 volts." Replace maintained within these limits with "4160 + 170, -410 volts and 60 + 1.2 Hz" in 4.8.1.1.2.g.7).	19
3/4 8-7	Insert "Specification" before "4.8.1.1.2" in footnote.	3
3/4 8-7	Change temperature to "temperature" in footnote #.	3
3/4 8-9	Delete the underline from "and" in footnote and footnote #.	3
3/4 8-11	Change 1 to 1/2 in order to reflect both units in the battery bank designators.	2
3/4 8-14	Change 1 to 1/2 in order to reflect both units in the battery bank designators.	2
3/4 8-15; 3/4 8-16	Change the initial 1 to 1/2 for the various electrical equipment.	2
3/4 8-17	Change "reenergize the switchgear or distribution panel in the specified manner" to "reenergize the 125 volt D.C. bus in the specified manner."	21
3/4 8-18	Change "RCS" to "Reactor Coolant System."	3
3/4 8-22; 3/4 8-23; 3/4 8-24.	Change "Motor Operated" to "Motor-Operated" in the title of table 3.8-1 and indicate that the valves exist for both units by preceding the valve designators with 1/2. Add "Continued" after the table number for each page of table 3.8-1 following the first page.	2, 3
3/4 8-24	Add valve 1/2 HV-2548, RCS Hot Leg Sample Valve, to those listed in Table 3.8-1.	22
3/4 9-1	Add a footnote to this page that states "During initial fuel load for Unit 2, the boron concentration limitation for the Unit 2 refueling canal is not applicable, provided the Unit 2 refueling canal level is verified to be below the reactor vessel flange elevation at least once per 12 hours."	2
3/4 9-14	Add "(Common System)" to the title of Specification 3/4.9.12 and change "The Storage pool" to "either storage pool" in the APPLICABILITY and ACTION statements.	2, 11
3/4 9-16	Change 4.9.12.d.4 by replacing "18 ± 2" with "20 ± 2".	27
3/4 11-1; 3/4 11-5; 3/4 11-6; 3/4 11-8; 3/4 11-12; 3/4 11-13; 3/4 11-14.	Change "Figure 5.1-1" to "Figure 5.1-1 and 5.1-2."	5
3/4 11-2	Capitalize "Waste Water Retention Basin" in Table 4/1-1. Item 2.a.	3
3/4 11-8	Change "Specification" to "Specifications" in ACTION b.	3
3/4 11-10	Correct the spelling of "omitted" in notation "P".	3
B3/40-2	Add Bases for 3.05.	2
3/4 11-8	Change "from the Unit" to "from each Unit" in 4.11.4.2.	2
B3/4 1-1	Add a comma after "2" in the second paragraph and after "5" in the third paragraph and change "the SHUTDOWN MARGIN" to "the required SHUTDOWN MARGIN."	3
B3/4 1-3	Add the following sentence "The RWST contained water volume limit provided in Specification 3/4.1.2.6 is specified as equal to the contained water volume limit specified in Specification 3/4.5.4 because the water volume limit in specification 3.4.5.4 is the more conservative value."	23
B3/4 1-3	Change "F*H to F*H in 3/4.1.3.2.	3
B3/4 2-2	Add FN*H to the end of the title for Bases Section 3/4.2.2 and 3/4.2.3.	3
B3/4 2-3	Add "(percent)" after "INDICATED AXIAL FLUX DIFFERENCE."	3
B3/4 3-3	Change "Control Room Ventilation Emergency Actuation Systems" to "Control Room Emergency Filtration System" in the first paragraph.	4
B3/4 3-4	Replace the last sentence of Bases Section B3/4.3.3.3 with "The instrumentation on Unit 1 is shared with Unit 2 and the seismic instrumentation and corresponding Technical Specifications meet the recommendations of Regulatory Guide 1.12, Revision 1, April 1974."	23
B3/4 3-5	Revise Bases 3/4.3.3.7 to indicate that chlorine detection instrumentation is not required.	4
B3/4 3-5	Change "LOOSE PART" to "LOOSE PARTS" in the title for Bases 3/4.3.3.8.	3
B3/4 4-2	Change "of equivalent size can be taken for an synonymous with" to "of equivalent size can be taken as synonymous with". This is a grammatical change.	3



## TS CHANGES—Continued

Page	Description and explanation	Item No.
B3/4 4-7; B3/4 4-8	The pressure/temperature limits for Unit 1 and 2 were derived using the same methods. Differences exist in the actual reactor materials that result in different limits. Bases section 3/4.4.9 has been revised to include equivalent information for Unit 2, and the different limits for the two units	2
B3/4 4-8	Capitalize "Effective Full Power Years."	3
B3/4 4-9	Revise Table 3/4.4-1 to indicate that it applies to Unit 1. Delete the empty column, and change "AVG UPPER SHELF ENERGY" to "Upper shelf energy."	2
B3/4 4-9a	Provide Table B 3/4.4-1b for Unit 2.	2
B3/4 4-10	Revise the first paragraph in this page to indicate separate heatup and cooldown curves for Units 1 and 2.	2
B3/4 4-10	Renumber this page to B3/4 4-11. Delete the grid lines from the figure for clarity.	2
B3/4 4-11	Renumber this page to B3/4 4-12 and show the figure as also applicable to Unit 2.	2
B3/4 4-12	Renumber this page to B3/4 4-10 and revise the first paragraph to indicate separate heatup and cooldown figures for Units 1 and 2.	2
B3/4 4-15	Revise this page to indicate separate heatup and cooldown curves and material properties for Units 1 and 2.	2
B3/4 5-2	Add the following sentences to the end of the second paragraph: "The surveillance requirements for leakage testing of ECCS check valves ensure a failure of one valve will not cause an intersystem LOCA. In MODE 3, with either HV-8809A or B closed for ECCS check valve leak testing, adequate ECCS flow for core cooling in the event of a LOCA is assured."	16
B3/4 5-2	FT2 should be ft <sup>2</sup> in the second paragraph of B3/4.5.4.	3
B3/4 6-2	Add a sentence to the first paragraph of Bases Section 3/4.6.1.6 that states "Unit 1 and Unit 2 containments satisfy the recommendations of Regulatory Guide 1.35, Revision 2, Position C.1.3. Therefore, Unit 2 containment is subject to visual inspection only." Also revise this section to indicate the differences in the Unit 1 and Unit 2 inspections.	17
B3/4 7-1	Add a period at the end of the definition of "Y."	3
B3/4 7-3	Change "Control Room Emergency Air Cleanup System" to "Control Room Emergency Filtration System" in Bases 3/4.7.6.	4
B3/4 7-4	Change "Control Room Emergency Filtration Cleanup System" to "Control Room Emergency Filtration System" in Bases 3/4.7.6.	4
5-1	Revise section 5.1 to indicate that figure 5.1-1 has been supplemented by figure 5.1-2 and that figure 5.1-2 has been renumbered as 5.1-3.	5
5-2	Figure 5.1-1 has been enlarged to improve legibility. The vicinity map has been deleted.	5
5-2a	Add page 5-2a with new figure 5.1-2.	5
5-3	Change the figure number to 5.1-3.	5
5-4	Change the reference to figure 5.1-1 to a reference to figures 5.1-1 and 5.1-2.	5
5-5	Insert new paragraph 5.6.1.2 which provides design data for Unit 2 spent fuel racks. Renumber existing paragraph 5.6.1.2 to 5.6.1.3.	2
6-1	Revise 6.2.2.b to reflect operations with two reactors.	24
6-5	Revise table 6.2-1 to refer to shift composition for two units with a common control room.	24
6-5	Revise the footnote regarding STA qualifications to refer to the NRC Policy Statement on Engineering Expertise on Shift.	25
6-6	Add "including proposed changes to Chapter 16.3 of the Vogtle Final Safety Analysis Report (FSAR)." to item 6.4.1.6.e.	26
6-10	Change "this operating license" to "these operating licenses."	2
6-12	Replace "and" with a period in item 1.	3
6-13	Add "(FSAR Chapter 16.3)" to item 6.7.1.	26
6-13	Change "the unit" to "the affected unit" in 6.6.1.d.	2
6-16	Change "the unit" to "either unit" in the first paragraph of 6.6.1.1.	2
6-17	Change "the unit" to "the plant" in 6.8.1.3 and add footnotes that allow a single report to be made for Units 1 and 2.	2
6-18	Change Reports to Report in 4 places on this page.	3
6-19	Change "from the unit or station" to "from each unit" in the second paragraph.	2
6-20	Change "Specification 3.3.3.10 or 3.3.3.11" to "Specification 3.3.3.9 or 3.3.3.10" in the first paragraph.	3
6-23	Correct the spelling of "activated" in the second paragraph of section 6.11.2.	3

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Vogtle Unit 2 operating license is expected to be issued in February 1989, and will utilize combined Units 1 and 2 TS. The combined Units 1 and 2 TS were

developed by adding specific Unit 2 requirements to the Unit 1 TS. The two units are of similar design with a shared control room, therefore the effect of the changes is minor. During the development of the combined Units 1 and 2 TS a number of editorial or format changes were added that did not alter the TS requirements. In addition, during that time a number of TS changes (items 4, 16, 19, 25, and 26) were requested for the Unit 1 TS. Those changes have been incorporated into the combined Units 1 and 2 TS because it is anticipated that they will have been approved for Unit 1, prior to the approval of the use of the combined TS for Unit 1. The proposed changes include any changes necessary for Unit 1 to continue operation following startup of Unit 2.

All but five of the changes (items 12, 14, 15, 22, and 27) represent format and editorial changes, changes necessary in order to incorporate Unit 2 requirements, changes necessary to

distinguish Unit 1 from Unit 2, and changes necessary to indicate that the TS apply to each unit. The changes in the editorial and format category do not result in a change in the current Unit 1 TS requirements.

The staff has reviewed items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 23, 24, 25, and 26 of the licensee's request and has determined that should these items be implemented, they would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed changes are administrative and do not involve physical changes to the plant, changes to procedures, commitments, or safety analyses.

Also the licensee's proposed changes would not (2) create the possibility of a new or different kind of accident from any accident previously evaluated because the physical plant design is not being changed. Finally, the licensee's

proposed changes would not (3) involve a significant reduction in a margin of safety because no operating parameters or setpoints are changed.

The five changes (items 12, 14, 15, 22, and 27) that have been incorporated into the combined Units 1 and 2 TS and which are not in the editorial or format category or are not currently under review are discussed below.

## Location of Free Field Accelerograph (Item 12)

The location of the Free Field Accelerometer as given in TS Table 3.3-5 and 4.3-4 was reviewed during the development of the combined Units 1 and 2 TS and determined to be approximately 225 feet from the Unit 1 containment rather than 500 feet as currently stated in Unit 1 TS. This location has been evaluated relative to seismic monitoring requirements.

The purpose of the "Free Field" accelerometer is to record a baseline ground acceleration time history that is representative of a location that is not significantly influenced by the presence of structures. This information will be used, along with the more significant acceleration time history information collected from in-structure accelerometers, to form the basis for the evaluation that is required following an earthquake. The actual location of the "Free Field" accelerometer is 225 ft. from the nearest Containment (Unit 1) and approximately 40 ft. from the Unit 1 Diesel Fuel Oil Storage Tank Pumphouse, which is the nearest structure. The instrument is located within the boundaries of the Category 1 backfill material to avoid influence from the in-site soil. Any soil/structure interaction effects from adjacent structures will tend to increase the instrument spectral response at the natural frequency of the adjacent structures and result in a conservative measurement.

The staff has reviewed item 12 of the licensee's request and has determined that should this item be implemented, it would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated because the accelerometer only records data of an earthquake.

Also, the licensee's proposed changes would not (2) create the possibility of a new or different kind of accident from any accident previously evaluated because the plant design is not being changed. Finally, the licensee's proposed changes would not (3) involve a significant reduction in a margin of safety because the accelerometer is still available to record earthquake data for evaluation.

## Temperature Instrumentation For Room RC41 (Item 15)

During the construction of Unit 2, it was decided to eliminate the Unit 2 waste evaporator. This eliminated the need for the routing of high energy steam lines through room RC41 to the Unit 2 waste evaporator. Two high temperature detection instruments (ATE 19722B and ATE 19723B) were located in this room for the purpose of detecting a temperature increase that would indicate a rupture in the high energy steam line in the evaporator area. The disconnection and capping of the high energy line outside of room RC41 eliminated the need for these instruments. Therefore these instruments were eliminated from the combined Units 1 and 2 TS.

The staff has reviewed item 15 of the licensee's request and has determined that should this item be implemented, it would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated because there is no high energy line in the room for the temperature instruments to monitor for a high energy line break.

Also, the licensee's proposed changes would not (2) create the possibility of a new or different kind of accident from any accident previously evaluated because the temperature instruments do not monitor any system or component. Finally, the licensee's proposed changes would not (3) involve a significant reduction in a margin of safety because there is no possibility of a high energy line break with the high energy line removed.

## Additional Value With Thermal Overload Protection Bypass (Item 22)

During the development of the combined Units 1 and 2 TS an additional valve was identified as having a thermal overload protection bypass device and thus was added to TS Table 3.8-1. This change is also applicable to Unit 1. The valve is for the reactor coolant system hot leg sample line. The inclusion of this valve does not reflect a change in design and does not alter the current surveillance requirements.

The staff has reviewed item 22 of the licensee's request and has determined that should this item be implemented, it would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated because adding the valve to TS Table 3.8-1 reflects the approved plant design.

Also, the licensee's proposed changes would not (2) create the possibility of a new or different kind of accident from

any accident previously evaluated because the physical plant design is not being changed. Finally, the licensee's proposed changes would not (3) involve a significant reduction in a margin of safety because no operating parameters or setpoints are changed.

## Unit 1 Area Temperature Monitoring For Room D067 (Item 14)

The rooms identified in TS 3/4.7.10 contain safety-related equipment that is required for safe shutdown and is not served by engineered safety feature HVAC systems. Temperature monitoring of these rooms ensures that the equipment will not be subjected to temperatures in excess of their environmental qualification temperatures. During the preparation of the combined Unit 1 and Unit 2 TS, it was determined that instrument 1PT-11742 (Nuclear Service Cooling Water from Tower B to Pumps) was located in auxiliary building room D067 rather than D068. TS 3/4.7.10 is therefore revised to add room D067 to the list of rooms requiring temperature monitoring and to delete room D068.

In regard to item 14 of the proposed amendment, the licensee has determined the following:

1. The proposed change will not significantly increase the probability of an accident previously evaluated. The change impacts only the area temperature monitoring program. Removal of auxiliary room D068 from the surveillance program does not effect the existing accident analysis since there is no safety-related safe shutdown equipment in this room. Adding auxiliary room D067 to the area temperature monitoring program ensures that instrument 1PT-11742 will not be subjected to temperatures in excess of its environmental qualification temperatures. This pressure transmitter controls one train of the NSCW tower spray header inlet and bypass valves. Temperature surveillance in room D067 will not affect the capability of 1PT-11742 to perform its safety-related function. Therefore, the consequences of accidents previously evaluated are not significantly increased.

2. The proposed change does not create the possibility of a new or different kind of accident than any accident previously evaluated. Removing auxiliary building room D068 and adding room D067 to the area temperature monitoring surveillance does not create the potential for any accident not previously evaluated.

Room D068 does not contain any safety-related safe shutdown equipment. Removal of this room from the area temperature monitoring surveillance does not create the potential for any accident not previously evaluated.

The addition of room D067 and the associated surveillance temperatures ensures that the safety-related, safe shutdown instrument 1PT-11742 will not be subjected to



temperatures in excess of its environmental qualification value. 1PT-11742 is qualified for temperatures, in excess of the maximum temperature of room D067 considering postulated pipe breaks and loss of HVAC. Surveillance of the temperature in room D067 will verify that the maximum normal temperature for the instrument is not exceeded. This will assure that the instrument aging used to determine qualified life is still valid.

The postulated failure of the valves (1HV-1669A and 1HV-1669B) controlled by 1PT-11742 is considered in Final Safety Analysis Report Table 9.2.1-2. Therefore, this change does not create the possibility of a new or different kind of accident than any accident previously identified.

3. The proposed change does not significantly reduce a margin of safety. Consistent with the basis of TS 3/4.7.10, the temperature surveillance of safety-related safe shutdown equipment is maintained. Therefore, this change does not significantly reduce a margin of safety.

The NRC staff has reviewed the licensee's determination regarding item 14 of the proposed amendment and concurs with its findings.

#### Fuel Handling Building Heater Requirement (Item 27)

During the review of the combined Unit 12 and 2 TS a concern was raised that the TS 4.9.12 value for the Fuel Handling Building HVAC system heater dissipation (18+2 kW) was inconsistent with the design rating of 20 kW. As stated in ANSI N509, the heater should be sized to ensure that the relative humidity of incoming air will be reduced to less than 70% to ensure that water does not buildup on the charcoal adsorber bed. A revision to the design calculation for heater sizing indicates a minimum heat dissipation requirement of 17kW. The design rating plus or minus 10% was determined to be an appropriate value. This change in heat dissipation value does not represent a physical design change to the heater. The surveillances which have been performed to date meet the minimum value proposed.

The staff has reviewed item 27 of the licensee's request and has determined that should this item be implemented, it would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated because the surveillance requirement is being changed to reflect plant design.

Also, the licensee's proposed changes would not (2) create the possibility of a new or different kind of accident from any accident previously evaluated because the physical plant design is not being changed. Finally, the licensee's proposed changes would not (3) involve a significant reduction in a margin of

safety because the change to the surveillance requirement is in the conservative direction.

Accordingly, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this *Federal Register* notice. Written comments may also be delivered to Room P-216, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 a.m. to 4:15 p.m. Copies of written comments received may be examined at the NRC Public Document Room, 2120 L Street NW., Washington, DC. The filing of requests for hearing and petitions for leave to intervene are discussed below.

By January 26, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rule of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted

with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene, which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the

license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

If the final determination is that the amendment involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-800-325-6000 (in Missouri 1-800-342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to David B. Matthews: Petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this *Federal Register* notice. A copy of the petition should also be sent to the Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Arthur H. Domy, Troutman, Sanders, Lockerman and Ashmore, Chandler Building, Suite 1400, 127 Peachtree Street, NE., Atlanta, Georgia 30043, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC 20555, and at the Burke County Public Library, 412 Fourth Street, Waynesboro, Georgia 30830.

Dated at Rockville, Maryland, this 20th day of December 1988.

For the Nuclear Regulatory Commission.

Jon B. Hopkins,  
Project Manager Project Directorate II-3,  
Division of Reactor Projects I/II, Office of  
Nuclear Reactor Regulation.

[FR Doc. 88-29619 Filed 12-23-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-346]

#### Toledo Edison Co., et al.; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 126 to Facility Operating License No. NPF-3, issued to The Toledo Edison Company and The Cleveland Electric Illuminating Company (the licensee), which revised the Technical Specifications for operation of the Davis-Besse Nuclear Power Station, Unit No. 1 (the facility) located in Ottawa County, Ohio. The amendment was effective as of the date of its issuance.

The amendment revised Technical Specification Table 3.3-11 to permit bypass of Functional Unit 1, Main Steam Pressure Low Instrument Channels, when steam pressure is below 700 psig vice 650 psig. It also changed the main steam line pressure for automatic removal of the bypass to 750 psig from 650 psig.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the *Federal Register* on May 12, 1988 (53 FR 16920). No request for hearing or petition for leave to intervene was filed following this notice.

For further details with respect to this action see (1) the application for amendment dated February 29, 1988, (2) Amendment No. 126 to License No. NPF-3, (3) the Commission's related Safety Evaluation dated December 19, 1988, and (4) the Environmental Assessment dated December 8, 1988 (53 FR 49620). All of these items are available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and at the University of Toledo Library,

Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606.

A copy of items (2), (3) and (4) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III, IV, V and Special Projects.

Dated at Rockville, Maryland this 19th day of December 1988.

For the Nuclear Regulatory Commission.

Albert W. De Agazio, Sr.,

Project Manager, Project Directorate III-3,  
Division of Reactor Projects—III, IV, V and  
Special Projects, Office of Nuclear Reactor  
Regulation.

[FR Doc. 88-29620 Filed 12-23-88; 8:45 am]

BILLING CODE 7590-01-M

#### OFFICE OF MANAGEMENT AND BUDGET

##### Reporting of Underground Storage Tanks Under Title III

**AGENCY:** Office of Management and Budget.

**ACTION:** Request for comments.

**SUMMARY:** The Office of Management and Budget (OMB), in cooperation with the Environmental Protection Agency (EPA), solicits comments on whether owners/operators of facilities managing underground storage tanks should be able to substitute the "Notification for Underground Storage Tanks" form for the Inventory reports required by sections 311 and 312 of the Superfund Amendments and Reauthorization Act of 1986 (SARA). The Notification form is currently required by EPA regulations specifically governing underground storage tanks. The Inventory reports cover businesses, including owners/operators of underground storage tanks, that use or store hazardous substances. Because information provided on the Notification and Inventory reports seems to be similar, OMB seeks comment on whether Notification form should be used in lieu of the Inventory requirements.

**DATE:** Written comments should be received by January 26, 1989.

**ADDRESS:** Written comments should be submitted to "UST/Title III Reporting," New Executive Office Building, Room 3019, 725 17th Street NW., Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Marcus Peacock, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street NW., Room 3019, Washington, DC 20503. (202) 395-3084



## SUPPLEMENTARY INFORMATION:

## A. Background

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires OMB to review and initiate changes in legislation, regulations, and procedures to improve the Federal government's collection of information. In particular, OMB reviews information collections so that they do not duplicate information otherwise accessible to the government (see 5 CFR 1320.4 and 1320.22(b)).

Current EPA regulations require owners of underground storage tanks containing hazardous substances to submit a one-time notice of the existence of such a tank to the appropriate State agency (see 40 CFR Part 280). This notice, the Notification for Underground Storage Tanks (henceforth "UST Notification form") includes information regarding the location, size, and contents of the tank (see Figure 1). EPA estimates that tank owners, predominantly retailers of petroleum products such as gasoline stations, have expended over 600,000 hours filing this form.

BILLING CODE 3110-01-M

## Notification for Underground Storage Tanks

FORM APPROVED  
OMB NO. 2050-0068  
APPROVAL EXPIRES 9-30-91

EPA estimates public reporting burden for this form to average 30 minutes per response, including time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the form. Send comments regarding this burden estimate to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, marked "Attention: Desk Officer for EPA."

I.D. Number  
Date Received

STATE USE ONLY

## GENERAL INFORMATION

Notification is required by Federal law for all underground tanks that have been used to store regulated substances since January 1, 1974, that are in the ground as of May 8, 1980, or that are brought into use after May 8, 1980. The information requested is required by Section 9002 of the Resource Conservation and Recovery Act (RCRA), as amended.

The primary purpose of this notification program is to locate and evaluate underground tanks that store or have stored petroleum or hazardous substances. It is expected that the information you provide will be based on reasonably available records, or, in the absence of such records, your knowledge, belief, or recollection.

**Who Must Notify?** Section 9002 of RCRA, as amended, requires that, unless exempted, owners of underground tanks that store regulated substances must notify designated State or local agencies of the existence of their tanks. Owner means—(a) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances; and

(b) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use.

**What Tanks Are Included?** Underground storage tank is defined as any one or combination of tanks that (1) is used to contain an accumulation of "regulated substances," and (2) whose volume (including connected underground piping) is 10<sup>3</sup> or more beneath the ground. Some examples are underground tanks storing: 1. gasoline, used oil, or diesel fuel; and 2. industrial solvents, pesticides, herbicides, or fumigants.

**What Tanks Are Excluded?** Tanks removed from the ground are not subject to notification. Other tanks excluded from notification are:

1. farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;
2. tanks used for storing heating oil for consumptive use on the premises where stored;
3. septic tanks;

4. pipeline facilities (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1979, or which is an intrastate pipeline facility regulated under State laws;

5. surface impoundments, pits, ponds, or lagoons;

6. storm water or waste water collection systems;

7. flow-through process tanks;

8. liquid traps or associated gathering lines directly related to oil or gas production and gathering operations;

9. storage tanks situated in an underground area (such as a basement, cellar, mine, or tunnel) if the storage tank is situated upon or above the surface of the floor.

**What Substances Are Covered?** The notification requirements apply to underground storage tanks that contain regulated substances. This includes any substance defined as hazardous in section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), with the exception of those substances regulated as hazardous waste under Subtitle C of RCRA. It also includes petroleum, e.g., crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

**Where To Notify?** Completed notification forms should be sent to the address given at the top of this page.

**When To Notify?** 1. Owners of underground storage tanks in use or that have been taken out of operation after January 1, 1974, but still in the ground, must notify by May 8, 1980. 2. Owners who bring underground storage tanks into use after May 8, 1980, must notify within 30 days of bringing the tanks into use.

**Penalties:** Any owner who knowingly fails to notify or submit false information shall be subject to a civil penalty not to exceed \$10,000 for each tank for which notification is not given or for which false information is submitted.

## INSTRUCTIONS

Please type or print in ink all items except "signature" in Section V. This form must be completed for each location containing underground storage tanks. If more than 5 tanks are owned at this location, photocopy the reverse side, and staple continuation sheets to this form.

Indicate number of continuation sheets attached

I. OWNERSHIP OF TANK(S)		II. LOCATION OF TANK(S)	
Owner Name (Corporation, Individual, Public Agency, or Other Entity)		(If same as Section I, mark box here <input type="checkbox"/> )	
Street Address		Facility Name or Company Site Identifier, as applicable	
County		Street Address or State Road, as applicable	
City		County	
State		City (nearest)	
ZIP Code		State	
Area Code		ZIP Code	
Phone Number		Indicate number of tanks at this location	
Type of Owner (Mark all that apply <input checked="" type="checkbox"/> )		Mark box here if tank(s) are located on land within an Indian reservation or on other Indian trust lands <input type="checkbox"/>	
<input type="checkbox"/> Current	<input type="checkbox"/> State or Local Gov't		
<input type="checkbox"/> Former	<input type="checkbox"/> Federal Gov't (GSA facility I.D. no. _____)		
<input type="checkbox"/> Private or Corporate	<input type="checkbox"/> Ownership uncertain		
III. CONTACT PERSON AT TANK LOCATION			
Name (If same as Section I, mark box here <input type="checkbox"/> )		Job Title	
Area Code		Phone Number	
IV. TYPE OF NOTIFICATION			
<input type="checkbox"/> Mark box here only if this is an amended or subsequent notification for this location.			
V. CERTIFICATION (Read and sign after completing Section VI.)			
I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.			
Name and official title of owner or owner's authorized representative		Signature	
Date Signed			

CONTINUE ON REVERSE SIDE



Owner Name (from Section I) \_\_\_\_\_ Location (from Section II) \_\_\_\_\_ Page No. \_\_\_\_\_ of \_\_\_\_\_ Pages

VI. DESCRIPTION OF UNDERGROUND STORAGE TANKS (Complete for each tank at this location.)					
Tank Identification No. (e.g., ABC-123), or Arbitrarily Assigned Sequential Number (e.g., 1,2,3...)	Tank No.	Tank No.	Tank No.	Tank No.	Tank No.
1. Status of Tank (Mark all that apply) <input type="checkbox"/> Currently in Use <input type="checkbox"/> Temporarily Out of Use <input type="checkbox"/> Permanently Out of Use <input type="checkbox"/> Brought into Use after 5/8/86	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Estimated Age (Years)					
3. Estimated Total Capacity (Gallons)					
4. Material of Construction (Mark one) <input type="checkbox"/> Steel <input type="checkbox"/> Concrete <input type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Unknown Other, Please Specify _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Internal Protection (Mark all that apply) <input type="checkbox"/> Cathodic Protection <input type="checkbox"/> Interior Lining (e.g., epoxy resins) <input type="checkbox"/> None <input type="checkbox"/> Unknown Other, Please Specify _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. External Protection (Mark all that apply) <input type="checkbox"/> Cathodic Protection <input type="checkbox"/> Painted (e.g., asphaltic) <input type="checkbox"/> Fiberglass Reinforced Plastic Coated <input type="checkbox"/> None <input type="checkbox"/> Unknown Other, Please Specify _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Piping (Mark all that apply) <input type="checkbox"/> Bare Steel <input type="checkbox"/> Galvanized Steel <input type="checkbox"/> Fiberglass Reinforced Plastic <input type="checkbox"/> Cathodically Protected <input type="checkbox"/> Unknown Other, Please Specify _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Substance Currently or Last Stored in Greatest Quantity by Volume (Mark all that apply) <input type="checkbox"/> a. Empty <input type="checkbox"/> b. Petroleum <input type="checkbox"/> Diesel <input type="checkbox"/> Kerosene <input type="checkbox"/> Gasoline (including alcohol blends) <input type="checkbox"/> Used Oil Other, Please Specify _____ <input type="checkbox"/> c. Hazardous Substance Please Indicate Name of Principal CERCLA Substance _____ OR Chemical Abstract Service (CAS) No. _____ Mark box <input type="checkbox"/> if tank stores a mixture of substances <input type="checkbox"/> d. Unknown	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Additional Information (for tanks permanently taken out of service) a. Estimated date last used (mo/yr) _____ b. Estimated quantity of substance remaining (gal.) _____ c. Mark box <input type="checkbox"/> if tank was filled with inert material (e.g., sand, concrete)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Owner Name (from Section I) \_\_\_\_\_ Location (from Section II) \_\_\_\_\_ Page No. \_\_\_\_\_ of \_\_\_\_\_ Pages

VII. CERTIFICATION OF COMPLIANCE (COMPLETE FOR ALL NEW TANKS AT THIS LOCATION)	
10. Installation (mark all that apply): <input type="checkbox"/> The installer has been certified by the tank and piping manufacturers. <input type="checkbox"/> The installer has been certified or licensed by the implementing agency. <input type="checkbox"/> The installation has been inspected and certified by a registered professional engineer. <input type="checkbox"/> The installation has been inspected and approved by the implementing agency. <input type="checkbox"/> All work listed on the manufacturer's installation checklists has been completed. <input type="checkbox"/> Another method was used as allowed by the implementing agency. Please specify: _____	
11. Release Detection (mark all that apply): <input type="checkbox"/> Manual tank gauging. <input type="checkbox"/> Tank tightness testing with inventory controls. <input type="checkbox"/> Automatic tank gauging. <input type="checkbox"/> Vapor monitoring. <input type="checkbox"/> Ground-water monitoring. <input type="checkbox"/> Interstitial monitoring within a secondary barrier. <input type="checkbox"/> Interstitial monitoring within secondary containment. <input type="checkbox"/> Automatic line leak detectors. <input type="checkbox"/> Line tightness testing. <input type="checkbox"/> Another method allowed by the implementing agency. Please specify: _____	
12. Corrosion Protection (if applicable) <input type="checkbox"/> As specified for coated steel tanks with cathodic protection. <input type="checkbox"/> As specified for coated steel piping with cathodic protection. <input type="checkbox"/> Another method allowed by the implementing agency. Please specify: _____	
13. I have financial responsibility in accordance with Subpart I. Please specify: Method: _____ Insurer: _____ Policy Number: _____	
14. OATH: I certify that the information concerning installation provided in Item 10 is true to the best of my belief and knowledge. Installer: _____ Name _____ Date _____ Position _____ Company _____	

BEST COPY AVAILABLE



In late 1987, EPA implemented sections 311 and 312 of SARA (see 40 CFR Part 370). Section 311 of SARA requires owners or operators of facilities handling hazardous substances to compile a list of such substances (or submit Material Safety Data Sheets (MSDSs) for these substances) that may be found at the facility. The list must contain the substances' chemical or common names and disclose the hazardous components of the chemicals.

In addition, section 312 requires owners and operators to prepare an Emergency and Hazardous Chemical Inventory Form. The form describes the location, quantity, and characteristics of hazardous chemicals that were present at a facility for the previous year. (This requirement may be fulfilled by submitting either a Tier One or Tier Two form as shown in Figure II). These two inventory requirements, the list (or MSDSs) and the Emergency and Hazardous Chemical Inventory Form must be submitted to State governments, local governments, and local Fire Departments. The chemical list or MSDSs must be resubmitted whenever they are changed or updated. The Emergency and Hazardous Chemical Inventory must be submitted by March 1 of each year. On September 24, 1988, these requirements were expanded to include many facility operators who have completed or must also complete an UST Notification form.

BILLING CODE 3110-01-M

# **Tier One** **EMERGENCY AND HAZARDOUS CHEMICAL INVENTORY** Aggregate Information by Hazard Type

FOR  
OFFICIAL  
USE  
ONLY

Page \_\_\_\_ of \_\_\_\_ pages  
Form Approved OMB No. 2050-0072

ID # \_\_\_\_\_  
Date Received \_\_\_\_\_

Important: Read instructions before completing form

Reporting Period: From January 1 to December 31, 19\_\_

<b>Facility Identification</b>	
Name _____	
Street Address _____	
City _____ State _____ Zip _____	
SIC Code [ ][ ][ ][ ]	Dun & Brad Number [ ][ ]-[ ][ ][ ][ ]-[ ][ ][ ][ ]
<b>Owner/Operator</b>	
Name _____	
Mail Address _____	
Phone ( ) _____	

<b>Emergency Contacts</b>	
Name _____	
Title _____	
Phone ( ) _____	
24 Hour Phone ( ) _____	
Name _____	
Title _____	
Phone ( ) _____	
24 Hour Phone ( ) _____	

Hazard Type	Max Amount*	Average Daily Amount*	Number of Days On-Site	General Location	<input type="checkbox"/> Check if site plan is attached
<b>Physical Hazards</b>	Fire [ ][ ]	[ ][ ]	[ ][ ][ ]		
	Sudden Release of Pressure [ ][ ]	[ ][ ]	[ ][ ][ ]		
	Reactivity [ ][ ]	[ ][ ]	[ ][ ][ ]		

<b>Health Hazards</b>	Immediate (acute) [ ][ ]	[ ][ ]	[ ][ ][ ]	
	Delayed (Chronic) [ ][ ]	[ ][ ]	[ ][ ][ ]	

## **Certification (Read and sign after completing all sections)**

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals responsible for obtaining the information, I believe that the submitted information is true, accurate and complete.

Name and official title of owner/operator OR owner/operator's authorized representative

Signature \_\_\_\_\_ Date signed \_\_\_\_\_

* Reporting Ranges	Range Value	Weight Range in Pounds From... To...
	00	0 99
	01	100 999
	02	1000 9,999
	03	10,000 99,999
	04	100,000 999,999
	05	1,000,000 9,999,999
	06	10,000,000 99,999,999
	07	50,000,000 99,999,999
	08	100,000,000 499,999,999
	09	500,000,000 999,999,999
	10	1 billion higher than 1 billion



<b>Tier Two</b> <b>EMERGENCY</b> <b>AND</b> <b>HAZARDOUS</b> <b>CHEMICAL</b> <b>INVENTORY</b>  <i>Specific</i> <i>Information</i> <i>by Chemical</i>	<b>Facility Identification</b>		<b>Owner/Operator Name</b>	
	Name _____		Name _____ Phone (____) _____	
	Street Address _____		Mall Address _____	
	City _____ State _____ Zip _____		<b>Emergency Contact</b>	
	SIC Code <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> Dun & Brad Number <input type="text"/> <input type="text"/> - <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>			
<b>FOR</b> <b>OFFICIAL</b> <b>USE</b> <b>ONLY</b>		Name _____ Title _____ Phone (____) _____ 24 Hr Phone (____) _____  Name _____ Title _____ Phone (____) _____ 24 Hr Phone (____) _____		

**Important** Read all instructions before completing form

Reporting Period From January 1 to December 31 19\_\_\_\_

Chemical Description	Physical and Health Hazards <small>(check all that apply)</small>	Inventory		Storage Codes and Locations <small>(Non-Confidential)</small>	
		<small>Max. Daily Amount (code)</small>	<small>Avg. Daily Amount (code)</small>	<small>No. of Days On-site (days)</small>	<small>Storage Code</small>
CAS <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> Trade Secret <input type="checkbox"/>	<input type="checkbox"/> Fire <input type="checkbox"/> Sudden Release of Pressure <input type="checkbox"/> Reactivity <input type="checkbox"/> Immediate (acute) <input type="checkbox"/> Delayed (chronic)	<input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<div style="display: flex;"> <div style="width: 60px; height: 80px; border: 1px solid black;"></div> <div style="flex-grow: 1;"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div> </div>
Chem. Name _____ _____ _____					
Check all that apply: <input type="checkbox"/> Pure <input type="checkbox"/> Mix <input type="checkbox"/> Solid <input type="checkbox"/> Liquid <input type="checkbox"/> Gas					
CAS <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> Trade Secret <input type="checkbox"/>	<input type="checkbox"/> Fire <input type="checkbox"/> Sudden Release of Pressure <input type="checkbox"/> Reactivity <input type="checkbox"/> Immediate (acute) <input type="checkbox"/> Delayed (chronic)	<input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<div style="display: flex;"> <div style="width: 60px; height: 80px; border: 1px solid black;"></div> <div style="flex-grow: 1;"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div> </div>
Chem. Name _____ _____ _____					
Check all that apply: <input type="checkbox"/> Pure <input type="checkbox"/> Mix <input type="checkbox"/> Solid <input type="checkbox"/> Liquid <input type="checkbox"/> Gas					
CAS <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> Trade Secret <input type="checkbox"/>	<input type="checkbox"/> Fire <input type="checkbox"/> Sudden Release of Pressure <input type="checkbox"/> Reactivity <input type="checkbox"/> Immediate (acute) <input type="checkbox"/> Delayed (chronic)	<input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<input type="text"/> <input type="text"/>	<div style="display: flex;"> <div style="width: 60px; height: 80px; border: 1px solid black;"></div> <div style="flex-grow: 1;"> <hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/><hr/> </div> </div>
Chem. Name _____ _____ _____					
Check all that apply: <input type="checkbox"/> Pure <input type="checkbox"/> Mix <input type="checkbox"/> Solid <input type="checkbox"/> Liquid <input type="checkbox"/> Gas					

**Certification** *(Read and sign after completing all sections)*

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those individuals responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete.

Name and official title of owner/operator OR owner/operator's authorized representative

Signature

Date signed

**Optional Attachments** *(Check one)*  
  
☐ I have attached a site plan  
☐ I have attached a list of site coordinate abbreviations



**B. Issue**

The UST Notification and inventory reports were created under two separate statutory authorities yet appear to require duplicative reporting from part of the regulated community. OMB solicits comments on whether owners/operators who have completed an UST Notification form should also be required to complete the Inventory reports under sections 311 and 312 of SARA. OMB is particularly interested in problems users of the information may face if the UST Notification form is used as a substitute for the Inventory reports. These users include: State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs), and Fire Departments. For instance, OMB would like to know:

- Are SERCs, LEPCs, and Fire Departments interested in receiving information on the location, size, and contents of underground storage tanks found at businesses such as gasoline stations?
- Does the UST Notification form include sufficient information to satisfy the chemical listing requirement?
- Does the UST Notification form include sufficient information to ascertain data requested on the Emergency and Hazardous Chemical Inventory Form?
- How difficult would it be for SERCs, LEPCs, and Fire Departments to obtain the necessary information from State Underground Storage Tank Programs or facility owners?
- To what extent are the problems (if any) of obtaining UST information mitigated if SERCs, LEPCs, and Fire Departments may specifically request owners/operators of underground storage tanks to complete the Inventory requirements or provide a copy of the UST Notification form?
- Assuming the UST Notification form may be used as a substitute for section 311/312 data, should EPA require the form be sent directly to section 311/312 recipients?

Jay Plager,

Administrator, Office of Information and Regulatory Affairs.

[FR Doc. 88-29570 Filed 12-23-88; 8:45 am]

BILLING CODE 3110-01-M

### **PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL**

#### **Power Plant Amendments: Columbia River Basin Fish and Wildlife Program and Northwest Conservation and Electric Power Plan**

**AGENCY:** Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

**ACTION:** Notice of proposed amendments to the Columbia River Basin Fish and Wildlife Program and the Northwest Conservation and Electric Power Plan, hearings and opportunity to comment (Yakima phase 2 passage).

**SUMMARY:** On November 15, 1982, pursuant to the Pacific Electric Power Planning and Conservation Act (the Northwest Power Act, 16 U.S.C. *et seq.*) the Pacific Northwest Electric Power and Conservation Planning Council (Council) adopted a Columbia River Basin Fish and Wildlife Program (program). The program has been amended from time to time since then. Major revisions of the program were adopted in 1984 and 1987. On October 28, 1988 the Yakima Indian Nation submitted an application to amend sections 803(b) and 1403(4.5) of the program, to allow advance design work on additional salmon and steelhead passage project in the Yakima River Basin. On December 15, 1988 the Council voted to initiate rulemaking pursuant to section 4(d)(1) of the Northwest Power Act to amend these sections of the program. This notice contains a brief description of the background of the proposal, explains how to obtain a full copy of proposed amendments, and how to participate in the amendment process.

**Public Comment:** All written comments must be received in the Council's central office, 851 SW. Sixth Avenue, Suite 1100, Portland, Oregon, 97204, by 5 p.m. Pacific time on February 10, 1989. Comments should be submitted to Dulcy Mahar, Director of Public Involvement, at this address. Comments should be clearly marked "Yakima Phase II Comments."

After the close of written comment, the Council may hold consultations with interested parties to clarify points made in written comment. Consultations may be held up to the time of the Council's final action in this rulemaking.

Hearings: Public hearings will be held

in Idaho, Montana, Oregon, and Washington. If you wish to obtain a schedule of the hearings, or more information about this process, contact the Council's Public Involvement Division, 851 SW. Sixth Avenue, Suite 1100, Portland, Oregon 97204 or (503) 222-5161, toll free 1-800-222-3355 in Idaho, Montana, and Washington or 1-800-452-2324 in Oregon. To reserve a time period for presenting oral comments at a hearing, contact Ruth Curtis in the Public Involvement Division. Requests to reserve a time period for oral comments must be received no later than two work days before the hearing.

**Final Action:** The Council expects to take final action on the proposed amendments at its March 1989 meeting.

**SUPPLEMENTARY INFORMATION:** The Yakima River Basin in central Washington has been featured in the program since the first program was adopted in 1982. Work to improve salmon and steelhead passage at irrigation diversion dams in the Yakima Valley was given high priority in the program, because the Yakima Basin holds miles of spawning habitat. In the first phase of this passage improvement effort, 20 dam-screening and fish-laddering projects were completed or are near completion.

Phase 2 includes 53 additional projects whose combined planning and design are estimated to cost \$600,000 (\$100,000-\$200,000 in the Fiscal Year 1989 and \$400,000 in Fiscal Year 1990). The Yakima Indian Nation, Columbia Basin Fish and Wildlife Authority and the Pacific Northwest Utilities Conference Committee support the amendment. The proposal would speed up the design process, and would allow the design team that worked on the Phase 1 Yakima passage project to continue its work. Actual approval and construction would remain contingent on the completion of subbasin and system plans.

**For a Full Copy of Proposed Amendments, or Further Information:** Contact Judi Hertz at 851 SW. Sixth Avenue, Suite 1100, Portland, Oregon, 97204, or at (503) 222-5161, toll free 1-800-222-3355 in Idaho, Montana, and Washington or 1-800-452-2324 in Oregon.

Edward Sheets,

Executive Director.

[FR Doc. 88-29610 Filed 12-23-88; 8:45 am]

BILLING CODE 0600-06-M



**Power Plan Amendments; Columbia River Basin Fish and Wildlife Program**  
**AGENCY:** Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council).

**ACTION:** Notice of final amendments to the Columbia River Basin Fish and Wildlife Program regarding Umatilla River flows.

**SUMMARY:** On November 15, 1982, pursuant to the Pacific Electric Power Planning and Conservation Act (the Northwest Power Act, 16 U.S.C. 839, *et seq.*) the Pacific Northwest Electric Power and Conservation Planning Council (Council) adopted a Columbia River Basin Fish and Wildlife Program (program). The program has been amended from time to time since then. Major revisions of the program were adopted in 1984 and 1987. On April 14, 1988, the Council voted to initiate rulemaking pursuant to section 4(d)(1) of the Northwest Power Act to amend the program to consider approving a request for the Bonneville Power Administration to provide funding for electric power to operate pumps for a flow enhancement project on the Umatilla River pending congressional authorization of construction of pumps. On November 10, 1988, the Council adopted amendments, and on December 15, 1988, adopted a response to comments. This notice contains a brief description of the amendment and the final amendments, and provides instructions on how to obtain further information.

**SUPPLEMENTARY INFORMATION:** The Council initiated this amendment process on July 14, 1988, by issuing a notice of proposed amendments. The notice outlined the background of the proceeding, the issues involved, and invited comments on the proposed amendments. The Council held hearings on the proposed amendments on September 22 in Boise, Idaho, on September 26 in Yakima, Washington, on September 28 in Portland, Oregon, and on October 12 in Missoula, Montana. Consultations with interested parties were held on several aspects of the proposed amendments, and public comment was heard at several regular Council meetings. Written comment was received through October 14, 1988.

On October 12, Congress passed the Umatilla Project Act, which addressed several of the issues involved in the Council's amendment process. The Umatilla Project Act authorizes \$42 million for the Bureau to construct, operate, and maintain pumping plants for the long-term pumping project. Bonneville is directed to provide pumping power for the exchange,

consistent with the Council's fish and wildlife program. A committee report accompanying the Umatilla Project Act noted that Bonneville has made funds available to provide for interim pumping, and that Bonneville is expected to continue to make such funds available until the facilities authorized by the Act are operating, as long as such pumping is consistent with the Columbia River Basin Fish and Wildlife Program (S. Rep. 100-48, 100th Cong. 2d Sess., page 7).

On November 10, 1988, the Council approved amendments to the program. The amendments conform the program to the Umatilla Project Act, by: (1) Approving interim pumping and making minor changes in the program measure on long-term pumping; (2) calling for the Bureau to conduct quantitative monitoring and evaluation for interim pumping, coordinated with state and tribal monitoring activities and other Bonneville and Council-sponsored monitoring and evaluation; (3) rejecting the request for Bonneville funding of \$23,000 in capital improvements to the private pumps and calling for exploration of interim options for augmenting flows in the upper part of the Umatilla River; and (4) calling on the Bureau to consult with the Council and other interested parties in connection with the report required by the Umatilla legislation on water conservation and other measures for fish. The amendments also call on Bonneville, the Bureau of Reclamation, the Oregon Water Resources Department, and other parties to study and report to the Council on possibilities for cooperative funding of water conservation measures. Finally, the amendments call for an annual report by the Oregon Water Resources Department on pumping's effect on streamflows.

On December 15, 1988, the Council adopted a response to comments explaining the Council's reasoning in adopting the amendments.

**FOR A FULL COPY OF THE AMENDMENTS, THE RESPONSE TO COMMENTS, OR FURTHER INFORMATION CONTACT:**

Ms. Judi Hertz at the Northwest Power Planning Council, Public Involvement Division, 851 SW. Sixth Avenue, Suite 1100, Portland, Oregon 97204, or at (503) 222-5161, toll free 1-800-222-3355 in Idaho, Montana, and Washington or 1-800-452-2324 in Oregon.  
 Edward Sheets,  
 Executive Director.

[FR Doc. 88-29611 Filed 12-23-88; 8:45 am]

BILLING CODE 0000-00-M

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-26380; File No. 600-26]

**Self-Regulatory Organizations; Clearing Corporation for Options and Securities; Application for Temporary Registration as a Clearing Agency; Extension of Time for Submission of Comments**

On October 14, 1988, the Clearing Corporation for Options and Securities ("CCOS") filed with the Commission an application for temporary registration as a clearing agency under section 17A of the Securities Exchange Act of 1934 ("Act") and Rule 17Ab2-1. On November 23, 1988, the Commission published in the Federal Register notice of the CCOS filing and invited interested persons to submit, on or before December 23, 1988, written data, views and arguments ("comments") concerning the application and the Commission's specific requests for comments on a variety of issues.<sup>1</sup>

One potential commentator requested an extension of the time period for submitting comments.<sup>2</sup> CCOS responded to that request and generally opposed the requested extension.<sup>3</sup> The Commission has determined to extend the time for submission of comments to January 31, 1989. Persons desiring to make written submissions should file six copies thereof with the Secretary of the Commission, 450 Fifth Street NW., Washington, DC 20549. Reference should be made to File No. 600-26. Copies of the application and of all written comments will be available for inspection at the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 20, 1988.

Jonathan G. Katy,

Secretary.

[FR Doc. 88-29630 Filed 12-23-88; 8:45 am]

BILLING CODE 8010-01-M

<sup>1</sup> See Securities Exchange Act Release No. 26286 (November 16, 1988), 53 FR 47597.

<sup>2</sup> See letter from Burton R. Rissman, Schiff, Hardin & Waite to Jonathan G. Katy, Secretary, Commission, dated December 3, 1988.

<sup>3</sup> See letter from Alan B. Cohen, Cleary, Gottlieb, Steen & Hamilton, to Jonathan Kallman, Assistant Director, Division of Market Regulation, dated December 20, 1988.

[Release No. 34-26374; File No. SR-DTC-88-18]

**Self-Regulatory Organizations; Depository Trust Company; Order Approving a Proposed Rule Change Concerning the International Institutional Delivery System.**

On October 26, 1988, the Depository Trust Company ("DTC") filed a proposed rule change (File No. SR-DTC-88-18) with the Commission pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> On November 10, 1988, the Commission published notice in the Federal Register to solicit comments from interested parties.<sup>2</sup> No comments were received. As discussed below, the Commission is approving this proposal.

**I. Introduction and Background**

The proposed rule change would establish a pilot program for the centralized, automated processing of international, institutional trades. The system, called the International Institutional Delivery ("IID") System, was developed at the request of DTC participants. In a 1987 memorandum, DTC estimated that 95% of the institutional trades undertaken by its broker-dealer participants involved U.S. and Canadian securities.<sup>3</sup> DTC's existing ID users urged DTC to develop the IID System to bring the advantages of the domestic ID System<sup>4</sup> to the remaining 5% of institutional transactions that involve foreign securities.<sup>5</sup> Three *ad hoc* industry committees of broker-dealers, custodian banks, and investment managers formed the International IID Steering Committee, and developed IID. IID is expected to increase efficiency in settling many institutional trades executed in foreign securities by centralizing and automating the communication among most of the many parties to an international, institutional trade.

The IID System is an international extension of DTC's current domestic ID System, with certain differences. For example, IID accommodates the need to identify foreign currencies and

internationally-used securities numbering systems. In addition, IID will enable participants to identify the foreign sub-custodians who will effect settlement. Also, processing times will differ for domestic and international institutional trades: IID trades will be capable of same-day processing.<sup>6</sup> Another important difference is that domestic ID will continue to provide for automated settlement at DTC, while IID will enable parties to communicate deliver/receive instructions for settlement outside DTC, presumably between foreign sub-custodians. Like the domestic ID System, however, once the pilot program period is over, IID is expected to be offered to all National Clearance and Settlement System participants through links between DTC and other registered clearing agencies.

The initial pilot program is expected to include as many as 15 users, including broker-dealers, custodians, and investment managers. The pilot will not be limited to securities of issuers domiciled in any one country. Upon successful use of the IID System by pilot program participants, DTC expects to finalize IID System procedures and open the IID System to all participants. At the end of the pilot period, DTC also will make the IID System available to participants of other registered clearing agencies.

**II. Description**

The proposed rule change establishes DTC's International Institutional Delivery System. Generally, the IID System will: (1) Process international institutional trade input from broker-dealers; (2) generate and distribute confirmations to broker-dealers and other interested parties such as institutions (investment managers) and their agent bank/global custodians; (3) process affirmations received from institutions and their agents; and (4) generate deliver/receive instructions to broker/dealers and agent bank/global custodians. IID will have the capability to perform all these functions on the same day.

Processing of IID transactions will occur as follows. Trade data input from broker-dealers via computer-to-computer ("CCF") links will be processed at two or three intervals during the business day in addition to the 2 a.m. batch cutoff.<sup>7</sup> Trade data

input via Participant Terminal Systems ("PTS") will be processed immediately, without regard for the cutoff times. An unused portion of the existing input record will be used for four new fields. Thus, programming changes are not required. The first of the new fields consists of an indicator that the input is domestic (DOM) or international (INT). Without this indicator, input will be deemed domestic and processed at 2 a.m. The second new field is a three character International Standards Organization ("ISO") currency code for identifying the settling currency. The third field is a three character ISO security-type code for identifying the type of security traded. The fourth new field is a two character security numbering system used for the security. Thus, while SEDOL<sup>8</sup> is DTC's preferred security numbering system, DTC will accept any recognized numbering system that is coded in this new field.

Upon receipt of trade data input, DTC will edit the data and prepare confirmations. The new fields for currency, security type, and security numbering system must contain valid codes or the data will be rejected. Moreover, IID trade input must contain valid ID numbers for agent banks, global custodians, and sub-custodians, in addition to valid ID numbers for broker-dealers and institutions, or they will be rejected. Confirmations for IID trades will be generated by DTC approximately one hour after the cutoff time. International trade data submitted after the last cutoff time, but before the existing 2 a.m. domestic cutoff, will have confirmations available at 7 a.m. The existing confirm record will be used with the new fields added in an unused portion of the record. Thus, IID confirms will show: An international indicator (INT) for CCF or a new confirmation heading for PTS or dial-in; the currency code and security numbering system code; the security-type code for CCF only; and a security description as supplied by the broker-dealer.

Confirmations are transmitted to the broker-dealer, agent bank/global, custodian, and institution. Affirmation processing will take place throughout the business day, beginning at approximately 8 a.m., until a cutoff

or separately, although domestic ID data will continue to be processed after the 2 a.m. cutoff.

<sup>8</sup> SEDOL is the Stock Exchange Daily Official Listing numbering system of the International Stock Exchange of the United Kingdom and the Republic of Ireland. DTC strongly recommends use of SEDOL in the IID System, but recognizes that participants may be using other numbering systems, and thus has provided for their use.

<sup>6</sup> Because IID is a same-day system, DTC output and affirmation input must be in machine-readable format.

<sup>7</sup> Currently, the cut-off times are at 2 a.m., 10 a.m., 2 p.m., and 6 p.m., but these times are subject to change as required by industry needs. Domestic ID and IID Trade data input may be submitted together

<sup>1</sup> 15 U.S.C. 78e(b)(1).

<sup>2</sup> Securities Exchange Act Release No. 26249 (November 3, 1988), 53 FR 45637.

<sup>3</sup> See DTC Memorandum to Users of the Institutional Delivery System and Interested Organizations (July 7, 1987).

<sup>4</sup> See, e.g., Securities Exchange Act Release No. 19910 (June 24, 1983), 48 FR 30505.

<sup>5</sup> "Foreign securities" means non-U.S. and non-Canadian securities that are not eligible for automated book-entry settlement, and that, for various reasons, e.g., lack of a compatible securities identification number, are not conducive to processing in the domestic ID system.



time yet to be determined.<sup>9</sup> Affirmations are transmitted by agent bank/global custodians and institutions. Affirmations by CCF must identify the data as domestic (DOM) or international (INT). In the absence of an identifier, DTC will assume that the affirmation concerns a domestic transaction and will hold the affirmation for processing at the 7:30 p.m. cutoff. For PTS and dial-in users, a new international affirmation function will be developed. Affirms by PTS will be processed on a trade-for-trade basis, up to six affirmations per screen. The affirming party has the capability of adding 158 characters of additional information, which will allow payment and settlement instructions to be communicated between institutions and agent bank/global custodians. Errors in affirmations submitted by CCF will be returned. Errors in affirmations submitted by CCF will be returned on a report or CCF function containing error conditions only. Error information will be available approximately 30 minutes after receipt of the affirmation.

DTC will generate deliver/receive instructions for broker-dealers and agent bank/global custodians throughout the day; those instructions will be available approximately 30 minutes after receipt of an affirmation, until a cutoff time yet to be established.<sup>10</sup> The format for deliver/receive instructions will be similar, with one exception, to receive and deliver tickets DTC currently generates for domestic ID trades in securities that are not eligible for book-entry settlement at DTC or other registered clearing agencies. CCF users may select to receive these instructions in the ISO format developed by DTC and a technical committee of the IID Steering Committee.<sup>11</sup> PTS and dial-in users will receive instructions in ticket format. Deliver/receive instructions for agent bank/global custodians will contain payment and settlement instructions entered by the institution.

All parties to a trade except sub-custodians will have inquiry capability in the IID system. Payment and settlement instructions entered by the affirming party will be displayed only to the institution and agent bank/global

custodian, however. An inquiry will result in a display of the trade's status—either "confirmed" (awaiting affirmation), or "affirmed" (deliver/receive instructions issued)—and an "affirmed by whom" indicator and date affirmed.

### III. DTC's Rationale

In the filing, DTC states that the purpose of the proposed rule change is to increase efficiency in settling many international, institutional trades. DTC further states that such purpose is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC.

### IV. Discussion

Section 17A of the Act sets forth the requirements of registered clearing agencies. Section 17A(b)(3)(F) provides that a clearing agency's rules must be designed, among other things, to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds in the custody or control of the clearing agency, and to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.

In recent years, the volume of international trading, including institutional, international trading, has increased significantly. For example, total purchases and sales comprising foreign activity in U.S. corporate stocks in 1987 was approximately \$482 billion, compared with approximately \$278 billion in 1986. Total purchases and sales comprising U.S. activity in foreign corporate stocks in 1987 was approximately \$189 billion, compared with approximately \$100 billion in 1986.<sup>12</sup> International trading, however, is complicated by the lack of uniformity in settlement times and settlement practices, and the large number of geographically distant parties involved in settling cross-border trades.

In a recent policy statement, the Commission noted the tremendous growth in the international securities markets, and set forth three areas of concern for markets and regulators—efficient market and supporting structures, sound disclosure systems, and fair and honest markets.<sup>13</sup> In

discussing clearance and settlement, the Commission urged international market participants to strive for fully-automated clearance and settlement systems that would permit book-entry movement of broker-dealers' and institutions' equity and debt positions. In addition, the Commission urged that markets and regulators should work toward establishing compatible worldwide standards for clearing entities, and in the near term, encourage a network of sound linkages among the major markets' clearing entities based on agreed minimum financial and operational standards.

The IID System will improve the efficiency and safety of international, institutional trading in several ways. First, IID will provide centralized, automated communications among most of the many parties to an international, institutional trade, including broker-dealers, institutions (investment managers), and agent bank/global custodians. Using the IID System, these parties can communicate with each other in a quick and organized fashion, not only confirming and affirming trades, but also passing along payment and settlement instructions with deliver and receive instructions. Second, in order to accommodate the varying settlement time frames that exist in international trading, including very short settlement time frames, the IID System has the capability to process a trade in one day. Third, by providing deliver and receive instructions, the IID System enables the parties to settle wherever they choose, in accordance with local settlement practices. Finally, IID's more efficient method of affirming trades and communicating delivery and receive instructions should provide greater certainty that institutional trades will settle in a timely manner. Thus, the IID System potentially can reduce the number of COD-DKs ("Don't knows") by institutions' agents, and reduce the financial risk to broker-dealers who undertake trades on behalf of institutional customers.

The exclusion of sub-custodians from DTC's communications network, however, detracts from the potential efficiency of the IID System. Although confirmations, affirmations, and deliver/receive tickets among DTC's existing users may be processed in the IID System all in one day, the amount of time it takes for broker-dealers and agent bank/global custodians to communicate instructions to their sub-custodians through their own communications networks, and for those sub-custodians to act in accordance with those instructions, remains a

variable outside of the IID System. This is particularly risky in markets with very short settlement time-frames. Thus, the potential for delays in communications with sub-custodians detracts from the benefits of the IID System, including the reduction of financial exposure to broker-dealers. According to DTC, however, the inclusion of sub-custodians is not a critical element at this time, primarily because the broker-dealers and agent bank/global custodians that are expected to use the IID System already have communications networks and procedures in place for transmitting deliver and receive instructions to sub-custodians. The Commission encourages DTC to consider the need for direct communication links between DTC and non-U.S. custodians because, among other reasons, future IID System users may not have communication networks, and may request that DTC include sub-custodians in the IID System.

A factor reducing the disadvantages of excluding sub-custodians from the IID network is the development of the ISO format for deliver/receive instructions. The ISO format simplifies instructions and is intended to give the sub-custodians, in a uniform format, only the information they need to effect settlement. At present, only broker-dealers and agent bank/global custodians who are CCF users have the option of receiving deliver/receive instructions in the ISO format. In the future, DTC should consider making the ISO format available to all IID System participants so that broker-dealers and agent bank/global custodians may forward the simplified, ISO deliver/receive instructions to sub-custodians.

With respect to securities numbering systems, the Commission specifically approves of the ability to use any recognized securities numbering system in the IID System. The Commission believes that, at the appropriate time, DTC should consider converting the securities numbering system to an international numbering system, such as the International Securities Identification Number ("ISIN"), that is being developed by the International Standards Organization.

The Commission believes that DTC has designed the IID System, as described in the proposal, to be consistent with DTC's statutory obligations concerning prompt and accurate clearance and settlement of securities transactions,<sup>14</sup> the

<sup>14</sup> The IID System does not provide for automated settlement, and DTC does not guarantee settlement of IID transactions. Settlement takes place entirely outside DTC; therefore, DTC does not incur any settlement risk.

safeguarding of securities and funds, and fostering cooperation and coordination with persons engaged in the clearance and settlement of securities transactions. The Commission has determined to approve the proposed pilot program until January 31, 1989.

### IV. Conclusion

For the reasons discussed above, the Commission finds that the proposed rule change is consistent with the Act and, in particular, section 17A.

It is therefore ordered, pursuant to (section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-88-18) be, and it hereby is, approved on a temporary basis until January 31, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 20, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29631 Filed 12-23-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-26370; File No. SR-MSRB-88-4]

### Self-Regulatory Organizations; Proposed Rule Change by the Municipal Securities Rulemaking Board; Relating to Books and Records

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on November 9, 1988, the Municipal Securities Rulemaking Board ("Board") filed with the Securities and Exchange Commission a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

(a) The Municipal Securities Rulemaking Board ("Board") is filing an amendment to Board rule G-8 on books and records (hereafter referred to as "the proposed rule change"). The proposed rule change will require the recordkeeping of suitability information for institutional accounts.

(b) Not applicable.

(c) Not applicable.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Rule G-19(b) provides that, before making a recommendation to a customer, a securities professional must determine that the securities are a suitable investment for that customer. The rule specifies that a suitability determination shall be based upon, among other things, information furnished by the customer relating to its "financial background, tax status and investment objectives and any other similar information." In 1987, the Board adopted and the SEC approved an amendment to rule G-8(a)(xi) to require the recordkeeping of suitability information for customer accounts required to be obtained by rule G-19. The Board noted that the amendment would provide additional protection by facilitating a dealer's discharge of its suitability responsibilities and would assist municipal securities principals and regulatory examiners in reviewing transactions for compliance with rule G-19.

Because of a cross-referencing problem in the rule, rule G-8(a) currently does not require dealers to keep suitability records for institutional accounts, yet dealers are required to comply with rule G-19 when making recommendations to institutional customers. The proposed rule change to rule G-8(a)(xi) will correct this cross-referencing problem and require the recordkeeping of suitability information for institutional accounts.

(b) The Board has adopted the proposed rule change pursuant to section 15B(b)(2)(C) of the Securities Exchange Act of 1934, as amended, which directs the Board to propose and adopt rules which are:

Designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

##### B. Self-Regulatory Organization's Statement on Burden on Competition

The Board believes that the proposed rule change will not have any impact on

<sup>9</sup> Domestic and international trade input may be submitted together or separately via CCF, but domestic affirmations will continue to be processed shortly after 7:30 p.m. cutoff.

<sup>10</sup> Global custodians and broker-dealers will forward deliver/receive instructions to their sub-custodians to effect foreign settlement.

<sup>11</sup> The ISO format contains fewer elements than the existing ID format. For example, the ISO format does not list trade details or commissions or other information that is likely to be irrelevant to the sub-custodians effecting settlement.

<sup>12</sup> Office of the Secretary, United States Department of the Treasury, *Treasury Bulletin* (various issues).

<sup>13</sup> Securities and Exchange Commission, *Policy Statement on the Regulation of International Securities Markets* (November 1988), *Securities Act Release No. 6807*, 53 FR 46963 (November 21, 1988).



competition since it applies equally to all brokers, dealers and municipal securities dealer.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

The Board neither solicited nor received comments on the proposed rule change.

*III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action*

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section. Copies of such filing also will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 17, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 19, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29633 Filed 12-23-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-26375; File No. SR-NASD-88-47]

**Self-Regulatory Organizations; Notice of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Section 24 of Article III of the Rules of Fair Practice**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on October 12, 1988 the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change and on December 8, 1988 filed Amendment No. 1 thereto as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The proposed rule change amends section 24(b)(2) of Article III of the NASD Rules of Fair Practice and the Board of Governors' Interpretation thereunder to conform the definition of "bona fide research" to the standard announced by the Commission in 1986 with respect to the meaning of "research" under section 28(e) of the Securities Exchange Act of 1934, as amended.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

**A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

The proposed rule change would amend the definition of "bona fide research" which presently is contained in section 24(b) of Article III of the NASD Rules of Fair Practice (hereinafter "section 24(b) definition"). The proposed rule change would also amend present language contained in the Interpretation of the Board of Governors under Section

24 which interprets and explains the section 24(b) definition ("Interpretation").

The definition proposed to be amended and the applicable language of the Interpretation were originally incorporated into the NASD rules as part of a larger package of new rules submitted by the NASD to the Securities and Exchange Commission regulating the granting by NASD members of selling concessions, discounts and other allowances in connection with sales of fixed price offerings.<sup>1</sup> The rule package, including the provisions proposed to be amended by this filing, came to be known as the "Papilsky" rules and were approved by the Commission on December 12, 1980.<sup>2</sup> Present subsection (a)(1) section 24 provides that nothing in the section shall prevent any member from selling any securities which are part of a fixed price offering to any person to whom it has provided or will provide "bona fide research" if the stated public offering price is paid by the purchaser.

The proposed rule change filed herewith would amend section 24(b)(2) which presently excepts certain products and services from being considered "bona fide research". The term "bona fide research" contained in section 24(b) is defined to mean advice, rendered directly or through publications or writings, as to the value of securities, the advisability of investing in, or purchasing or selling securities, and the availability of securities or purchasers or sellers of securities, or analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and performance of accounts; provided, however, that (1) investment management or investment discretionary services, and (2) "products or services that are readily and customarily available and offered to the general public on a commercial basis are not bona fide research." The Interpretation of the NASD Board of Governors adopted under section 24 states that the definition of "bona fide research" is substantially the same as the definition of the term research in section 28(e)(3) of the Securities Exchange Act of 1934, as amended.

<sup>1</sup> The term "fixed price offering" is defined by section 1(m) of Article II of the Rules of Fair Practice to mean the offering of securities at a stated public offering price or prices, with certain specified exceptions, including securities exempted under sections 3(a)(12) and 3(a)(29) of the Exchange Act and certain redeemable securities of registered investment companies.

<sup>2</sup> Securities Exchange Act Release No. 17371 (Dec. 12, 1980).

("Exchange Act"), as interpreted by the Securities and Exchange Commission.

The exclusion from the definition of "bona fide research" provided by subsection (b)(2) of section 24 incorporates into the NASD provision the interpretation of the term "research" under section 28(e)(3) which was published by the Securities and Exchange Commission in Securities Exchange Act Release No. 12251 (March 24, 1976).<sup>3</sup> Thus, section 24(b)(2) presently excludes "products" or services that are readily and customarily available and offered to the general public on a commercial basis." The Board of Governors' Interpretation following section 24, which became effective simultaneously with the effectiveness of section 24, states that for guidance concerning the meaning of "bona fide research" under section 24(b) members should refer to interpretations of the definition of "research" under section 28(e) of the Exchange Act.

The Commission on April 30, 1986, however, withdrew its 1976 standard and announced a revised standard to be used in determining what products and services shall be deemed protected "research" under section 28(e) of the Act. The rule change filed herewith is intended to amend the language of section 24(b)(2) of Article III of the NASD Rules of Fair Practice to eliminate the existing exclusion from the definition of "bona fide research" and to allow, without any other change in the section 24 language, the new standard established by the Commission in its 1986 release interpreting the term "research" under section 28(e) of the Act to determine the parameters of "bona fide research." The Commission in its 1986 release stated that the controlling principle to be used to determine whether something is research under the statute is "whether it provides lawful and appropriate assistance to the money manager in the performance of his investment decision-making responsibilities." The Commission also stated that, under the revised standard of "research", the fact that a product or service is readily and customarily available and offered to the general public on a commercial basis does not dictate the conclusion that the product or service is not research, as was the case under the 1976 standard.

As noted above, the Board of Governors' Interpretation under section 24 states that the exclusion in section 24(b)(2) from the definition of "bona fide research" for products and services

<sup>3</sup> Securities Exchange Act Release No. 12251 (March 24, 1976).

which are commercially available and offered to the general public, was based directly upon the standard established by the Commission in its 1976 release. The 1986 Commission release has substituted a revised and different standard which the NASD Board of Governors believes should be incorporated into section 24 to replace the present language. The Board is concerned that failure to do so will create confusion in the securities industry and among money managers who would be required to use one standard for fixed price public offerings, but could use a totally different standard for other types of securities transactions, such as secondary market trading. Although the Board is aware that elimination of the present standard of section 24(b)(2) may compound the difficulties of enforcement, it nevertheless believes that consistency in the definitions under section 24 of the NASD rules and section 28(e) of the Exchange Act is the more appropriate course to be pursued.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The NASD does not believe that the proposed amendment will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934, as amended.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

The NASD did not publish the proposed rule change for comment, but contemporaneously with this filing with the Commission published Notice to Members 88-72 requesting member vote on the proposed rule change and that any comments be made to the Commission in response to the Commission's publication in the Federal Register of the NASD's proposed rule change. On November 4, 1988 the membership approved the proposed rule change.

*III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action*

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NASD consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR-NASD-88-47 and should be submitted by January 17, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: December 20, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29632 Filed 12-23-88; 8:55am]  
BILLING CODE 8010-01-M

[Release No. 34-26376; File No. SR-NASD-88-49]

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Excused Withdrawal of Quotations from the NASDAQ System Based on Vacation**

The National Association of Securities Dealers, Inc. ("NASD") submitted a proposed rule change on October 31, 1988, pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder to amend Part VI of Schedule D to the NASD By-Laws to add new provisions to permit small market makers to be granted an excused withdrawal of quotations from the NASDAQ system for vacations.

Notice of the proposed rule change together with the substance of the terms of the proposed rule change was given by the issuance of a Commission release (Securities Exchange Act Release No.



26258, November 7, 1988) and by publication in the *Federal Register* (53 FR 45837, November 14, 1988). No comments were received with respect to the proposed rule change.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD and, in particular, with the requirements of section 15A and the rules and regulations thereunder.

IT is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change, SR-NASD-88-49, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Dated: December 20, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29634 Filed 12-23-88; 8:45 am]  
BILLING CODE 8010-01-M

#### SMALL BUSINESS ADMINISTRATION

##### Region I Advisory Council Meeting; Public Meeting

The U.S. Small Business Administration Region I Advisory Council, located in the geographical area of Hartford, will hold a public meeting at 8:00 a.m. on Monday, January 23, 1989 at the Yale Inn, 900 East Main Street, Meriden, Connecticut, 06450, to discuss such matters as may be presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Henry A. Povinelli, District Director, U.S. Small Business Administration, 330 Main Street, Hartford, Connecticut, 203/240-4870.

December 20, 1988.

Jeannette M. Pauli,  
Acting Director, Office of Advisory Councils.  
[FR Doc. 88-29669 Filed 12-23-88; 8:45 am]  
BILLING CODE 8025-01-M

##### Small Business Investment Company; Maximum Annual Cost of Money to Small Concerns

13 CFR 107.302(a) and (b) limit maximum annual Cost of Money (as defined in 13 CFR 107.3) that may be imposed upon a Small Concern in connection with Financing by means of Loans or through the purchase of Debt Securities. The cited regulation incorporates the term "Debt Rate", which is defined elsewhere in 13 CFR 107.3 in terms that require SBA to

publish, from time to time, the rate changed on ten-year debenture sold by Licensees to the public. Notice of this rate will be published upon change in the Debenture Rate.

Accordingly, Licensees are hereby notified that effective the date of publication of this Notice, and until further notice, the Debenture Rate to be used for computation of maximum cost of money pursuant to 13 CFR 107.302 (a) and (b) is 9.75 percent per annum.

13 CFR 107.302 does not supersede or preempt any applicable law imposing an interest ceiling lower than the ceiling imposed by its own terms. Attention is directed to section 308(i) of the Small Business Investment Act, as further amended by section 1 of Pub. L. 99-228, December 28, 1985 (99 Stat. 1744), to that law's Federal override of State usury ceilings, and to its forfeiture and penalty provisions.

(Catalog of Federal Domestic Assistance Program No. 59.011, small business investment companies)

Robert G. Lineberry,  
Deputy Associate Administrator for  
Investment.

Dated: December 21, 1988.

[FR Doc. 88-29670 Filed 12-23-88; 8:45 am]  
BILLING CODE 8025-01-M

#### DEPARTMENT OF TRANSPORTATION

##### Coast Guard

[CGD14 88-01]

##### Vessel Certificates and Exemptions Under the International Regulations for Preventing Collisions at Sea (72 COLREGS)

AGENCY: Coast Guard, DOT.

ACTION: Notice of granting of  
Certificates of Alternative Compliance  
to vessels.

SUMMARY: This notice lists a vessel granted a Certificate of Alternative Compliance. This notice lists a vessel which, due to its special construction and purpose, cannot comply fully with certain provisions of the International Regulations for Preventing Collisions at Sea (72 COLREGS) without interfering with the vessel's special functions. The intent of this notice is to allow the mariner to be aware of the listing of this vessel that has been granted a Certificate of Alternative Compliance.

EFFECTIVE DATE: December 16, 1988.

FOR FURTHER INFORMATION CONTACT:  
CDR Gerald W. Abrams, Chief,  
Commercial Vessel Safety Branch, U.S.  
Coast Guard, Commander (mvs),  
Fourteenth Coast Guard District, PJKK

Federal Bldg., 300 Ala Moana Blvd.,  
Room 9149, Honolulu, Hawaii 96850-  
4982. Telephone (808) 541-2114.

SUPPLEMENTARY INFORMATION: Under the provisions of subsection 1605(c) of Title 33 United States Code, the Coast Guard publishes, in the *Federal Register*, a listing of vessels granted Certificates of Alternative Compliance. Certificates of Alternative Compliance are based on a determination that a vessel cannot comply fully with International Rules of light(s), shape(s), and sound signal provisions without interference with the vessel's special function. The listing consists of vessels granted certificates after authority of issuance was transferred to the Chief of the Marine Safety Division of the Coast Guard Districts on April 1, 1982 (33 CFR Part 81). The alternative allowed results in the closest possible compliance with Annex I of the 72 COLREGS. The following vessel is not in compliance with 72 COLREGS and has been issued a Certificate of Alternative Compliance.

Vessel and Official Number

The following vessel's after masthead light separation from the forward masthead light is less than one half the length of the vessel (Annex I(3)(a)). The length overall of the vessel is 195 feet and the horizontal separation between the lights is 63 feet.

"THE OTHER WOMAN" .. Runmere PTY.  
Ltd. Hull No.  
21.

Dated: December 16, 1988.

A.E. Tanos,  
Captain, U.S. Coast Guard Chief, Marine  
Safety Division, Fourteenth Coast Guard  
District.

[FR Doc. 88-29624 Filed 12-23-88; 8:45 am]  
BILLING CODE 4910-14-M

[CGD8-88-20]

##### Eighth Coast Guard District Industry Day

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: On 18 January 1989, the Commander, Eighth Coast Guard District will sponsor an Industry Day program to provide for an exchange of ideas, opinions and information concerning developments affecting the Coast Guard and the maritime community as well as related industries. The Industry Day program will be held at the Sheraton-New Orleans in New Orleans, LA.

The format for the day will be as follows:

7:15 a.m. Registration begins

8:00 a.m. General session; greeting,  
opening remarks

8:45 a.m. Group discussions; four  
separate, small group discussions  
focusing on the Deep Sea Industry,  
Offshore Oil/Support Industry,  
Towing Industry and Shore Side  
Facilities

11:15 a.m. No host cocktails

12:00 p.m. No host lunch (cost \$15.00)

2:00 p.m. Resume small group  
discussions

3:00 p.m. General session; closing  
remarks, adjournment

Tentative topics of discussion for the  
small groups are:

a. Platform Self-Inspection program

b. Low water problems

c. Zero Tolerance

d. Drug Testing

e. New licensing regulations

f. MARPOL Annex V

g. Liftboats, Offshore Supply Vessels

Persons desiring to attend the program are encouraged to provide additional topics for consideration. Preregistration for the program is required. Contact the below named officer to submit topics for discussion and to obtain registration forms. Topic suggestions and lunch reservations must be received by 4 January 1989.

DATE: 18 January 1989, 8:00 a.m. to 5:00 p.m.

ADDRESS: Sheraton-New Orleans Hotel,  
500 Canal Street, New Orleans, LA  
70130.

FOR FURTHER INFORMATION CONTACT:  
LCDR Robert L. Knapp, USCG, c/o  
Commander (mvs), Eighth Coast Guard  
District, Hale Boggs Federal Building,  
Room 1341, 500 Camp Street, New  
Orleans, LA 70130-3396; telephone  
number (504) 589-6271.

Dated: December 12, 1988.

A.E. Henn,

Acting Captain, U.S. Coast Guard,  
Commander, 8th Coast Guard District.

[FR Doc. 88-29625 Filed 12-23-88; 8:45 am]

BILLING CODE 4910-14-M

#### DEPARTMENT OF TREASURY

##### Internal Revenue Service

##### Exempt Organizations Advisory Group; Open Meeting

The Exempt Organizations Advisory Group will meet from 9:30 a.m. to approximately noontime on Tuesday, January 10, 1989. The meeting will be held in room 3313 of the Internal Revenue Service National Office Building, 1111 Constitution Avenue, NW., Washington, DC.

Among the agenda items for the meeting are a discussion of revised

proposed regulations under sections 501(h) and 4911 relating to lobbying activities by charitable organizations; charitable fundraising solicitations and the requirements of Revenue Ruling 67-246; and a discussion of possible changes to the annual information return reporting requirements for exempt organizations for 1989.

The meeting will be open to the public, although seating will be limited. Opportunity for public statements will be provided at the end of the meeting, or at other appropriate intervals, to the extent that time permits.

Brief written comments of no more than two double-spaced pages relating to each announced agenda topic will be accepted from members of the public by the Service for consideration as a discussion item by the Advisory Group. Comments should be sent by January 5, 1989, to the Assistant Commissioner (Employee Plans and Exempt Organizations), Attn: EOCAG, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224.

For additional information contact Robert I. Brauer, Assistant Commissioner (Employee Plans and Exempt Organizations), telephone (202) 566-3171 (not toll-free).

Lawrence B. Gibbs,  
Commissioner.

[FR Doc. 88-29607 Filed 12-23-88; 8:45 am]

BILLING CODE 4830-01-M



## Sunshine Act Meetings

Federal Register

Vol. 53, No. 248

Tuesday, December 27, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

### FEDERAL DEPOSIT INSURANCE CORPORATION

#### Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 3:48 p.m. on Tuesday, December 20, 1988, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session, by telephone conference call, to consider: (1) A

recommendation regarding certain delegations of authority with respect to a merger type transaction; and (2) matters relating to an assistance agreement pursuant to section 13(c) of the Federal Deposit Insurance Act.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), seconded by Mr. Robert L. Clarke (Comptroller of the Currency), concurred in by Chairman L. William Seidman, that Corporation business required its consideration of the matters in less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require

consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(8), (c)(9)(A)(ii), and (c)(9)(B)).

Dated: December 21, 1988.

Federal Deposit Insurance Corporation

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 88-29674 Filed 12-22-88; 9:24 am]

BILLING CODE 6714-01-M

Tuesday  
December 27, 1988

## Part II

## Department of Commerce

International Trade Administration

19 CFR Part 355

Countervailing Duties; Final Rule

federal register



## DEPARTMENT OF COMMERCE

## International Trade Administration

## 19 CFR Part 355

[Docket No. 50448-8214]

## Countervailing Duties

**AGENCY:** International Trade Administration (Import Administration), Department of Commerce.

**ACTION:** Final rule.

**SUMMARY:** The International Trade Administration hereby revises its regulations on countervailing duty proceedings to implement the provisions in Title VI of the Trade and Tariff Act of 1984 concerning countervailing duties and to modify in other respects provisions in the version of Part 355 that has been in effect since 1980. The modifications are intended to improve administration of the countervailing duty provisions of the Tariff Act of 1930.

**EFFECTIVE DATE:** The effective date of this Part 355 is January 26, 1989 except that the effective date of § 355.22(a) and (c) of this Part 355 is March 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Stephen J. Powell, Chief Counsel for Import Administration, Room B-099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230. (202) 377-8915.

## SUPPLEMENTARY INFORMATION:

## Classification

## Executive Order 12291

The International Trade Administration ("ITA") has determined that this final revision of the existing countervailing duty regulations in 19 Code of Federal Regulations ("CFR") Part 355 is not a major rule as defined in section 1(b) of Executive Order 12291 (46 FR 13193, February 19, 1981) because it will not: (1) have a major monetary effect on the economy; (2) result in a major increase in costs or prices; or (3) have a significant adverse effect on competition (domestic or foreign), employment, investment, productivity, or innovation.

## Executive Order 12612

These regulations do not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612 (52 FR 41885, October 30, 1987).

## Paperwork Reduction Act

The information collection requirement contained in 19 CFR Part

355 has been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and has been assigned OMB control number 0625-0148. ITA estimates an average of 40 burden hours to submit a petition. Any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden may be sent to the Department at the above address or to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

## Regulatory Flexibility Act

The General Counsel of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small business entities because, to the extent it changes existing practices, the rule simply improves the administration of the countervailing duty provisions of the Tariff Act of 1930, as amended. As a result, a Regulatory Flexibility Analysis was not prepared.

## Background

The existing countervailing duty regulations in Subparts A, B, C, and E of 19 CFR Part 355 (45 FR 4932, January 22, 1980, as amended by 49 FR 22466, May 30, 1984; 50 FR 5746, February 12, 1985; 50 FR 32556, August 13, 1985; and 52 FR 30660, August 17, 1987) are based on Subtitles A, C, and D of Title I of the Trade Agreements Act of 1979 ("Trade Agreements Act"), which amended section 303 and Title VII of the Tariff Act of 1930 (19 U.S.C. Subtitle IV, Parts I, III and IV) ("Act"). Title VI of the Trade and Tariff Act of 1984 (Pub. L. No. 98-573, October 30, 1984) ("1984 Act") amended those provisions of the Act, effective on the dates specified in section 1886(b) of the Tax Reform Act of 1986 (Pub. L. No. 99-514, October 22, 1986). The existing regulations relating to subsidies on quota cheese in Subpart D of 19 CFR Part 355 (45 FR 74460, November 10, 1980) are based on section 702 of the Trade Agreements Act (19 U.S.C. 1202 note).

Some of the changes to the existing countervailing duty regulations are necessary to implement the amendments made by the 1984 Act. Other changes: (1) incorporate existing administrative interpretations and practices, not currently stated in the regulations, that will continue under the amended statute; (2) improve administrative efficiency in countervailing duty proceedings; or (3) simplify the language of existing regulations. The Department

currently is drafting a proposed rule and request for comments to implement the amendments made by the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). This final rule does not reflect changes required by the 1988 Act, except that we have referred to certain changes made by the 1988 Act in response to comments on §§ 355.2(i), 355.2(l), 355.2(t), 355.13(a), 355.15, 355.16(b), and 355.34(a). The final rule printed here (Part 355) replaces the entire text of Part 355 that has been in effect since January 22, 1980 (45 FR 4932).

The Department has considered carefully all of the comments received in response to the proposed rule and request for comments on 19 CFR Part 355 that was published on June 10, 1985 (50 FR 24207). These comments, and the Department's responses to them, are summarized below.

## Index

**Comment:** One party suggests that the Department establish a "unified sub-index" of time limits.

**Department's Position:** We agree that a consolidated listing of time limits might be helpful. We have added as Annex II a list of time limits and a reference to the section in which each appears.

## Sec. 355.1

**Comment:** One party suggests that the Department add a paragraph specifically setting forth the times when an injury test is required under section 303 of the Act. For example, an injury test is required for duty-free products from signatories to the General Agreement of Tariffs and Trade ("GATT").

The same party also requests that the Department specifically state the procedures to be followed in a proceeding when a country becomes a "country under the Agreement."

**Department's Position:** The question of when injury tests are required is not an appropriate rulemaking issue for the Department of Commerce ("the Department"). The Department does agree that it could not impose countervailing duties on duty-free imports from GATT signatories absent an injury test.

Information on the procedures to be followed when a country becomes a country under the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT ("The Agreement") is contained in sections 102 and 104 of the Trade Agreements Act, 19 U.S.C. 1671 note. For countries that become countries under

the Agreement after the dates specified in these provisions, procedures will be based on the accords surrounding signature of the Subsidies Code, other agreements, and the U.S. Trade Representative's ("USTR") declaration that the country is to be accorded country under the Agreement status. No rulemaking is required.

## Sec. 355.2(h)

**Comment:** One party wants to know if "like product" should be defined.

Another party argues that the regulation improperly deletes part of the statutory definition of industry and authorizes the exclusion of importers from the industry. The legislative history of the 1984 Act shows that section 771(4)(B) was intended to allow the Commission to exclude importers in injury determinations, not to allow the Department to do so in determining standing to file a petition.

Another party requests that the Department affirm its practice of presuming that a petitioner has filed an action on behalf of an industry unless and until significant opposition from other domestic producers has been presented. This party also is troubled by the reference to "the like product" (emphasis added) in the first sentence of the proposed regulation. The party argues that the use of the word "the," combined with the Department's stated intention to consult with the International Trade Commission ("Commission") on the decision concerning the like product, is overly restrictive, likely to be contentious, and goes beyond the legislative intent of the standing requirement—"to prevent companies or individuals with no interest from commencing an investigation." Furthermore, this party believes that the Department's proposal would permit circumvention of the decision in *Roses Inc. v. United States*, 706 F.2d 1563 (Fed. Cir. 1983), which does not permit the Department to receive views from importers or foreign producers prior to a determination to initiate.

**Department's Position:** We see no need to attempt a more precise definition than that contained in section 771(10) of the Act. The substantial body of determinations by the Commission, as well as the practice before that agency, provide a substantial basis for understanding what the term means.

Although the legislative history does not explicitly address standing requirements in discussing the definition of "industry," the meaning of "industry" is integral not only to the Commission's determinations of injury but also to the Department's decision on standing

under section 702(b)(1) of the Act. The proposed regulatory definition highlights those parts of the definition in section 771(4) of the Act which are relevant to standing. The part of the definition which refers to producers of a "major proportion" of the total domestic production is not pertinent to standing because applying it could result in a petition that has the support of just over one quarter of the domestic industry, as the following analysis shows. Section 702(b)(1) requires that a petition be filed "on behalf of" an industry. Both the Court of International Trade, in *Gilmore Steel Corp. v. United States*, 7 CIT 219 (1984), and the Department, in *Certain Textile Mill Products and Apparel from Malaysia*, 50 FR 9852 (1985), interpret the "on behalf of" language to mean that standing can be defeated if a majority of the concerned industry opposes the petition. If "industry" is defined as a simple majority ("a major proportion") of total domestic production, and "on behalf of" is also a mere majority, then a petitioner filing "on behalf of an industry" would have standing as long as a majority of the majority of the industry did not oppose the petition. If a petition may be filed "on behalf of" producers of a "major proportion" of total domestic production, arguably opposition by even a substantial majority of U.S. producers would not suffice to show lack of standing. This result was not intended by the requirement to file on behalf of an industry. Because this conclusion contradicts and confuses the intent of the requirement to file on behalf of an industry, the "major proportion" of the industry element of the definition is not pertinent for standing purposes.

As to our proposed inclusion of the related party provision of section 771(4)(B) of the Act, the Court in *Gilmore* indicated that it believes the Department may exclude importers from the industry for standing purposes if appropriate. 7 CIT at 226-27 (*dicta*). The Department has used this provision on a number of occasions. See, e.g., *Frozen Concentrated Orange Juice from Brazil*, 52 FR 8324 (1987); *Fabricated Auto Glass from Mexico*, 50 FR 1906 (1985). The Department finds the proposed regulatory definition to be the appropriate one for purposes of identifying those producers with a stake in the outcome. *Gilmore Steel Corp. v. United States*, 7 CIT at 224. For these reasons, the comment is not adopted.

As we stated in *Certain Textile Mill Products and Apparel from Malaysia*, 50 FR 9852, 9853 (1985), the holding in *Gilmore* "does not amount to a requirement that a petitioner somehow prove, when a petition is filed, that at

least 51 percent of an industry has expressed itself in support of a petition." The proposed regulation does not disturb existing practice in this regard.

The phrase "the like product" appears in the existing regulation and its use here will not result in a change in agency practice. The use of "the," as opposed to "a," in referring to like product and the Department's intention to consult with the Commission are not intended to be overly restrictive or to go beyond Congressional intent with respect to the standing requirement. Pre-initiation consultations with the Commission at the staff level permit the Department to draw on that agency's expertise and its knowledge of the injury requirements for initiation of a proceeding. In addition, the regulation does not circumvent the teaching in *Roses* on pre-initiation contact with potential interested parties that might be adversely affected by an investigation and order. *Roses* does not limit the Department's pre-initiation communications with the Commission.

## Sec. 355.2(i)(3), (i)(4), and (i)(5)

**Comment:** One party contends that in defining "interested party," retailers should not be excluded *per se*. Retailers should have the opportunity to participate if the Department's determination will affect them.

**Department's Position:** Section 771(9) of the Act is limited to resellers at the wholesale level. In accordance with current practice, we have revised paragraphs (i)(3), (i)(4), and (i)(5) to refer to sellers of the like product produced in the United States.

We also note that we are drafting a regulation to implement section 1326(c) of the 1988 Act, which expands the definition of interested parties to include, in investigations involving processed agricultural products, a coalition or trade association representative of (a) processors, (b) processors and producers, or (c) processors and growers.

## Sec. 355.2 (j) and (n)

**Comment:** Two parties state that in these sections the Department assumes that it has the authority to terminate investigations on the basis of rescissions of initiations or investigations. The Act does not confer such authority. Either the Department should delete this provision or promulgate rules stipulating the claimed legal authority and the conditions under which such rescissions will occur.

**Department's Position:** The Department has the authority to reconsider a determination to initiate an



investigation and to act to correct manifest error which taints the proceeding. The issue considered in *Gilmore Steel Corp. v. United States*, 7 CIT 219 (1984) was standing. Since 1983, the Department has rescinded all or parts of initiations in ten cases. Several dealt with standing, two with the issue of subsidies in nonmarket economies, and one with programs previously found not to be countervailable. See, e.g., *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986); *Certain Textile Mill Products and Apparel from Turkey*, 50 FR 9186 (1985); *Unprocessed Float Glass from Mexico*, 48 FR 58095 (1983).

We note that because a suspension of investigation does not "end" an investigation, we have deleted that phrase from paragraph (j).

#### Sec. 355.2(k)

**Note:** As stated in the preamble to the proposed rule, paragraph (k) defines "the merchandise." The definition avoids continual repetition throughout the regulations of the phrase "the class or kind of merchandise imported or sold, or likely to be sold, for importation into the United States, that is the subject of the proceeding."

#### Sec. 355.2(l)

**Comment:** All parties commenting on this section object to the limitation of "parties to the proceeding" to those which participate in a particular decision by the Secretary through the submission of factual information or written argument. The parties generally argue that the provision is an attempt by the Department to define, without statutory authority, the jurisdiction of federal courts. One party argues that the provision is an unconstitutional usurpation of Congress' authority to define the jurisdiction of Article III courts. Others argue that the definition is too limited; U.S. and state courts have held that a party not actively participating in a proceeding has a right to appeal a decision reached in the course of that proceeding.

Others argue that the provision is not in accordance with Congress' intention of streamlining and reducing the cost of countervailing duty proceedings, and will result in needless duplication of effort by interested parties through protective filings. Recommended definitions include: (1) none; (2) any interested party entering a notice of appearance (with or without time limit); and (3) the proposed provision, a notice of appearance, or any party which qualified under the proposed provision during the preceding three years.

**Department's Position:** The Department must define the term "party

to the proceeding." Section 703(b)(3) of the Tariff Act provides for disclosure of information to "any interested party, then a party to the proceedings" and section 777(c)(1)(A) of the Act, as amended by the 1988 Act, limits disclosure of business proprietary information to "all interested parties who are parties to the proceeding \* \* \*." Furthermore, the term "party to the investigation," a term that the Department interprets as being synonymous with "party to the proceeding," appears a number of times in the statute. See, e.g., section 774(a)(1), dealing with requests for hearings.

As to the arguments that the Department is attempting to limit a party's right to appeal to the court, we believe the comments prove too much. It is the province of Congress to regulate trade, but that does not argue that the Department has no authority to interpret statutory enactments on trade matters through its regulations. Section 516A(d) of the Act limits standing before the court to "[a]ny interested party who was a party to the proceeding under section 303 of this Act or title VII of this Act \* \* \*." Those proceedings are administrative processes carried out before the Department and subject to its rules. We believe the court will benefit from the agency's expertise as to the minimum participation in the administrative process that will make possible the party's exhaustion of its administrative remedies, so that the time of the court and the parties will not be spent needlessly on matters that could have been addressed and resolved by the agency in the first instance. The court may disagree in the circumstances of a particular case that adherence to the regulatory requirements was consistent with Congressional intent, but that does not argue for ignoring our obligation to ensure, to the extent possible, the orderly, efficient, and equitable implementation of the law.

Finally, the Department does not believe that the definition places an unreasonable burden on interested parties. To the extent that parties wish to make clear their right to litigate issues raised by other parties, they may incorporate by reference the other parties' comments in whole or in part. If the parties' positions differ, then the Department believes that the second party has an obligation to raise its argument with the administering authority before litigating the issue.

#### Sec. 355.2(p)

**Comment:** Several parties state that by limiting the definition of "likely sale" to an "irrevocable offer to sell," the Department has in effect limited the

Commission's ability to consider a case in which revocable offers to sell may be found to constitute a threat of material injury. One party suggests that we modify the regulation either by dropping the requirement that offers be irrevocable or by creating a rebuttable presumption that all offers are irrevocable.

Another party objects to the Department's practice (stated in the preamble to the proposed rule) of considering likely sales only in the event that there are no consummated sales in the relevant foreign markets. For instance, the party cites the possibility that a foreign bid for a major long-term contract may be subsidized, forcing domestic producers to restructure their proposals in order to remain competitive, even though other recent sales by the same foreign producers are not subsidized.

Another party states that it is inconsistent with the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade ("the Agreement") to initiate an investigation before the merchandise is imported.

**Department's Position:** The Department has defined the term "likely sale" in order to cover the situations where actionable unfair trade practices can be reasonably expected to exist. The issue to be addressed is the likelihood that a sale will be made. In our view, that can occur only when an offer is irrevocable for some time period sufficient to indicate a likelihood of sale. Revocable offers encompass such a wide spectrum of activities as to provide no measure of the likelihood of sales. The definition would not preclude the Commission from considering revocable offers in determining the threat of injury, provided that the Department has initiated an investigation. We have decided to retain the requirement that offers be irrevocable, without adding a rebuttable presumption, because we believe the provision is administrable and reasonable as drafted.

Regarding the practice on consideration of likely sales, the Department continues to believe that sales generally are a more appropriate measure of market activity than are offers. The manner in which the Department defines the period of the investigation will most often deal with the problem identified by the commenter. In the unusual situation where that is not the case, the Department may consider both sales and offers.

Regarding initiations prior to importation of the merchandise, the regulation is based on the U.S. statute, which itself is consistent with the Agreement. The GATT (Article VI) and the Agreement (Article 2) permit the importing country to commence an investigation to determine the existence, degree, and effect of any alleged subsidy on merchandise once it becomes apparent that a particular import will benefit from subsidies. Evidence of an irrevocable offer to sell or a sale is sufficient evidence to satisfy the requirement in Article 2 that there be "subsidized imports." It would undermine the purpose of the GATT and the Agreement to interpret narrowly and literally the phrase "subsidized imports" in Article 2(1). Neither the Agreement nor the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade requires such an interpretation. In certain situations, such as large capital equipment purchases, implementing the Agreement's authority to impose countervailing duties on "subsidized imports" requires that the investigation be initiated prior to the actual importation. See, e.g., *Railcars from Canada*, 48 FR 6569 (1983). We believe the drafters of the Agreement intended this result, because the contrary interpretation reduces the Agreement's authority to a nullity in those situations. Of course, no countervailing (or antidumping) duties are levied until the merchandise is imported in the formal Customs sense.

Although all of the comments focused on the likely sale issue, we note that section 1327 of the 1988 Act lists the factors to be considered in deciding whether a lease is equivalent to a sale. These factors are the terms of the lease, normal commercial practice within the industry, the circumstances of the specific transaction, the integration of the product into the operation of the lessee or importer, the likelihood of continuation or renewal of the lease over a significant period of time, and other relevant factors, including the possibility of avoidance of antidumping or countervailing duties.

#### Sec. 355.3

**Comment:** One party requests that respondents and petitioners not be required to resubmit evidence or documents that are already in the Department's possession. To reduce the burden, the resubmission should be waived if the submitter can identify the location of the requested data in the Department's files or in the Subsidy Library. These documents could be made part of the court record without

physically inserting them into the record.

**Department's Position:** The burden that would be created, and the potential disruption to an orderly proceeding that would result, given the enormous volume of records, does not permit the Department to provide this service. See also the Department's response to comments on § 355.34(b).

#### Sec. 355.3(a)

**Comment:** One party asks if the verifier's personal notes and verification documents that are neither important nor material to the factual assertions in the verification (except as secondary corroboration) should be included in the official record.

Another party objects to the narrow time window for filing factual information to be included in the official record. All information submitted and not returned by the Department should become part of the official record. Otherwise, petitioners are penalized for delays caused by respondents' late (but not "untimely") filings or the Department's late release of administrative protective order ("APO") material.

**Department's Position:** The verifier's notes are not part of the official record because such notes merely form the first draft of the final verification report. As for verification documents, those which clearly are not pertinent (whatever their "importance") will be excluded from the record.

We believe that our retention as part of the official record of untimely submitted documents would erode the principle of timely filings and in turn would jeopardize our ability to review submissions with care within the statutory deadlines for completion of an investigation or review. Therefore, we will not include in the official record (i.e., will return to the submitter) any untimely filings. We do not believe that any party should be disadvantaged as a result of late actions by another party or by the Department. The Department, therefore, will strictly enforce its deadlines to avoid such results.

We note that we have clarified that documents returned to a submitter under §§ 355.31(b)(2) and 355.32(g) will not be included in the official record. All untimely or nonconforming submissions will be returned to the submitter with written notice stating the reasons for return of the documents. The written notice, which will detail the untimely or nonconforming nature of the submission, will be placed in the record of the proceeding.

#### Sec. 355.3(b)

**Comment:** One party contends that the public record of proceedings should contain material that can be disclosed to the public, rather than just what "the Secretary decides can be disclosed."

Another party also seeks uniformity between the definitions of "public record" and "public information." It is not clear whether all "public information" would have to be included in the public record.

**Department's Position:** The Department believes there may be some ambiguity between §§ 355.3(b) and 355.4(a). We are altering the second sentence of § 355.3(b) to read as follows: "The record will consist of all material described in paragraph (a) of this section that the Secretary decides is public information within the meaning of § 355.4(a), government memoranda or portions of memoranda that the Secretary decides may be disclosed to the general public, plus public versions of all determinations, notices, and transcripts."

#### Sec. 355.4

**Comment:** One party suggests that § 355.4 come immediately before § 355.32 for unity of subject matter. Also, § 355.33 is redundant in view of § 355.4.

**Department's Position:** Although the text of § 355.4 logically could be placed in Subpart C, we prefer to leave that text in Subpart A. As for the second point, we believe § 355.4 is definitional and § 355.33 is operational.

#### Sec. 355.4(a)

**Comment:** One party states that the Department's proposed standards for proprietary treatment are inadequate. Under the regulation, factual information in a form which cannot be associated with or used to identify a particular firm nonetheless may be proprietary for that firm. An example would be marketing strategies.

Another party suggests the inclusion of those portions of the Department's memoranda, memoranda of *ex parte* meetings, and transcripts cited at § 355.3(a) which do not contain proprietary, privileged, or classified information within the category of "public information." Also, "other official documents" in § 355.4(a)(4) should read "other published documents," because official documents contain proprietary, classified, or otherwise privileged information and are not necessarily public.

**Department's Position:** The Department may deviate from the list of normally public information if the

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submitter presents a convincing argument of harm. Rather than modify § 355.4(a)(3), we will entertain such arguments on a case-by-case basis.

We have already addressed the first part of the second comment in our response to the comment on § 355.3(b). As for the second argument, we agree and are amending § 355.4(a)(4) to read "publicly available laws, regulations, decrees, orders, and other official documents of a country, including English translations."

#### Sec. 355.4(b)

**Comment:** One party suggests that the proprietary nature of any enumerated exceptions should be judged by the same standards as other information for which proprietary treatment is requested. The types of information enumerated (that will not be given proprietary treatment) may be valuable to competitors, revealing marketing areas, a shift in customer focus, or the timing of new marketing efforts.

Another party also suggests that the exceptions in paragraphs (b)(3) and (b)(6) be deleted.

A third party suggests changing the terminology to "confidential" to conform with section 777 of the Act. This section should also state that "proprietary" information is a class of "confidential" information, because "confidential" is more of a red-flag to alert document users.

**Department's Position:** We will entertain on a case-by-case basis arguments against the parenthetical exceptions listed in § 355.4(b). As we stated in the proposed rulemaking, the list of exceptions reflects our experience with information submitted in proceedings. It attempts to eliminate unnecessary disagreement over documents that generally fall into one category or another.

Section 777 of the Act was amended in 1986 to strike out the words "confidential," "confidentiality," and "non-confidential" throughout that section and insert instead "proprietary," "proprietary status," and "non-proprietary," respectively. See Tax Reform Act of 1986, Pub. L. No. 99-514, section 1886(a)(18), 100 Stat. 2085 (1986). This technical amendment accomplished the stated purpose of the House-Senate conference on the 1984 Act. See H. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 178 (1984). The term "confidential" is used specifically to identify a national security classification referred to in paragraph (d) of this section and § 355.33. "Proprietary" has a different meaning.

#### Sec. 355.4(b)(5)

**Comment:** One party suggests that dates and order numbers be proprietary because they may disclose customer identities.

**Department's Position:** We have addressed this comment in the discussion of our position on § 355.4(b).

#### Sec. 355.4(b)(6)

**Comment:** One party states that the parenthetical phrase in paragraph (b)(6) should include the designation of the type of distributor and supplier. The proposed rule specifies only the type of customer. This party also suggests adding a paragraph to clarify whether the Department treats customer codes as proprietary information. The party urges the Department to extend proprietary treatment to the codes in order to avoid inadvertent disclosure of customer names and sales patterns.

**Department's Position:** We agree with the suggestion for parallel construction in the parenthetical phrase, so that the phrase would include a reference to "designation of type of customer, distributor, or supplier," and have modified the regulation accordingly. As for customer codes, we believe that the encoding sheets, but not the encoded names, should be proprietary. We have already included the encoding sheets within the description of proprietary material, because such sheets must by definition contain customer names. In other words, we would give proprietary treatment to customer, distributor, and supplier names in whatever documents they might be presented to the Department, including encoding sheets. If customer codes alone are sufficient to reveal proprietary information in a particular situation, the Department would consider a request by the submitter to protect such codes from public disclosure.

#### Sec. 355.4(b)(7)

**Comment:** Another party suggests adding to the list of public information, with the burden on the submitter to establish the contrary, items such as price lists distributed to a group of customers, subsidy amounts available to the general public, and the total amount of subsidy benefits by program given by a government.

**Department's Position:** Price lists may be public information of a type described in paragraph (a)(1) or (a)(2) of this section, or proprietary information described in paragraph (b)(5). We cannot presume that limited distribution of a price list to a specific group of customers constitutes public availability. For example, sellers may

circulate different price lists to different groups of customers and expect prospective customers to protect the information as proprietary.

We agree that subsidy amounts that are publicly stated (e.g., through press releases or public statements of government officials or others) presumptively are not proprietary, and thus we are amending the exceptions in paragraph (b)(7) to so state. We do not agree that the total amount given by a government through a particular program should be presumptively public information, unless the government has made the amount public.

#### Sec. 355.5

**Comment:** One party suggests that, as a method of better informing the public, the Department should develop and maintain a compendium of issues and precedents as part of the Subsidy Library.

**Department's Position:** Although a laudable goal, we do not currently have the resources to undertake this substantial task. In notices of determinations published in the Federal Register, we state each significant issue and describe the Department's position on it. There are private services available for researching those notices.

#### Sec. 355.7

**Note:** These rules include the regulation promulgated on August 17, 1987 (52 FR 30660) regarding *de minimis* net subsidies. The provision has been renumbered from § 355.8 to § 355.7.

#### Sec. 355.11

**Comment:** One party asks what standards apply to a determination to self-initiate an investigation, and whether the Department might self-initiate an investigation under § 355.11 rather than an administrative review under § 355.22(i) for the purpose of complying with section 762 of the Act.

**Department's Position:** As provided in section 702(a) of the Act, the standards for self-initiation are stated in section 701(a) of the Act. The determination must be based on available information. Regarding implementation of section 762(b) of the Act, as added by the 1984 Act, we believe that initiation of an administrative review rather than an investigation is appropriate. The proceeding is *sui generis*. It is initiated "at the direction of the President," and there is no indication in section 762 that time limits for investigations would apply. Because many sections in Subpart B of the regulations relating to investigations are inapplicable to these

proceedings, the special procedures described in § 355.22(i) are appropriate.

#### Sec. 355.12(a)

**Note:** See Department's position on § 355.13(a) for the explanation of a change to this paragraph.

#### Sec. 355.12(b)

**Comment:** Two parties state that the regulation should clarify that the administering authority will determine whether information is "reasonably available" in light of the circumstances of each petitioner. Another party urges the Department to continue to define the requirement "loosely" and to provide "counsel and assistance" to petitioners that do not have the resources to develop the required information on their own.

**Department's Position:** In deciding whether to initiate an investigation, the Department's practice is to take into account the ability of the petitioner to obtain information in support of the petition. The type and quantity of relevant information that is reasonably available to a large corporation in a well-defined industry may not be available to a small company in an emerging or less well-defined industry. The Department's practice of considering the size and nature of the business and industry in deciding what information is "reasonably available" is not changed in this section. Moreover, this rule contains a new paragraph (i) in § 355.12 which specifically provides for technical assistance to small businesses. The Department has consistently provided such assistance on request.

#### Sec. 355.12(b)(2)

**Comment:** One party states that the regulation should specify on what basis (e.g., production or sales) the petitioner should determine the companies that account for two percent of the industry. Two parties state that the regulation should not require the names and addresses of members of the industry not supporting the petition because this information is not an element necessary to obtain relief and, therefore, not a statutory requirement. Several parties express concern that the regulation would unduly burden petitioners and might cause petitioners to violate U.S. antitrust laws in seeking proprietary information about their competitors' market shares. One party contends that the regulation should define the phrase "on behalf of" an industry.

**Department's Position:** We have modified the parenthetical phrase in paragraph (b)(2) to clarify that two percent of the industry may be measured either in terms of sales or

production levels. In addition, we have modified this provision to clarify that, in deciding whether a person in the industry accounts for two percent or more of the industry, the petitioner may rely on publicly available information only. The Department includes the two percent cut-off only to reduce the potential burden on the petitioner in industries that include a large number of small firms. In satisfying the requirements of paragraph (b)(2), the Department does not expect petitioners to obtain business proprietary information from other persons in the industry or otherwise to engage in activity that arguably might call into play the U.S. antitrust laws. We believe there are many methods of gathering the information that would not present a problem.

The requirement to include the names and addresses of other persons in the industry is consistent with the requirement that the petition be filed "on behalf of" an industry. Obviously, the identity of persons that comprise the industry is an important fact relevant to petitioner's assertion. This is especially true with respect to known opponents of the petition. As explained in our response to comments on § 355.12(b), the Department will consider the size and nature of the business and industry in deciding what information is reasonably available to a petitioner.

We see no need to define the phrase "on behalf of" an industry because the phrase speaks for itself. The Department will continue to rely on the petitioner's representation of industry support. Neither the statute nor the legislative history requires the petitioner to establish affirmatively that it has the support of a particular percentage of the members of an industry. See the Department's response to comments on § 355.2(h).

#### Sec. 355.12(b)(3)

**Comment:** One party recommends that we broaden the requirement in this paragraph to include "the petitioner and anyone purported to be represented by the petitioner."

**Department's Position:** We see no need for this proposed modification. The Department routinely obtains from other agencies relevant information on other trade law proceedings. It is important to minimize the burden on petitioners.

#### Sec. 355.12(b)(4)

**Comment:** Two parties object to a comment in the preamble of the proposed rule that "the petitioner's description of the merchandise does not necessarily determine the scope of an investigation" and that "[i]n some

instances the Secretary may expand or contract the class or kind of merchandise under investigation to conduct an adequate investigation." They contend that these statements are contrary to the Department's longstanding practice and the rulings of the Court of International Trade.

**Department's Position:** Congress has recognized that "the administrators of the law have reasonable discretion to identify the most appropriate group of products for purposes of both the subsidy and injury investigations." S. Rep. No. 249, 98th Cong., 1st Sess. 45 (1979). Moreover, the Court of International Trade has acknowledged that the Department has authority to clarify the description of the class or kind of merchandise contained in the petition. *Mitsubishi Electric Corp. v. United States*, Slip Op. 88-152, 12 CIT (October 31, 1988); *Kokusai Electric Co. Ltd. v. United States*, Slip Op. 86-29, 10 CIT (March 14, 1986). The Court also has recognized that the Department has the authority to define the scope of an investigation. *Diversified Products Corp. v. United States*, 6 CIT 155, 159 (1983) (citing *Royal Business Machines v. United States*, 1 CIT 80, 87 n.18 (1980), *aff'd*, 669 F.2d 691 (Fed. Cir. 1982)). This authority is important for the purpose of ensuring that the Department's orders are administrable, clear, enforceable, and adequate to protect the U.S. industry from the unfair trade practices covered by the statute. In defining the class or kind of merchandise, the Department may, for example, rely on information not available to the petitioner and conclude that the petitioner's statement of class or kind is inadequate to prevent easy circumvention of the order.

We have modified this paragraph to delete the reference to the Tariff Schedules of the United States. The reference to "U.S. tariff classification" in the final rule would cover the Harmonized Tariff System when it is implemented in the United States.

#### Sec. 355.12(b)(6)

**Comment:** Several parties object to the requirement that the petition state the proportion of total exports to the United States from each person alleged to have benefitted from a subsidy. They contend that the information is irrelevant to the purpose of the petition and often difficult or impossible for the petitioner to obtain, and that the requirement is contrary to the Congressional intent to reduce the cost of filing a petition. They suggest that this requirement be deleted.

**Department's Position:** The information on exports to the United



States is not irrelevant because the Department uses such information in the preparation of questionnaires and the review of questionnaire responses. Therefore, to the extent that this information is reasonably available to the petitioner, it should be reported in the petition. To the extent that it would be unduly burdensome, difficult, or impossible for a petitioner to obtain this information, the petition would be acceptable without it. As we stated in response to the comments on paragraph (b)(2) of this section, the petitioner may rely on publicly available information.

#### Sec. 355.12(b)(7)

**Comment:** One party urges the Department to be flexible in applying this provision to U.S. small business petitioners.

**Department's Position:** See the Department's response to comments on § 355.12(b).

#### Sec. 355.12(b)(8)

**Comment:** Two parties urge adoption of a 0.5 percent *de minimis* standard for measuring whether the upstream subsidy has a "significant effect" on the cost of producing the merchandise.

Another party suggests that the regulations be expanded in order to discourage "fishing expeditions" regarding suspected input subsidies. The party would have the Department require, under paragraph (b)(8)(i), information on the production process in which the input product is utilized and, under paragraph (b)(8)(ii), information showing that the price of the input product is lower than the price that the producer would otherwise pay to an arm's length seller.

**Department's Position:** The House Committee on Ways and Means explained that the purpose of the "significant effects" test "is to avoid needless investigation and verification of upstream subsidies which, although passed through to the final merchandise, are insignificant in affecting the competitiveness of that final product." H.R. Rep. No. 725, 98th Cong., 2d Sess. 34 (1984). We interpret this statement to mean that an effect on the cost of producing the final product is significant when the upstream subsidy significantly affects the competitiveness of that final product. Whether or not 0.5 percent is significant, therefore, may depend on factors such as the degree to which the final product competes on the basis of price. Because our experience with section 771A is still relatively limited, we are not prepared at this time to establish in the regulation a fixed threshold for significant effect and prefer instead to address this issue on a

case-by-case basis. See, e.g., *Certain Agricultural Tillage Tools from Brazil*, 50 FR 34525, 34528 (1985).

Regarding the suggestion that the petition requirements be increased to include additional information, we believe that the requirements as stated in the proposed rule are sufficiently detailed to permit the Department to determine whether there is a reasonable basis to believe or suspect that the products under investigation benefitted from an upstream subsidy (and thereby avoid "fishing expeditions") without placing unnecessary burdens on petitioners to supply information that normally would be difficult to obtain. Of course, nothing would preclude the petitioner from submitting the kind of information suggested by the commenter, and to do so likely would strengthen any upstream subsidy allegation.

#### Sec. 355.12(b)(9)

**Comment:** Three parties suggest deletion of the requirement that the petition contain information on individual sales, customers, and prices because the requirement is not relevant to or necessary for countervailing duty investigations. One party also notes that the requirement is burdensome to small business petitioners.

**Department's Position:** We agree and have deleted the requirement that the petition contain information on individual sales, customers, and prices pertaining to the imported merchandise.

#### Sec. 355.12(b)(10)

**Comment:** One party urges the Department to be flexible in applying this provision to U.S. small business petitioners.

**Department's Position:** See the Department's response to comments on § 355.12(b).

#### Sec. 355.12(b)(12)

**Comment:** One party states that in order to conform to section 703(e)(1)(A) of the Act, this paragraph of the regulation must refer to "any alleged subsidy inconsistent with the Agreement" rather than the proposed language which states "an export subsidy inconsistent with the Agreement."

**Department's Position:** The proposed rule does not change the existing regulations in this respect. The legislative history of section 703(e) states that the provision is "consistent with article 5(9) of the agreement." S. Rep. No. 249, 96th Cong., 1st Sess. 50 (1979). The cited paragraph of the Agreement, which sets forth the elements necessary for a critical

circumstances finding, requires *inter alia* that the product benefit from "export subsidies paid or bestowed inconsistently with the provisions of the General Agreement on Tariffs and Trade." Therefore, regardless of how broadly one might interpret the language of Article 5(9), it is clear that one must first find that the product has benefitted from an export subsidy. Paragraph (b)(12) is consistent with section 703(e)(1)(A) in this regard, but it makes the export subsidy requirement explicit for the petitioner whereas section 703(e)(1)(A) does not.

We note that if the petitioner alleges critical circumstances, and if the relatively short period begins prior to the date of the filing of the petition, the petition should provide information on imports during that period—otherwise, the information as to "relatively short period" would not be available at the time the petition is filed.

#### Sec. 355.12(d)

**Comment:** Two parties suggest that this section be revised not to exclude from consideration the entire petition, but only the particular information which the petitioner claims is proprietary and which was not submitted in conformity with the requirements of § 355.32.

**Department's Position:** Because the petitioner can easily resubmit the petition in proper form, we believe that it is in the petitioner's interest to do so. Otherwise, if the information which does not comply with § 355.32 is essential, the Department would decide under § 355.13 that the petition does not properly allege the basis on which a countervailing duty may be imposed. Nevertheless, we agree that the choice is the petitioner's and have revised paragraph (d) accordingly.

#### Sec. 355.12(g)

**Comment:** One party asks whether the service requirement should be extended to domestic and foreign interested parties and, if so, whether the Department or the petitioner should effect service of the petition.

**Department's Position:** This paragraph and paragraph (j)(2) of this section together satisfy the consultation requirement of Article 3(1) of the Agreement. No purpose is served by broadening this pre-initiation service requirement, because the Department, as provided in paragraph (j)(1), can accept almost no communications regarding the petition. *United States v. Roses, Inc.*, 706 F.2d 1563, 1567 (Fed. Cir. 1983). In any event, the Department usually does not know prior to initiation

the identity of all interested parties. Once the Department decides to initiate an investigation, the broad service requirements in § 355.31(g) apply to documents filed in the proceeding. Upon receipt of the petition, the Department places a public version of it in the public record. See § 355.3(b).

#### Sec. 355.12(h)

**Comment:** One party contends that the phrase "derogation of an international undertaking on official export credits" is not clear and should be explained.

**Department's Position:** This paragraph, which implements section 702(b)(3) of the Act, concerns petitions which allege that a foreign government is providing export credit financing on terms more favorable than those allowed under international agreements. See the proviso in paragraph (k) of the Annex to the Agreement ("Illustrative List of Export Subsidies"). Section 702(b)(3) is relevant to the administration of the countervailing duty law only to the extent that it requires the Department to notify the Department of the Treasury "immediately" when a petition that contains such an allegation is filed. In order to ensure that Treasury receives timely notice, paragraph (h) of the regulation also requires the petitioner simultaneously to file a copy of the petition with the Secretary and the Secretary of the Treasury.

#### Sec. 355.12(j)(1)

**Comment:** Several parties state that this paragraph on pre-initiation communications with the Department is more restrictive than the decision of the Court of Appeals in *United States v. Roses, Inc.*, 706 F.2d 1563 (Fed. Cir. 1983). Four parties note that *Roses* dealt with communications from potential respondents (including foreign producers, exporters, governments, and U.S. importers) and should not be interpreted as a restriction on communications with petitioners. One of those parties suggests that the Department modify the regulation to prohibit communications with U.S. producers that are related to potential respondents. Two other parties state that the Department can take into account procedural defects in the petition (such as the standing of the petitioner), provided that the communications are on the record and with adequate notice to petitioners. One of these parties also believes the Department should permit interested parties to bring to the Department's attention matters in the public domain.

**Department's Position:** Paragraph (j) is consistent with the *Roses* decision. Paragraph (j)(1) limits the restriction on communication to interested parties defined in paragraph (i)(1) or (i)(2) of section 355.2, which means that the Department will accept communications from domestic interested parties defined in paragraphs (i)(3) through (i)(8) of section 355.2. If a U.S. producer of the like product (§ 355.2(i)(3)) or any other domestic party communicates with the Department as an agent of a potential respondent, the prohibition in paragraph (j)(1) would apply to that communication. It is neither necessary nor appropriate to prohibit all communication from U.S. producers related to potential respondents because, to the extent relevant to the communication, the U.S. related party may share the interests and concerns of non-related U.S. producers of the like product. Regarding procedural issues, the Court in *Roses* held that under no circumstances was the Department to engage in an advocacy proceeding based on information from potential respondents at the pre-initiation stage of the proceeding. 706 F.2d at 1567. We believe that this holding precludes the Department from making fine distinctions between law and fact, procedure and substance, and whether information is in the public domain, especially because the Department would have to accept and review correspondence in order to make such distinctions. Such a review of correspondence would lead to needless and time-consuming disputes as to whether the Department had abided by the ruling in *Roses* in a particular case.

#### Sec. 355.12(j)(2)

**Comment:** One party states that we should clarify when a foreign government is entitled to consultation under this paragraph. Another party states that because the Court in *Roses* held that U.S. law does not permit pre-initiation consultations with potential respondents, the Department has no authority to conduct such consultations even if the respondent is a foreign government. Section 3 of the Act provides that no provision of a trade agreement which is in conflict with a U.S. statute shall be given effect. If the Department does make an exception for consultations required by Article 3(1) of the Agreement, this and another party state that the Department should not consider factual or legal matters discussed in such consultations in determining the sufficiency of the petition.

**Department's Position:** Paragraph (j)(2) is sufficiently clear: consultations

will be conducted, if requested, only when required by Article 3(1) of the Agreement or other international agreement that contains a substantially equivalent consultation provision. The provision is narrowly drafted to comply with the requirements of Article 3(1). Because *Roses* involved an antidumping duty petition and there is no such consultation provision in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, the Court neither considered whether Article 3(1) might create an exception to its "no communication" rule nor held that it does not create such an exception. The Act does not by its terms preclude these pre-initiation consultations with a foreign government. International agreements and domestic statutes should be, to the extent possible, construed to give effect to both. See *Lake Ontario Land Development and Beach Protection Ass'n v. F.P.C.*, 212 F.2d 227 (DC Cir.), cert. denied, 347 U.S. 1015 (1953). Therefore, we believe that paragraph (j)(2) is consistent with and a reasonable interpretation of U.S. law. Because these pre-initiation consultations are authorized by law, we should not exclude from consideration factual information and legal argument presented during the consultations.

#### Sec. 355.13(a)

**Comment:** Two parties recommend that, prior to initiation of an investigation, the Department require each petitioner and the lawyer, if any, who prepared the petition to certify that: (1) the petition contains information reasonably available to the petitioner(s) supporting the allegations in the petition; (2) the petition does not omit important facts which are reasonably available to the petitioner(s); and (3) all information in the petition is, to the best of each certifier's knowledge, true and correct. The purpose of the certification is to prevent the filing of baseless or knowingly false allegations for the purpose of chilling legitimate competition.

**Department's Position:** The countervailing duty law requires that the allegations in a petition be supported by information reasonably available to the petitioner and that such information accompany the petition. As explained in the legislative history of section 702(b)(1) of the Act, the Department is expected to reject petitions "which are clearly frivolous, not reasonably supported by the facts alleged or which omit important facts which are reasonably available to the petitioner." H. Rep. No. 317, 96th Cong., 1st Sess. 51



(1979). We agree that a certification requirement is an appropriate means of deterring the kind of problems described in this legislative history. However, we prefer to apply the certification requirement to all submissions of factual information, not just to those contained in petitions. Accordingly, we are adding to § 355.31 a new paragraph (i), which requires that all submissions of factual information (as defined in § 355.2(g)) be accompanied by an appropriate certification of a responsible official of the submitter and the submitter's legal counsel or other representative, if any. This certification requirement also is incorporated in section 1331 of the 1988 Act. We also are modifying § 355.12(a) of the proposed rule to cross-reference § 355.31(i).

#### Sec. 355.13(c)

*Comment:* One party believes that we should add a sentence at the end of paragraph (c) which states that the Secretary will not initiate an investigation without first determining that the petition is brought "on behalf of an industry."

*Department's Position:* The Secretary has neither the authority nor the ability (in 20 days) to conduct a pre-initiation investigation of the petitioner's standing. See the Department's response to comments on § 355.12(j)(1). Based on the petitioner's representation that the petition is filed on behalf of the industry, the new certification requirement of § 355.31, and other relevant factual information (§ 355.12(b)(2)), the Department decides prior to initiation whether the petition is filed "on behalf of" an industry. If, during the investigation, there is "a clear indication that there are grounds to doubt a petitioner's standing, the Department will investigate" with regard to parties that oppose the petition, see, e.g., *Certain Electrical Conductor Aluminum Redraw Rod from Venezuela*, 53 FR 24755 (1988); *Certain Fresh Atlantic Groundfish from Canada*, 51 FR 10041 (1986), and the Department will re-examine the issue based on all available relevant information.

#### Sec. 355.14(a) and (b)

*Comment:* Several parties comment that the 30-day time limit on submission of requests for exclusion is too short. Some companies may not learn about the investigation in 30 days or, even if they do, may not have time to prepare the request described in this section. They suggest the time limit be extended to (1) the date when the questionnaire response is due, or (2) the date of the preliminary determination or

verification. One party suggests that there should be no time limit at all.

Several of these parties object to the 30-day time limit because of the requirement in paragraph (b) of this section that the person requesting exclusion submit with the request that person's certification and the certification of the government of the affected country. They state that it would be impossible to obtain the government certification within 30 days, especially when there are a large number of foreign government agencies and programs involved. It would be difficult for the person submitting the request to provide that person's certification because of the amount of work involved in researching and preparing the certification. Two parties urge the Department to drop the requirement for certification by the government of the affected country. One of these parties notes that the firm's certification should be sufficient, because proposed § 355.20(e) applies a penalty for false certification by the firm.

One party believes that the regulation should specify that any foreign producer or exporter may seek exclusion by submitting a questionnaire response in a timely manner. The party believes that the certifications in paragraph (b) are unnecessary because the verification process in effect is the equivalent of certification. Another party adds that any company should be permitted, if necessary, to request that it be served with a questionnaire. If the Department requires a certified undertaking that the person will not receive subsidies in the future, the Department should permit submission of the certification shortly before the final determination.

One party believes that the 30-day time frame for filing requests should be adequate but adds that, if the Department extends the deadline in its final rule, the deadline should be no later than the date the questionnaire response is due and the request should be accompanied by sufficient additional information to make the Department's verification "plausible for the exclusion requests." The additional information would consist of copies of all annual reports for the last 15 years, written statements from the respondent company and its accounting firm regarding non-receipt of subsidies, and a copy from the foreign government of a list of all benefits and benefit recipients during all relevant periods.

*Department's Position:* The deadline for submission of requests for exclusion is 50 days from the date the petition is filed, because initiation normally occurs

on the 20th day after the petition is filed. In most cases, 50 days should be a reasonable period of time for preparation of the request. If not, the Department may nonetheless exclude the foreign producer or exporter if it makes a negative final determination with respect to that producer or exporter. See Department's response to comments on § 355.14(c). Alternatively, the foreign producer or exporter may request a company-specific revocation under § 355.25(a)(3) at the earliest opportunity.

The Department cannot extend the deadline for filing requests for exclusion beyond the 30-day period set forth in the proposed rule, because it must decide by that date or shortly thereafter which companies it will investigate and to which it will send questionnaires and begin preparing for verification of responses. If the certifications were not submitted until the deadline for submitting questionnaire responses, the Department would not have sufficient time to issue questionnaires, analyze responses, and prepare for verification.

The certifications by the government of the affected country and the party requesting exclusion are required in order to ensure that the requests are carefully considered by all parties that have relevant information. These certification requirements are analogous to those required under § 355.25(b)(3) for company-specific revocations. The certifications are required in order to justify the Department's decision to conduct an investigation specifically of the company submitting the request for exclusion, an investigation it might not otherwise conduct. Neither questionnaire responses nor verification serve the same purpose as certifications. See Department's response to comments on § 355.14(c).

#### Sec. 355.14(a)

*Comment:* One party states that the request for exclusion should not be irrevocable because a firm that submits the request in good faith may later discover that it received a benefit the Department considers a countervailable subsidy. Another party comments that requests for exclusion should not be limited to producers or exporters which export during the most recent fiscal year, because the Department should make every effort to exclude all producers and exporters which do not benefit from countervailable subsidies. Another party argues that a request for exclusion should not have to cover a program that the Department has previously found to be noncountervailable.

*Department's Position:* As we explained in the preamble of the proposed rule, the Department structures its investigations to take into account requests for exclusion. The reason for requiring the company and the government of the affected country to certify the accuracy of the information in the request is to permit the Department to rely on the statements made in the request. To permit withdrawal of requests for exclusion would destroy the basis for the Department's reliance because it would, in effect, weaken or undermine the company's and the affected government's incentive to research thoroughly the facts on which the certifications are based. The Department must be able to rely on the accuracy of the certifications in order to ensure that it uses its limited administrative resources in the most efficient and effective manner. Moreover, if the requests were revocable, the Department would have the additional burden of attempting to determine whether the request was submitted in good faith. Therefore, we are not adopting the comment.

The Department can grant an exclusion request only on the basis of facts pertaining to the period of investigation. The Department cannot determine whether a company receives countervailable subsidies unless the company has exported to the United States during the period of investigation. To provide special periods of investigation for companies which do not export to the United States during that period would complicate unnecessarily the Department's investigation. The period of investigation is the most recent period for which information is available. Exports of foreign companies in earlier periods would not be subject to countervailing duties. Any company that begins to export or resumes exporting during a period following the period covered by the investigation may be entitled to revocation based on the procedures in § 355.25.

We agree that exclusion requests need not provide certification as to programs that the Department has found not to be subject to countervailing duties, and have modified the rule accordingly. The fact that the Department may decide to take another look at the program is not, in and of itself, sufficient reason to ignore the prior finding for the purpose of exclusion requests.

#### Sec. 355.14(b)

*Comment:* Several parties state that the certification requirements are not

broad enough for one or more of the following reasons: (1) foreign producers would try to circumvent orders by deciding for themselves whether they received "any net subsidy;" (2) "any net subsidy" does not clearly cover upstream subsidies; (3) only the Department can determine whether a "net" subsidy has been received; (4) the word "program" should be changed to "allegation" or "alleged benefit" to avoid the possibility that requesters may not include benefits provided on a one-time, or recurring (but non-program) basis; (5) in addition to subsidy practices listed in the initiation notice, the certification should cover any subsidy practice subsequently included in the investigation; and (6) the one-year limitation should be dropped and the producer should be required to certify that it never applied for or received a subsidy that, under the Department's interpretation of the measurement of benefits, would be found to provide a net subsidy during the period of investigation. One party states that it is unreasonable and unnecessary to require the certifications of non-producers.

*Department's Position:* In preparing the certifications required by this paragraph, the company and the government will have to consider the Department's practice (as set forth in published determinations and other documents) regarding the identification and measurement of subsidies. Because the Department, not the party requesting exclusion, will determine whether exclusion is warranted, the requester has nothing to gain by interpreting the operative language of paragraph (b) in a manner inconsistent with the Department's practice at the time the certification is made. The phrase "any net subsidy on the merchandise" clearly covers upstream subsidies, and the word "program" includes any countervailable benefit provided to a company whether on a one-time or recurring basis. The certifying party must consider whether any portion of a net subsidy, regardless of the time of bestowal, would be attributed to the investigatory period under the Department's method of quantification and allocation of benefits.

Certifications need not cover subsidy practices not listed in the Department's notice of initiation. Given the short time limits set forth in paragraph (a), any greater burden on the requesting party would be unreasonable. However, if the Department determines as a result of its investigation that the party requesting exclusion has benefitted from a net subsidy not covered by the certification,

the Department will deny the request for exclusion. See § 355.21(c).

Finally, the requirement that a non-producer requesting exclusion also submit the certification described in paragraph (b)(1) is reasonable because the non-producer may benefit from net subsidies (such as export credits) other than or in addition to those provided to the producer. Moreover, the non-producer must certify that it "will not apply for or receive any subsidy on the merchandise in the future," as provided in paragraph (b)(1).

#### Sec. 355.14(c)

*Comment:* Two parties state that the Department should grant requests for exclusion only when it conducts a thorough investigation and verifies that the requesting company has satisfied the requirements set forth in this section. One of these parties urges deletion of the phrase "to the extent practicable," or alternatively, the addition of a statement that when investigation of a request is impracticable, then the request will be denied. One party is concerned that § 355.14 does not permit petitioners to comment on requests for exclusion. Two other parties suggest that the Department explain in the regulation that the phrase "to the extent practicable" means that the Department must be able to conduct a thorough investigation of the request.

Several parties argue that the Department has no authority under U.S. law or the Agreement to impose countervailing duties against merchandise that did not benefit from a subsidy, and that it would be unfair to force a producer or exporter that received no countervailable benefit to defend itself during an entire investigation. One of these parties concludes that due process and the GATT require the Department to exclude innocent parties at the onset of an investigation. One party notes that if the Department in its final determination concludes that a producer received no net subsidy or a *de minimis* net subsidy, the Department must automatically exclude that producer from the countervailing duty order.

One party states that the Department must investigate all requests for exclusion and exclude all applicants eligible for exclusion. Because this requirement is clearly set forth in § 355.38 of the existing regulations, this party favors retention of the existing regulation in lieu of the proposed rule. Another party comments that if it truly is an administrative impossibility for the Department to investigate every firm that has requested exclusion, the



Department should investigate a sample of such firms and exclude all firms requesting exclusion if all sampled firms satisfy the Department's requirements.

**Department's Position:** When the Department receives requests for exclusion which comply with the requirements of this section, the Department normally will investigate the requests in accordance with the investigatory procedures described in other sections of this part. For example, the Department will ask each party requesting exclusion to answer a questionnaire, submit to verification, and abide by the procedures on information and argument in Subpart C of this part.

As explained in the preamble to the proposed rule, the phrase "to the extent practicable" would permit the Department to refuse to investigate one or more of the requests when it concludes that it could not do so within the statutory time limits on investigations. Such refusal might occur, for example, in a case in which an extraordinarily large number of requests for exclusion are submitted. If the Department refuses to investigate a request for exclusion, the requester may be excluded from the countervailing duty order by requesting a revocation under § 355.25(b)(3). These regulations do not address the question whether the Department has authority to exclude all firms requesting exclusion based on the results of an investigation of a sample of those firms. Neither the GATT nor U.S. law requires the Department to investigate every request for exclusion or every company that produces or exports the class or kind of merchandise under investigation.

In compliance with the Agreement, the Department levies a countervailing duty only against merchandise which benefitted from a subsidy. The term "levy" is defined in the Agreement to mean "the definitive or final legal assessment or collection of a duty or tax." (Art. 4, para. 2, fn. 14.) The Agreement does not require that countervailing duties be levied on a company-specific (rather than country-wide) basis. It only requires that the amount assessed not exceed the amount of the subsidy on the product "from all sources found to be subsidized" and exporting to the United States. (Art. 4, para. 3.) Under section 751 of the Act, the Department determines, upon request, the amount, if any, of the countervailing duty to be assessed on merchandise entered. In this manner, the Agreement requirements are met under U.S. law. Neither the GATT nor U.S. law requires the Department to exclude from

an order any producer or exporter without first conducting an investigation (or administrative review) to determine whether exclusion (or revocation) is warranted. Obviously, that is one of the purposes of the investigation and review process.

If the Department includes a producer or exporter in its investigation and determines that the producer or exporter received no countervailable benefits during the period of investigation, the Department would automatically exclude that producer or exporter from the countervailing duty order, even if the producer or exporter did not request exclusion under the procedures described in this section. The purpose of this section is merely to provide an opportunity for producers and exporters which the Department might not otherwise include in its investigation to request that the Department specifically include and investigate them. If the Department investigates a company on other grounds, no purpose would be served by an exclusion request.

#### Sec. 355.15

**Comment:** One party suggests adding the following provisions to this section: (1) when respondents cooperate in the investigation, the best information available is the respondent's reply to the questionnaire when verification occurs after the preliminary determination; (2) when petitioner requests a postponement of the preliminary determination, the Department shall conduct verification prior to the preliminary determination; and (3) the Department shall issue and publish a corrected preliminary determination as soon as it discovers clerical error.

**Department's Position:** (1) Section 778 (b) and (c) of the Act and § 355.37 of this regulation specify the limited conditions in which the Department may use "best information available" in lieu of information submitted by respondents. As explained in the preamble to the proposed rule, paragraph (a) of this section refers to "available information" in order to indicate that the Department may base its preliminary determination on any information available to it at the time. "Available information" includes, but is not necessarily limited to, the respondent's submissions. For example, even prior to verification, the Department may know that respondent's submissions are incomplete or demonstrably incorrect. In that event, the Department may use apparently reliable information from other sources.

(2) Whenever there are adequate time and resources for verification prior to a preliminary determination, the Department will conduct the verification

prior to the date of the preliminary determination in order to make its preliminary determination more accurate. In practice, the Department usually conducts verification after the preliminary determination, even when the petitioner requests an extension of the date for the preliminary determination. Normally the petitioner requests an extension for the purpose of permitting the Department to obtain additional information from the respondent. Preparation of the supplemental questionnaires and submission and review of responses consumes 25 to 45 days of the extension period. Verification is conducted only after the Department has provided each respondent with an adequate opportunity to submit the information requested by the Department. The on-site verification, including associated preparation and report-writing, normally requires 30 to 40 days. Because the period of the extension under paragraph (c) of this section is not more than 65 days, there is in most cases insufficient time for verification prior to the date of the preliminary determination.

(3) Facts available to the Department at an early stage of the investigation are limited in comparison with those available later in the investigation. Preliminary determinations are simply interim decisions intended to focus issues and provide the basis for comment by the parties to the proceeding. They are not subject to judicial review. One important effect of a final determination is to correct inaccuracies in the preliminary determination. Therefore, an additional procedure for correcting errors in a preliminary determination would be an unwarranted waste of the Department's scarce resources. We have established a practice of correction of clerical errors in final determinations and final results, which is also provided for in section 1333 of the 1988 Act. See 53 FR 41617 (October 24, 1988); 53 FR 5813 (February 26, 1988).

#### Sec. 355.15(a)

**Comment:** One party states that in order to conform to section 703(b) of the Act, paragraph (a)(1) should state that the Department must have a reasonable basis to believe "or suspect" that a subsidy is being provided. Another party suggests that paragraph (a)(2)(i) be modified to indicate that determinations will include administrative and judicial precedents on which legal conclusions are founded. Another party notes, with regard to paragraph (a)(3)(ii), that the statute requires implementation of suspension of liquidation and other

provisional measures on or after the date of publication, not the date of signing, of the preliminary determination. Finally, one party states that paragraph (a)(4) should incorporate the elements listed in paragraphs (a)(2) and (a)(3), as well as an invitation for argument consistent with § 355.38.

**Department's Position:** Because the word "suspect" appears in section 703(b) of the Act, we have added this word to paragraph (a) of the regulation. The suggestion that the Secretary's determination recite legal precedent would impose a burden not required by the statute. To the extent necessary to explain the determination, the Department does discuss legal precedents in its preliminary determinations. In view of the fact that the preliminary determination is not subject to judicial review and is subject to revision in the final determination, any additional discussion of administrative and judicial precedents is unnecessary.

Paragraph (a)(3)(ii) does not specifically address the question of when provisional measures take effect. However, the effective date is the date of publication of the notice in the Federal Register, as clearly provided in section 703(d)(1) of the Act. Finally, the notice that is published in the Federal Register, as a matter of practice, does incorporate the elements of the preliminary determinations described in paragraphs (a)(2) and (a)(3). This issue was addressed in "Notice of Withdrawal of Proposed Change in Format of Federal Register Notices" at 52 FR 1218 (January 12, 1987).

#### Sec. 355.15 (b) and (c)

**Comment:** One party asks whether the terms used in paragraph (b)(2) should be defined or qualified and whether a postponement under paragraph (c) could extend the time for amending the petition under § 355.31(c)(1). Another party suggests that paragraph (b) should provide, as an additional reason for postponement, the consideration of requests for exclusion or the calculation of individual rates for one or more producers or exporters.

**Department's Position:** The Department's precedents, which address dozens of varied situations difficult to describe in a single definition, provide adequate guidance regarding the meaning of the terms used in paragraph (b)(2). The Department's authority to extend the time limit for issuing a preliminary determination is "narrowly circumscribed" by the statutory criteria in paragraph (b)(2). See S. Rep. No. 249, 96th Cong., 1st Sess. 50 (1979). Section 703(c)(1)(B) of the Act does not permit

consideration of additional criteria for allowing an extension of time. Postponements under paragraphs (b) and (c) would not necessarily affect the time limits in § 355.31(c)(1), but the appropriate official of the Department may take into account the fact that the preliminary determination has been postponed in considering whether to grant, under § 355.31(c)(3), a request for extension of the time limits set forth in that section for submission of new allegations.

#### Sec. 355.15(d)

**Comment:** One party suggests that we modify this paragraph to include a time limit for submission of upstream subsidy allegations. The party suggests that a reasonable deadline would be five calendar days before the date of the preliminary determination, in order to provide petitioners the maximum opportunity to raise the issue. See also comment on § 355.20(b).

**Department's Position:** The Department agrees that it is appropriate to include in this paragraph a time limit for submission of upstream subsidy allegations. The Department must have sufficient time to clarify (if necessary, by obtaining additional information) and evaluate a request after it is submitted. Based on past experience, ten days is a reasonable amount of time for this purpose. Therefore, we have added a 10-day time limit in a new paragraph (d)(1). The text of paragraph (d) that appeared in the proposed rule is now paragraph (d)(2) of this final rule.

#### Sec. 355.15(e)-(h)

**Comment:** One party argues that paragraph (e) should permit publication of the notice of postponement less than 20 days before the scheduled date for the preliminary determination, provided the notice is sent to the Federal Register not less than 20 days before the scheduled date. Regarding paragraph (f), that same party asks: (1) whether verification can be waived if the Department does not receive a response to the questionnaire within 50 days of initiation; (2) should there be a time limit for issuing a questionnaire; (3) does this provision mean the Department will make a preliminary and final determination based on the same information; and (4) can the Department receive data after waiver of verification? Regarding paragraph (g), the party questions whether the Department should provide notice that the Commission may not, without the Department's permission, disclose proprietary information received from the Department. Regarding paragraph (h), the party asks the Department to

explain the nature of the information which the Department will disclose. In addition, another party suggests that disclosure be described as a "complete," rather than "further," explanation of the determination.

**Department's Position:** Regarding paragraph (e), the time limit applies only to the requirement that the Secretary notify all parties to the proceeding of the decision to postpone the preliminary determination. It does not apply to the publication of notice in the Federal Register. We have revised paragraph (e) to shorten the time for notice of postponement for upstream subsidy investigations under paragraph (d) from 20 days before the scheduled date for the preliminary determination to not later than that scheduled date. The 20-day time limit for notice of postponement in extraordinarily complicated cases (paragraph (b)) and at the request of the petitioner (paragraph (c)) are mandated by section 703(c)(2) of the Act. There is no statutory time limit for notice of postponement for investigation of upstream subsidies. The Department believes it is important to afford as much time as possible for submission of an upstream subsidy allegation prior to the preliminary determination. Accordingly, we have separated paragraph (e) into paragraph (e)(1), which contains most of the proposed text of paragraph (e), and paragraph (e)(2), which provides for notice of postponement for investigation of upstream subsidies.

Regarding paragraph (f), the language of the regulation closely tracks the language of section 703(b)(3) of the Act. This provision has not been invoked or applied in practice. Absent practical experience in the administration of this provision, the Department is not in a position to answer most of the questions posed. We do not, however, believe it is necessary to include in paragraph (f) a time limit for issuing a questionnaire because questionnaires are, as a matter of practice, issued as soon as possible after initiation of an investigation.

Regarding paragraph (g), the limitation on the Commission's authority to disclose business proprietary information that is provided to it by the Department is set forth in the last sentence of § 355.32(f). The Commission may disclose such information only with the Department's permission. See the preamble to the proposed rule concerning § 355.15(g).

Regarding paragraph (h), we have clarified that the purpose of disclosure is only to provide an explanation of the



calculation methodology used in the determination.

#### Sec. 355.16(a)

*Comment:* One party recommends that paragraph (a)(1) be amended to read "[a]ny alleged export subsidy which is inconsistent with the Agreement" to clarify that only export subsidies are inconsistent with the Agreement. Conversely, two parties suggest deleting the word "export" in § 355.12(b)(12)(iii) because they believe that even a non-export (*i.e.*, domestic) subsidy may be inconsistent with the Agreement and, therefore, sufficient to trigger a critical circumstances investigation.

One of these parties contends that there is no statutory authority for the Department to self-initiate an investigation of critical circumstances, and that the Department should not substitute its perception of what is in the petitioner's interest for that of the petitioner. Another party states that the 21-day time limit does not afford the Department sufficient time to conduct an adequate investigation of critical circumstances.

*Department's Position:* We agree with the comment about an alleged export subsidy and have revised the regulation to be consistent with the existing regulation. The use of the terms "export subsidy" and "subsidy inconsistent with the Agreement" is discussed above in the Department's position on § 355.12(b)(12)(iii). We have also revised this paragraph to codify the Department's practice of making a determination of the consistency of export subsidies with the Agreement only when such subsidies are used by producers or exporters of the merchandise.

Although section 703(e) does not expressly authorize the Department to find critical circumstances in self-initiated investigations, the Department in such cases is considered the petitioner and, as such, has authority to allege and investigate critical circumstances. Under a similar interpretation of the statute, the Department has determined that in a self-initiated investigation the administering authority is the "petitioner" and may, in appropriate circumstances, withdraw its petition and terminate the investigation. See *e.g.*, *Certain Steel Products from Belgium, Brazil, France, Romania, South Africa, and Spain*, 47 FR 5754 (1982). An interpretation of the law which would exclude critical circumstances from the purview of self-initiated investigations would be inconsistent with the Congressional desire for vigorous

enforcement of the countervailing duty law. See, *e.g.*, H.R. Rep. No. 317, 96th Cong., 1st Sess. 51 (1979).

Because the principal research involved is the analyzing of import data, we believe that 21 days is an adequate period of time for the Department to investigate and to make a finding on critical circumstances.

#### Sec. 355.16(b)

*Comment:* Three parties state that nothing in the Subsidies Code or the statute precludes a preliminary finding of critical circumstances prior to the preliminary determination. They argue that to allow such a preliminary finding prior to the date of the preliminary determination, even if suspension of liquidation is not imposed until the date of the preliminary determination, would help deter import surges during the investigation.

*Department's Position:* We have revised paragraphs (b)(2)(i), (c), and (g) to permit the Department to issue a preliminary critical circumstances finding before the date of the preliminary determination under § 355.15 in appropriate cases. (We note that this requirement also is provided in section 1324 of the 1988 Act.) If a preliminary critical circumstances finding is made before the date of the preliminary determination, suspension of liquidation will take effect only at the time of, and in the event of, an affirmative preliminary determination. In order to make an affirmative preliminary finding of critical circumstances, the Department must find: (1) that the merchandise has benefitted from an export subsidy; and (2) as explained in the Department's position on comments on paragraphs (f) and (g), that imports have increased significantly during a relatively short period. A "relatively short period" is defined in paragraph (g) as normally the three-month period beginning either on the date the proceeding begins, or, when appropriate, a period of not less than three months from the date prior to the initiation of the proceeding on which importers and exporters had reason to believe that a proceeding was likely.

In order to make an affirmative preliminary finding of critical circumstances before the preliminary determination under § 355.15, therefore, the Department would have to have sufficient information about the subsidies on the merchandise and the shipments of the merchandise to have a "reasonable basis to believe or suspect" (as provided in section 703(e)(1) of the Act) that the statutory criteria are met. The Department might, for instance, obtain sufficient information about

subsidies if it could establish that the merchandise benefitted from a subsidy which the Department previously had found to be countervailable. Absent such information and a prior relevant determination, the Department could not make its finding prior to the date of its preliminary determination under § 355.15. The critical circumstances finding is not intended to supplant the preliminary determination under § 355.15.

The Department also cannot make a preliminary finding of critical circumstances unless it can obtain information on shipments of the merchandise during the "relatively short period" as defined in paragraph (g). This means that the Department could make a preliminary finding of critical circumstances prior to its preliminary determination in proceedings in which the date of the preliminary determination is postponed under § 355.15(b), (c), or (d), to a date beyond the 85th day from the date the petition is filed, in proceedings in which the "relatively short period" begins on a date before the petition is filed, or in unusual situations in which the "relatively short period" is less than three months. Section 1324 of the 1988 Act authorizes the Department to request that the Customs Service compile the relevant statistics on an expedited basis.

#### Sec. 355.16(c)

*Comment:* Three parties suggest that this paragraph be redrafted to indicate more clearly that the Department will order suspension of liquidation no earlier than the date of its preliminary determination. One of the parties suggests changing the reference to "all entries" in the first sentence of this paragraph to "all unliquidated entries," because retroactive suspension applies only to unliquidated entries.

*Department's Position:* We agree and have modified paragraph (c) to provide clearly for suspension of liquidation only at the time of, or after, an affirmative preliminary determination under § 355.15. See also Department's response to comments on § 355.16(b). Suspension of liquidation can apply only to unliquidated entries. In these regulations, we have not used the longer phrase and see no reason to do so.

We note that we have revised paragraph (c) to clarify that suspension of liquidation would apply only to entries covered by the affirmative critical circumstances finding. In addition, we have made technical changes to paragraph (c) to clarify the language of this paragraph.

#### Sec. 355.16(d) and (e)

*Comment:* Two parties contend that neither the Department nor the Customs Service has authority to order the retroactive collection of a cash deposit or posting of a bond. Therefore, they suggest that we delete the reference in paragraph (d) to cash deposit and bond and clarify that an affirmative finding of critical circumstances does not result in retroactive collection of deposits or posting of bonds.

Another party suggests that the Department should be subject to the same time limits for making findings in self-initiated investigations (paragraph (e)) as in investigations based on petitions (paragraphs (b) and (d)), because the same standard for determining critical circumstances applies to all investigations.

*Department's Position:* The authority to impose retroactively a bond or cash deposit requirement is stated by implication in section 705(c)(3)(B) and (c)(4) of the Act. If Congress did not intend retroactive bonding or cash deposits, these provisions of the Act would be superfluous because there would be nothing to release or refund.

Paragraph (e) provides that the time limits relating to the submission of critical circumstances allegations by the petitioner do not apply in self-initiated investigations. This paragraph gives the Department maximum flexibility to make critical circumstances findings early in self-initiated investigations.

#### Sec. 355.16(f)

*Comment:* Several parties advocate elimination of the reference in paragraph (f) to a 15 percent increase in imports over imports during an "immediately preceding" period. They contend that a 15 percent increase in imports is not necessarily indicative of behavior that would warrant application of the retroactivity provisions of the law. Some of these parties believe that application of the 15 percent standard, even though it is not an absolute standard, may lead to arbitrary results and may discourage importations. On the other hand, two of these parties emphasize that in some cases (even those in which imports have not accounted for a preponderance of U.S. apparent consumption) the 15 percent standard may be too high.

Several parties object to the statement in the preamble of the proposed rule that in cases where imports account for a "preponderance" of U.S. apparent consumption, an increase in imports of less than 15 percent may be massive. One party argues that market share is irrelevant to the issue whether imports

are "massive." Another party believes that the word "preponderance" should be defined in the regulation.

Some of the parties that object to the 15 percent standard suggest dropping it in favor of a completely *ad hoc* analysis based on consideration of historical and seasonal import patterns and other factors relevant to the decision whether the increase in imports is an attempt to circumvent the law. One party suggests that if the Department retains the 15 percent standard, the Department should provide that any increase of less than 15 percent (even if imports accounted for a preponderance of U.S. apparent consumption) will not be considered massive. Another party suggests adding to paragraph (f) a statement that any interested party may submit evidence to rebut the presumption created by the 15 percent general rule. That party also would delete the reference to "immediately preceding period" and would insert reference to a longer historical period, preferably three years. Other parties suggest raising the 15 percent standard to 25 or 50 percent or adding a requirement that the increase also must have accounted for five percent of total consumption.

One party notes that some increase in imports is necessary for a finding of "massive imports," even if the imports account for a preponderance of U.S. apparent consumption. Two other parties conclude that the statute does not require a surge in imports when the volume of imports is already "massive." They urge the Department not to require evidence of an increase in imports when the industry is suffering as the result of a sustained large volume of imports.

Two parties express concern with the Department's practice of relying on import statistics compiled by the Bureau of the Census to measure the volume and value of imports. One of these parties suggests adding to paragraph (f)(1) the phrase "based on the most up-to-date information available to the Secretary." This party suggests that the Department should ask the Customs Service to provide data on an expedited basis.

*Department's Position:* Neither the Act nor the legislative history defines "massive imports." However, the Department has concluded for the following reasons that, in order to be "massive," imports must increase significantly in relation to prior import levels or U.S. apparent consumption: (1) section 703(e)(1)(B) of the Act requires "massive imports" \* \* \* over a *relatively short period*, a test which appears to require a surge in imports over "normal" levels; (2) the purpose of the critical

circumstances provision is to prevent circumvention of the law, a purpose which presupposes an increase in import activity associated with the possibility of assessment of countervailing duties; and (3) the requirement is consistent with the Department's established practice in defining the term "massive imports." The degree of increase required logically would depend to some extent on the size of the import volume in relation to total U.S. apparent consumption. Moreover, the Department would consider an argument in a particular case that it is unreasonable to infer that the increase in imports is attributable to the filing of a petition or the expectation of the filing of a petition.

As noted in the preamble to the proposed rule, "[t]he criteria described in the proposed rule are intended to clarify the bases for the Secretary's critical circumstances findings without adversely affecting the Secretary's administrative discretion." Any interested party may submit information to establish that an increase of less than 15 percent is massive or more than 15 percent is not massive under the circumstances. For example, a party may argue that a 15 percent increase is not massive in the case of a new product where the market for the product is expanding rapidly. Any interested party may also submit information showing that the increase is a seasonal import trend unrelated to the filing of the petition. The 15 percent benchmark is not intended to limit the Department's discretion or responsibility to consider in each case the factors relevant to a decision whether imports are "massive." Paragraph (f) uses the 15 percent benchmark as a general rule—it is merely a rough guide which gives some element of predictability to the process.

Under paragraph (b), the Secretary is to make the determination "based on available information." The phrase "available information" implies that the Department has an obligation to use up-to-date information whenever possible. There is no need to incorporate additional language to this effect in paragraph (f). As a matter of practice, the Department makes every effort to obtain current and complete information for its decision on critical circumstances.

#### Sec. 355.16(g)

*Comment:* Two parties believe that the portion of this paragraph which permits the Department to extend the



length of the "relatively short period" when the Department finds that importers or exporters "had reason to believe" that a "proceeding was likely" is not consistent with the Congressional purpose to deter import surges during the period between initiation of an investigation and a preliminary determination. One of these parties also believes the provision is anticompetitive. Several parties believe that the provision is subjective and unadministrable.

Most of these parties favor deletion of this provision, but one party advocates revising paragraph (g) to include a list of objective criteria for the Department to refer to in deciding whether the importers or exporters had "reason to believe" that a "proceeding was likely."

On the other hand, two parties contend that the statute permits the Department normally to consider imports in the period prior to the filing of the petition. One party states that the Department should discard the proposed rule and in its place define the relevant period as a period extending "no more than three months prior to the filing of the petition." Another party seems to advocate no limitation on the Department's ability to consider import surges prior to the filing of the petition.

**Department's Position:** Neither the statute nor the legislative history defines the phrase "relatively short period." The definition in paragraph (g) is consistent with the Congressional purpose of deterring import surges prior to suspension of liquidation that can be attributed to an effort to circumvent the effect of the law. The House Report states that the purpose is to "deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by the Authority." H.R. Rep. No. 317, 96th Cong., 1st Sess. 63 (1979). We believe that Congress intended that there be a benchmark period unaffected by the possibility of the imposition of countervailing duties. If the exporters had knowledge that an investigation would be initiated, that period must be prior to initiation. In order to accomplish this purpose by issuing an affirmative critical circumstances finding at the earliest possible moment during the investigation, the Department must have the discretion to compare the level of imports during the surge period with the level of imports during the benchmark period.

In applying this provision, the Department will carefully evaluate all

available information in order to eliminate the possibility of chilling legitimate trade and competition from abroad. For example, the Department would examine historical and seasonal trends to determine whether or not the increase in imports during the "relatively short period" is normal and appropriate.

This paragraph has been revised to permit the Department, when appropriate, to issue a critical circumstances finding prior to the date of the Department's preliminary determination under § 355.15. See Department's response to comments on § 355.18(b).

#### Sec. 355.17(a)

**Comment:** One party is concerned that the proposed rule does not assure that the Department will adequately evaluate the public interest under this paragraph. This party recommends revising paragraph (a) to require petitioners, upon withdrawal of a petition, to certify whether they have knowledge of, or reason to believe that there is, any agreement by the foreign government or foreign firms to restrain export prices or quantities to the United States, or whether any such restraints have been, or are expected to be, implemented as an inducement to withdrawal of the petition. If the certification is affirmative, the Department should follow the procedures for the public interest determination that are set forth in paragraphs (b)(1) and (b)(2) of this section.

Another party contends that we should delete the last sentence of paragraph (a)(1), because the statute only requires the public interest to be considered when termination on withdrawal of petition is based on a quantitative restriction agreement, as provided in paragraph (b).

**Department's Position:** The certification requirement proposed by the first commenter is unnecessary. The obligation to consider the public interest gives the Department sufficient authority to obtain from interested parties all relevant information concerning withdrawal of petitions. The requirement that the Department consider whether a termination agreement serves the public interest derives from the 1979 legislative history of section 704(a) of the Act, which states, "The committee intends that an investigation be terminated under section 704(a) only if the Authority or the ITC, as the case may be, determines that termination will serve the public interest." S. Rep. No. 249, 96th Cong., 1st Sess. 54 (1979). This requirement was articulated in § 355.30(a) of the existing

regulations and is carried over into this paragraph. If withdrawal is in fact based on a quantitative restraint agreement, the Department applies the provisions in paragraph (b) of § 355.17. Those provisions implement the 1984 amendment to section 704(a) of the Act, which provides more detailed public interest criteria for terminations based on quantitative restraint agreements.

#### Sec. 355.17(b)

**Comment:** One party suggests clarifying in paragraph (b)(2) that the Department will consult with other U.S. Government agencies before making the public interest determination.

**Department's Position:** Paragraph (b)(2) restates the statutory requirement set forth in section 704(a)(2)(C) of the Act. As a matter of practice, the Department consults with other agencies, when appropriate, on issues affecting the public interest determination under this paragraph. See also § 355.38(a).

#### Sec. 355.18(a)(1)

**Comment:** One party would change this paragraph to state clearly that the net subsidy is to be eliminated or offset completely with respect to the merchandise "sold, or likely to be sold, to the United States" or "exported to the United States."

**Department's Position:** The phrase "the merchandise," which is used in paragraph (a)(1), is defined in § 355.2(k) as "the class or kind of merchandise imported or sold, or likely to be sold, for importation into the United States, that is the subject of the proceeding." See also the preamble to the proposed rule on § 355.2(k). Therefore, the change is unnecessary.

#### Secs. 355.18 (b) and (c)

**Comment:** One party states that if the Commission reaches a negative determination under section 704(h) of the Act regarding an agreement eliminating injurious effect, the Department should resume its investigation as of the point in time it was suspended, rather than as of the date of the Department's preliminary determination, for the purpose of measuring statutory time limits. This procedure would reduce delay in the investigative process.

Another party suggests adding the following to paragraph (b)(3): "The Secretary may be guided in his decisions to accept an agreement to restrict the volume of merchandise by, among other factors, whether such agreements have been effective in other investigations involving that country."

One party believes that paragraph (c) is misdirected, because it refers to 85 percent of the merchandise rather than 85 percent of the subsidy, as section 704(c)(2)(B) of the Act requires.

**Department's Position:** Section 704(h)(2) of the Act provides that if the Commission's determination regarding the elimination of injurious effect is negative, the investigation shall be resumed on the date of publication of the Commission's determination as if the Department's affirmative preliminary determination had been made on that date. If the Department suspends an investigation after the date of its preliminary determination, the Department makes every effort, upon resuming the investigation, to issue its final determination without delaying the investigative process.

Paragraph (b)(3) is intended to reflect the statutory requirement in section 704(d)(1) of the Act. To accomplish more fully this purpose, we are adding the phrase ", in addition to other factors the Secretary considers appropriate," after the statement "the Secretary may take into account". This additional language will indicate clearly that the Department, as appropriate, may consider a factor such as the one the commenter suggests adding to this paragraph.

Paragraph (c) reflects the requirement in section 704(c)(1) of the Act, which states that the Department may suspend an investigation upon acceptance of an agreement from exporters which (under section 704(b) of the Act) "account for substantially all of the imports." The legislative history of this provision states that "substantially all of the imports" means "no less than 85 percent." S. Rep. No. 249, 96th Cong., 1st Sess. 54 (1979). Section 704(c)(2)(B) of the Act, which refers to 85 percent of the net subsidy, is implemented in paragraph (b)(2)(ii) of the regulation.

#### Sec. 355.18(d)

**Comment:** One party believes it is important to enhance the ability of the domestic industry to influence the Department's decision whether "extraordinary circumstances," as defined in this paragraph, exist. An affirmative decision is based in part on a finding that "suspension of the investigation will be more beneficial to the industry than continuation of the investigation." The party recommends requiring the foreign respondent and the government to submit any proposed suspension agreement at the time they submit the questionnaire response. The domestic parties would then have 14 days to comment and indicate their willingness to accept the proposed

agreement. If a majority of the domestic producers (in terms of volume of sales) or importers do not indicate acceptance, the idea of a suspension agreement should be dropped.

**Department's Position:** The legislative history of section 704(c)(4) of the Act states that "the language of the statute is general so as to provide the Authority with flexibility in administering the provision. However, the provision is not intended to be so general as to be meaningless." H.R. Rep. No. 317, 96th Cong., 1st Sess. 54, 65 (1979).

The Department recognizes the importance of obtaining the views of the domestic industry in deciding whether "extraordinary circumstances" exist. We believe, however, that more than a one-time head count of proponents and opponents (even if weighted by volume of sales) is required for the Department to make a reasonable decision on this issue. The Department's preliminary conclusion about whether suspension would be beneficial to the domestic industry should focus more on the concept of suspension in general than on the specific language of an initial draft agreement. The comments and views of all interested parties regarding specific draft proposals and even suspension itself, may change significantly as the investigation progresses.

Moreover, to the extent practicable, all interested parties should have the opportunity to evaluate the possibility of a suspension of investigation in light of the Department's preliminary determination under § 355.15, an opportunity that would not exist under the requirement described by the commenter. Under § 355.18(g), the Department consults with the petitioner and affords the petitioner a right to comment on specific draft language. The Department concludes an agreement only if it determines that the agreement is in the public interest, including the interest of the domestic industry.

#### Sec. 355.18(e)

**Comment:** One party comments that, in order to ensure that effective monitoring of an agreement is practicable, this paragraph should be revised to require, at a minimum, the following information: (1) from the foreign government, a list of all recipients of benefits (and the dollar amount for each) under any and all programs under investigation; (2) from the foreign respondents and producers, evidence of selling prices to the United States on a quarterly basis for the past two years and copies of their financial statements for the current and past two years; and (3) from foreign respondents, statements by their certified

accountants that, based on an examination of books and records, they find that no benefits or funds to cover operating losses have been received from the government. In addition, this party objects that the second sentence of paragraph (e) relieves the Department of the obligation to collect pricing information that may be highly relevant to any inquiry into continuing receipt of subsidies, such as those to cover operating losses.

**Department's Position:** Although the Department recognizes the importance of effective monitoring, we have not adopted the commenter's suggestion. Paragraph (g)(2)(i) provides that each suspension agreement shall contain a statement of the procedures to be followed to monitor compliance. The monitoring provisions of each agreement specify the types of information to be submitted. In practice, the Department requires submission of relevant information on a quarterly basis. The Department may consider it necessary to require all of the information identified by the commenter but does not believe it is necessary or appropriate to require such information in cases where it is not needed.

The second sentence of paragraph (e) does not relieve the Department of its obligation to monitor effectively each suspension agreement. If appropriate, the Department will obtain price information described in that sentence. The regulation merely states that the Department is not obligated to collect such information on a continuing basis.

#### Sec. 355.18(g)(1)

**Comment:** One party suggests that the 45-day time limit on submission of a proposed agreement is unnecessarily restrictive, but another party believes that the limit should be 60 days, so that consideration of the proposed suspension agreement will not occur concurrently with preparation of the final determination.

One party notes that this paragraph continues to permit the Department to suspend an investigation up to the date of its final determination, even though the purpose of a suspension agreement is to eliminate the unfair trade practices or the injurious effects rapidly (*i.e.*, before the scheduled date for the final determination) in order to eliminate as much as possible the uncertainty and expense of the investigation. The party recommends that paragraph (g)(1) be changed to require that: (1) foreign respondents and governments submit, at the time they submit their responses to the Department questionnaire, any proposed suspension agreement and all



documentation for verification of benefits and for renunciation of present and future benefits; (2) the domestic interested parties be given a reasonable time thereafter to comment on the proposed agreement; and (3) the Department make a final decision on the proposed suspension agreement not later than the scheduled date for the preliminary determination.

Three parties suggest that we revise paragraph (g)(1) to provide specifically that any party submitting to the Department a proposed suspension agreement serve it at the same time directly on domestic interested parties.

**Department's Position:** The 45-day time limit in this paragraph establishes the minimum amount of time the Department requires to review a proposed agreement and provide the 30-day notice to the petitioner under paragraph (2)(i). This time limit also affords ample time for the Department to prepare the final determination.

The statute and legislative history clearly permit the Department to conclude a suspension agreement any time prior to its final determination. See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 51-52 (1979). The purpose of permitting suspension of investigations is, as the commenter notes, to "permit rapid and pragmatic resolutions of countervailing duty cases." *Id.* at 54. See also H.R. Rep. No. 317, 96th Cong., 1st Sess. 53-54 (1979). In practice, however, it is difficult to reach a pragmatic resolution of cases, especially complex cases, in significantly less time than that allowed by the statute. The Department proceeds cautiously in signing suspension agreements to ensure that all statutory criteria, including the public interest criteria, are satisfied. Therefore, we have not adopted the suggestion that suspension agreements be concluded no later than the date of the preliminary determination.

Although the third commenter's proposals would ensure an early resolution of the question whether a suspension agreement is attainable, it would not ensure a "rapid and pragmatic resolution of countervailing duty cases." The proposal would impose time limits much shorter than those permitted by statute. As a result, the prospects of reaching an agreement on suspension would be severely reduced by the lack of time to consider and negotiate a solution to issues associated with the proposed suspension agreement. The regulation as drafted is more consistent with the statute, legislative history, and the Department's experience.

Draft proposed suspension agreements submitted to the Department

on or before the 45th day for review under paragraph (g)(1) need not be served on other interested parties. We are modifying this paragraph to clarify that the service requirement only applies to a proposed agreement preliminarily accepted by the Department. We are amending § 3255.31(g) specifically to exempt submissions under paragraph (g)(1)(i) from the general service requirements. The 15-day period between the deadline for submission of an initial draft agreement (paragraph (g)(1)(i)) and service of an agreement preliminarily accepted by the Department to the petitioner and other interested parties (paragraphs (g)(1)(ii) and (g)(2)(i)) is intended to give the Department, not interested parties, an opportunity to review and, if appropriate, suggest modifications to the proposed agreement. The petitioner and other interested parties have ample opportunity to comment beginning on the date specified in paragraph (g)(2)(i).

#### Sec. 355.16(g)(2) and (g)(3)

**Comment:** Two parties state that the consultation requirement in paragraph (g)(2)(ii) should provide explicitly that, on request by the petitioner, the Department will meet and discuss with the petitioner the proposed suspension agreement. One party believes that, although the consultation requirement is stated in the existing regulations, the Department has interpreted the requirement as satisfied by the separate provision (§ 355.31(h)(3) of the existing regulations) for submission of written comments.

Regarding paragraph (g)(3), one party suggests changing the deadline for submitting written argument and factual information from five to 14 days prior to the final determination, in order to provide adequate time for consideration of the submissions. Another party suggests changing "final determination" to "date of the proposed adoption of the suspension agreement."

**Department's Position:** The regulation as drafted addresses the commenters' concerns. Paragraph (g)(2)(ii) provides for consultation and paragraph (g)(3) provides for submission of written argument and factual information concerning the proposed suspension agreement. The regulation draws a clear distinction between the two types of communication. As a matter of practice, the Department affords the petitioner in each case the opportunity for "complete disclosure and discussion." S. Rep. No. 249, 96th Cong., 1st Sess. 54 (1979).

We agree that five days allows the Department too little time in which to consider written argument and factual

information. Accordingly, we have changed paragraph (g)(3) to establish the deadline for submissions as ten days prior to the final determination. To limit the deadline to 14 days, as suggested, would unnecessarily restrict the Department's access to relevant information and arguments.

Unless the deadline stated in this paragraph is keyed to a date known to or determinable in advance by all parties to the proceeding, the deadline would be meaningless. The Department would sign a suspension agreement prior to the scheduled date for the final determination only after the Department has given all parties their opportunity to consult and comment on the proposed agreement. This paragraph necessarily establishes only the maximum conceivable time limit on submissions.

#### Sec. 355.18 (i) and (j)

**Comment:** One party suggests that paragraph (j)(2) include a statement of the effect of a negative final determination by the Department or the Commission.

Regarding paragraph (j), one party contends that there is no statutory authority for prohibiting entry of merchandise, as provided in paragraph (j)(2). This party believes that imports in excess of the limits in a quantity restriction agreement are merely a violation of the agreement, to be addressed under § 355.19.

**Department's Position:** The effect of a negative final determination by the Department or the Commission is stated in § 355.17(c). We are adding to this paragraph, however, a sentence to clarify the effect of a negative final determination on the suspension agreement, in accordance with section 704(f)(3)(A) of the Act.

The authority for paragraph (j)(2) is found in section 704(d)(3) of the Act. The Department may order Customs to limit or exclude entry of merchandise under paragraph (j)(2) and may also determine under § 355.19 that the agreement has been violated. The cross-reference in paragraph (j)(2) is corrected to read "under paragraph (b)(3)" rather than "(b)(2)."

#### Sec. 355.19(a)

**Comment:** Three parties object to this paragraph because it provides that, "without right of comment," the Department may determine that the signatory foreign government or exporters have violated an agreement and take enforcement action. They believe that fairness and due process require right of comment before the contractual agreement is abrogated or

punitive action taken. One of these parties states that, in order to abrogate the agreement, the Department must make "a determination based on some sort of fact finding that there has, in fact, been a violation by the other party." This party also believes that, because paragraph (a) provides no right of comment, but paragraph (b) does provide such a right, the two paragraphs are in conflict.

One party comments that, in order to comply with section 704(i)(1)(D) of the Act, paragraph (a)(4) must require the Secretary to notify the Commissioner of Customs if the Secretary determines that the violation of the suspension agreement was intentional. This party states that the requirement of paragraph (a)(4) as drafted—to notify Customs "if appropriate"—is too vague and suggests that Customs must itself determine whether the violation was intentional.

**Department's Position:** As stated in the preamble to the proposed rule, "The Secretary would use the 'fast track' approach in paragraph (a) when the Secretary decides that the record shows clear evidence of violation and that notice and comment are unnecessary." There is no unfairness or violation of due process when the Department's determination is based on facts in the record of the case which establish that the foreign government or the exporters have failed to comply with the terms of an agreement by their own act or omission. This regulation is consistent with the statute and legislative history.

Paragraph (b), which does provide for notice and comment, covers situations when the evidence of a violation is less compelling. It also covers situations when the Department has reason to believe that a suspension agreement no longer satisfies the public interest or monitoring requirements of the Act. Paragraphs (a) and (b), therefore, cover different situations and are not in conflict.

We are revising paragraph (a)(4) by deleting the phrase "if appropriate" and inserting in its place "if the Secretary determines that the violation was intentional." This change will make plain that the Department will refer the violation to the U.S. Customs Service when the Department considers that the agreement was intentionally violated.

#### Sec. 355.19(b)

**Comment:** One party complains that paragraph (b)(2) does not provide a meaningful right of comment, because, as drafted, this provision would allow the Department to take action after publishing a Federal Register notice requesting comment but before actually receiving and considering the comments.

The party suggests that paragraph (b)(2) be amended: (1) to provide a reasonable time prior to the determination for submission and consideration of comments; and (2) to require that the Department explain the reasons and basis for its determination, including its response to the comments submitted.

Another party contends that it is illogical to impose suspension of liquidation, as provided under paragraph (b)(2)(ii), from the date of first entry of merchandise under the agreement, because the Department's determination under this paragraph is based on its subjective evaluation whether circumstances have changed subsequent to the effective date of the agreement. The suspension of liquidation should apply only from the date the Department makes the determination under paragraph (b)(2)(ii).

**Department's Position:** In order to avoid any confusion and better reflect the intent of this paragraph (its title is "Determination After Notice and Comment"), we are adding the phrase "and after consideration of comments received," before the phrase "the Secretary will" in paragraph (b)(2). Because the notice published under paragraph (b)(1) will contain a time period for submission of comments that is reasonable under the circumstances of the case, it is not necessary to provide time limits in the regulation. Because the statute does not contain such a requirement, it also is not necessary to add to the regulation a special requirement that the Department provide reasons for its determination and address each comment submitted. However, it is the Department's general practice to explain its determination and address comments received. See, e.g., *Iron Ore Pellets from Brazil*, 51 FR 10906 and 21961 (1986).

Regarding the effective date of suspension of liquidation, paragraph (b)(2)(ii) was intended to conform to section 704(i)(1)(A)(ii) of the Act, which provides for suspension of liquidation of all unliquidated entries of the merchandise made on or after the date the agreement no longer meets statutory requirements, even if that merchandise was entered before the date of the Department's notice under paragraph (b)(1). We have amended paragraph (b)(2)(ii) to reflect that intention more clearly.

#### Sec. 355.19(d)

**Comment:** Six parties believe the proposed definition of "violation" is inconsistent with section 704(i) and the legislative history of the Act to the extent that it defines a violation in terms of "significant" noncompliance. Three

parties believe that any violation of the agreement must be treated as a violation, not just those which the Department considers significant. One of these parties states that the common law *de minimis* doctrine would apply to suspension agreements even without the proposed regulation.

Of the six parties, two suggest that the definition be modified to apply a standard based on inadvertence and inconsequential acts or omissions; three advocate deleting the entire definition; and one would define "violation" to mean "any breach of terms of a suspension agreement \* \* \*" and would add a list of acts by the signatory foreign government, producers, or exporters which, in addition to "breaches of specific agreements," shall be considered violations. These activities, which the party believes should be prohibited by the specific terms of any agreement, are: (1) failure to pay export taxes on the date of exportation; (2) payment of benefits constituting subsidies to other divisions or subsidiaries of a signatory corporation; and (3) application by the signatory company for benefits from any covered subsidy program or other program reasonably countervailing under agency precedents.

Finally, one party expresses agreement with the proposed definition of "violation," because it clarifies that insignificant acts or omissions will not be considered violations.

**Department's Position:** The purpose of the definition of "violation" is not to permit the Department to ignore noncompliance or equate "significant noncompliance" with "intentional violations," but to distinguish noncompliance that warrants termination of the agreement from noncompliance which is *de minimis* and clearly does not warrant termination. This is similar to the distinction in contract law between "material" and "immaterial" breach. The word "significant" is too vague to accomplish this purpose. Therefore, we are modifying the definition to state that "violation means noncompliance with the terms of a suspension agreement caused by an act or omission of a signatory foreign government or exporter, except, at the discretion of the Secretary, an act or omission which is inadvertent or inconsequential." Even if the Department finds that the act or omission was clearly inadvertent or inconsequential and decides not to declare the agreement violated, the Department would consider whether it is appropriate to seek revision of the agreement under paragraph (b)(2)(ii) (B)



or (b)(2)(ii)(C) in order to eliminate the possibility of repetition of such acts or omissions.

#### Sec. 355.20(a)

**Comment:** One party states that the regulations should provide that the Department will make a final determination not later than 75 days after "the date of" its preliminary determination (as under the existing regulation) rather than "the date of publication of" its preliminary determination, as proposed. The party notes that the preliminary determination may be signed three to five days before it is published in the Federal Register, which means that under the proposed rule the Department may extend the statutory time limit by the same number of days.

Another party suggests that paragraph (a)(2)(i) should be modified to require inclusion of administrative and judicial precedents on which the legal conclusions are based. Regarding paragraph (a)(3)(ii), one party would insert "publication of" before "the countervailing duty order under § 355.21."

**Department's Position:** We have revised paragraph (a) to state that "[n]ot later than 75 days after the date of the Secretary's preliminary determination, the Secretary will make a final determination."

Regarding paragraph (a)(2)(i), it is the Department's practice to explain in detail the legal conclusions for its final determinations, including, as appropriate, a statement of relevant legal precedent. This practice fully complies with section 705(d) of the Act.

We have modified paragraph (a)(3)(ii) by inserting "publication of" before the phrase "the countervailing duty order under § 355.21" in order to conform this paragraph to § 355.21(b).

#### Sec. 355.20(b)

**Comment:** One party suggests that this paragraph be modified to include a time limit for submission of upstream subsidy allegations. The party suggests that a reasonable deadline would be five calendar days before the date of the final determination in order to provide petitioners the maximum opportunity to raise the issue. In addition, this paragraph should provide that the Secretary may self-initiate an upstream subsidy investigation at any time prior to making the final determination.

Another party suggests deleting the first clause of the first sentence in paragraph (b)(2)(ii)(C) and inserting in its place the statement that the Secretary shall end the suspension of liquidation ordered in the preliminary

determination on an entry-by-entry basis on the 120th day after the date of each entry. The purpose is to ensure that suspension of liquidation continues on an entry-by-entry basis, rather than on the basis of all entries covered by the preliminary determination, for the maximum time permitted by law.

**Department's Position:** As explained in the Department's position on § 355.15(d), we agree that there should be a time limit for requesting postponement of the scheduled determination to investigate upstream subsidies. Because of the greater workload associated with final determinations, we have modified paragraph (b)(1) to provide a 15-day time limit before the scheduled date for the Secretary's final determination (as opposed to the 10-day time limit specified in § 355.15(d)(1) for preliminary determinations). Paragraph (b)(3) adds a notice and publication requirement like that set forth in § 355.15(e)(2). The text of paragraph (b) in the proposed rule corresponds to the text of paragraph (b)(1) of the final rule, except for the last sentence which is now revised as paragraph (b)(3). If the Department decides on its own initiative to commence an upstream subsidy investigation, it may postpone the scheduled determination (or, under paragraph (b), the decision concerning upstream subsidization) by notifying all parties to the proceeding not later than the date of the scheduled determination, as provided in this paragraph and in § 355.15(e).

Regarding the 120-day limit on suspension of liquidation, paragraph (b)(1)(ii)(B)(iii) accurately reflects section 703(g)(2)(B)(ii) of the Act, which provides *inter alia* that "suspension of liquidation ordered in the preliminary determination shall terminate at the end of 120 days from the date of publication of that determination." This provision specifies that suspension of liquidation shall terminate 120 days after the date of publication of the preliminary determination, not 120 days after the date of entry of the merchandise. Consistent with Article 5(3) of the Subsidies Code, the statute clearly places a 120-day limit on the imposition generally of provisional measures, not on an entry-by-entry application of them.

#### Sec. 355.20(c)

**Comment:** Six parties argue that paragraph (c)(1)(ii) is inconsistent with section 705(a)(1) of the Act and relevant legislative history. They contend that neither the statute nor the legislative history authorizes the 120-day limit on provisional measures which is set forth

in this paragraph. Although all six parties advocate deletion of this provision, one party states that at a minimum the provision should be redrafted to make the suspension of liquidation terminate on the 121st day after the date of each entry. This party states that such a provision would satisfy the purpose of Article 5, para. 3 of the Agreement, because no single entry would remain subject to provisional measure for more than 120 days. Finally, this party also comments that paragraph (c)(1) is unclear, because it suggests that the Secretary will end suspension of liquidation only at the petitioner's request.

Regarding the request for postponement described in paragraph (c)(2), one party states that it is unfair to the exporter to allow the petitioner to obtain postponement at such a late date in the investigation. Another party comments that if the request for postponement is made after hearings have been held and briefs filed, the Department should specify, upon granting the request, that the postponement does not create a right to an additional hearing or briefing in the same investigation.

**Department's Position:** In *United States Steel Corp. v. United States*, 9 CIT 453 (1985), the Court of International Trade upheld the Department's interpretation of section 705(a)(1) of the Act, as reflected in paragraph (c)(1)(ii) of the proposed regulation, and the court rejected plaintiff's contention that provisional measures must remain in force until the Department issues its final determination in the postponed investigation. The statutory scheme, moreover, provides for provisional suspension of liquidation no longer than 120 days from the date such suspension is first imposed in the investigation, not 120 days from the date it was imposed on each entry. See the Department's response to comments on § 355.20(b). We have clarified the language of paragraph (c) to provide that suspension of liquidation will end after 120 days with or without a request from the petitioner.

Regarding paragraph (c), it is not unfair to any interested party for the Department to entertain a request for postponement of the final determination submitted not later than 10 days before the scheduled date of the final determination. The exporter knows from the outset that if antidumping and countervailing duty investigations are initiated simultaneously on the merchandise from the same or other countries, the Department will, at the petitioner's request, postpone its final

determination in the countervailing duty investigation. Moreover, the purpose of the postponement is to facilitate and simplify parallel investigations for the interested parties, as well as for the Department and the Commission. Even if the request is submitted at a date late in the investigation, this purpose is served by granting the requested postponement. Of course, postponement would not create a right to an additional hearing or extension of the briefing schedule in the countervailing duty investigation if a hearing had already been held and the deadlines for submitting information and written argument had already passed. See §§ 355.31 and 355.38.

We have added a new paragraph (c)(3) to provide for notice to all parties to the proceeding and publication of notice in the Federal Register. This provision corresponds to the notice of postponement provisions in paragraph (b)(3) and § 355.15(e)(2).

#### Sec. 355.20(d)

**Comment:** Several parties object to the benchmark in paragraph (d)(3) for identifying a significant differential between a company-specific and a country-wide countervailing duty rate. One party believes that the definition of "significant differential" is so high that it does not conform to Article 4, para. 2 of the Agreement. Other parties state that the regulation does not conform to the legislative purpose of section 706(a)(2) of the Act, because the benchmark would apply even in the absence of evidence of an administrative burden associated with calculation of company-specific rates. Several parties urge the Department to reduce the benchmark in order to minimize the number of situations in which the expectation of averaging may cause foreign firms to maintain or increase, rather than decrease, their reliance on subsidies.

The following benchmarks are recommended as a substitute for the "greater of 10/25" in the proposed rule: greater of 5/25; lesser of 5/25; lesser of 10/25 or, alternatively, more than 10 percentage points; lesser of 5/50; and more than 0.5 percent or some other minimal level. One party suggests that the Department should calculate a company-specific rate for each company to which it sends a questionnaire. Four parties believe that the best approach is to eliminate the benchmark completely and provide in the regulation that the Department will determine whether a significant differential exists based on an evaluation of all relevant factors in each case. Under this approach, the Department would consider the nature

of the product and market and the extent of the administrative burden associated with calculation and application of company-specific rates (as determined by the number of non-government-owned firms investigated or a specific analysis in each case of the administrative burden on the Department and the Customs Service). Three parties state that the country-wide average should not include companies with zero or *de minimis* rates.

According to two parties, paragraph (d) should provide that, in applying company-specific rates, the Department will treat as a single company all companies that are directly or indirectly related to each other through stock or government ownership. The reason is that producers that are subsidiaries of a common state-owned parent can evade countervailing duties by making the subsidiary with the lowest individual rate the exporter to the United States for the group.

Several parties comment that paragraph (d)(1) lacks clarity. One party suggests that the beginning of the paragraph should be modified to read "For a producer or exporter that is government owned". In addition, this party suggests that we define "government owned" to mean more than 50 percent owned, directly or indirectly, by the government.

**Department's Position:** Paragraph (d) is consistent with the Agreement for the reason stated in this preamble in the Department's response to comments on § 355.14(c). It is consistent with section 706(a)(2) of the Act, because the Department has developed a reasonable standard for measuring a "significant differential."

The purpose of section 706(a)(2) is to "lessen the administrative burden on the administering authority stemming from implementing company-specific rates." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 180 (1984). Congress recognized that the administrative burden of calculating and assessing company-specific rates is significant, and did not require the Department or the Customs Service to quantify the burden in each case. Such a requirement would simply have added in additional administrative burden and, to some extent at least, have undermined the purpose of section 706(a)(2). Instead, Congress created a presumption in favor of country-wide rates. Unlike the antidumping law, which is directed at company-specific activity, the countervailing duty law is directed at government or government-sponsored activity. Country-wide countervailing duty rates are well-suited

to discourage such foreign subsidization. A central purpose of the law is to encourage foreign governments not to provide competitive benefits to their exporting industries. The best way to accomplish that end is by continuing to treat the foreign government as the central actor, rather than by piecemeal policing of individual companies to encourage them not to use programs offered by those foreign governments. Furthermore, assigning the same rate to all companies encourages those that receive less than the maximum subsidies available to seek maximal subsidization, which would probably overburden the foreign government. In that event, the foreign government would be driven to lower the overall level of subsidization or eliminate the program.

Congress directed the Department to develop a "reasonable" standard for determining under section 706(a)(2)(A) what is a "significant differential between companies receiving subsidy benefits." See *id.* The Department considered all relevant factors, including the purpose of the countervailing duty law, the nature and extent of the administrative burden in implementing company-specific rates in past cases, and the concerns of the respondent firms and importers. The Department also evaluated the effect that the various possible approaches would have on these factors. We agree that the benchmark can reach anomalous results when the country-wide average is 10 percent or less and an individual firm has been found to have a rate several percentage points below that rate. For example, a firm with a one percent rate would, under the proposed rule, be subject to the country-wide average if that average was 10 percent or less. In response to this anomaly, we have modified the proposal to provide a benchmark of the greater of five percentage points or 25 percent.

For the reasons described in the preamble to § 355.20(d) of the proposed rule, we believe the benchmark in paragraph (d), with this modification, is reasonable. A benchmark is preferable to a completely *ad hoc*, case-by-case analysis, because it provides an important element of predictability and it lessens the administrative burden significantly.

Except in investigations or administrative reviews in which the Department does not investigate every company (see the Department's response to comments on § 355.14), the country-wide rate includes all companies. The first step in the Department's calculation of the net



subsidy is to determine the country-wide average rate. This rate includes all companies, regardless of the level of benefits of each company. If the country-wide average is *de minimis*, our determination would be negative in an investigation, and the rate for all companies, regardless of the level of benefits of each company, would be zero in an administrative review. If the country-wide average is above *de minimis*, we then compare individual company rates with the country-wide average rate to determine whether significant differentials exist. Because we have added to the definition of "significant differential" individual rates of zero and *de minimis* (see §§ 355.20(d)(3) and 355.22(d)(3)), it is at this point that we remove all zero and *de minimis* companies (as well as other companies with significantly different rates) from the calculation. As soon as at least one company is removed from the country-wide rate average, we no longer use the country-wide rate for duty deposit or assessment purposes. Rather, we assign individual company-specific rates to those companies that are "significantly different" (including zero rate and *de minimis* companies in an administrative review); the remaining companies form the basis of the "all other" rate. An "all other" rate is different from a country-wide rate because an "all other" rate is not based on all companies.

In our experience to date, we have identified three situations that require an exception to this general practice. One occurs when an investigation or review does not cover virtually all exports of the merchandise to the United States. If, for example, we examine only 60 percent of total exports, and we receive an exclusion request from a company in the remaining 40 percent, we would not include that company in the calculation of the country-wide average rate. In this instance, we would calculate the country-wide average rate in accordance with our general practice as though the 60 percent coverage defined the "universe" of exports. [N.B.: We no longer permit exclusion requests from companies within the 60 percent total coverage because such firms would achieve the same result with our zero or *de minimis* standards. See the Department's response to comments on § 355.14.]

A second exception is when we have no company-specific export data, only aggregate export data from a government (such as in the case of *Live Swine and Fresh, Chilled and Frozen Pork Products from Canada*, 50 FR 25097 (1985)). This occurs when there is an

extremely large number of exporters. In such a case, companies that request and are granted exclusion would be taken out of our calculation of the country-wide rate.

A third exception occurs when we use generally recognized sampling techniques. Companies included in the sample may not request exclusion; they may, however, be excluded if the Department determines that they received zero or *de minimis* benefits. Although such companies would be excluded from the order, they would be included in the calculation of the country-wide rate. We would apply the same methodology in an administrative review; a company included in the sample may submit notification of zero or *de minimis* benefits and obtain a zero or *de minimis* rate, but the company still would be included in the calculation of the country-wide rate. To do otherwise would upset the accuracy of the sample.

The Department is aware of the potential for evasion of an order resulting from the shifting of export business to a related company with a lower company-specific rate, and believes this is one more good reason for the presumptive country-wide rates. However, rather than require by regulation that all foreign producers and exporters that are related or government-owned be treated as a single entity for deposit and, under § 355.21(a), assessment purposes, the Department believes it is more appropriate to address and correct this problem on a case-by-case basis. The rule suggested by the commenter likely would result in unfair treatment for many producers and exporters.

Whether or not a company is "government owned" for purposes of section 706(a)(2)(B) of the Act will depend on the facts developed in a particular proceeding.

We have revised paragraph (d)(1) for clarity based on the comments received.

#### Sec. 355.20(e) and (f)

**Comment:** Six parties characterize paragraph (e) as an attempt to penalize producers or exporters that make false certifications. They believe the penalty is unduly harsh, especially if the certifications described in § 355.14 were made in good faith. One party contends that the provision contravenes section 706(a)(2), because the Department has no authority to ignore an individual rate, once calculated, if that rate differs significantly from other calculated rates. Four parties suggest that we delete paragraph (e). Two parties suggest that we limit the rule to situations in which we find that the certifications under § 355.14(b) were made in bad faith, with

the burden of proof on the foreign producers or exporters to show that the false certifications were made in good faith.

Two parties suggest that the Department automatically exclude from a final determination all companies for which the Department calculates a *de minimis* rate.

One party wonders whether there is a conflict between paragraph (e) and § 355.14(c). Paragraph (e) appears to require the Department to investigate each request for exclusion (and verify factual information) in order to calculate an individual rate, whereas § 355.14(c) states that the Department will do so "to the extent practicable."

The same party suggests that we modify paragraph (f) to limit the Commission's right to disseminate business proprietary information supplied by the Department.

**Department's Position:** As proposed, paragraph (e) might require the Department to apply a country-wide rate to a company that, by the standard described in paragraph (d), received a net subsidy that was significantly different from the weighted-average net subsidy calculated on a country-wide basis for the period. To this extent, we believe the proposal is inconsistent with paragraph (d)'s requirement that significantly different rates calculated by the Department be separately stated in the final determination. The paragraph is not intended to penalize interested parties that have submitted requests for exclusion. Moreover, it is neither necessary nor appropriate for the Department to attempt to determine whether or not a particular certification was submitted in good faith. Therefore, we have revised the last sentence of paragraph (e) to conform to paragraph (d). That sentence now reads, "The individual rate, calculated in accordance with paragraph (d), will be either the weighted-average net subsidy calculated on a country-wide basis or the individual rate calculated for that person."

The Department would exclude automatically any company that received a *de minimis* net subsidy. See Department's response to comments on § 355.14(c).

Paragraph (e) is consistent with § 355.14(c) because, like the latter section, it does not require the Department to investigate all requests for exclusion. Only if the Department conducted an investigation based on a request submitted under § 355.14 and found a net subsidy for the person investigated would paragraph (e) apply.

In response to the comment on paragraph (f), the Commission may disclose such information only with the Department's permission. See the Department's response to comments on § 355.15(g).

#### Sec. 355.20(h)

**Note:** We have added a new paragraph (h) that would require the Department to hold a disclosure conference, if requested, after a final determination. This paragraph reflects the Department's current practice. We note that the purpose of any disclosure conference is only to provide an explanation of the calculation methodology used in a determination. See the Department's response to comments on § 355.15(h).

#### Sec. 355.21(c)

**Comment:** One party suggests that the phrase "any net subsidy" be changed to read "greater than *de minimis* net subsidies" to reflect the Department's practice. Another party agrees that the regulation should provide for exclusion of any party for which the Department calculated a *de minimis* net subsidy, but believes that *de minimis* should be defined as three percent or less.

**Department's Position:** The phrase "any net subsidy" means any subsidy greater than zero. A *de minimis* subsidy is considered a zero subsidy. Any party that receives a zero (including *de minimis*) subsidy would be excluded from the Department's order. See the Department's response to comments on § 355.14(c). The definition of *de minimis* was addressed in the rulemaking which culminated in publication of a final rule on *de minimis* dumping margins and countervailable subsidies at 52 FR 30660 (August 17, 1987). That rule is included in these regulations as § 355.7.

Paragraph (c), as proposed, only addressed exclusions based on requests submitted under § 355.14. We have modified this paragraph to clarify that any producer or exporter that did not request exclusion under § 355.14 and for which the Department nonetheless calculated a zero net subsidy will be excluded from the order. See Department's response to comments on § 355.14(c).

#### Sec. 355.21(d)

**Note:** We have added a new paragraph (d) to implement the special rule of section 706(b)(2) of the Act, which generally limits assessment to future entries if the Commission's affirmative final determination finds threat of material injury or material retardation of the establishment of an industry. There is no corresponding provision in the existing regulations.

#### Sec. 355.22(a)

**Comment:** Comments focused on the timetables for requesting and conducting

reviews and the requirements for requests for review, including the certification requirements.

Regarding the timetable for requesting and conducting reviews, one party notes that, under paragraphs (a) and (c), the Department can issue the final results of administrative review almost 14 months after the anniversary date of the order. In this party's view, the regulation does not conform to section 751(a)(1) of the Act, which requires a review "at least once during each 12-month period beginning on the anniversary of the date of publication of the order."

Several parties identify one or more of the following practical problems posed by the timetables for submitting requests for review: (1) the agency takes more than 12 months to perform a review, any interested party will be in the position of having to request a second review before the first has been completed, because the second review must be requested during the second anniversary month of the order. To solve this problem, one party suggests extending the deadline for submission of requests for subsequent reviews until after completion of the previous review, and another party would permit submission of requests for the next review only after completion of the previous review. Other parties believe that the only acceptable solution is to require completion of each review within a 12-month period. See comments and Department's position on paragraph (c)(7).

The period for submitting requests for review (the anniversary month) is too short to provide a reasonable opportunity for all interested parties to submit their requests. One party suggests lengthening the period, and two other parties recommend that the Department publish in the Federal Register at the beginning of each month a list of those orders or agreements whose anniversary dates fall within that month. Another party agrees with this recommendation, but would include in the notice the automatic assessment rate for each producer or exporter (see paragraph (g)) and would require the Department to mail the notice to each interested party.

Two comments urged the Department to consider a provision for expediting reviews. One comment was that petitioners should have the opportunity to request prior to the anniversary month an expedited review if, in the investigation or previous review, the Department declined to take into account in calculating the deposit rate the value of a subsidy brought to the Department's attention late in the proceeding or discovered at verification.

The second comment proposed that foreign producers that are new entrants into the U.S. market after the investigation was completed should have the opportunity to request a review at any time more than six months from the deadline for exclusion requests in the last segment of the proceeding. If it is determined that the new entrant received no countervailable benefits, the order would be revoked *ab initio* with regard to the products of that party.

Regarding the requirements for requests under paragraph (a)(1), one party states that individual importers, foreign producers, and exporters should not be allowed to request administrative reviews under this paragraph covering any exports or imports that do not directly affect their products. Another party, who assumes that the reference in paragraph (a)(1) to "interested party" means domestic interested party only, states that the Department should consider adding a requirement that the party requesting review act on behalf of an industry. Otherwise, one small domestic producer could keep the review process active indefinitely, without the support of the major part of the domestic industry.

Regarding paragraph (a)(2), one party considers the requirements contrary to both the purpose of section 751 of the Act, which is to provide for assessment and cash deposit based on the circumstances applicable to imports made during the review period, and the purpose of the amendments made by the 1984 Act, which provided for reviews on request but gave the Department no discretion to impose conditions on requests for review. This party suggests that in order to eliminate these and other conflicts with the Act, the Department should adopt as its final rule on administrative reviews the interim final rule that the Department published on August 13, 1985 (50 FR 32566).

Other parties suggest that we revise paragraph (a)(2) to permit requests for review whenever the importer, foreign producer, or exporter believes it could show that the amount of the net subsidy on entries covered by a review had been reduced substantially from the last established level. One party suggests that the Department might require an allegation of at least a 20 percent reduction, and other parties suggest an alleged reduction sufficient to entitle the requester to a company-specific rate rather than the country-wide rate.

Regarding the certifications described in paragraph (a)(2), the following comments were submitted. (1) Concerning subsidies received,



certifications should be uniform for the foreign government and foreign companies. (2) The certifications should cover any and all subsidies, not just net subsidies and not just subsidies previously found countervailable. (3) Does "received" include subsidy benefits allocated to a current year from a subsidy provided in an earlier year? (4) The regulation should include the form of the certification and indicate who may certify. For example, certification could be in the form of an affidavit attested to by a responsible officer of the producer who can legally commit the company and, for the government, the responsible official of the government entity(ies) concerned.

**Department's Position:** Regarding the timetable for requesting and conducting reviews, we agree that proposed § 355.22 does not comply with the statutory direction that a review be conducted "at least once during each 12-month period beginning on the anniversary of the date of publication of the order \* \* \*." We have, therefore, amended paragraph (c)(7) to require that the review be completed not later than 365 days after the anniversary month (replacing "Secretary's initiation of"). Consequently, reviews will be completed by the end of the anniversary month. In order to ensure that the Department can meet the new deadlines for completing reviews during the period of transition to the new final rule, we have provided that the effective date of § 355.22 (a) and (c) will be the first day of the first month beginning 60 days after the publication of these rules. Prior to that date, the interim final rule published on August 13, 1985 (50 FR 32556) will apply.

We recognize the importance to the party submitting the request for review of knowing the final results of the immediately preceding review, if any. Therefore, we are modifying paragraph (a) to permit the party that submits a request to withdraw the request under certain conditions. If a relevant review has not been completed before the end of the anniversary month during which the new request is submitted, the party that submitted the new request may withdraw it not later than 90 days after the date of publication of notice of initiation of the requested review. The Secretary may extend the time limit if it is reasonable to do so. Notice of the termination or partial termination of an administrative review, based on withdrawal of the request, will be published in the Federal Register (notice of partial termination normally will be published together with the preliminary

results of administrative review for other firms being reviewed, if any).

A one-month request window is sufficient for all interested parties to request a review. As a matter of practice, the Department does publish in the Federal Register at the beginning of each month a courtesy listing of reviews which can be requested during the month. However, it is the responsibility of interested parties to follow developments in a proceeding, even in the absence of published notice at the beginning of the anniversary month. Inclusion of listings of various estimated countervailing duty rates in the published notice is unnecessary, especially because our experience has been that almost all parties discuss their options with the Department prior to filing a request for review.

The Act does not provide for expedited reviews in countervailing duty proceedings. Prior to the normal request month, interested parties may request that the Department conduct a changed circumstances review as described under § 355.22(h). The suggestion that new entrants after the publication of a countervailing duty order be excluded, if our first examination of those exporters shows an absence of a subsidy, is not acceptable. Countervailing duty orders apply to all imports from a covered country, except those from firms specifically excluded from the countervailing duty order. Exclusions are based on the examination of a period prior to initiation of the investigation, when the respondent firm presumably acted without regard to the potential imposition of duties under the countervailing duty law. Under these circumstances, the Department can predict with some reliability the firm's future actions. If we were to follow the proposal in the comment, it would be simple for a firm, knowing of the countervailing duty order, to enter the market, ship for one year or less without accepting subsidies, be "excluded," and then begin to accept subsidies. We believe the revocation procedures of § 355.25 provide the additional measure of security necessary before revocation.

Objections to the provision in paragraph (a)(1), which provides that interested parties may request an administrative review of all producers or exporters covered by an order or agreement, miss the thrust of the provision. The presumptive application of a country-wide countervailing duty rate requires that the review also be country-wide. The only exception to the country-wide review is in paragraph (a)(2), where the claimed absence of a

subsidy, if demonstrated, automatically amounts to a significant difference. As to the suggestion that we amend paragraph (a)(1) to require review on behalf of an industry, no such requirement is imposed by the statute. Although section 751(a)(1), as amended by the 1984 Act, does not specify the acceptable requesters, the legislative history specifies that an appropriate requester is "an interested party \* \* \*." H.R. Rep. No. 725, 98th Cong., 2d Sess. 7 (1984). Therefore, this paragraph of the regulations does not limit an "interested party" to a domestic interested party. Moreover, Section 771(9) of the Act does not limit interested parties to domestic parties acting on behalf of an industry. If the domestic industry no longer supports the continued existence of an order, an interested party can request a changed circumstances review under paragraph (h) of this section.

Objections to the special requirements imposed on a person requesting review of only that person are misplaced. We impose no restriction on requesting a review of all producers or exporters under paragraph (a)(1). Because paragraph (a)(2), however, is designed to deal with only one class of producers or exporters (those receiving zero or *de minimis* benefits, i.e., a significantly different rate), we must be reasonably satisfied that the producer or exporter is entitled to that rate. Thus, we require the requester's and government's certification that the requester is so entitled. Because significant differences, other than zero or *de minimis*, cannot be calculated absent a country-wide review, we make no provision for individual producer or exporter review other than those involving firms claiming zero or *de minimis* benefits.

Regarding the comments on the certifications described in paragraph (a)(2), see the Department's position on § 355.14(b). Although the regulation does not specify a particular form for certification, the form described by the commenter would be appropriate.

#### Sec. 353.22(b) and (c)

**Comment:** Regarding the period under review, one party suggests that we modify the phrase "the most recent completed reporting year of the government of the affected country" in paragraph (b) to refer to the companies', not the governments', reporting year, because "the companies' fiscal years are far more relevant."

Regarding the procedures set forth in paragraph (c), one party contends that the Department should be required to assure individual notice of initiation of a review to all parties to the original

investigation or most recent review. If the Department initiates a review of an individual producer or exporter under paragraph (a)(2) by publication of a notice under paragraph (c)(1), the Department should give other producers and exporters 30 days from the date of publication of the notice to inform the Department that they also want a review.

One party states that the Department does not have authority to limit the number of interested parties to which it sends questionnaires, as provided in paragraphs (c)(2), (h)(1)(ii), and (i)(3), because the sampling authority in section 777A of the Act is limited to antidumping cases. The regulation should provide that the Department will mail questionnaires to the government of the affected country and to all known foreign producers or exporters of the merchandise.

Finally, one party believes the 365-day time limit in paragraph (c)(7) for issuing the final results of administrative review should be shortened to six months with the possibility of extension to nine months for reviews under paragraph (a)(1) that involve a large number of respondents. This party states that the Department should expedite reviews in order to reduce uncertainties caused by long periods of suspension of liquidation. See also comments on paragraph (a).

**Department's Position:** In examining a period, the Department must often rely on both government and firm records. Government and firm reporting (fiscal, tax, etc.) years often differ. We have found government records the most difficult to deal with for periods of less than one year and, thus, have chosen the government reporting year as generally the most appropriate period to review. However, when special situations warrant some other period, we will tie our review to that other period.

We do not agree that all parties to the segment of a proceeding immediately preceding the initiated review must receive actual notice of the initiation under § 355.22(c)(1). However, as a matter of practice, we have attempted and will continue to attempt to provide actual notice to the parties. As to the suggestion that, following initiation of an individual producer or exporter review under paragraph (a)(2), the Department provide a second period for requesting reviews, the party submitting the comment provided no reason, and we can see no reason, to do so. All interested parties have an opportunity to request a review during the anniversary month. A decision to request a review is completely independent of any other

party's request for review of an individual producer or exporter.

The party that argues that the sampling authority of section 777A of the Act is limited to antidumping cases is incorrect. The Conference Report of the 1984 Act specifically described the provision as expanding "the instances in which the administering authority may use sampling and averaging techniques . . . in carrying out annual reviews of outstanding AD or CUD [sic] orders under section 751 \* \* \*." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 186 (1984).

Regarding the suggestion that the Department shorten the time limit in paragraph (c)(7) to six or nine months, the Department requires no less than 365 days in many cases to complete an administrative review. Any shorter time limit is impracticable.

We note that we have extended the deadline in paragraph (c) for publication of notices of initiation of administrative reviews from 10 days to 15 days after the anniversary month. This change has been made to reflect the amount of time that is actually needed to publish an initiation notice. This revision does not change the Department's deadline for completing reviews.

We also note that in paragraph (c) we have clarified that the Department will hold a disclosure conference, if requested, promptly after issuing the final results in an administrative review. In addition, we have clarified that the purpose of disclosure, whether after the preliminary results or after the final results, is only to provide an explanation of the calculation methodology used in reaching the results.

#### Sec. 355.22(d)

**Comment:** Several parties incorporated by reference the comments they made in response to § 355.20(d) of the proposed rule on calculation of individual rates in the final determination. One of these parties states that it is "even more imperative that every effort be made to calculate individual rates during the review process since the determination results in the actual assessment of additional duties." See comments in this preamble on § 355.20(d).

**Department's Position:** See the Department's response to comments on § 355.20(d).

#### Sec. 355.22(f)

**Comment:** Two parties suggest that we revise paragraph (f)(2) to provide that the Secretary "shall," not "may," issue final results that include a zero rate of assessment and cash deposit for

the merchandise of producers and exporters that the Department has verified did not receive countervailable benefits above *de minimis* during the period reviewed.

One of these parties objects to paragraph (f)(3) to the extent that it calls for imposition of a rate on the producer or exporter which exceeds the amount of the subsidy found to exist with regard to that producer or exporter.

Six parties object to paragraph (f)(6) for one or more of the following reasons: it is not authorized by law and is based on a review requirement not authorized by law; and it penalizes producers for actions and conditions beyond their control, such as deficiencies in the certification mechanisms of their governments, the Department's lack of time and resources to conduct a complete verification of all alleged subsidy programs, the Department's decision to change its methodology, or the unintentional or intentional failure of other producers and exporters to pass the certification test. Two parties request that we delete the paragraph. One party suggests that a bar to additional individual reviews should apply only to a producer or exporter found by the Department to have made a material misrepresentation of fact in the certification, and another party would require the foreign producer or exporter to show that the false certification was made in good faith. One party recommends that we revise the paragraph to permit, but not to require, the Secretary to refuse to accept any other requests for review, and another party agrees that more discretion is needed but would limit the discretionary authority to requests for review from the same producer or exporter and would make an exception if that producer or exporter provides good cause for such a review.

**Department's Position:** If the Department is able to verify that an individual producer or exporter received no net subsidy during the period of review, it will issue instructions to the Customs Service to assess no countervailing duties on exports (or entries) during the period of review. If the Department also finds evidence of a net subsidy during a period subsequent to the review period, it will issue instructions requiring a cash deposit of estimated countervailing duties. The use of "may" in the proposed rule was intended to address both assessment and cash deposits. To avoid any ambiguity, we have modified the rule to require assessment of a zero rate and collection of the appropriate cash deposit.

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Paragraph (f)(3) does not call for the imposition of an excessive rate. The assessment and cash deposit rate will be based on the net subsidies found for the individual producer or exporter.

The thrust of the comments regarding the Department's refusal to entertain individual producer or exporter requests following the failed verification of certifications is that one firm's failure ought not to affect the ability of another firm to request a review. It is not, however, deficiencies in the firm's certification that require this provision. Rather, if the government certification is found to be incorrect, we must assume that the government's certification mechanism is faulty. The Department cannot rely on a faulty mechanism as a basis for action, even though this mechanism is not within the control of a particular producer or exporter. Of course, it is hoped that this provision will encourage all governments and firms to be extremely cautious in preparing certifications.

#### Sec. 355.22(g)

**Comment:** Three parties contend that, for the purpose of automatic assessment, the Department should always apply the most recently determined rate. For example, the cash deposit collected on entries made while a review is being conducted are based on a rate established by a determination made before publication of the final results of the on-going review. These parties believe that, under these circumstances, it is more consistent with the purpose of the law to assess duties at the latest determined rate rather than the cash deposit rate.

**Department's Position:** Because of fluctuations in the availability of programs, levels of benefits, exports, and benchmarks, the amount of the net subsidy changes from year to year. Thus, the results of a later review are not necessarily a better estimation of countervailing duties than the results of an earlier review or determination. Moreover, because the existing cash deposit rate is a primary factor entering into each interested party's decision whether to exercise its right to request a review, it would make no sense to change the rate after the time for request has expired. Interested parties that believe the assessment level should be higher or lower than the estimated countervailing duties deposited at the time of entry can request an administrative review. In addition, the use of the cash deposit rate required at the time of entry is in accordance with the purpose of the entire review-upon-request mechanism, i.e., to reduce unnecessary administrative burdens. If

these recommendations were adopted, the Customs Service would be required to make adjustments for under- or over-collections as well as collecting, or paying, interest. In any event, the failure of an interested party to file a timely request for review constitutes a determination under section 751 of the net subsidy for the entries made during the review period.

We emphasize that when no interested party requests an administrative review, the Department will instruct Customs to liquidate the entries for that review period at the rate deposited at the time of entry. This automatic assessment will occur regardless of whether litigation is pending regarding a prior administrative review or the initial subsidy investigation. See *NTN Bearing Corp. of America v. United States*, Slip Op. 88-161, 12 CIT \_\_\_\_ (November 23, 1988) (citing *Fundicao Tupy S.A. v. United States*, Slip. Op. 87-93, 11 CIT \_\_\_\_ (August 3, 1987)).

#### Sec. 355.22 (h) and (i)

**Comment:** One party suggests that we delete the phrase "If appropriate" in paragraph (h)(1)(vi), because timely disclosure would always be appropriate. Another party suggests adding the following sentence at the end of paragraph (h)(2): "Changed circumstances reviews may be requested at any time, including periods other than anniversary months."

Regarding paragraph (i), one party notes that section 762 of the Act refers to the "President," not "a designee." Because "a designee" might be an official not confirmed by the Congress or responsive to requests to appear before Congress, the authority should be restricted to the President. Another party wonders whether section 762(b) of the Act would preclude the preliminary determination described in paragraph (i)(4), and whether the Department would verify information received. Another party states that, in order to conform to the requirement in section 762 that the order be "effective with respect to merchandise entered on and after the date on which the agreement terminates," we should revise paragraph (i)(11) to require publication in the Federal Register of the countervailing duty order on or before the date on which the agreement terminates.

**Department's Position:** We have modified proposed paragraph (h)(1)(vi) (now paragraph (h)(1)(vii)) by deleting the phrase "If appropriate." This change would make it necessary for the Department to provide a further explanation of its determination, if there is additional information about the

determination that can be disclosed, to any party to the proceeding that requests disclosure. As modified, this paragraph conforms to paragraph (c)(6) of this section and to § 355.15(h).

Paragraph (h)(1) does not place any limit on a party's right to request a changed circumstances review or to bring relevant information to the Department's attention. We agree that it is appropriate to clarify specifically that changed circumstances reviews may be requested at any time. Therefore, we have added in a new paragraph (h)(2) the suggested sentence.

We note that we have added a new paragraph (h)(1)(iii) providing that the Department will conduct verifications if appropriate. We also note that we have added a new paragraph (h)(1)(xi) to clarify that the Department will hold a disclosure conference, if requested, promptly after issuing the final results in a changed circumstances administrative review.

The reference to "a designee" in paragraph (i) is a recognition of the President's authority to delegate the authority vested by section 762 of the Act, and is necessary for sound management purposes. The decision called for by paragraph (i) is significant and would be made either by the President or by another high-ranking official in the Executive Branch. Section 762(b) provides that the Department shall prescribe procedures for conducting proceedings under section 762. The procedures prescribed in this paragraph, including the provision for a preliminary determination, are consistent with section 762 and relevant legislative history. Generally, these proceedings are analogous procedurally to administrative reviews. Whether verification of information is required would depend in part on the facts of each case. Regarding the effective date of the order, the Department would provide in the published notice an effective date that conforms to section 762(b). The Department cannot issue or publish the order until it knows that the agreement has terminated. For example, if an agreement accepted under section 704(a)(2) of the Act is extended, there would be no need to publish an order.

We note that we have added a new paragraph (i)(12) to clarify that the Department will hold a disclosure conference, if requested, promptly after issuing the final results in a review conducted at the direction of the President.

#### Sec. 355.23

**Comment:** One party claims that this section is inconsistent with section

707(a) of the Act and the Department's practice. Section 707(a) states that the "cap" on assessment of duties on entries made during the period between the Department's preliminary determination under section 703(d)(2) and the Commission's final determination under section 705(b) is the cash deposit rate set by the Department in its preliminary determination under section 703(d)(2) of the Act. Section 707(a) does not authorize the Department to establish a new cap at the time it issues its final determination under section 705(a) of the Act, as this section of the regulation would do.

**Department's Position:** Section 355.23 is consistent with section 707(a) of the Act and the Department's practice. Section 707(a) of the Act provides that the "cap" on the assessment of duties on an entry made prior to the date of the Commission's final affirmative determination is the amount of the cash deposit or bond required as security for that entry. For an entry made between the Department's preliminary and final determinations, the cash deposit or bond is set by the Department's preliminary determination. For an entry made after the final determination, the cash deposit or bond is set by the Department's final determination. Nothing in section 707 precludes the Department from changing the amount required as security (the bond or deposit rate) when it issues its final affirmative determination. In fact, if the rate in the final determination is higher than the rate in the preliminary determination, it is necessary to order the larger security, in order to assure that the duty can be collected at the appropriate time. The Department has consistently followed the practice reflected in § 355.23. See, e.g., *Forged Undercarriage Components from Italy*, 48 FR 52111, 52116 (1983).

#### Sec. 355.24(b)

**Comment:** One party wonders where the rate described in paragraph (b) may be obtained.

**Department's Position:** The rates under section 6621 of the Internal Revenue Code of 1954 are established by the Internal Revenue Service and may be obtained from that agency.

#### Sec. 355.25

**Note:** In cases in which the Department has issued tentative revocations prior to the effective date of these regulations, it will complete the revocation procedure under the existing regulations. In all other cases, the new regulations will apply.

#### Sec. 355.25(a)

**Comment:** Eight parties object to the three- and five-year time periods for

revocation or termination based on the absence of a subsidy that are set forth in paragraph (a). One party would apply a one-year rather than three-year standard for the government in order to make the policy regarding revocations and terminations consistent with the policy in investigations. In investigations, this party notes, the Department issues a final negative determination when the government has abolished the countervailable subsidy programs, without requiring any established waiting period. Three parties suggest keeping the current two-year period of no subsidization for both the government and the producers and exporters, because they believe the Department's current practice has worked well. Alternatively, two parties state that if the current two-year period is to be extended, three years for both the government and the companies would be sufficient. Two parties recommend five years for both the government and the companies. One of these parties argues that evidence of government abolition of a subsidy program for a period of three years may not ensure that no company is receiving benefits from a pre-existing program, because the Department's practice is to allocate certain benefits to later years. Finally, the same party believes that the required period of no subsidization, whatever its length in years, should end on the date of the Department's tentative determination to revoke.

Regarding the consequences of receipt of a net subsidy subsequent to revocation or termination, three parties would like the reinstatement provision in paragraph (a)(3)(iii) expanded to cover both the government and any or all producers and exporters. Two of these parties believe the Department should consider the original injury finding to have continuing validity unless the Commission subsequently has made a finding of no injury under section 751 of the Act. One of these parties suggests that the Department should immediately conduct a changed circumstances review under § 355.22(h) if revocation was based on a request by the government (paragraph (a)(1)) or all producers and exporters (paragraph (a)(2)).

One party believes the references in paragraphs (a)(1)(ii), (a)(2)(ii), and (a)(3)(iii) to "substantially equivalent programs" are ambiguous. As a substitute, the party would use "countervailable subsidy programs."

**Department's Position:** The adoption of a three-year period for revocation or termination based on the government's elimination of countervailable subsidy programs does not substantially modify

the period of time that must be examined under the existing regulations. Even though the existing regulations require a two-year period without subsidy, the practice adopted in antidumping proceedings requires the examination of, at a minimum, about two years and nine months. That is because the Department examines the period between the end of the two-year period and the date of the tentative revocation or termination (the "gap period"). The adoption in § 355.25(c)(3) of the day after the end of the three-year period as the effective revocation date eliminates the need for an examination of the gap period.

Section 751(c) of the Act grants the Department broad authority to revoke orders and terminate investigations after review under section 751. The Department has long held the view that the absence of a subsidy program, alone, is an insufficient basis for revocation. Section 355.42(a) of the existing regulations provides that, before acting, the Secretary must be "satisfied that there is no likelihood of resumption of the subsidy." A number of factors enter into this question of likelihood of resumption, including the length of time over which producers and exporters have functioned without a subsidy. Because government elimination of subsidy programs can generally only be reversed through relatively transparent and time consuming actions (legislation, regulations, or administrative determinations), we believe that the three-year period in § 355.25(a)(1)(i), in combination with the government's certification required in § 355.25(b)(1), is a sufficient basis to conclude that no resumption of subsidies is likely. As to the shorter and longer periods recommended by commenters, the Department is neither satisfied that the shorter periods are sufficient to meet the likelihood requirements nor convinced that the longer periods are necessary. Thus, we will adhere to a period substantially the same as that contemplated by the existing regulation for government elimination of benefits.

Regarding the contention that a one-year rather than a three-year standard should apply to governments that eliminate programs in order to make the policy on revocation consistent with that in investigations, the analogy to investigations is not appropriate. The Department makes a negative determination in an investigation on any subsidy program that it finds was abolished prior to the date of initiation of the investigation. In abolishing the program, the government presumably acted without regard to the U.S.



countervailing duty law and certainly without regard to the not-yet-issued countervailing duty order. Under these circumstances, the Department can be assured to a reasonable degree that the government will not reinstitute the subsidy program in response to any specific U.S. action under the countervailing duty law. On the other hand, elimination of subsidy programs after the date of initiation of a U.S. countervailing duty investigation or after publication of a U.S. countervailing duty order provides no such reasonable assurance. Elimination of the program under these circumstances might well be the government's short-term response to the U.S. action. The three-year waiting period for revocation provides a reasonable measure of assurance that the government has no intention of reinstating the same or other countervailable programs.

Regarding non-use by producers or exporters of programs, we are not convinced that a three-year period provides the Department adequate assurance that there is no likelihood of resumed use of subsidies. This is because resumption of use is not as easily identifiable as government action to reinstitute a program and can be accomplished quickly. We note that the practice of the Department has been not to grant partial revocation of an order for producers or exporters that do not use countervailable programs. In changing the approach to company-specific revocation for such producers or exporters in countervailing duty cases, the Department intends to proceed cautiously to ensure that it grants no unwarranted revocations. Thus we believe that the five-year period is necessary before revocation or termination.

Regarding the concern that subsidies may be allocated to periods after the period of receipt, the Department will not revoke an order or terminate a suspended investigation as long as there is a net subsidy on the merchandise, computed in accordance with the Department's subsidy methodology.

Although the Department has the authority to reinstate a producer into an existing order, the Department does not believe it has the authority to reinstate a revoked order absent a new investigation. Thus, the reinstatement provisions apply only to partial revocations during the existence of an order. The Department, of course, has the authority to self-initiate an investigation when it concludes that governments or producers or exporters have not complied with the

certifications required by paragraphs (b) (1) and (b)(2) of this section.

In paragraphs (a)(1)(ii), (a)(2)(ii), (a)(3)(ii) and (b)(1), to eliminate any ambiguity, we have, as requested, dropped the reference to "substantially equivalent programs" and inserted in its place the phrase "countervailable programs."

#### Sec. 355.25(b)

*Comment:* One party believes that a request for a review under this section, which the party characterizes as "essentially a changed circumstances review," should be permitted at any time after the initial qualifying period of no subsidies.

Another party states that a request by a foreign government for revocation or termination under the standard set forth in paragraph (a)(1) should include certifications by the foreign producers and exporters. In addition, any request submitted under paragraph (b) should include the agreement of the party or the government to immediate reinstatement of the order.

*Department's Position:* The changed circumstances review mechanism should not be available to a party that fails to use the request and review mechanism established in paragraphs (b) and (c) of this section, which allows a party to secure a revocation in the shortest possible time, given the minimum waiting period requirements.

Certifications by producers and exporters with requests for revocation as a result of the government's elimination of programs would be superfluous. Section 355.25(b)(1) requires the government to certify that it will neither reinstate the program nor substitute other countervailable programs. See the Department's response to comments on § 355.25(a) for a discussion of the reinstatement provisions.

#### Sec. 355.25 (c) and (d)

*Comment:* Two parties recommend that, given the importance of revocation and termination, the Department directly notify domestic interested parties at the time it publishes the notices described in paragraphs (c)(2)(i) and (d)(4)(i). They point out that, especially for small businesses located outside the Washington, D.C. area, notice in the *Federal Register* may be insufficient. Regarding paragraph (d)(4)(i), one of these parties notes, "while it may well be that the passage of time has made a case moot, it is at least equally likely that the passage of time has simply ratified the finding in the investigation to the point where no one bothers to contest it."

Regarding "changed circumstances" revocations or terminations described in paragraph (d)(1) and (d)(2), one party believes that the Department should revise paragraphs (d)(1) to clarify the meaning of the phrase "other changed circumstances." Specifically, changed circumstances do not exist if one or more of the original petitioners or a domestic producer whose production capacity accounts for a significant portion of the domestic industry continues to have an interest in the proceeding. Should some but not all members of the domestic industry favor revocation or termination, this party believes that the Commission is "the appropriate body to weigh the conflicting concerns of the members of the domestic industry . . . under the review procedure." Another party suggests that we revise paragraph (d)(2) to provide that a changed circumstances review may be requested at any time.

Regarding the "sunset" provision in paragraph (d)(4), one party wants the provision deleted, because there is no statutory basis for it and it cannot be justified otherwise. For example, keeping an inactive order in effect does not adversely affect the Department's resources. Another party would have us extend the period for objecting to the proposed revocation, as described in paragraph (d)(4)(iii), from one to two months. A third party recommends initiation of the procedure described in paragraph (d)(4)(i) 90 days before the third anniversary month followed by revocation or termination if no objections are received by the end of that anniversary month.

*Department's Position:* Section 355.31(g) requires that any document presented to the Department, including a request for revocation or termination under § 355.25(b), be provided to all parties on the Department's service list. It is then the party's responsibility either to watch for publication of the initiation and announcement of the request required by paragraph (c)(2)(i), or to contact the Department for information. As to the notice of intention to revoke or terminate required by paragraph (d)(4)(i), actual notice to each party to the proceeding and to other known producers or sellers is required by paragraph (d)(4)(ii). Because, however, the notice of initiation and consideration of revocation or termination provided for in paragraph (d)(3)(i) need not be based on a request, we have added a new paragraph (d)(3)(ii), requiring actual notice if the consideration is not based on a request.

The purpose of paragraphs (d)(1) and (d)(2) is to permit the Secretary to

revoke an order in which the domestic industry is no longer interested. The Secretary cannot conclude that the domestic industry is no longer interested in an order if parties which account for a significant proportion of domestic production continue to favor maintenance of the order. On the other hand, an affirmative statement of no interest by parties representing a significant portion of domestic production is certainly an inducement to conduct a review and may indicate changed circumstances sufficient to warrant revocation or termination. The opposition of one or more domestic parties, including the petitioner, would be evaluated within the context of the continuing requirement that the order have the support of the industry. Of course, an interested party may request the Commission to conduct a changed circumstances review. Furthermore, if the domestic interested parties take conflicting positions, the Department may find that circumstances have not changed sufficiently to warrant revocation or termination.

Paragraph (d)(2) is clear on its face that a request for revocation or termination based on changed circumstances may be submitted at any time.

Congress has recognized that the Department may revoke or terminate in the absence of domestic party interest in continuation of the order or suspended investigation. See H.R. Rep. No. 1156, 98th Cong., 2d Sess. 181 (1984). The so-called sunset provision is merely a means for ascertaining if interest in continuation exists. As to the suggestion that we extend the period for objecting to revocation, we can see no reason to do so. Surely, a one-month period is sufficient to decide if objection is warranted. Finally, if parties believe that five years is too long to wait for a revocation in accordance with the provisions of paragraph (d)(4), they may request revocation under the other provisions of § 355.25.

#### Sec. 355.25(e)

*Note:* We have added clarifying language to paragraph (e) regarding a finding by the Commission on a suspension agreement which would result in termination of a suspended investigation.

#### Sec. 355.31(a)

*Comment:* Twelve parties believe that the deadlines for submission of factual information are unreasonably short and inflexible. Most of these parties object to the proposed deadlines because they would preclude submission of factual information during verification, even though such information could be

verified, or after verification, even though such information may rebut, clarify, or correct earlier submissions.

One party suggests that for both investigations and administrative reviews, the Department establish a deadline of 10 days subsequent to verification or 30 days prior to a final determination or final results of review for submission of factual information that is publicly available and verifiable by reference to "well recognized and respected sources." One party favors retention of the more discretionary guidelines in § 355.34(a)(1) of the existing regulations, which permit the Department to issue specific instructions regarding specific submissions and extend the deadline for submission when warranted. Several parties urge retention of the flexibility afforded by the existing regulation to extend established deadlines, whatever deadlines are included in the new regulations. One party suggests that the regulations be revised to permit the Department to accept at any time information that corrects or clarifies earlier submissions, as under current practice.

Seven parties focus specifically on the effect of the deadlines on the ability of petitioners to participate fully in proceedings. They emphasize that the deadlines in paragraph (a) are appropriate for respondents but would make it impossible for petitioners to organize and to focus their investigative efforts on particular issues raised in respondents' submissions, because respondents' submissions are often made just prior to the deadline established in this paragraph. The effect of the deadlines would be to defeat the legislative intent to permit all interested parties a meaningful right to comment. It would also adversely affect the domestic industry's right to judicial review based on substantial evidence of record.

Two parties suggest that we permit submission of factual information by petitioners a reasonable period ("normally 14 days") ("not less than 30 days") after information submitted by respondents has been released to petitioners under administrative protective order. Another party suggests that the deadlines for respondent be one week before verification begins, and, in an administrative review without verification, one week before the Department's preliminary determination. The domestic industry would have 10 days from the date it obtains all proprietary information under protective order (including the non-public version of the Department's verification report) in which to submit factual information

and to comment. Another party suggests that domestic interested parties be given "ten days to two weeks" after the date all proprietary material becomes available under administrative protective order. One party believes the standard in paragraph (a)(2) should conform to § 355.38(b) and provide that the Department will consider factual information submitted after an applicable time limit if "sufficient time remains" to consider it. Other parties believe the Department should establish specific deadlines in each case, as under current practice.

*Department's Position:* The purpose of this section is to provide all interested parties a reasonable opportunity to submit factual information for the Department to consider in the final determination or the final results of review. The "flexible" approach to deadlines for submission of factual information, which means that the Department establishes time limits separately for each investigation or review, has led to seemingly endless confusion and time-consuming debate about what is a reasonable time limit.

The comments have not persuaded us that the time limits for submission of factual information by respondents (interested parties as defined in paragraph (i)(1) or (i)(2) of § 355.2) are unfair or unreasonable. If the Department deems additional factual information to be critical to the investigation or review, the Department will request the information under § 355.31(b)(1). Such information might include information that to some extent clarifies or corrects earlier timely submissions and that could be, for example, requested orally at verification.

We do agree, however, that the proposed rule does not provide domestic interested parties (interested parties as defined in paragraphs (i)(3), (i)(4), (i)(5), or (i)(6) of § 355.2) an adequate opportunity to rebut, clarify, or correct earlier submissions of factual information by respondents. Accordingly, we have modified paragraph (a) of this section to provide a period of 10 days from the date such factual information is available to domestic interested parties for them to submit factual information that clarifies, rebuts, or corrects earlier submissions by respondents. The information is "available" to a domestic interested party when it is either served on it or, if the information is business proprietary information that is not served directly on the domestic interested party, released to it under administrative protective order.



Although paragraph (a)(1)(i) of this section permits submission of factual information the day before the scheduled starting date of verification in an investigation, it is incumbent on parties and their counsel to provide such information before verification commences. Otherwise, the Department cannot verify the information and cannot use it, because section 776 of the Act precludes reliance on unverified information in making the final determination. It is therefore pointless to submit factual information before verification has technically begun but after the verifier can use it.

We note that the deadlines for submissions of questionnaire responses, including deficiency responses, and submissions by petitioners of new allegations, are controlled by paragraphs (b) and (c).

We also note that we have clarified that factual information submitted after the applicable deadline will be returned to the submitter with written notice stating the reason for return of the information.

#### Sec. 355.31(b)

**Comment:** One party suggests that the last sentence of paragraph (b)(2) should read: "The Secretary will consider unsolicited questionnaire responses if submitted on or before the due date of solicited responses." In this way, all producers would have an opportunity to have the Department include them in the investigation and, if appropriate, calculate for them an individual rate.

Another party contends that paragraph (b)(3) should be revised to permit requests for extension to be submitted and approved orally and thereafter confirmed by written memorandum to be placed in the public record. The written request requirement is unnecessary and may prove unadministrable as a result of unforeseeable contingencies. Moreover, the approving officials should not be limited by regulation, because the designated officials may be unavailable due to other obligations.

One party believes that under paragraph (b)(3) the Department should provide that each request will be judged on its own merits. It is inappropriate to provide that requests for extension ordinarily will not be granted, because the need for additional time may be legitimate.

**Department's Position:** As explained in the preamble to the proposed rule, the short statutory time limits and the complexity of countervailing duty proceedings, including verification requirements, usually make it impossible for the Department to

consider unsolicited questionnaire responses. See 50 FR 24214 (1985). The Department normally includes in its investigation foreign producers and exporters accounting for most of the exports of the merchandise. In addition, a party may request exclusion from an investigation under § 355.14 or revocation under § 355.25, as appropriate. In unusual circumstances, paragraph (b)(2) permits the Department to consider unsolicited questionnaire responses. We note that we have added a sentence to paragraph (b)(2) to clarify that untimely or unsolicited questionnaire responses rejected by the Department will be returned to the submitter with written notice specifying the reasons why the Department rejected the information.

Requests for extension must be approved in writing, as provided in paragraph (b)(3), in order to avoid confusion and ensure fair and equitable treatment for all parties. If the designated official is not available to act on a request, the official will have designated someone else to act in the official's absence.

The first sentence of paragraph (b)(3) emphasizes the fact that an extension of time for submitting a questionnaire response is difficult to obtain. The Department will judge each request on its own merits and grant requests when the requester can establish a legitimate need for additional time.

#### Sec. 355.31(c)

**Comment:** Seven parties comment that the deadline in paragraph (c)(1) for submission of allegations of subsidies is unreasonably short. One of these parties states that Congress did not include any time limit in section 775 of the Act and recognized the importance of having the Department examine all potential subsidies, subject only to the caveat that examination of allegations of additional subsidy practices not delay the investigation more than absolutely necessary. S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979). Moreover, in practice, the Department has identified potential subsidies during and even after verification without delaying the investigation. If the petitioner identifies a new subsidy after analyzing the respondents' submissions and the Department's verification report, that subsidy should be included in the investigation.

One party would delete paragraph (c)(1) and provide instead a general rule that the Department will consider factual information, including new subsidy allegations, submitted within a reasonable time after petitioner receives under administrative protective order all

of the respondents' submissions and the Department's verification reports. Four parties would revise that paragraph to provide that new subsidy allegations may be submitted as long as "sufficient time remains to include them in the investigation," as provided in § 355.39(a). Another party would also add to paragraph (c) the provision in § 355.39(b)(2) regarding deferral of consideration until the next administrative review.

Regarding paragraph (c)(2), one party suggests that the Department should consider during an investigation an allegation that petitioner no longer has standing whenever there is evidence to support such an allegation.

**Department's Position:** The time limit for submission of additional allegations of subsidies is intended to ensure that the Department is informed of any allegation that it must include in its investigation or review sufficiently early in the proceeding for it to obtain information, conduct verification, and issue its preliminary and final determinations and results on the additional allegations. A party may request an extension of the time limit, as provided in paragraph (c)(3). Moreover, even after the time limit stated in this paragraph has passed, the Department, under § 355.39(a), would include in its investigation or review any newly discovered practice that appears to provide a subsidy, provided it concludes that sufficient time remains before the scheduled date of the final determination or final results of review. In practice the Department has identified and included in an investigation new subsidies discovered at verification. See, e.g., *Certain Atlantic Groundfish from Canada*, 51 FR 10041, 10050 (1986).

Submitters should note that the adequacy of new allegations, including upstream subsidy allegations, would be judged by the same standard as would have applied if the allegations had been contained in the petition.

We agree that the time limit may be unnecessarily short in investigations in which the Department has extended the scheduled date of its preliminary determination. If the preliminary determination in an investigation is extended under § 355.15 (b) or (c), the time limit for submission of new allegations also could be extended without causing any additional delay in the investigation. Accordingly, we are modifying § 355.32(c)(1)(i) to read, "In an investigation, [not later than] 40 days prior to the scheduled date of the Secretary's preliminary determination." This new deadline is approximately 20

days after the date of publication of the notice of initiation in a normal investigation and 110 days after that date in an investigation extended under § 355.15 (b) or (c).

Any party that is precluded by the time limit in paragraph (c)(1) from raising an additional subsidy allegation in an investigation or administrative review may request a review during the first or following anniversary month, as provided in section 355.22, to include that alleged subsidy.

Regarding the time limit on allegations of petitioner's lack of standing, the Department must ensure that the allegation is submitted sufficiently early in the proceeding to permit adequate investigation of the allegation. As stated in the preamble to the proposed rule, "[s]tanding is important; however, it is also complex and the Department needs time to gather and evaluate the facts." 50 FR 24214 (June 10, 1985). The Department believes the time limit is reasonable based on its experience in dealing with such allegations. See, e.g., *Certain Atlantic Groundfish from Canada*, 51 FR 10041, 10043 (1986).

#### Sec. 355.31(e)

**Comment:** One party states that the Department should not reject a submission which substantially conforms to the requirements stated in paragraphs (e)(1) and (e)(2), and that the regulation should provide an automatic right for a party to resubmit a document in acceptable form when the initial submission was unsatisfactory solely because it failed to comply with the requirements set forth in these paragraphs.

Regarding paragraph (e)(3), one party believes that a time or expense, rather than time and expense, standard would be fairer to foreign producers. Another party would add a statement that, absent clear evidence to the contrary, the Department will accept a submitter's representation that it would be unable to submit a computer tape without unreasonable additional burden in time and expense. Another party would delete this paragraph, because the requirement is unnecessary for the types of information normally requested in countervailing duty investigations.

**Department's Position:** Although paragraph (e)(1) gives the Department the authority in specific situations to alter the requirements in paragraph (e), the Department believes it is important that submissions conform to the stated requirements. The Department must be able to process documents quickly so that deadlines can be met. Proprietary information must be identifiable quickly and, if subject to administrative

protective order, should be so marked. From the standpoint of an individual submitter of information, these filing requirements and deadlines may seem trivial. However, from the standpoint of the Department, they are very important to the efficient and timely administration of the program. If each of the hundreds of submitters of information were free to depart from the filing requirements, the cumulative burden on the Department would be enormous, and would defeat the very purpose for having filing requirements and deadlines. Therefore, the Department cannot accept "substantial compliance" as a norm. By spelling out in detail each filing requirement, the Department has made it easy for interested parties to understand how to file documents timely and in the proper form. The Department does not anticipate a need to create exceptions to the straight-forward filing requirements.

Regarding the exception to the filing requirement in paragraph (e)(3), the Department will consider the "burden in time and expense" without necessarily requiring that both be demonstrated in each case. If the burden can be measured in terms of both time and expense, however, the submitter should address both. In evaluating such claims, the Department will draw on its knowledge of the submitter and on its own expertise in computer operations. Although the Department is likely to accept the submitter's description of the additional burden it would incur, the Department will decide whether such burden is unreasonable. The Department will require computer tapes to be submitted in an investigation or administrative review only if the Department believes that computer tapes are necessary and appropriate in the particular segment of the proceeding in question.

In order to improve the speed and efficiency of document handling, the Department is revising paragraph (e) to: (1) increase from five to seven the number of copies of a document required in an administrative review; (2) specify that documents shall be single-sided; (3) require a statement that the document may or may not be released under administrative protective order; and (4) require that each computer tape submitted be accompanied by a printout of the tape.

We also have modified paragraph (e)(3) to clarify that the Secretary may require submissions on computer tape as long as that requirement is not an "unreasonable additional burden."

#### Sec. 355.31(f)-(i)

**Comment:** In order to avoid unnecessary expense, one party would have the Department require the submitter to provide an English translation for any submitted document, or designated portion thereof, within five days of a request from the Department. Another party suggests that we modify the regulation to provide that documents should be accompanied by English translations and failure to provide such translation may result in rejection of the document. This approach would eliminate the burden on the Department to waive in writing the translation requirement.

**Department's Position:** We believe paragraph (f) as drafted properly balances the needs of the Department for an English translation of a document against the desire of the submitter to meet deadlines and avoid unnecessary administrative burdens.

We note that we have modified paragraph (g) to make exceptions to the service requirement for petitions, proposed suspension agreements, and factual information submitted under § 355.32(a) that is not required to be served on an interested party. See the Department's response to comments on § 355.18(g)(1).

We note that we have added as paragraph (i) to the final rule a certification requirement for submissions of factual information. See the Department's response to comments on § 355.13(a). We believe that the certification requirement will help to ensure the completeness and accuracy of factual submissions.

#### Sec. 355.32(a)

**Comment:** One party recommends that we delete the requirement in paragraph (a)(2) that the submitter explain why each piece of factual information is proprietary. Because section 777(b)(2) of the Act requires an explanation of reasons for the designation only when the Department determines that such designation is "unwarranted," we should revise paragraph (a)(2) to require an explanation only for information outside the scope of § 355.4(b), which describes information the Department normally considers proprietary. Given the time constraints placed on submission of factual information, the rule as drafted is unduly burdensome.

**Department's Position:** For information that falls within § 355.4(b), the Department will expect only that the submitter will specify how the information fits within § 355.4(b).



**Sec. 355.32(b)**

*Comment:* Two parties urge the Department to make the summarization requirements more specific in order to make the summaries of factual information more useful for the personnel of client organizations or firms who do not have access to the business proprietary information. They suggest that the regulation require all numeric information to be summarized within 10 percent of the actual figure, except that columns of numbers one page or more in length may be indexed by page within a range of 10 percent of the average for the page. In addition, one of these parties would require that the text of any business proprietary financial statement be summarized (rather than deleted), unless the submitter supports a claim that the text cannot be summarized adequately. Furthermore, that party would require a submitter to characterize the type of customer, supplier, or distributor, the name of which is deleted as proprietary information, unless the submitter supports a claim that to do so would reveal the business proprietary information.

On the other hand, four parties suggest modifications that would make paragraph (b) less burdensome to the submitter. One of these parties urges the Department to clarify that the reference to "an individual portion" of data means an entire request (such as all sales listings) rather than a smaller segment of the submission. Two of these parties suggested that the Department delete the reference to ranging within 10 percent of the actual figure because, especially when the actual figure is small, the ranging may not sufficiently mask the proprietary information. For voluminous data, one party suggests that the submitter be permitted to summarize a representative sample. Two of the four parties would modify the regulation to require a detailed nonproprietary summary only when domestic interested parties have established a particular need for such a detailed summary. If the Department retains the proposed rule without modifying it, one of these parties urges the Department to allow the submitter a period of 10 days after submission of the proprietary information in which to file the nonproprietary summary.

*Department's Position:* As amended by the 1984 Act, section 777(b)(1) of the Act requires either "a nonproprietary summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" or a statement explaining why such a summary is not feasible. As

we explained in the preamble to the proposed rule, the "brief" nonproprietary summary permitted by the existing rule is not consistent with the Act as amended.

To some extent, what is "sufficient detail" and what is "feasible" depend on the facts of each case, including the identity of the parties, the number of items of information, and whether or not the submitter has computer capability. The general requirement that numeric data be grouped within 10 percent of the actual figure is intended to alert parties to an approach which our experience shows has been adequate in the past in many situations to meet the statutory purpose. The regulation recognizes what the conflicting comments make clear—that *ad hoc* decisions as to particular data may be necessary. Some of the suggestions are excellent ways to deal with particular submissions, and the Department will take account of these approaches in specific cases.

The fact that the data submitted are voluminous does not by itself excuse the submitter from the burden of providing a public summary that would afford parties not entitled to receive the proprietary data an opportunity for "a reasonable understanding of the substance of the information submitted in confidence." We note that we have clarified that if a portion of a submission is voluminous, the numeric data summarized must be representative of that portion.

To extend the deadline for submission of the nonproprietary summary of information would delay the availability of such information to parties that may rely on having access to it in the proceeding. The Department has found that the requirement can be met without allowing additional time for submission of the nonproprietary summary.

**Sec. 355.32(c)**

*Comment:* Two parties suggest that ordinarily the Department should be required to release under protective order (subject to the right to withdraw the information) all proprietary information except (1) customer names, (2) identification of sources of information regarding the operation of a foreign interested party, and (3) information submitted by a domestic interested party that is not relied on by the Department in making its determination. By stating this policy in the regulations, the Department could limit the number and scope of objections to release under administrative protective order. Another party states that, rather than require submitters to anticipate arguments supporting a request for disclosure, the Department

should allow submitters 48 hours to rebut arguments in favor of disclosure after the Department receives such arguments. The Department should modify the last sentence of this paragraph accordingly.

*Department's Position:* Although the Department has made its practice known in numerous instances, it is not an appropriate subject for rulemaking. In practice, the Department has not released information which identifies specific customers (such as customer names or codes) or which identifies the specific sources of information regarding the operation of a foreign interested party (such as the sources of information in market research surveys), and other especially sensitive information (such as secret production formulas). However, the Department in each case balances the need for disclosure against the need of the submitter to protect the information from the possibility of inadvertent disclosure. See, e.g., *Monsanto Industrial Chemical Co. v. United States*, 6 CIT 241 (1983). For this reason, we are not prepared to state that we will not ordinarily release any other data under APO. Practitioners are advised, however, that we will look very carefully at requests for nonrelease of data that do not fall into the categories listed above.

It is unnecessary to provide in the regulation an additional opportunity for argument in opposition to release of submitted information under protective order. Our experience has been that the submitter almost always is aware of the arguments at the time the information is submitted. Therefore, the submitter is capable of presenting any arguments against disclosure at that time. Moreover, this requirement is essential to avoid unnecessary delay in release of such information which in the past has resulted from repetitive submissions supporting and opposing release. Only in the most extraordinary situation would the Department make an exception to this rule and provide the submitter an additional opportunity for comment. As drafted, the last sentence of this paragraph adequately covers such an exception.

**Sec. 355.32(d)**

*Comment:* Three parties contend that 48 hours is too short a period in which to require resubmission of information that the Department has determined does not conform to the requirements of this section. Suggested time limits are 10 business days, one week or five business days, and five calendar days. One party suggests that the 48 hour

period should not begin to run until after the submitter receives the information returned by the Department.

*Department's Position:* Because the requirements of this section are clearly stated and known to the submitter in advance of submission, the submitter should have no difficulty meeting the short deadline for resubmission. Nonconforming portions of a public summary should be quickly and easily correctible by the local representative of the submitter. We agree that the time should run from receipt, but, in order to deal with unusual situations, we have changed the regulation to refer to receipt of the Department's explanation, and not of the returned information itself. When the submitter picks up the returned information and explanation at the Department, the time of receipt is the time of pick-up. In order to clarify that the 48-hour period does not include weekends and federal holidays, we are changing the stated deadline to "two business days." We have modified the proposal to clarify that nonconforming information will not be considered.

**Sec. 355.32(f)**

*Comment:* One party suggests that the Department should: (1) modify paragraph (f)(4) to specify that disclosure to the Customs Service is limited to investigations regarding fraud relating directly to the countervailing duty investigation, as required by section 777(b)(1) of the Act; and (2) delete the phrase "Unless the Secretary otherwise provides" from the last sentence of paragraph (f)(6), because the Secretary has no authority to authorize the person covered by a protective order to disclose the proprietary information to another person after the material has been obtained under the terms of a protective order.

*Department's Position:* We have modified the language of paragraph (f)(4) in order to clarify that the scope of this provision is limited to matters relating to countervailing duty proceedings. We have also modified paragraph (f) to permit release of proprietary information, under Part 354 of this title (19 CFR Part 354), to a party charged with violating an APO or counsel for such a charged party.

The last sentence of § 355.32(f), which modifies the entire section rather than paragraph (f)(5) only, permits the Department to allow a limited number of professional support staff (such as paralegals) to have access to information released under protective order to an attorney or other professional. The sentence is a limitation intended to prevent any unauthorized disclosure of proprietary

information released under protective order. The protective order itself would identify each individual authorized access, either by name or by reference to the section of the application (Form ITA-367) which lists the names of authorized support staff.

**Sec. 355.33**

*Comment:* One party suggests that the Department list in this section the types of proprietary information that will not be disclosed under administrative protective order, including customer names, verification exhibits, and trade secrets. Two parties suggest that the Department modify this section to indicate that information and documentation obtained during verification will be released in accordance with § 355.34. One party suggests that we include a provision stating that proprietary information which the Department obtains from the Commission may be released only by the Commission, not the Department.

*Department's Position:* See the Department's position on § 355.32(c) for the types of information which ordinarily will be released, or not released, under protective order. The comments are inappropriate, because this section deals with nonrelease of privileged and classified information, as those terms are defined in § 355.4 (c) and (d) of these regulations. "Privileged" information includes information protected by Executive Privilege. Similarly, information which the Department obtains from the Commission may be disclosed to interested parties by the Commission (not by the Department), but this information is not necessarily "exempt" from disclosure.

**Sec. 355.34**

*Note:* The following comment was submitted in response to the proposed rule on procedures for imposing sanctions for violation of an antidumping or countervailing duty protective order.

*Comment:* One party suggests that all counsel in a proceeding be covered by a single, blanket administrative protective order. This approach would limit the concern of respondents' counsel when multiple source information is used and would reduce the risk of inadvertent disclosure when attempting to make many versions of the same brief.

*Department's Position:* We disagree. Although the law has been amended to simplify the release, to counsel or other representatives of a party, of an opposing party's proprietary information, the Department carefully tailors administrative protective orders to prevent disclosure of information that

the first party's representative does not need. A single blanket administrative protective order would permit counsel or other representatives to have access to information that is not essential, and may be irrelevant, to the representation of their clients. It also unnecessarily increases the risk of inadvertent disclosure.

**Sec. 355.34(a)**

*Comment:* One party believes that the Department should modify this paragraph to clarify that one protective order application serves as a continuing application during the investigation or administrative review, and that the order covers release of all proprietary information submitted by parties to the proceeding as well as that submitted into the record by the Department in the form of verification reports and other memoranda. On the other hand, another party argues that by requiring a decision on release before submission of this information, the proposed rule prevents the Department from conducting the balancing test described in this paragraph. The Department cannot balance the competing interests without knowing why the requester believes the nonproprietary summaries are inadequate for the requester's purposes and without knowing what information is submitted. One party suggests more generally that the regulation should describe the Department's method of balancing competing interests.

Several parties would expedite release of information by having the Department rule on the "blanket" application within a short time (specified in the regulation) after it is filed, and by providing in the regulation that the party submitting proprietary information subject to the protective order must serve the information on the protective order recipient either at the same time or within 24 hours after submission to the Department. One of these parties would also have the Department serve within 24 hours on the protective order recipient all business proprietary information which the Department places in the record of the proceeding. However, another party would limit the direct service requirement to proprietary information which the submitter agrees (in light of the "blanket" protective order) should be released.

According to one party, the general inclination expressed in the regulation to release proprietary information is an abdication of the Department's statutorily mandated investigator role in favor of an adjudicatory role. By allowing release of proprietary



information to consultants, the Department in effect is admitting its own inability to develop an adequate record. The proceeding becomes adjudicatory in nature, but the procedural safeguards of the Administrative Procedure Act do not apply. Another party states that because the legislative history of section 777 of the Act generally limits disclosure only to attorneys, the regulation goes too far. Release to consultants and non-attorney representatives should be the "rare exception," and the regulation should define the special circumstances under which such release might occur.

Two parties are concerned that release to consultants and in-house counsel may increase the risk of inadvertent disclosure. Another party believes that disclosure to economic consultants is inappropriate, because consultants are not subject to the same ethical standards as attorneys and are not subject to disbarment. Moreover, release to consultants makes the proposed safeguards in paragraph (b)(4) ineffective because of the high risk that unauthorized disclosure may occur without the knowledge of the attorney responsible. Regarding release to in-house counsel, one of these parties suggests that the Department adopt the following guidelines: (1) no release to in-house counsel who also play a managerial role in the company; (2) no release to in-house counsel in proceedings in which the interested party is also represented by outside counsel; and (3) in-house counsel are permitted to examine protective order material only at the Department or another location not belonging to the company. Another party suggests that the Department provide more specific rules for release to parties not represented by counsel and to parties represented by in-house counsel.

The preamble to the proposed rule states that the Department will not release proprietary information after it makes a judicially reviewable determination "because the need to prepare for judicial review is not an adequate reason for additional disclosure." One party argues that if the Department refuses to disclose final calculations (whether before or after a final determination), the domestic interested parties cannot identify clerical errors in the determination. Because the Department has inherent authority to correct its own clerical errors, disclosure of final calculations under protective order would assist the Department within the parameters of its authority to discover and correct these errors.

**Department's Position:** Paragraph (b) of this section clearly indicates that a protective order application, if granted, would entitle the applicant to receive proprietary information not yet submitted to the Department at the time the application is filed with the Department.

Approval of release of information in advance of its submission does not impede the Department's ability to balance the competing interests of submitter and requester. The types of information submitted in countervailing duty proceedings are well-known to all parties in advance of submission. See, e.g., § 355.4. The existence of an adequate public summary does not affect the balancing test or a party's representative's right to access under protective order to the proprietary information. The summary is for the benefit of those who do not have access to the proprietary information. The protective order is intended to maximize access to proprietary information for the purpose of permitting interested parties to contribute to the objectives of the proceeding. See S. Rep. No. 249, 96th Cong., 1st Sess. 100 (1979). Paragraph (a) identifies the factors that make up the Department's balancing of competing interests; the specifics depend on the facts of an individual case, and it would be futile to attempt to spell these out in this general description of the balancing factors.

Use of the phrase "proprietary information" in this section clearly indicates that an application covers, at the election of the applicant, any factual information submitted to or obtained by the Department which the Department considers proprietary and which is part of the record of the proceeding. See §§ 355.3(a), 355.4(b), and 355.32. In practice, the Department releases under protective order its verification reports which contain such information. Whether it would also release an internal memorandum containing such information would depend on the nature and contents of the memorandum. The Department, for example, would not normally release a pre-decisional staff memorandum simply because it contains some proprietary information extracted from a respondent's submission of factual information.

The Department makes every effort to expedite its decisions on release of information. Normally the decision is made within 14 days of receipt of the application. However, in proceedings involving, for example, a large volume of different types of information or complex issues relevant to the balancing test described in paragraph (a), the

Department may need some additional time. We have modified paragraph (b) to indicate that the normal time period for the Department's decision is not more than 14 days. This is reflected in section 1332 of the 1988 Act; we are drafting revised regulations to incorporate this statutory requirement.

Regarding service of proprietary information subject to protective order, we are modifying paragraph (a) to indicate that the Department may require direct service of the proprietary information on the recipient of the protective order. The first sentence of paragraph (a) now reads in part "the Secretary may disclose, or require to be disclosed \* \* \*." The Department normally would require direct service when the submitter has agreed in advance, under § 355.32(c), to release submitted information under protective order.

Release to consultants and other non-attorney representatives does not change the character of the countervailing duty proceeding from fact finding to adjudication. The Department's role as investigator is clearly established in the Act (see, e.g., sections 703(b)(1), 705(a)(1), and 751(a)). The Act does not empower any interested party to conduct independent investigations or develop a separate record for judicial review. The Department releases proprietary information under protective order to consultants and non-attorney representatives when it concludes that there is sufficient evidence of a particular need for the individual's expertise in analyzing the information on behalf of a party to the proceeding, and only when the Department is satisfied that the information will be protected from unauthorized disclosure. Consistent with the legislative history of section 777 of the Act, the Department "generally" releases information under administrative protective order "only to attorneys who are subject to disbarment from practice before the agency in the event of a violation of the order." S. Rep. No. 249, 96th Cong., 1st Sess. 101 (1979). When the Department releases information under administrative protective order to consultants and other non-attorney representatives, these individuals are subject to the same sanctions as are attorneys for any violation of the order. See the Department's final rule entitled "Procedures for Imposing Sanctions for Violation of an Antidumping or Countervailing Duty Protective Order," 53 FR 47916 (November 28, 1988). In conducting the balancing test described in paragraph (a), the

Department gives special consideration to the situation of in-house counsel and the possibility of inadvertent disclosure. For example, we do not permit disclosure to any in-house counsel who is also an officer of the company that is a party to the proceeding. The Department's policy for evaluating competing interests in requests for disclosure to in-house counsel, consultants, and other non-attorney representatives has developed in the context of specific proceedings. Given the fact that we still have relatively little experience with respect to disclosure to such persons, we do not believe that this is an appropriate subject for rulemaking at this time.

Regarding disclosure of the Department's calculations after issuing its final determination, the Department has provided for such disclosure in the clerical error correction procedures (published at 53 FR 41617 (October 24, 1988) and 53 FR 5813 (February 28, 1988)) and in paragraph 355.20(h) of these regulations.

#### Sec. 355.34(b)

**Comment:** One party wonders if the Department has authority to deny a request for disclosure submitted later than the time limits specified in paragraph (b)(1). Another party sees no valid reason for the short time limits. For example, although a party may at first choose not to participate actively in a proceeding, the party may decide later in the proceeding to participate actively and, therefore, to request access to information under protective order. The Department should consider requests for release of information even if submitted later than the time limits specified in paragraph (b)(1).

Regarding paragraph (b)(2), one party suggests that the regulation specify that submission of five copies of the request is sufficient, rather than the 10 copies required by § 355.31(e). Another party asks that we delete the standard form requirement, because it ignores the possibility that special circumstances may justify deviation from the standard form.

Regarding paragraph (b)(3), one party suggests that we allow disclosure to anyone authorized by the submitter in writing or where otherwise authorized by law. Another party questions the requirement in paragraph (b)(3)(ii) that released information be used "solely for the segment of the proceeding then in progress." When the purpose of protecting the information is accomplished, the person having access to the information should be permitted to use it, on behalf of the same client, in

another investigation in which the information is relevant.

Regarding paragraph (b)(4), one party suggests that the proposed rule be modified to ensure that "the taint of a person who violates a protective order" does not affect that person's firm, partner, associates, employees, and employer after that person is no longer employed or associated, and likewise does not affect the new firm or employer of that person. Another party disagrees with the requirement (stated in the preamble to the proposed rule) that the party's attorney (and the law firm) take responsibility for violation of a protective order by consultants assisting the attorney. This party believes that the sanctions listed would apply with the same effect to consultants and that the person committing the violation should be held responsible. There should be no distinction between consultants who work with attorneys and those who do not.

One party would add a new paragraph (b)(5) requiring the Department to inform the requester within 10 days of submission whether the request meets all the requirements of paragraph (b). If not, the Department will explain the deficiencies and permit the requester to resubmit the request within five days.

**Department's Position:** Time limits for requesting disclosure of information under administrative protective order are necessary to eliminate the possibility that the Department will receive a request too late in the proceeding to process it in time to ensure timely disclosure of information. The time limits are also intended to eliminate the administrative burden of processing multiple requests from the same person and to encourage the filing of requests that cover information not yet submitted in the proceeding. See H.R. Rep. No. 725, 98th Cong., 2d Sess. 44-45 (1984). Because the application may be submitted in advance of submission of the information, there is no reason for a party that may want to participate in a proceeding to delay submitting the requests. On the other hand, submission of the application for disclosure does not obligate a party to participate actively in the proceeding. We do agree, however, that the time limits in the proposed rule may be shorter than necessary for the intended purpose. Accordingly, we are modifying paragraph (b) to provide that requests for disclosure be submitted not later than either 30 days after the date the notice of initiation is published in the Federal Register (rather than 10 as provided in the proposed rule) or, if

later, 10 days after the date the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under § 355.38, are due. The time limits are reasonable and consistent with the purpose of the Act.

The standard form requirement reduces significantly the administrative burden of reviewing requests for consistency with the law. It also simplifies the process for the requester. The standard form covers "special situations" such as in-house counsel and non-attorney representatives. The requirement that 10 copies be submitted reflects the Department's need in many cases, and is consistent with the general filing requirements in § 355.31(e).

Section 355.32(f) lists all parties to whom the Secretary may disclose information under protective order, including anyone authorized by the submitter in writing to receive it (paragraph (f)(5)) and those parties authorized by law to receive it (paragraphs (f)(2), (f)(3), and (f)(4)).

Section 777(b) limits the use of proprietary information to the single proceeding for which the information was submitted, and thus it cannot be used in another investigation. Thus, the information cannot be used by anyone other than the submitter of the data in any other proceeding. For the definition of proceeding, see § 355.2(n). Paragraph (b)(3)(ii) goes further in limiting use of the information released to the "segment of the proceeding in which [the information] was submitted." The reason is that the potential benefits of enlarging the pool of information available in a particular segment are small relative to the risk of inadvertent disclosure if the proprietary data could be retained and used over years of successive section 751 administrative reviews. In addition, the Department's limited resources would be diverted away from the real work of a review. In order to implement the comment, protective orders would have to extend in time from the initial investigation through all administrative reviews, which means keeping such orders active for ten years or more in some cases. The chance that proprietary material can be managed adequately under those circumstances is slim, and the risk, therefore, of inadvertent disclosure is greatly increased. Moreover, parties would find it necessary to raise issues again that had already been resolved as to the particular facts in prior reviews, thus ensuring that no topic is ever put to rest and distracting Department personnel from resolving the issues that pertain to the facts in the current



review. These dangers are not warranted by the potential benefits identified in the comment. Our experience has been that parties can raise issues in a review without resorting to use of proprietary information obtained in another segment of the proceeding. Furthermore, the Department is aware of the information contained in its own files and, in its discretion, draws upon essential information in order to fulfill its investigative duties. Finally, this limitation also maintains the statutory scheme of segmented proceedings, each with a separate administrative record for judicial review.

We have modified paragraph (b)(4) to reference the sanctions listed in § 354.3 of the Department's final rule entitled "Procedures for Imposing Sanctions for Violation of an Antidumping or Countervailing Duty Protective Order," 53 FR 47916 (November 28, 1988). The sanctions are necessary and appropriate for ensuring the effectiveness of the Department's protective orders. Under the proposed rules, the person who violates a protective order is held responsible, be it an attorney or other professional representative. Holding the employer, partner, and others in the firm or company responsible to the extent of disbaring the firm or company from practice before the Department is consistent with the need for strict compliance with the terms of protective orders, although that sanction would be exceedingly rare and would be appropriate only when the firm's actions, practices, or policies have contributed to the violation. Section 354.3 gives the decisionmaker a broad range of sanctions to deal with all possible types and degree of violations.

With regard to the last comment, the Department notifies the requester promptly of any deficiencies in the request. This practice has worked well, and deficiencies are quickly corrected.

We have changed paragraph (b)(3)(ii) to refer to the "segment of the proceeding in which [the information] was submitted" instead of "the segment of the proceeding then in progress" to allow for the possibility that segments may occur simultaneously.

#### Sec. 355.34(c)

**Comment:** Two parties state that the 24-hour time limit for deciding whether or not to withdraw proprietary information is unreasonably short because it does not provide an adequate opportunity for communication between the submitting party and its counsel. Five working days is suggested as a reasonable alternative.

One party suggests that paragraph (c) be revised to include a 5-day time limit for the Department's decision to release submitted information over the objection of the submitter, as well as the 24-hour time limit for withdrawal of the submitted information.

**Department's Position:** Because the submitter of proprietary information can and should anticipate that disclosure under protective order is possible, the submitter should also anticipate having to decide whether or not to withdraw the information submitted. Nonetheless, we have modified the time limit to two business days in order to ensure that all parties have an opportunity to consider withdrawing after the Department makes its decision to disclose the information. Five days for this purpose would unnecessarily delay disclosure.

Regarding a time limit for the Department to make its decision on the request for disclosure in spite of objection by the submitter of the information, see the Department's position on § 355.34(a).

#### Sec. 355.34 (d) and (e)

**Comment:** According to one party, there is no need to impose an arbitrary 15-day time limit on filing a request for a judicial protective order. When judicial action is instituted, all interested parties should be allowed to retain the information obtained under administrative protective order until they no longer have the opportunity to intervene in the judicial proceeding.

**Department's Position:** The proposed rule significantly expands the right of a person to retain protective order information after the end of a judicially reviewable segment of an administrative proceeding. The time limit set forth in this paragraph might be 120 days after the date of publication of a countervailing duty order, because (1) a party to the proceeding has 30 days from that date to file the summons and another 30 days to file the complaint, (2) the Department has 45 days from the latter date to file the administrative record, and (3) the party which has the information subject to administrative protective order has an additional 15 days to file a request for judicial protective order. To permit a party to retain the information until the party no longer has a right to intervene in the judicial proceeding would in effect move the deadline back to an indeterminate date late in the judicial proceeding. Unless the party decides to pursue the matter promptly in court, there is no reason to allow that party to retain the business proprietary information. Continued retention of the documents

merely would increase the risk that they might be lost or disclosed inadvertently.

We have modified this paragraph to provide that alleged violations of protective orders will be handled under the procedures of Part 354 of this title. See the Department's final rule entitled "Procedures for Imposing Sanctions for Violation of an Antidumping or Countervailing Duty Protective Order," 53 FR 47916 (November 28, 1988).

#### Sec. 355.35

**Comment:** One party suggests that we should define "factual information." Another party contends that, in order to conform to the Congressional intent that all parties to the proceeding be "fully aware" of representations to the Department at *ex parte* meetings (H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1989)), this section should require the memorandum of the *ex parte* meeting to report all legal arguments and nonfactual representations.

**Department's Position:** "Factual information" is defined in § 355.2(g) of the regulation. This section conforms to the requirements of section 777(a)(3) of the Act, and is consistent with the cited legislative history of that section of the Act.

#### Sec. 355.36(a)

**Note.**—In order to conform the numbering of Subpart C to that under the proposed antidumping regulations, we have moved §§ 355.36 to 355.39 in the final rule. Correspondingly, we have renumbered §§ 355.37, 355.38, and 355.39 so that in the final rule they are numbered as §§ 355.36, 355.37, and 355.38, respectively.

**Comment:** Two parties contend that paragraph (a)(1)(iv)(B) violates section 778(b) of the Act by requiring verification on request during an administrative review when the Department has conducted no verification "during either of the two immediately preceding administrative reviews." They contend that section 778(b) requires verification (on request) unless the Department has conducted a verification during both of the two previous consecutive reviews. Moreover, the House Report accompanying the 1984 Act specifies that verification would not be required "after recent verifications have taken place \* \* \*." H.R. Rep. No. 725, 98th Cong., 2d Sess. 43 (1984). (Emphasis added.)

Four parties contend that there is no statutory authority for the sampling procedure described in paragraph (a)(2). They believe the sampling authority in section 777A of the Act is limited to the use of sampling in analysis of sales and

price information, and does not cover sampling in selection of respondents for questionnaire responses or verification. One of these parties suggests that verification samples should be allowed only with the petitioner's concurrence. Another believes that the regulation should permit sampling only if both the party requesting the verification and other domestic interested parties to the proceeding agree to sampling. Others argue that it would be unreasonable to apply the results of one company's verification to other companies whose submissions have not been verified. One of these parties contends that to do so would violate the requirements in section 776(c) of the Act for use of best information available, because there would be no evidence that parties not included in the sample have been uncooperative. Moreover, because the Department cannot levy a countervailing duty when the respondent has received no countervailable subsidy, interested parties have an absolute right to verification.

**Department's Position:** Section 776(b) of the Act requires the Department to conduct a verification, upon request, if no verification was conducted "during the 2 immediately preceding reviews" of the same order. In addition, the statute permits the Department to verify any administrative review for good cause. The legislative history expands upon the statutory directive, stating that the Department need not conduct a verification of the third administrative review if it has verified "in the two immediately previous [administrative] reviews" of that order or finding. H.R. Rep. No. 725, 98th Cong., 2d Sess. 43 (1984). This means that the Department only is required to conduct a verification upon request in the third review if there were no verification in the first or second review. This interpretation is consistent with the further admonishment in the legislative history that the purpose of the amendment was to eliminate "an unnecessary administrative burden on the Department of Commerce" and "perfunctory verifications." *Id.* The amendments implicitly overruled *Al Tech Specialty Steel Corp. v. United States*, 6 CIT 243 (1983), *aff'd*, 745 F.2d 632 (Fed. Cir. 1984), which held that the Department must conduct a verification of submissions in each administrative review. The legislative history also states that the amendment "generally codifies the current administrative practice of the Department of Commerce," which was to verify information in administrative reviews when the Department believed there

was good cause for verification. H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 177 (1984). Regarding the Department's practice, see *Stainless Steel Wire Rods from France*, 48 FR 2808-09 (1983). In view of the language of section 776(b) and the legislative purpose, paragraph (a)(1)(iv)(B) of the proposed rule is a reasonable interpretation of section 776(b) of the Act. Unless the Department "decides that good cause for verification exists" (§ 355.36(a)(1)(iii)), there is no need for verification in more than one out of three consecutive administrative reviews.

Regarding the authority to use sampling in selecting respondents that will receive questionnaires or in conducting verifications in administrative reviews of countervailing duty orders, section 777A of the Act states that the Department may use generally recognized sampling techniques "for the purpose of carrying out [administrative] reviews under section 751." The Conference Report on the 1984 Act specifically describes the provision as expanding "the instances in which the administering authority may use sampling and averaging techniques \* \* \* in carrying out [administrative] reviews of outstanding AD or CUD [sic] orders under section 751 \* \* \*." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 186 (1984). The only qualification in section 777A is that "a significant volume of sales is involved or a significant number of adjustments to prices is required." Under the circumstances described in § 355.36(a)(2), this qualification is satisfied.

Section 777A(b) specifically provides that the Department has exclusive authority to select "appropriate" samples and averages (whether of respondents or of programs) that are "representative of the transactions under investigation." Because the provisions of this section are independent of the authority in section 778(c) for use of best information available, there is no requirement that the Department establish that the parties not included in the sample have been uncooperative. As to the comments that it is unreasonable to apply the results of one company's verification to another, the commenters either misunderstand the concept of sampling or are criticizing the inclusion in the statute of the Department's authority to sample.

We note that we have revised paragraph (a)(2) to clarify that the selection of a sample of companies or programs for verification could occur in

an investigation as well as in an administrative review.

#### Sec. 355.36(b)

**Comment:** Two parties urge the Department to provide in the regulation for advance notice of verification schedules and outlines, and an opportunity for interested parties to comment. One of these parties suggests a two-day comment period prior to verification.

**Department's Position:** The Department prepares verification outlines as far in advance of the scheduled dates for verification as possible. Normally all parties to the proceeding have an opportunity to submit comments and suggestions. This practice has worked well and there is no reason to define the practice or time limits in the regulation. Verification schedules are frequently subject to modification as the result of unforeseeable circumstances. Such administrative matters are appropriately matters of agency discretion.

#### Sec. 355.36(c)

**Comment:** Regarding verification procedures, one party believes we should modify paragraph (c) to indicate that the Department will verify the completeness as well as the accuracy of submissions.

Several parties suggest that we add to the regulation a statement of procedures for issuing verification reports and receiving comments on the reports. Two parties recommend that the regulation require the Department to issue its report within 14 days, and one party recommends seven days, after verification. One party suggests that the proprietary version of the report include all proprietary exhibits requested in the questionnaire but not received until verification. The public version of the report should include all exhibits that are not proprietary. The regulation should provide 10 days for comment after receipt of the report.

One party would modify paragraph (c) to state that "whenever feasible, verification will take place prior to a preliminary determination."

**Department's Position:** Section 776(b) of the Act states that "[i]f the administering authority is unable to verify the accuracy of the information submitted, it shall use the best information available \* \* \*" (emphasis added). In practice, the Department verifies the completeness of information submitted, because completeness is one indication of accuracy. We have modified paragraph (c) to reflect this practice. See also § 355.37(a)(2).



The Department places the highest priority on prompt preparation and release of verification reports. However, the required time is a function of the complexity and length of verification, the date and place of verification, and other demands on the verifiers' time (such as statutory deadlines in other pending cases). Under these circumstances, regulatory deadlines are inappropriate. Similarly, the content of the verification report is an administrative matter best left to a case-by-case approach.

We have decided not to modify paragraph (c) to provide that "whenever feasible" verification will take place prior to the date of the preliminary determination. Although the Department does in practice conduct verification as early as possible, nothing is gained by placing on the Department an obligation to explain its decision to verify after a preliminary determination rather than before. The Department is as much concerned about the quality of the verification as about its timing. We conduct verification after the date of the preliminary determination when we determine that there is inadequate time or opportunity to conduct a thorough verification before that date.

#### Sec. 355.37(a)

*Comment:* One party suggests that the regulation specify that the Department will use best information available only if the inability to verify the information submitted is due to the fault of the respondent. Another party suggests that the regulation specify that when the inability to verify is not the fault of the respondent, the best information available will be deemed to be the factual information submitted.

According to one party, the regulation should contain a "substantial completeness" standard in order to prevent punitive, rather than remedial, use of this regulation. The Department should not reject an entire submission if only a part of it is defective. Prior to using best information available, the Department should be required to notify the producer or exporter of the deficiencies in its submissions and allow that party to correct or supplement the incomplete or inaccurate data.

*Department's Position:* Verification is designed to establish the accuracy and completeness of a questionnaire response. If either of those factors cannot be established, regardless of "fault," the Department must, under the statute, adopt the best information otherwise available. See *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556 (Fed. Cir. 1984).

The Department has broad discretion to determine whether to reject an entire submission when the Department is unable to verify submitted information. The Department evaluates each situation on the facts. In practice, depending on the scope of the deficiency, the Department may use portions of a submission which have been verified and not use portions which cannot be verified. See, e.g., *Certain Stainless Steel Sheet and Strip Products from Spain*, 49 FR 35338 (1984). Because the statute requires that information the Department relies on be verified, not "substantially verified," the Department has no authority to add a "substantial completeness" test to the regulation. The verification requirement is neither punitive nor remedial; it is an integral part of the investigatory process.

Prior to resorting to best information available, the Department as a matter of practice often allows a respondent to correct a deficiency in a submission. First, the Department may request a supplemental submission of information after it receives a deficient response to the questionnaire referred to in § 355.31(b). Second, the Department often permits a respondent to correct a deficiency during the verification process, depending on the nature and scope of the deficiency. Under § 355.31(b), the Department has the authority to request an additional submission at any time during the proceeding, but, under section 355.31(a), the respondent's right to submit factual information is subject to certain time limits necessitated by statutory deadlines. Although the statute does not require it, the Department usually does notify respondents of deficiencies in submissions.

#### Sec. 355.37(b)

*Comment:* Two parties suggest that, as drafted, this paragraph requires the Department to use as best information available the information in the petition and other information submitted by domestic interested parties. Because this punitive intent is not supported by section 776(c) of the Act, the regulation should be redrafted to permit, but not require, use of such information. For example, the regulation might also refer to information submitted by other interested parties or state "may include" rather than "includes." Another party believes the regulation should specify that best information available in an administrative review cannot include information in the original petition, because the last sentence of section 776(b) limits the use of petition information to investigations and

because the Department "should always use the most up-to-date information available." H.R. Rep. No. 317, 98th Cong., 1st Sess. 77 (1979).

*Department's Position:* Paragraph (b) is intended to permit, rather than require, use of factual information submitted in support of the petition as best information available. To make this point as clear as possible, we have modified the paragraph to state "may include" rather than "includes."

We disagree that section 776(b) eliminates the Department's authority to use information submitted in support of the petition as best information available in an administrative review. The statute merely highlights the possibility of using such information during an investigation without precluding its use during an administrative review. This interpretation is supported by the following statement in the legislative history: "The express reference in the statute to the use of information submitted in support of the petition as the best information available for purposes of final determinations in investigations should not be interpreted as precluding the administering authority from using the best information available for purposes of administrative reviews." H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 177 (1984).

#### Sec. 355.38

*Comment:* Several parties state that the time limits for submission of case briefs are unreasonable for one or more of the following reasons: (1) the Department often does not issue its verification reports until after the time limits expire; (2) the Department often does not provide information under protective order until shortly before or even after the time limits expire; (3) respondents often do not obtain disclosure of the preliminary determination or results of review until two weeks after it is published and, at the same time, they may be preparing for verification; and (4) the Department has extended the time limit for submission of information (for example, in cases in which the final determination is postponed) to a date after the time limit for submission of the case brief. The unreasonable time limits in paragraphs (b) and (c) make it impossible for interested parties, especially domestic interested parties, to comment on important information in the record of the proceeding.

Three of these parties suggest that we delete this section and continue the current administrative practice, based on § 355.34 of the existing regulation, of

establishing specific deadlines in each proceeding. Alternatively, these and other parties suggest one of the following modifications in this section: (1) measure the time limit for the case brief from the date of release of the verification report (one party suggests 10 days); (2) permit separate submission of written comments on the verification report not later than 15 days before the scheduled date for the final determination; (3) permit submission of written comments not later than 10 days after submission of any factual information; and (4) permit the Department to modify any of the time limits for submission of briefs. One party believes that the Department should distribute more evenly the time limits for case and rebuttal briefs.

One party believes we should amend the regulation to provide for submission of written comment prior to the date of the preliminary determination and the case brief.

Several parties urge the Department to permit post-hearing briefs. They believe such briefs are necessary to cover new arguments brought out at the hearing, to clarify statements made at the hearing, and to provide complete answers to questions raised by the Department at the hearing. One party suggests that the Department could limit the length of such briefs to 10 double-spaced pages, as the Commission does, in order to ensure that the arguments are concise and selective.

Regarding paragraph (b), two parties suggest that, rather than requiring all issues relevant to the final determination or results of review to be "presented in full" in the case brief, the Department should require all such issues to be identified and, to the extent not previously briefed, presented in full. For issues previously briefed, the submitter should be required to reference the document in which the argument is presented in full.

Regarding paragraph (d), one party recommends that the Department require the submitter of the case or rebuttal brief to serve a copy on any U.S. Government agency that has submitted a case brief.

One party suggests that the Department modify paragraph (e) to permit introduction of non-documentary exhibits at hearings.

*Department's Position:* The Department believes that the time limits in this section will provide all interested parties a reasonable opportunity to comment on the record of the proceeding. In administrative reviews, the Department's practice is to conduct verifications prior to the scheduled date of the preliminary determination. This

practice allows the parties to the proceeding sufficient opportunity for preparation of case and rebuttal briefs after they have obtained access to the verification report and all factual information. In investigations, the regulation will encourage the Department to conduct its verification as early as possible. We have extended the deadlines for submission of case and rebuttal briefs in investigations in order to increase the likelihood that parties will be able to comment on verification reports or other factual information in those briefs, without curtailing the Department's capability of considering and addressing the parties' comments in the final determination. Paragraph (c) (proposed paragraph (b)) already contains adequate authority for the Department to alter the time limits for submission of case briefs in an investigation to cover the situations described in the comments. Paragraph (d) (proposed paragraph (c)) likewise permits the Department, as appropriate, to adjust the time limit for submission of rebuttal briefs. In this manner, the regulation ensures that the Department retains the necessary discretion to establish realistic time limits in any proceeding in which the normal time limits are too short.

The regulation does not limit submissions of written argument prior to the date of the preliminary determination or after that date and prior to the submission of the case brief.

Regarding the suggestion that the Department permit post-hearing briefs, we believe the case and rebuttal briefs afford each party to the proceeding ample opportunity to address the issues and comment on the factual information. Moreover, under paragraph (f)(3) (proposed paragraph (e)(3)) of this section, the presiding officer at the hearing "may question any interested party or witness and may request interested parties to present additional written argument." These procedures, we believe, eliminate the need for post-hearing briefs in every case, particularly in view of the fact that all issues addressed at the hearing first must be addressed in the case or rebuttal brief.

The requirement in paragraph (c) (proposed paragraph (b)) that the party "[s]eparately present in full" all arguments which the party wants the Department to consider in the final determination or final results of review is important given the difficult task the Department often faces at that late date in the proceeding. The convenience of having all arguments consolidated in a few submissions outweighs the additional effort required of the interested parties. If necessary, the

interested party may attach to the case brief as appendices the relevant portions of earlier submissions rather than re-write an entire argument.

We agree that the submitter of a case or rebuttal brief should be required to serve a copy of the brief on any U.S. Government agency that has submitted a case brief. Accordingly, we have modified paragraph (e) (proposed paragraph (d)) to include this requirement.

Regarding introduction of exhibits at hearings, the Department has not found it necessary to include non-documentary exhibits in a record of a proceeding. An interested party may use alternative means of explanation, such as charts or diagrams, which are easily incorporated into the official and public record.

We note that we have revised paragraph (a) to clarify that the Department will return untimely submissions to the submitter with written notice stating the reasons for return of the document in question.

We also note that we have added a new paragraph (b), which concerns requests for hearings. We have added this paragraph to allow sufficient time for all parties and the Department to prepare for a hearing.

#### Sec. 355.38(f)

*Note.*—The following comments were submitted in response to the proposed rule on procedures for imposing sanctions for violation of an antidumping or countervailing duty protective order.

*Comment:* Two parties recommend that the Department close the administrative hearings in antidumping and countervailing duty proceedings when necessary to permit disclosure of proprietary information. One of these parties suggests that a portion of the hearing be closed only when all parties to the investigation consent. The other party suggests that the Department withhold copies of the transcript from the public for 48 hours to permit counsel to delete proprietary information from it. The spontaneous nature of testimony at a hearing increases the risk of an inadvertent disclosure of proprietary information. Closed hearings would reduce this risk.

*Department's Position:* Closing hearings to permit the discussion of business proprietary information is administratively unfeasible. Determining which participants have access to each party's information under protective order and excluding those who do not have access to the particular information to be disclosed would lead to excessive loss of time, even assuming



it could be ascertained in a reasonable time.

Indeed, if different parties' proprietary data were to be disclosed at various times during the hearing, individuals would likely be permitted to attend or be barred from the proceeding at particular times, depending on whether or not they have access to the data under protective order. Furthermore, special arrangements would be necessary to grant the court reporter access to the information under protective order, and sanitized versions of the hearing transcript, perhaps in multiple versions, would need to be created, at substantial cost to the Department. For these reasons, the Department has consistently denied requests to close hearings. Furthermore, we have never encountered a situation where an issue could not be addressed at a hearing without disclosing proprietary data.

We note that we have modified paragraph (f) (proposed paragraph (e)) to provide that hearings ordinarily will be held seven days (instead of 14 days) after the scheduled date for submission of rebuttal briefs in an administrative review. We also have modified paragraph (f)(3) (proposed paragraph (e)(3)) to clarify that parties may submit additional written argument only at the Department's request.

#### Sec. 355.39

**Comment:** Two parties believe that the time limits for submission of additional subsidy allegations (§ 355.31) and the time frame for considering additional subsidy practices discovered by the Department should be consistent. They recommend that the Department adopt the standard in § 355.39(a) ("if the Secretary concludes that sufficient time remains \* \* \*") because it is reasonable and practical.

Regarding deferral of examination of a subsidy (paragraph (b)), two parties would limit the Department's discretion, because the Department's decision to defer consideration might mean the difference between a *de minimis* and an above *de minimis* rate of subsidization and might significantly affect the Commission's determination of injury. These parties would modify paragraph (b) to provide that the Department could either (1) declare the investigation "extraordinarily complicated" under § 355.15(b) when the newly-discovered practice could significantly affect the outcome of the investigation or (2) find that "extraordinary circumstances" justify postponement when the Department concludes that insufficient time remains in the investigation for

even a preliminary analysis of the newly-discovered practices.

Another party suggests that we expand this section to describe how the Department would investigate a subsidy practice discovered during an antidumping investigation. The Department would be required either to examine the subsidy practice in an ongoing countervailing duty proceeding, or, if there is no such proceeding, to inform petitioners in the antidumping case how to file a countervailing duty petition.

**Department's Position:** Regarding the time limit for submission of additional subsidy allegations, see the Department's position on § 355.31(c).

In considering whether "sufficient time remains" to investigate an additional subsidy practice, the Department would take into account the potential significance of the additional subsidy to the outcome of the investigation and would, if appropriate, declare the investigation "extraordinarily complicated" under § 355.15(b). The Department would apply the criteria specified in § 355.15(b)(2) in making this decision under that section. It is not necessary to modify § 355.39 to provide authority for the Department to do what § 355.15(b) already authorizes the Department to do. There is no authority to postpone the final determination on the basis of "extraordinary circumstances," as suggested by the comment.

Similarly, it would add nothing to the regulation to include in § 355.39 a statement describing how the Department would investigate a subsidy practice discovered during an antidumping investigation. These regulations adequately describe the requirements for the initiation and conduct of a countervailing duty investigation, as well as limitations on the Department's use of proprietary information.

#### List of Subjects in 19 CFR Part 355

Business and industry, Foreign trade, Imports, Trade practices.

Date: December 2, 1988.

Jan W. Mares,  
Assistant Secretary for Import Administration.

For the reasons set forth in the preamble, 19 CFR Part 355 is revised to read as follows:

### PART 355—COUNTERVAILING DUTIES

#### Subpart A—Scope and Definitions

- Sec.  
355.1 Scope.  
355.2 Definitions.

- Sec.  
355.3 Record of proceedings.  
355.4 Public, proprietary, privileged, and classified information.  
355.5 Library of foreign subsidy practices and countervailing measures.  
355.6 Trade and Tariff Act of 1984—effective date.  
355.7 *De minimis* net subsidies disregarded.

#### Subpart B—Countervailing Duty Procedures

- 355.11 Self-initiation.  
355.12 Petition requirements.  
355.13 Determination of sufficiency of petition.  
355.14 Request for exclusion from countervailing duty order.  
355.15 Preliminary determination.  
355.16 Critical circumstances findings.  
355.17 Termination of investigation.  
355.18 Suspension of investigation.  
355.19 Violation of agreement.  
355.20 Final determination.  
355.21 Countervailing duty order.  
355.22 Administrative review of orders and suspension agreements.  
355.23 Provisional measures deposit cap.  
355.24 Interest on certain overpayments and underpayments.  
355.25 Revocation of orders; termination of suspended investigation.

#### Subpart C—Information and Argument

- 355.31 Submission of factual information.  
355.32 Request for proprietary treatment of information.  
355.33 Information exempt from disclosure.  
355.34 Disclosure of proprietary information under administrative protective order.  
355.35 *Ex parte* meeting.  
355.36 Verification of information.  
355.37 Best information available.  
355.38 Written argument and hearings.  
355.39 Subsidy practice discovered during investigation or review.

#### Subpart D—Quota Cheese Subsidy Determinations

- 355.41 Definition of "subsidy."  
355.42 Annual list and quarterly update.  
355.43 Determination upon request.  
355.44 Complaint of price-undercutting by subsidized imports.  
355.45 Access to information.

ANNEX I—List of countries under the Agreement.

ANNEX II—Time limits for submissions specified in this part.

**Authority:** The authority for Part 355, except as otherwise noted below, is 5 U.S.C. 301; 19 U.S.C. 1303; 19 U.S.C. 2501 note; Title VII of the Tariff Act of 1930 (19 U.S.C. Subtitle IV, Parts II, III, and IV), as amended by Title I of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 150; section 221 and Title VI of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948; and Title XVIII, Subtitle B, Chapter 3, of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2919 (October 22, 1986).

The authority for § 355.12(h) is section 650 of Pub. L. No. 98-181 (November 30, 1983), which added sections 702(b)(3), 703(b)(2), and

708 to the Tariff Act of 1930, 19 U.S.C. 1671a(b)(3), 1671b(b)(2), and 1671g.

The authority for §§ 355.41 through 355.46 is section 702 of the Trade Agreements Act of 1979, 19 U.S.C. 1202 note.

#### Subpart A—Scope and Definitions

##### § 355.1 Scope.

This part sets forth procedures and rules applicable to proceedings under section 303 and Title VII of the Tariff Act of 1930, as amended (19 U.S.C. 1303 and 1671-1677(h)) (the "Act"), relating to the imposition of countervailing duties, and under section 702 of the Trade Agreements Act of 1979 (19 U.S.C. 1202 note) ("Trade Agreements Act"), relating to subsidies on quota cheese. This part incorporates the regulatory changes made pursuant to Title VI of the Trade and Tariff Act of 1984 (Pub. L. No. 98-573; October 30, 1984) and Title XVIII, Subtitle B, Chapter 3 of the Tax Reform Act of 1986, Pub. L. No. 99-514 (October 22, 1986). Certain portions of the regulations in this part do not apply to proceedings under section 303 of the Act in the case of the merchandise from a country that is not a "country under the Agreement," as defined in section 701(b) of the Act, and also is not entitled to an injury test under section 303 of the Act for the merchandise. Specifically, for such proceedings under section 303:

- (a) No determination by the Commission under section 703(a), 704, or 705(b)(1) of the Act is required;
- (b) No investigation may be suspended by the Secretary under section 704(c) of the Act and § 355.18(b);
- (c) No finding of critical circumstances may be made by the Secretary, under § 355.16; and
- (d) If an allegation or factual information regarding injury and subsidies is required by this part, only an allegation or factual information regarding subsidies is required.

##### § 355.2 Definitions.

(a) **Act.** "Act" means the Tariff Act of 1930, as amended.

(b) **Agreement.** "Agreement" means the "Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade," that is, the Subsidies Code, and any amendments accepted by the United States.

(c) **Commission.** "Commission" means the United States International Trade Commission.

(d) **Country.** "Country" means a foreign country or a political subdivision, dependent territory, or possession of a foreign country, and may include an association of two or more foreign countries, political subdivisions, dependent territories, or

possessions of foreign countries in a customs union outside the United States.

(e) **Customs Service.** "Customs Service" means the United States Customs Service of the United States Department of the Treasury.

(f) **Department.** "Department" means the United States Department of Commerce.

(g) **Factual information.** "Factual information" means:

- (1) Initial and supplemental questionnaire responses;
- (2) Data or statements of facts in support of allegations;
- (3) Other data or statements of facts; and
- (4) Documentary evidence.

(h) **Industry.** "Industry" means the producers in the United States collectively of the like product, except those producers in the United States that the Secretary excludes under section 771(4)(B) of the Act on the grounds that they are also importers (or are related to importers, producers, or exporters) of the merchandise. Under section 771(4)(C) of the Act, an "industry" may mean producers in the United States, as defined above in this paragraph, in a particular market in the United States if such producers sell all or almost all of their production of the like product in that market and if the demand for the like product in that market is not supplied to any substantial degree by producers of the like product located elsewhere in the United States.

(i) **Interested party.** "Interested party" means:

- (1) A producer, exporter, or United States importer of the merchandise, or a trade or business association a majority of the members of which are importers of the merchandise;
- (2) The government of the country in which the merchandise is produced (the affected country);
- (3) A producer in the United States of the like product or seller (other than a retailer) in the United States of the like product produced in the United States;
- (4) A certified or recognized union or group of workers which is representative of the industry or of sellers (other than retailers) in the United States of the like product produced in the United States;
- (5) A trade or business association a majority of the members of which are producers in the United States of the like product or sellers (other than retailers) in the United States of the like product produced in the United States; or
- (6) An association a majority of the members of which are interested parties, as defined in paragraph (i)(3), (i)(4), or (i)(5) of this section.

(j) **Investigation.** An "investigation" begins on the date of publication of notice of initiation of investigation and ends on the date of publication of the earliest of (1) notice of termination of investigation, (2) notice of rescission of investigation, (3) notice of a negative determination that has the effect of terminating the proceeding, or (4) an order.

(k) **The merchandise.** "The merchandise" means the class or kind of merchandise imported or sold, or likely to be sold, for importation into the United States, that is the subject of the proceeding.

(l) **Party to the proceeding.** "Party to the proceeding" means any interested party, within the meaning of paragraph (i) of this section, which actively participates, through written submissions of factual information or written argument, in a particular decision by the Secretary subject to judicial review. Participation in a prior reviewable decision will not confer on any interested party "party to the proceeding" status in a subsequent decision by the Secretary subject to judicial review.

(m) **Person.** "Person" includes any "interested party" as well as any other individual, enterprise, or entity, as appropriate.

(n) **Proceeding.** A "proceeding" begins on the date of the filing of a petition, publication of notice of initiation under § 355.11, or publication of notice of initiation under § 355.22(i) if the review is of the merchandise subject to an understanding or other kind of agreement accepted § 355.17(b), and ends on the date of publication of the earliest of notice of (1) dismissal of petition, (2) rescission of initiation, (3) termination of investigation, (4) a negative determination that has the effect of terminating the proceeding, (5) revocation of an order, or (6) termination of a suspended investigation.

(o) **Producer; production.** "Producer" means a manufacturer or producer. "Production" means manufacture or production.

(p) **Sale; likely sale.** A "sale" includes a contract to sell and a lease that is equivalent to a sale. A "likely sale" means a person's irrevocable offer to sell.

(q) **Secretary.** "Secretary" means the Secretary of Commerce or a designee. The Secretary has delegated to the Assistant Secretary for Import Administration the authority to make final determinations under §§ 355.18(i), 355.20, and 355.22(i). The Deputy Assistant Secretaries for import



Administration, Investigations, and Compliance have other delegated authority relating to countervailing duties.

### § 355.3 Record of proceedings.

(a) *Official record.* The Secretary will maintain in the Import Administration Central Records Unit, at the location stated in § 355.31(d), an official record of each proceeding. The Secretary will include in the record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of the proceeding which pertains to the proceeding. The record will include government memoranda pertaining to the proceeding, memoranda of *ex parte* meetings, determinations, notices published in the Federal Register, and transcripts of hearings. The record will not include any factual information, written argument, or other material which is not timely filed or which the Secretary returns to the submitter under §§ 355.31(b)(2), 355.32(d), 355.32(g), or 355.34(c). The record will contain material that is public, proprietary, privileged, and classified. For purposes of section 516A(b)(2) of the Act, the record is the official record of each judicially reviewable segment of the proceeding.

(b) *Public record.* The Secretary will maintain in the Central Records Unit a public record of each proceeding. The record will consist of all material described in paragraph (a) of this section that the Secretary decides is public information within the meaning of § 355.4(a), governmental memoranda or portions of memoranda that the Secretary decides may be disclosed to the general public, plus public versions of all determinations, notices, and transcripts. The public record will be available to the public for inspection and copying in the Central Records Unit (see § 355.31(d)). The Secretary will charge an appropriate fee for providing copies of documents.

(c) *Protection of records.* Unless ordered by the Secretary or required by law, no record or portion of a record will be removed from the Department.

### § 355.4 Public, proprietary, privileged, and classified information.

(a) *Public information.* The Secretary normally will consider the following to be public information:

(1) Factual information of a type that has been published or otherwise made available to the public by the person submitting it;

(2) Factual information that is not designated proprietary by the person submitting it;

(3) Factual information which, although designated proprietary by the person submitting it, is in a form which cannot be associated with or otherwise used to identify activities of a particular person;

(4) Publicly available laws, regulations, decrees, orders, and other official documents of a country, including English translations; and

(5) Written argument relating to the proceeding that is not designated proprietary.

(b) *Proprietary information.* The Secretary normally will consider the following factual information to be proprietary information, if so designated by the submitter:

(1) Business or trade secrets concerning the nature of a product or production process;

(2) Production costs (but not the identity of the production components unless a particular component is a trade secret);

(3) Distribution costs (but not channels of distribution);

(4) Terms of sale (but not terms of sale offered to the public);

(5) Prices of individual sales, likely sales, or other offers (but not (i) components of prices, such as transportation, if based on published schedules, (ii) dates of sale, (iii) product descriptions except as described in paragraph (b)(1), or (iv) order numbers);

(6) The names of particular customers, distributors, or suppliers (but not destination of sale or designation of type of customer, distributor, or supplier, unless the destination or designation would reveal the name);

(7) The exact amounts of the gross or net subsidies received and used by a person (but not descriptions of the operations of the subsidies, or the amount if included in official public statements or published documents);

(8) The names of particular persons from whom proprietary information was obtained; and

(9) Any other specific business information the release of which to the public would cause substantial harm to the competitive position of the submitter.

(c) *Privileged information.* The Secretary will consider information privileged if, based on principles of law concerning privileged information, the Secretary decides that the information should not be released to the public or to parties to the proceeding.

(d) *Classified information.* Classified information is information that is classified under Executive Order No.

12356 of April 2, 1982 (43 FR 28949) or successor executive order, if applicable.

### § 355.5 Library of foreign subsidy practices and countervailing measures.

The Secretary will maintain in the Central Records Unit a library of public information relating to all foreign subsidy practices and countervailing measures that are known to the Secretary, whether or not the subject of a proceeding. The Secretary will make documents in the library available to the public and will charge an appropriate fee for providing copies of documents. For further information, contact the Central Records Unit at the location stated in § 355.31(d).

### § 355.6 Trade and Tariff Act of 1984—effective date.

In accordance with section 626 of the Trade and Tariff Act of 1984 (Pub. L. No. 98-573) (for purposes of this subpart, referred to as "the 1984 Act"), the amendments to the Act made by Title VI of the 1984 Act are deemed effective as follows:

(a) Except as provided in paragraphs (b), (c), and (d) of this section, all amendments made by Title VI of the 1984 Act which affect authorities administered by the Secretary are effective on October 30, 1984.

(b) Amendments made by sections 602, 611, 612, and 620 of the 1984 Act which affect authorities administered by the Secretary take effect immediately with respect to all investigations and administrative reviews begun on or after October 30, 1984.

(c) Amendments made by section 623 of the 1984 Act, regarding judicial review, apply with respect to civil actions pending on, or filed on or after, October 30, 1984.

(d) Notwithstanding the provisions of paragraphs (a) and (b) of this section, the Secretary may implement the amendments of the 1984 Act at a date later than October 30, 1984, if the Secretary determines that implementation in accordance with paragraphs (a) or (b) of this section would prevent the Department from complying with other requirements of law.

### § 355.7 De minimis net subsidies disregarded.

For purposes of this part, the Secretary will disregard any aggregate net subsidy that the Secretary determines is less than 0.5% *ad valorem*, or the equivalent specific rate.

### Subpart B—Countervailing Duty Procedures

#### § 355.11 Self-initiation.

(a) *In general.* (1) If the Secretary determines from available information that an investigation is warranted with respect to the merchandise, the Secretary will initiate an investigation and publish in the Federal Register notice of "Initiation of Countervailing Duty Investigation." The Secretary will publish the notice only after providing the government of the affected country an opportunity for consultation to the extent required by Article 3(1) of the Agreement or by a substantially equivalent obligation.

(2) The notice will include:

(i) A description of the merchandise, after consultation as appropriate with the Commission;

(ii) The name of the country in which the merchandise is produced and, if the merchandise is imported from a country other than that in which it is produced, the name of the intermediate country; and

(iii) A summary of the available information that would, if accurate, support the imposition of countervailing duties.

(b) *Information provided to the commission.* If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary will notify the Commission at the time of initiation of the investigation and will make available to it and to its employees directly involved in the proceeding all information upon which the Secretary based the initiation and which the Commission may consider relevant to its injury determinations.

#### § 355.12 Petition requirements.

(a) *In general.* Any interested party, as defined in paragraph (1)(3), (1)(4), (1)(5), or (1)(6) of § 355.2, may file on behalf of an industry a petition under this section requesting the imposition of countervailing duties equal to the alleged subsidy, if that person has reason to believe that:

(1) A subsidy is being provided with respect to the merchandise, and

(2) If the merchandise is from a country entitled to an injury test for the merchandise, an industry is materially injured, is threatened with material injury, or its establishment is materially retarded by the merchandise.

Factual information in the petition shall be certified, as provided in § 355.31(i).

(b) *Contents of petition.* The petition shall contain the following, to the extent reasonably available to the petitioner:

(1) The name and address of the petitioner and any person the petitioner represents;

(2) The identity of the industry on behalf of which the petitioner is filing, including the names and addresses of other persons in the industry (if numerous, provide information at least for persons that, based on publicly available information, individually accounted for two percent or more of the industry, in terms of sales or production levels, during the most recent 12-month period);

(3) A statement indicating whether the petitioner has filed for import relief under sections 337 or 732 of the Act (19 U.S.C. 1337 or 1673a), sections 201 or 301 of the Trade Act of 1974 (19 U.S.C. 2251 or 2411), or section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) with respect to the merchandise;

(4) A detailed description of the merchandise that defines the requested scope of the investigation, including technical characteristics and uses of the merchandise, and its current U.S. tariff classification number;

(5) The name of the country in which the merchandise is produced and, if the merchandise is imported from a country other than that in which it is produced, the name of the intermediate country;

(6) The names and addresses of each person the petitioner believes benefits from the subsidy and exports the merchandise to the United States and the proportion of total exports to the United States which each person accounted for during the most recent 12-month period (if numerous, provide information at least for persons that, based on publicly available information, individually accounted for two percent or more of the exports);

(7) The alleged subsidy and factual information (particularly documentary evidence) relevant to the alleged subsidy, including the authority under which it is provided, the manner in which it is paid, and the value of the subsidy to producers or exporters of the merchandise;

(8) If the petitioner alleges an upstream subsidy under section 771A of the Act, factual information regarding:

(i) Domestic subsidies described in section 771(5) of the Act that the government of the affected country provides to the upstream supplier;

(ii) The competitive benefit the subsidies bestow on the merchandise; and

(iii) The significant effect the subsidies have on the cost of producing the merchandise;

(9) The volume and value of the merchandise during the most recent two-year period and any other recent

period that the petitioner believes to be more representative or, if the merchandise was not imported during the two-year period, information as to the likelihood of its sale for importation;

(10) The name and address of each person the petitioner believes imports or, if there were no importations, is likely to import the merchandise;

(11) If the merchandise is from a country entitled to an injury test for the merchandise, factual information regarding material injury, threat of material injury, or material retardation, as described in 19 CFR §§ 207.11 and 207.26;

(12) If the petitioner alleges "critical circumstances" under § 355.16, factual information regarding:

(i) Material injury which is difficult to repair;

(ii) Massive imports in a relatively short period; and

(iii) An export subsidy inconsistent with the Agreement; and

(13) Any other factual information on which the petitioner relies.

(c) *Simultaneous filing with the Commission.* If the merchandise is from a country entitled to an injury test for the merchandise, the petitioner must file a copy of the petition with the Commission and the Secretary on the same day and so certify in submitting the petition to the Secretary.

(d) *Proprietary status of information.* The Secretary will not consider any factual information for which the petitioner requests proprietary treatment unless the petitioner meets the requirements of § 355.32.

(e) *Amendment of petition.* The Secretary will allow timely amendment of the petition. If the merchandise is from a country entitled to an injury test for the merchandise, the petitioner must file an amendment with the Commission and the Secretary on the same day and so certify in submitting the amendment to the Secretary. The timeliness of new allegations is controlled under § 355.31.

(f) *Where to file; time of filing; format and number of copies.* The requirements of § 355.31(d), (e), and (f) apply to this section.

(g) *Notification of affected country's representative.* Upon receipt of a petition, the Secretary will deliver a public version of the petition, as described in § 355.31(e)(2), to a representative in Washington, DC, of the government of the affected country.

(h) *Petition based upon derogation of an international undertaking on official export credits.* In addition to the other requirements of this section, if the sole basis of a petition is the derogation of an international undertaking on official

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export credits, the Secretary will immediately notify the Secretary of the Treasury of the filing. The petitioner shall file a copy of the petition with the Secretary of the Treasury and the Secretary on the same day and so certify in submitting the petition to the Secretary.

**(i) Assistance to small businesses; additional information.**

(1) The Secretary will provide technical assistance to eligible small businesses, as defined in section 339 of the Act, to enable them to prepare and file petitions. The Secretary may deny assistance if the Secretary concludes that the petition, if filed, could not satisfy the requirements of § 355.13.

(2) For additional information concerning petitions, contact the Deputy Assistant Secretary for Investigations, Import Administration, International Trade Administration, Room B099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, N.W., Washington, D.C. 20230; (202) 377-5497.

**(j) Limitation on communication before initiation.**

(1) Except as provided in paragraph (j)(2) of this section, before the Secretary decides whether to initiate an investigation, the Secretary will not accept from an interested party, as defined in paragraph (i)(1) or (i)(2) of § 355.2, oral or written communication regarding a petition except inquiries concerning the status of the proceeding.

(2) The Secretary will provide the government of the affected country an opportunity for consultation to the extent required by Article 3(1) of the Agreement or by a substantially equivalent obligation.

(The information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0625-0148.)

**§ 355.13 Determination of sufficiency of petition.**

(a) **Determination of sufficiency.** Not later than 20 days after a petition is filed under § 355.12, the Secretary will determine whether the petition properly alleges the basis on which a countervailing duty may be imposed under section 701(a) of the Act, contains information reasonably available to the petitioner supporting the allegations, and is filed by an interested party as defined in paragraph (i)(3), (i)(4), (i)(5), or (i)(6) of § 355.2.

(b) **Notice of initiation.** If the Secretary determines that the petition is sufficient under paragraph (a) of this section, the Secretary will initiate an investigation and publish in the Federal Register notice of "Initiation of Countervailing Duty Investigation." The

notice will include the information described in § 355.11(a)(2). If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary will notify the Commission at the time of initiation of the investigation and will make available to it and to its employees directly involved in the proceeding all information upon which the Secretary based the initiation and which the Commission may consider relevant to its injury determinations.

(c) **Insufficiency of petition.** If the Secretary determines that a petition is insufficient under paragraph (a) of this section, the Secretary will dismiss the petition in whole or in part and, if appropriate, terminate the proceeding. The Secretary will notify the petitioner in writing of the reasons for dismissal, notify the Commission of the dismissal, if appropriate, and publish in the Federal Register notice of "Dismissal of Countervailing Duty Petition," summarizing the reasons for dismissal.

**§ 355.14 Request for exclusion from countervailing duty order.**

(a) Any producer or exporter which exported the merchandise to the United States during the period described in paragraph (b)(1) of this section and which desires exclusion from a countervailing duty order must submit to the Secretary, not later than 30 days after the date of publication of the notice of initiation under § 355.11 or § 355.13, an irrevocable written request for exclusion.

(b) The person must submit with the request:

(1) The person's certification that the person did not apply for or receive any net subsidy on the merchandise, during the period from the beginning of the last fiscal year for which the person has records to the date of filing of the petition, from any program listed in the Secretary's notice of initiation (except programs that the Secretary has previously found, in a notice published under § 355.20 or § 355.22(c)(8), not to be countervailable) and will not apply for or receive any subsidy on the merchandise in the future;

(2) The certification of the government of the affected country that the government did not provide to that person any net subsidy during the period described in paragraph (b)(1) of this section; and

(3) If the person is not the producer of the merchandise, the certification under paragraph (b)(1) of this section of the suppliers and producers of the merchandise and the certification under paragraph (b)(2) of this section of the government regarding those suppliers and producers.

(c) The Secretary will investigate requests for exclusion to the extent practicable in each investigation.

**§ 355.15 Preliminary determination.**

(a) **In general.** (1) Not later than 85 days after the date of filing of a petition or the date of publication of notice of initiation under § 355.11, the Secretary will make a determination based on the available information at the time whether there is a reasonable basis to believe or suspect that a subsidy is being provided with respect to the merchandise. If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary will not make the determination unless the Commission has made an affirmative preliminary determination.

(2) The Secretary's determination will include:

(i) The factual and legal conclusions on which the determination is based;

(ii) The estimated net subsidy, if any, stated on a country-wide basis, except as provided in § 355.20(d); and

(iii) A preliminary finding on critical circumstances, if appropriate, under § 355.16(b)(2)(i).

(3) If affirmative, the Secretary's determination will also:

(i) Order the suspension of liquidation of all entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the Secretary's preliminary determination; and

(ii) Impose provisional measures by instructing the Customs Service to require for each entry of the merchandise suspended under this paragraph a cash deposit or bond equal to the estimated net subsidy.

(4) The Secretary will publish in the Federal Register notice of "Affirmative (Negative) Preliminary Countervailing Duty Determination," including the estimated net subsidy, if any, and an invitation for argument consistent with § 355.38.

(5) The Secretary will notify all parties to the proceeding. If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary also will notify the Commission.

(b) **Postponement in extraordinarily complicated investigation.** If the Secretary decides the investigation is extraordinarily complicated, the Secretary may postpone the preliminary determination to not later than 150 days after the proceeding begins. The Secretary will base the decision on express findings that:

(1) The respondent parties to the proceeding are cooperating in the investigation;

(2) The investigation is extraordinarily complicated by reason of (i) the large number or complex nature of the alleged subsidies, (ii) novel issues raised, (iii) the need to determine the extent to which particular subsidies are used by individual producers or exporters, or (iv) the large number of producers and exporters; and

(3) Additional time is needed to make the preliminary determination.

(c) **Postponement at the request of the petitioner.** If the petitioner, not later than 25 days before the scheduled date for the Secretary's preliminary determination, requests a postponement and states the reasons for the request, the Secretary will postpone the preliminary determination to not later than 150 days after the date of filing of the petition, unless the Secretary finds compelling reasons to deny the request.

(d) **Postponement to investigate upstream subsidies.** (1) Any interested party shall submit in writing any allegation of upstream subsidies not later than 10 days before the scheduled date for the Secretary's preliminary determination under this part.

(2) If the Secretary decides to investigate an upstream subsidy allegation and concludes that additional time is needed to investigate the allegation, the Secretary may postpone the preliminary determination to not later than 250 days after the proceeding begins (up to 310 days if also postponed under paragraph (b) or (c) of this section).

(e) **Notice of postponement.** (1) If the Secretary decides to postpone the preliminary determination under paragraph (b) or (c) of this section, the Secretary will notify all parties to the proceeding not later than 20 days before the scheduled date for the Secretary's preliminary determination and will publish in the Federal Register notice of "Postponement of Preliminary Countervailing Duty Determination," stating the reasons for the postponement.

(2) If the Secretary decides to postpone the preliminary determination under paragraph (d)(2) of this section, the Secretary will notify all parties to the proceeding not later than the scheduled date for the Secretary's preliminary determination and will publish in the Federal Register notice of "Postponement of Preliminary Countervailing Duty Determination" stating the reasons for the postponement.

(f) **Expedited preliminary determination.** Not later than 55 days

after the initiation of an investigation under § 355.13, the Secretary will review the record of the first 50 days of the investigation. If the available information is sufficient for the Secretary to make a preliminary determination, the Secretary will disclose to the petitioner, and any interested party that has requested disclosure, all available public and proprietary information (subject to the requirements of § 355.34). If, not later than three business days after disclosure, each party to whom disclosure was made furnishes an irrevocable written waiver of verification and agrees to a preliminary determination based on information in the record on the 50th day of the investigation, the Secretary will make an expedited preliminary determination.

(g) **Commission access to information.** If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding all information upon which the Secretary based the determination and which the Commission may consider relevant to its injury determination.

(h) **Disclosure.** Promptly after making the preliminary determination, the Secretary will provide to parties to the proceeding which request disclosure a further explanation of the calculation methodology used in making the determination.

**§ 355.16 Critical circumstances findings.**

(a) **In general.** If the merchandise is from a country entitled to an injury test for the merchandise and if a petitioner submits to the Secretary a written allegation of critical circumstances, with reasonably available factual information supporting the allegation, not later than 21 days before the scheduled date of the Secretary's final determination, or on the Secretary's own initiative in an investigation under § 355.11, the Secretary will make a finding whether:

(1) Any alleged export subsidy that benefits the merchandise is inconsistent with the Agreement; and

(2) There have been massive imports of the merchandise over a relatively short period.

(b) **Preliminary finding.** (1) If the petitioner submits the allegation of critical circumstances not later than 30 days before the scheduled date for the Secretary's final determination under § 355.20, the Secretary, based on the available information, will make a preliminary finding whether there is a reasonable basis to believe or suspect

that critical circumstances as described in paragraph (a) of this section exist.

(2) The Secretary will issue the preliminary finding:

(i) Not later than the Secretary's preliminary determination under § 355.15, if the allegation is submitted not later than 20 days before the scheduled date for the preliminary determination; or

(ii) Not later than 30 days after the petitioner submits the allegation, if the allegation is submitted later than 20 days before the scheduled date for the Secretary's preliminary determination.

The Secretary will notify the Commission and publish in the Federal Register notice of the preliminary finding.

(c) **Suspension of liquidation.** If the Secretary makes an affirmative preliminary finding of critical circumstances, either before or at the time of an affirmative preliminary determination under § 355.15, any suspension of liquidation ordered under § 355.15 will apply to all entries of the merchandise covered by the finding entered, or withdrawn from warehouse, for consumption on or after 90 days before the date of the order of suspension of liquidation. If the Secretary makes an affirmative preliminary finding of critical circumstances after an affirmative preliminary determination under § 355.15, the Secretary will amend the order suspending liquidation to apply to all entries of the merchandise covered by the finding entered, or withdrawn from warehouse, for consumption on or after 90 days before the date suspension of liquidation was first ordered.

(d) **Final finding.** For any allegation submitted not later than 21 days before the scheduled date for the Secretary's final determination under § 355.20, the Secretary will make a final finding on critical circumstances. If the final finding is affirmative and if the Secretary did not make an affirmative preliminary finding of critical circumstances, the Secretary will order the suspension of liquidation of all entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after 90 days before the date the Secretary ordered suspension of liquidation either as part of an affirmative preliminary or final determination. If the final finding is negative and if the Secretary made an affirmative preliminary finding of critical circumstances, the Secretary will end the retroactive suspension of liquidation ordered under paragraph (c) of this section, and will instruct the



Customs Service to release the cash deposit or bond.

(e) *Findings in self-initiated investigations.* In investigations initiated under § 355.11, the Secretary will make a preliminary and final finding on critical circumstances without regard to the time limits in paragraphs (b) and (d) of this section.

(f) *Massive imports.* (1) In determining for the purpose of paragraph (a) of this section whether imports of the merchandise have been massive, the Secretary normally will examine:

- (i) The volume and value of the imports;
- (ii) Seasonal trends; and
- (iii) The share of domestic consumption accounted for by the imports.

(2) In general, unless the imports during the period identified in paragraph (g) of this section have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive.

(g) *Relatively short period.* For the purpose of paragraph (a) of this section, the Secretary normally will consider the period beginning on the date the proceeding begins and ending approximately three months later. However, if the Secretary finds that importers or exporters had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, then the Secretary may consider a period of not less than three months from that earlier time.

#### § 355.17 Termination of investigation.

(a) *Withdrawal of petition.* (1) Except as provided in paragraph (b) of this section, the Secretary may terminate an investigation upon withdrawal of the petition by the petitioner, or on the Secretary's own initiative in an investigation initiated under § 355.11, after notifying all parties to the proceeding and, if the merchandise is from a country entitled to an injury test on the merchandise, after consultation with the Commission. The Secretary may not terminate an investigation unless the Secretary concludes the termination is in the public interest.

(2) If the Secretary terminates an investigation, the Secretary will publish in the *Federal Register* notice of "Termination of Countervailing Duty Investigation" together with, when appropriate, a copy of any correspondence with the petitioner forming the basis of the withdrawal and the termination.

(b) *Withdrawal of petition based on acceptance of quantitative restriction*

*agreements.* (1) The Secretary may not terminate under paragraph (a) of this section an investigation by accepting an understanding or other kind of agreement with the government of the affected country to restrict the volume of the merchandise unless the Secretary, taking into account the factors listed in section 704(a)(2)(B) of the Act, is satisfied that termination is in the public interest.

(2) In deciding for the purpose of paragraph (b)(1) of this section whether termination is in the public interest, the Secretary, to the extent practicable, will consult with representatives of potentially affected United States consuming industries and potentially affected persons in the industry, including persons not parties to the proceeding.

(3) At the direction of the President of the United States or a designee, the Secretary will modify any understanding or other kind of quantitative restriction agreement accepted under paragraph (b)(1) of this section as a result of consultations entered into under section 761(a) of the Act.

(c) *Negative determination.* An investigation terminates, without further comment or action, upon publication in the *Federal Register* of the Secretary's negative final determination or the Commission's negative preliminary or final determination.

(d) *End of suspension of liquidation.* If the Secretary previously ordered suspension of liquidation, the Secretary will order the suspension ended on the date of publication of the notice of termination under paragraph (a) of this section or on the date of publication of a negative determination referred to in paragraph (c) of this section, and will instruct the Customs Service to release any cash deposit or bond.

#### § 355.18 Suspension of investigation.

(a) *Agreement to eliminate or offset completely a subsidy or to cease exports.* If the Secretary is satisfied that suspension is in the public interest, the Secretary may suspend an investigation at any time before the Secretary's final determination by accepting an agreement with the government of the affected country or exporters that account for substantially all of the merchandise:

- (1) To eliminate or to offset completely the net subsidy with respect to the merchandise; or
- (2) To cease exports of the merchandise not later than 180 days after the date of publication of the notice of suspension of investigation.

(b) *Agreement eliminating injurious effect.* (1) As provided in this paragraph

and paragraph (b)(2) or (b)(3), the Secretary may suspend an investigation at any time before the Secretary's final determination if the merchandise is from a country entitled to an injury test for the merchandise and if the Secretary:

- (i) Is satisfied that the proposed suspension is in the public interest;
- (ii) Finds that extraordinary circumstances are present; and
- (iii) Finds that the agreement will eliminate completely the injurious effect of the merchandise.

(2) The Secretary may suspend an investigation under paragraph (b)(1) of this section by accepting an agreement with the government of the affected country or exporters that account for substantially all of the merchandise, if the Secretary finds that:

- (i) The agreement will prevent the suppression or undercutting by the merchandise of prices of like products produced in the United States; and
- (ii) The agreement will eliminate or offset completely at least 85 percent of the net subsidy.

(3) The Secretary may suspend an investigation under paragraph (b)(1) of this section by accepting an agreement with the government of the affected country to restrict the volume of the merchandise. In considering for the purpose of this paragraph whether suspension is in the public interest, the Secretary will take into account, in addition to other factors the Secretary considers appropriate, the factors listed in section 704(a)(2)(B) of the Act. To the extent practicable, the Secretary will consult with representatives of potentially affected United States consuming industries and potentially affected persons in the industry, including persons not party to the proceeding.

(c) *Definition of "substantially all."* For purposes of paragraphs (a) and (b)(2) of this section, exporters which account for "substantially all" of the merchandise means exporters that have accounted for not less than 85 percent by value or volume of the merchandise during the period for which the Department is measuring benefits in the investigation or such other period that the Secretary considers representative.

(d) *Definition of "extraordinary circumstances."* For purposes of paragraph (b) of this section, "extraordinary circumstances" means circumstances in which (1) suspension of the investigation will be more beneficial to the industry than continuation of the investigation and (2) there are a large number of alleged subsidy practices which are

complicated, the issues raised are novel, or the number of exporters is large.

(e) *Monitoring.* The Secretary will not accept an agreement unless effective monitoring of the agreement by the Secretary is practicable. In monitoring an agreement under paragraph (b) of this section, the Secretary will not be obliged to ascertain on a continuing basis the prices in the United States of the merchandise or of like products produced in the United States.

(f) *Exports not to increase during interim period.* The Secretary will not accept an agreement under paragraph (a) of this section unless the agreement ensures that the quantity of the merchandise exported during the interim period set forth in the agreement does not exceed the quantity of the merchandise exported during a period of comparable duration that the Secretary considers representative.

(g) *Procedure for suspension of investigation.* (1) The government of the affected country or the exporters, as appropriate, shall:

- (i) Submit to the Secretary a proposed agreement not later than 45 days before the scheduled date for the Secretary's final determination under § 355.20; and
- (ii) Serve a copy of an agreement preliminarily accepted by the Secretary on other parties to the proceeding not later than the day following the Secretary's preliminary acceptance.

(2) The Secretary will:

- (i) Not later than 30 days before the date the Secretary suspends the investigation, notify all parties to the proceeding of the proposed suspension and provide to the petitioner a copy of the agreement preliminarily accepted by the Secretary (the agreement shall contain the procedures for monitoring compliance and a statement of the compatibility of the agreement with the requirements of this section); and
- (ii) Consult with the petitioner concerning the proposed suspension.

(3) The Secretary will provide all interested parties and United States Government agencies an opportunity to submit, not later than 10 days before the scheduled date for the Secretary's final determination, written argument and factual information concerning the proposed suspension.

(h) *Acceptance of agreement.* (1) If the Secretary accepts an agreement to suspend an investigation, the Secretary will publish in the *Federal Register* notice of "Suspension of Countervailing Duty Investigation," including the text of the agreement. If the Secretary has not already published notice of affirmative preliminary determination, the Secretary will include that notice. In accepting an agreement, the Secretary may rely on

factual or legal conclusions the Secretary reached in or after the affirmative preliminary determination.

(2) If the Secretary suspends an investigation based on an agreement under paragraph (a) of this section, the Secretary will not order the suspension of liquidation of entries of the merchandise. If the Secretary previously ordered suspension of liquidation, the Secretary will order the suspension of liquidation ended on the effective date of notice of suspension of investigation and will instruct the Customs Service to release any cash deposit or bond.

(3) If the Secretary suspends an investigation based on an agreement under paragraph (b) of this section, the Secretary will order the suspension of liquidation to continue or to begin, as appropriate. The suspension of liquidation will not end until the Commission completes any requested review, under section 704(h) of the Act, of the agreement. If the Commission receives no request for review within 20 days after the date of publication of the notice of suspension of investigation, the Secretary will order the suspension of liquidation ended on the 21st day after the date of publication and will instruct the Customs Service to release any cash deposit or bond.

(4) If the Commission undertakes a review of an agreement under section 704(h) of the Act and determines that the agreement will not eliminate the injurious effect, the Secretary will resume the investigation on the date of publication of the Commission's determination as if the Secretary's affirmative preliminary determination had been made on that date. If the Commission determines that the agreement will eliminate the injurious effect, the Secretary will continue the suspension of investigation, order the suspension of liquidation ended on the date of publication of the Commission's determination, and instruct the Customs Service to release any cash deposit or bond.

(i) *Continuation of investigation.*

(1) An interested party, as defined in paragraph (i)(2), (i)(3), (i)(4), (i)(5), or (i)(6) of § 355.2, not later than 20 days after the date of publication of the notice of suspension of investigation, may request in writing that the Secretary continue the investigation. If the merchandise is from a country entitled to an injury test for the merchandise, the party shall simultaneously file a request with the Commission to continue its investigation.

(2) Upon receiving the request, the Secretary and, if appropriate, the

Commission will continue the investigation.

(j) If the Secretary and the Commission make affirmative final determinations, the suspension agreement will remain in effect in accordance with the factual and legal conclusions in the Secretary's final determination. This paragraph does not affect the provisions of paragraph (h) of this section regarding suspension of liquidation.

(ii) If the Secretary or the Commission makes a negative final determination, the agreement shall have no force or effect.

(j) *Merchandise imported in excess of allowed quantity.* (1) The Secretary may instruct the Customs Service not to accept entries, or withdrawals from warehouse, for consumption of the merchandise in excess of any quantity allowed by paragraph (f) or by an agreement under paragraph (a) or (b) of this section.

(2) Imports in excess of the quantity allowed by an agreement may be exported or destroyed under Customs Service supervision, except that if the agreement is under paragraph (b)(3) of this section, the excess merchandise may be held for future opening under the agreement by placing it in a foreign trade zone or by entering it for warehouse.

(k) *Modification of quantitative restriction agreements.* At the direction of the President or a designee, the Secretary will modify an agreement accepted under paragraph (b)(2) of this section as a result of consultation under section 761(a) of the Act.

#### § 355.19 Violation of agreement.

(a) *Immediate determination.* If the Secretary determines that the signatory foreign government or exporters have violated a suspension agreement, the Secretary, without right of comment, will:

(1) Order the suspension of liquidation of all entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after the later of (i) 90-days before the date of publication of the notice of cancellation of agreement or (ii) the date of first entry, or withdrawal from warehouse, for consumption of the merchandise the sale or export of which was in violation of the agreement;

(2) If the investigation was not completed under § 355.18(i), resume the investigation as if the Secretary made an affirmative preliminary determination on the date of publication of the notice of cancellation and impose provisional measures by instructing the



Customs Service to require for each entry of the merchandise suspended under paragraph (a)(1) of this section a cash deposit or bond equal to the estimated net subsidy determined in the affirmative preliminary determination;

(3) If the investigation was completed under § 355.18(i), issue a countervailing duty order for all entries subject to suspension of liquidation under paragraph (a)(1) of this section and instruct the Customs Service to require for each entry of the merchandise suspended under this paragraph a cash deposit equal to the estimated net subsidy determined in the affirmative final determination;

(4) Notify all persons who are or were parties to the proceeding, the Commission if appropriate, and if the Secretary determines that the violation was intentional, the Commissioner of Customs; and

(5) Publish in the Federal Register notice of "Countervailing Duty Order (Resumption of Countervailing Duty Investigation); Cancellation of Suspension Agreement."

(b) *Determination after notice and comment.* (1) Notwithstanding paragraph (a) of this section, if the Secretary has reason to believe that the signatory government or exporters have violated an agreement or that an agreement no longer meets the requirements of section 704(d)(1) of the Act, the Secretary will publish in the Federal Register notice of "Invitation for Comment on Countervailing Duty Suspension Agreement."

(2) After publication of the notice inviting comment and after consideration of comments received the Secretary will:

(i) If the Secretary determines that the signatory government or exporters have violated the agreement, take appropriate action as described in paragraphs (a)(1) through (a)(5) of this section; or

(ii) If the Secretary determines that the agreement no longer meets the requirements of section 704(d)(1) of the Act:

(A) Take appropriate action as described in paragraphs (a)(1) through (a)(5) of this section, except that, for paragraph (a)(1)(ii) of this section, the date shall be the date of first entry, or withdrawal from warehouse, for consumption of the merchandise the sale or export of which does not meet the requirements of section 704(d)(1) of the Act;

(B) Continue the suspension of investigation by accepting a revised suspension agreement under § 355.18(a) (whether or not the Secretary accepted the original agreement under that paragraph) that, at the time the

Secretary accepts the revised agreement, meets the applicable requirements of section 704(d)(1) of the Act, and publish in the Federal Register notice of "Revision of Agreement Suspending Countervailing Duty Investigation;" or

(C) Continue the suspension of investigation by accepting a revised suspension agreement under § 355.18(b) (whether or not the Secretary accepted the original agreement under that paragraph) that, at the time the Secretary accepts the revised agreement, meets the applicable requirements of section 704(d)(1) of the Act, and publish in the Federal Register notice of "Revision of Agreement Suspending Countervailing Duty Investigation." If the Secretary continues to suspend an investigation based on a revised agreement accepted under § 355.18(b), the Secretary will order suspension of liquidation to begin. The suspension will not end until the Commission completes any requested review of the agreement under section 704(h) of the Act. If the Commission receives no request for review within 20 days after the date of publication of the notice of the revision, the Secretary will order the suspension of liquidation ended on the 21st day after the date of publication, and will instruct the Customs Service to release any cash deposit or bond. If the Commission undertakes a review under section 704(h) of the Act, the provisions of § 355.18(h)(4) will apply.

(iii) If the Secretary decides neither to consider the order violated nor to revise the agreement, the Secretary will publish in the Federal Register notice of the Secretary's decision under paragraph (b)(2) of this section, including a statement of the factual and legal conclusions on which the decision is based.

(c) *Additional signatories.* If the Secretary decides that the agreement no longer meets the requirements of § 355.18(b)(1)(iii) or that the signatory exporters no longer account for substantially all of the merchandise, the Secretary may revise the agreement to include additional signatory exporters.

(d) *Definition of "violation."* For the purpose of this section, "violation" means noncompliance with the terms of a suspension agreement caused by an act or omission of a signatory foreign government or exporter, except, at the discretion of the Secretary, an act or omission which is inadvertent or inconsequential.

#### § 355.20 Final determination.

(a) *In general.* (1) Not later than 75 days after the date of the Secretary's

preliminary determination, the Secretary will make a final determination whether a net subsidy is being provided with respect to the merchandise.

(2) The Secretary's determination will include:

(i) The factual and legal conclusions on which the determination is based;

(ii) The estimated net subsidy, if any, stated on a country-wide basis, except as provided in paragraph (d) or (e) of this section; and

(iii) If appropriate, a final finding on critical circumstances under § 355.18.

(3) If affirmative, the Secretary's determination will also:

(i) Unless previously ordered by the Secretary, order the suspension of liquidation of all entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of the Secretary's final determination; and

(ii) If the merchandise is from a country not entitled to an injury test for the merchandise, instruct the Customs Service to require a cash deposit, as provided in § 355.21(b), for each suspended entry of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the countervailing duty order under § 355.21; or

(iii) If the merchandise is from a country entitled to an injury test for the merchandise, instruct the Customs Service to require, for each suspended entry of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the Secretary's final determination, a cash deposit or bond equal to the estimated net subsidy determined under paragraph (a) of this section.

(4) The Secretary will publish in the Federal Register notice of "Affirmative (Negative) Final Countervailing Duty Determination," including the estimated net subsidy, if any.

(5) The Secretary will notify all parties to the proceeding. If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary will also notify the Commission.

(b) *Postponement to investigate upstream subsidies.* (1) Any interested party shall submit in writing any allegation of upstream subsidies not later than 15 days before the scheduled date for the Secretary's final determination under this part.

(2) If the Secretary decides to investigate an upstream subsidy allegation and concludes that additional

time is needed to investigate the allegation, the Secretary may:

(i) If the Secretary's preliminary determination was negative, postpone the final determination under this section to not later than 165 days after the preliminary determination;

(ii) If the Secretary's preliminary determination was affirmative:

(A) Postpone the final decision concerning upstream subsidization until the conclusion of the first administrative review of a countervailing duty order, if any; or

(B) At the written request of the petitioner:

(i) Make the decision concerning upstream subsidization in the final determination under this section;

(ii) Postpone the final determination to not later than 165 days after the preliminary determination; and

(iii) End the suspension of liquidation ordered in the preliminary determination not later than 120 days after the date of publication of the preliminary determination, and not resume it unless and until the Secretary publishes a countervailing duty order.

(3) If the Secretary decides to postpone the final determination under paragraph (b)(2)(i) or (b)(2)(ii)(B) of this section, the Secretary will notify all parties to the proceeding not later than the scheduled date for the Secretary's final determination and will publish in the Federal Register notice of "Postponement of Final Countervailing Duty Determination" stating the reason for the postponement.

(c) *Postponement for simultaneous investigations.* (1) If the Secretary simultaneously initiated antidumping and countervailing duty investigations on the merchandise (from the same or other countries), the Secretary will:

(i) At the petitioner's request, postpone the final determination under this part to the date of the final determination under Part 353, unless the Secretary's final determination under this part is due on a later date as the result of postponement under paragraph (b) of this section or § 355.15; and

(ii) If the Secretary postpones the final determination, end any suspension of liquidation ordered in the preliminary determination not later than 120 days after the date of publication of the preliminary determination, and not resume it unless and until the Secretary publishes a countervailing duty order.

(2) The petitioner shall submit any such request in writing not later than 10 days before the scheduled date for the Secretary's final determination under this part.

(3) If the Secretary decides to postpone the final determination under

paragraph (c)(1) of this section, the Secretary will notify all parties to the proceeding not later than the scheduled date for the Secretary's final determination and will publish in the Federal Register notice of "Postponement of Final Countervailing Duty Determination" stating the reason for the postponement.

(d) *Calculation of individual rates.* (1) For a producer or exporter that is government-owned, the Secretary will, and to the extent practicable for other producers or exporters the Secretary may, investigate whether a significant differential existed, during the period for which the Department is measuring benefits in the investigation, between the net subsidy received by an individual producer or exporter of the merchandise and the weighted-average net subsidy calculated on a country-wide basis.

(2) If the Secretary decides that an individual (including government-owned) producer or exporter received a significantly different net subsidy during the period, the Secretary will state in the final determination an individual estimated net subsidy for that person.

(3) A significant differential is:

(i) A difference of the greater of at least five percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis; or

(ii) The difference between a net subsidy of zero (or *de minimis*) and any rate greater than *de minimis*.

(e) *Effect of decision not to exclude from order.* If the Secretary finds that a person requesting exclusion under § 355.14 received, during the period for which the Department measured benefits in the investigation, any net subsidy from any program that the Secretary determines countervailable in the affirmative final determination, the Secretary will state in the affirmative final determination an individual rate for that person, and that rate will be the basis for the cash deposit or bond, as appropriate, of estimated countervailing duties for that person. The individual rate, calculated in accordance with paragraph (d) of this section, will be either the weighted-average net subsidy calculated on a country-wide basis or the individual rate calculated for that person.

(f) *Commission access to information.* If the merchandise is from a country entitled to an injury test for the merchandise, the Secretary will make available to the Commission and to employees of the Commission directly involved in the proceeding all information upon which the Secretary based the final determination and which

the Commission may consider relevant to its injury determination.

(g) *Effect of negative final determination.* An investigation terminates, without further comment or action, upon publication in the Federal Register of the Secretary's or the Commission's negative final determination. If the Secretary previously ordered suspension of liquidation, the Secretary will order the suspension ended on the date of publication of the notice of negative final determination and will instruct the Customs Service to release any cash deposit or bond.

(h) *Disclosure.* Promptly after making the final determination, the Secretary will provide to parties to the proceeding which request disclosure a further explanation of the calculation methodology used in making the determination.

#### § 355.21 Countervailing duty order.

Not later than seven days after receipt of notice of the Commission's affirmative final determination under section 705 of the Act, or simultaneously with publication of the Secretary's affirmative final determination if the merchandise is from a country not entitled to an injury test for the merchandise, the Secretary will publish in the Federal Register a "Countervailing Duty Order" that:

(a) Instructs the Customs Service to assess countervailing duties on the merchandise, in accordance with the Secretary's instructions at the completion of each administrative review requested under § 355.22(a) or, if not requested, in accordance with the Secretary's instructions under § 355.22(g);

(b) For each entry of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the order, instructs the Customs Service to require a cash deposit of estimated countervailing duties equal to the net subsidy stated in the Secretary's final determination;

(c) Excludes from the application of the order any producer or exporter that the Secretary finds did not receive directly or indirectly, during the period for which the Department measured benefits in the investigation, any net subsidy on the merchandise from any program that the Secretary determined countervailable in the affirmative final determination; and

(d) Orders the suspension of liquidation ended for all entries of the merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the



Commission's final determination, and instructs the Customs Service to release the cash deposit or bond on those entries, if in its final determination, the Commission found a threat of material injury or material retardation of the establishment of an industry, unless the Commission in its final determination also found that, absent the suspension of liquidation ordered under § 355.15(a), it would have found material injury.

**§ 355.22 Administrative review of orders and suspension agreements.**

**(a) Request for administrative review; withdrawal of request for review.**

(1) Each year during the anniversary month of the publication of an order or suspension of investigation (the calendar month in which the anniversary of the date of publication of the order or suspension occurs), an interested party may request in writing that the Secretary conduct an administrative review of all producers or exporters covered by an order or an agreement on which suspension of investigation was based.

(2) During the same month, a producer or exporter covered by an order may request in writing that the Secretary conduct an administrative review of only that person if the person submits with the request:

(i) The person's certification that the person did not apply for or receive any net subsidy on the merchandise, during the appropriate period described in paragraph (b) of this section, from any program that the Secretary previously found countervailable in the proceeding, and that the person will not do so in the future;

(ii) The certification of the government of the affected country that the government did not provide to that person any net subsidy, during the period described in paragraph (b) of this section, from any program that the Secretary previously found countervailable in the proceeding; and

(iii) If the person is not the producer of the merchandise, the certifications under paragraph (a)(2)(i) of this section of the suppliers and producers of the merchandise and the certification under paragraph (a)(2)(ii) of this section of the government regarding those suppliers and producers.

(3) The Secretary may permit a party that requests a review under paragraph (a) of this section to withdraw the request not later than 90 days after the date of publication of notice of initiation of the requested review. The Secretary may extend this time limit if the Secretary decides that it is reasonable to do so. When a request for review is withdrawn, the Secretary will publish in

the Federal Register notice of "Termination of Countervailing Duty Administrative Review" or, if appropriate, "Partial Termination of Countervailing Duty Administrative Review."

(b) *Period under review.* (1) Except as provided in paragraph (b)(2), an administrative review under paragraph (a) of this section normally will cover entries or exports of the merchandise during the most recently completed reporting year of the government of the affected country.

(2) For requests received during the first anniversary month after publication of an order or suspension of investigation, the review under paragraph (a) of this section will cover entries or exports, as appropriate, during the period from the date of suspension of liquidation under this part or suspension of investigation to the end of the most recently completed reporting year of the government of the affected country.

(c) *Procedures.* After receipt of a timely request under paragraph (a) of this section, or on the Secretary's own initiative when appropriate, the Secretary will:

(1) Not later than 15 days after the anniversary month, publish in the Federal Register notice of "Initiation of Countervailing Duty Administrative Review;"

(2) Normally not later than 30 days after the date of publication of the notice of initiation, send to appropriate interested parties or a sample of interested parties questionnaires requesting factual information for the review;

(3) Conduct, if appropriate, a verification under § 355.36;

(4) Issue preliminary results of review, based on the available information, that include:

(i) The factual and legal conclusions on which the preliminary results are based;

(ii) The net subsidy, if any, during the period of review stated on a country-wide basis, except as provided in paragraph (d) or (f) of this section;

(iii) A description of official changes in the subsidy programs made by the government of the affected country that affect the cash deposit of estimated countervailing duties; and

(iv) For an agreement, the Secretary's preliminary conclusions with respect to the status of, and compliance with, the agreement;

(5) Publish in the Federal Register notice of "Preliminary Results of Countervailing Duty Administrative Review," including the net subsidy, if any, the estimated net subsidy for cash

deposit purposes, and an invitation for argument consistent with § 355.38, and notify all parties to the proceeding;

(6) Promptly after issuing the preliminary results, provide to parties to the proceeding which request disclosure a further explanation of the calculation methodology used in reaching the preliminary results;

(7) Not later than 365 days after the anniversary month, issue final results of review that include:

(i) The factual and legal conclusions on which the final results are based;

(ii) The net subsidy, if any, during the period of review stated on a country-wide basis, except as provided in paragraph (d) or (f) of this section;

(iii) A description of official changes in the subsidy programs, made by the government of the affected country not later than the date of publication of the notice of preliminary results, that affect the cash deposit of estimated countervailing duties; and

(iv) For an agreement, the Secretary's conclusions with respect to the status of, and compliance with, the agreement;

(8) Publish in the Federal Register notice of "Final Results of Countervailing Duty Administrative Review," including the net subsidy, if any, and the estimated net subsidy for cash deposit purposes, and notify all parties to the proceeding;

(9) Promptly after issuing the final results, provide to parties to the proceeding which request disclosure a further explanation of the calculation methodology used in reaching the final results; and

(10) Promptly after publication of the notice of final results, instruct the Customs Service to assess countervailing duties on the merchandise described in paragraph (b) of this section and to collect a cash deposit of estimated countervailing duties on future entries. Both the assessment and the cash deposit will be at the rates found in the final results of review, calculated on a country-wide basis, except as provided in paragraph (d) or (f) of this section.

**(d) Calculation of individual rates.**

(1) If a producer or exporter is government-owned, the Secretary will, and to the extent practicable for other producers or exporters the Secretary may, review whether a significant differential existed, during the period under review, between the net subsidy received by an individual producer or exporter of the merchandise and the weighted-average net subsidy calculated on a country-wide basis.

(2) If the Secretary decides that an individual (including government-

owned) producer or exporter received a significantly different net subsidy during the period, the Secretary will state in the final results an individual rate for that person, and that rate will be the basis for the assessment of countervailing duties and, except as provided in paragraph (c)(7)(iii) of this section, the cash deposit of estimated countervailing duties for that person.

**(3) A significant differential is:**

(i) A difference of the greater of at least five percentage points, or 25 percent, from the weighted-average net subsidy calculated on a country-wide basis; or

(ii) The difference between a net subsidy of zero (or *de minimis*) and any rate greater than *de minimis*.

(e) *Possible cancellation or revision of suspension agreement.* If during an administrative review the Secretary determines or has reason to believe that the signatory foreign government or exporters have violated a suspension agreement or that the agreement no longer meets the requirements of § 355.18, the Secretary will take appropriate action under § 355.19. The Secretary may suspend the time limit in paragraph (c)(7) of this section while taking action under § 355.19(b).

(f) *Review of individual producer or exporter.* For an administrative review requested under paragraph (a)(2) of this section:

(1) The Secretary will verify whether there is a net subsidy on the merchandise covered by the request from any program that the Secretary:

(i) Previously found countervailable in the proceeding; or

(ii) Determines in the review to be countervailable.

(2) If the Secretary verifies that the certifications are complete and accurate with regard to paragraph (f)(1)(i) of this section and verifies that there is no net subsidy described in paragraph (f)(1)(ii) of this section on the merchandise, the Secretary will issue and publish in the Federal Register final results for that person and take actions under paragraph (c)(9) of this section that include a zero rate of assessment and the appropriate cash deposit.

(3) If the Secretary verifies that the certifications are complete and accurate with regard to paragraph (f)(1)(i) but is unable to verify there is no net subsidy described in paragraph (f)(1)(ii) of this section on the merchandise, the Secretary will:

(i) Issue and publish final results for that person and take actions under paragraph (c)(9) of this section that include a rate based on the net subsidies found; and

(ii) Initiate an administrative review under paragraphs (b) and (c) of this section of all producers and exporters covered by the order, unless the Secretary is concurrently reviewing the same period as a result of a request under paragraph (a)(1) of this section.

(4) If the Secretary is unable to verify that the certifications are complete and accurate with regard to paragraph (f)(1)(i) of this section but verifies there is no net subsidy described in paragraph (f)(1)(ii) of this section on the merchandise, the Secretary will issue and publish final results for that person and take actions under paragraph (c)(9) of this section that include a rate based on the previously or concurrently determined country-wide weighted-average rate.

(5) If the Secretary is unable to verify that the certifications are complete and accurate with regard to paragraph (f)(1)(i) of this section and is unable to verify that there is no net subsidy described in paragraph (f)(1)(ii) of this section on the merchandise, the Secretary will:

(i) Issue and publish final results for that person and take actions under paragraph (c)(9) of this section that include a rate based on the previously determined country-wide weighted-average rate plus the additional rate under paragraph (f)(1)(ii) of this section, or, if appropriate, the concurrently determined country-wide weighted-average rate; and

(ii) Initiate an administrative review under paragraphs (b) and (c) of this section of all producers and exporters covered by the order, unless the Secretary is concurrently reviewing the same period as a result of a request under paragraph (a)(1) of this section.

(6) In addition to the actions described in paragraphs (f)(4) and (f)(5) of this section, if the Secretary is unable to verify that the certifications are complete and accurate with regard to paragraph (f)(1)(i) of this section, the Secretary will refuse to accept any other requests for review under paragraph (a)(2) of this section for the duration of the order.

**(g) Automatic assessment of duty.**

(1) For orders, if the Secretary does not receive a timely request under paragraph (a)(1) or (a)(2) of this section, the Secretary, without additional notice, will instruct the Customs Service to assess countervailing duties on the merchandise described in paragraph (b) of this section at rates equal to the cash deposit of or bond for estimated countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for

consumption and to continue to collect the cash deposit previously ordered.

(2) If the Secretary receives a timely request under paragraph (a)(2) of this section and no request under paragraph (a)(1) of this section, the Secretary in accordance with paragraph (g)(1) of this section will instruct the Customs Service to assess countervailing duties, and to continue to collect the cash deposits, on the merchandise not covered by the request.

**(h) Changed circumstances review.**

(1) If the Secretary concludes from available information, including information in a request under this paragraph for an administrative review, that changed circumstances sufficient to warrant a review exist, the Secretary will:

(i) Publish in the Federal Register notice of "Initiation of Changed Circumstances Countervailing Duty Administrative Review;"

(ii) If necessary, send to appropriate interested parties or a sample of interested parties questionnaires requesting factual information for the review;

(iii) Conduct, if appropriate, a verification under § 355.36;

(iv) Issue preliminary results of review based on the available information that include the factual and legal conclusions on which the preliminary results are based and any action the Secretary proposes based on the preliminary results;

(v) Publish in the Federal Register notice of "Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review," including an invitation for argument consistent with § 355.38;

(vi) Notify all parties to the proceeding of the preliminary results;

(vii) Promptly after issuing the preliminary results, provide to parties to the proceeding which request disclosure a further explanation of the preliminary results;

(viii) Not later than 270 days after the date of the Secretary's initiation of the review, issue final results of review that include the factual and legal conclusions on which the final results are based and any action, including action under paragraph (c)(9) of this section and § 355.25(d), that the Secretary will take based on the final results;

(ix) Publish in the Federal Register notice of "Final Results of Changed Circumstances Countervailing Duty Administrative Review;" and

(x) Notify all parties to the proceeding; and

(xi) Promptly after issuing the final results, provide to the parties to the



proceeding which request disclosure a further explanation of the final results.

(2) Changed circumstances reviews may be requested at any time, including periods other than anniversary months.

(3) The Secretary will not initiate an administrative review under paragraph (h) of this section before the end of the second annual anniversary month (the calendar month in which the anniversary of the date of publication of the order or suspension occurs) after the date of publication of the Secretary's affirmative preliminary determination or suspension of investigation, unless the Secretary finds that good cause exists.

(4) If the Secretary concludes that expedited action is warranted, the Secretary may combine the notices identified in paragraphs (b)(1)(i) and (h)(1)(v) of this section in a notice of "Initiation and Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review." In that event, the notification required in paragraph (h)(1)(vi) of this section will be given to all interested parties included on the Department's service list described in § 355.31(h).

(i) *Review at the direction of the president.* At the direction of the President or a designee, the Secretary will conduct an administrative review to determine if a net subsidy is being provided with respect to the merchandise subject to an understanding or other kind of quantitative restriction agreement accepted under § 355.17(b) or § 355.18(b)(3). The Secretary will:

(1) Publish in the Federal Register notice of "Initiation of Countervailing Duty Administrative Review at the Direction of the President," which will include a description of the merchandise, the period under review, and a summary of the available information which would, if accurate, support the imposition of countervailing duties;

(2) Notify the Commission;

(3) Send to appropriate interested parties or a sample of interested parties, normally not later than 30 days after the date of publication of the notice of initiation, questionnaires requesting factual information for the review;

(4) Conduct, if appropriate, a verification under § 355.36;

(5) Issue preliminary results of review, based on the available information, that include:

(i) The factual and legal conclusions on which the preliminary results are based;

(ii) The net subsidy, if any, during the period of review stated on a country-wide basis, except as provided in paragraph (d) of this section; and

(iii) A description of official changes in the subsidy programs made by the government of the affected country that affect the estimated net subsidy;

(6) Publish in the Federal Register notice of "Preliminary Results of Countervailing Duty Administrative Review at the Direction of the President," including the net subsidy, if any, the estimated net subsidy for cash deposit purposes, and an invitation for argument consistent with § 355.38;

(7) Notify the Commission and all parties to the proceeding;

(8) Promptly after issuing the preliminary results, provide to parties to the proceeding which request disclosure a further explanation of the preliminary results;

(9) Issue final results of review that include:

(i) The factual and legal conclusions on which the final results are based;

(ii) The net subsidy, if any, during the period of review stated on a country-wide basis, except as provided in paragraph (d) of this section; and

(iii) A description of official changes in the subsidy programs, made by the government of the affected country not later than the date of publication of the notice of preliminary results, that affect the estimated net subsidy;

(10) Publish in the Federal Register notice of "Final Results of Countervailing Duty Administrative Review at the Direction of the President," including the net subsidy, if any, and the estimated net subsidy for cash deposit purposes; and

(11) Notify all parties to the proceeding;

(12) Promptly after issuing the final results, provide to parties to the proceeding which request disclosure a further explanation of the final results; and

(13) If the Secretary's final results of administrative review under paragraph (i)(9) of this section and the Commission's final results of review under section 762(a)(2) of the Act are affirmative:

(i) Publish in the Federal Register a "Countervailing Duty Order" under § 355.21 on or promptly after the date the agreement terminates; and

(ii) Order the suspension of liquidation of entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the countervailing duty order.

#### § 355.23 Provisional measures deposit cap.

This section applies to the merchandise entered, or withdrawn from warehouse, for consumption before

the date of publication of the Commission's notice of affirmative final determination or, if the merchandise is from a country not entitled to an injury test for the merchandise, the date of the Secretary's notice of affirmative final determination. If the cash deposit or bond required under the Secretary's affirmative preliminary or affirmative final determination is different from the net subsidy the Secretary calculates under § 355.22, the Secretary will instruct the Customs Service to disregard the difference to the extent that the cash deposit or bond is less than the net subsidy, and to assess countervailing duties equal to the net subsidy calculated under § 355.22 if the cash deposit or bond is more than the net subsidy.

#### § 355.24 Interest on certain overpayments and underpayments.

(a) *In general.* The Secretary will instruct the Customs Service to pay or collect, as appropriate, interest on the difference between the cash deposit of estimated countervailing duties and the assessed countervailing duties on entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of a countervailing duty order.

(b) *Rate.* The rate or rates of interest payable or collectible under paragraph (a) of this section for any period of time are the rates established under section 6621 of the Internal Revenue Code of 1954.

(c) *Period.* The Secretary will instruct the Customs Service to calculate interest for each entry from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry.

#### § 355.25 Revocation of orders; termination of suspended investigation.

(a) *Revocation or termination based on absence of subsidy.* (1) The Secretary may revoke an order or terminate a suspended investigation if the Secretary concludes that:

(i) The government of the affected country has eliminated all subsidies on the merchandise by abolishing for the merchandise, for a period of at least three consecutive years, all programs that the Secretary has found countervailable; and

(ii) It is not likely that the government of the affected country will in the future reinstate for the merchandise those programs or substitute other countervailable programs.

(2) The Secretary may revoke an order or terminate a suspended investigation if the Secretary concludes that:

(i) All producers and exporters covered at the time of revocation by the order or the suspension agreement have not applied for or received any net subsidy on the merchandise for a period of at least five consecutive years; and

(ii) It is not likely that those persons will in the future apply for or receive any net subsidy on the merchandise from those programs the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs.

(3) The Secretary may revoke an order in part if the Secretary concludes that:

(i) One or more producers or exporters covered by the order have not applied for or received any net subsidy on the merchandise for a period of at least five consecutive years;

(ii) It is not likely that those persons will in the future apply for or receive any net subsidy on the merchandise from those programs the Secretary has found countervailable in any proceeding involving the affected country or from other countervailable programs; and

(iii) Except for producers or exporters that the Secretary previously has determined have not received any net subsidy on the merchandise, the producers or exporters agree in writing to their immediate reinstatement in the order, as long as any producer or exporter is subject to the order, if the Secretary concludes under § 355.22(h) that the producer or exporter, subsequent to the revocation, has received any net subsidy on the merchandise.

(b) *Request for revocation or termination.* (1) During the third and subsequent annual anniversary months of the publication of an order or suspension of investigation (the calendar month in which the anniversary of the date of publication of the order or suspension occurs), the government of the affected country may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (a)(1) of this section if the government submits with the request its certification that it has satisfied, during the period described in § 355.22(b)(1), the requirements of paragraph (a)(1)(i) of this section and that it shall not reinstate for the merchandise those programs or substitute other countervailable programs; or

(2) During the fifth and subsequent annual anniversary months of the publication of an order or suspended investigation, the government of the affected country may request in writing

that the Secretary revoke an order or terminate a suspended investigation under paragraph (a)(2) of this section if the government submits with the request:

(i) The certifications required under § 355.22(a)(2) for all producers and exporters covered by the order or suspension agreement; and

(ii) Those producers' and exporters' certifications that they shall not apply for or receive any net subsidy on the merchandise from any program described in paragraph (a)(2)(ii) of this section.

(3) During the fifth and subsequent annual anniversary months of publication of an order or suspension of investigation, a producer or exporter may request in writing that the Secretary revoke an order with regard to that person if the person submits with the request:

(i) The certifications required under § 355.22(a)(2);

(ii) The certifications described in paragraph (b)(2)(ii) of this section for the merchandise covered by the request; and

(iii) The agreement described in paragraph (a)(3)(iii) of this section.

(c) *Procedures.* (1) After receipt of a timely request under paragraph (b) of this section, the Secretary will consider the request as including a request for an administrative review and will conduct a review under § 355.22(c).

(2) In addition to the requirements of § 355.22(c), the Secretary will:

(i) Publish with the notice of initiation, under § 355.22(c)(1), notice of "Request for Revocation of Order (in Part)" or, if appropriate, "Request for Termination of Suspended Investigation;"

(ii) Conduct a verification under § 355.36;

(iii) Include in the preliminary results of review, under § 355.22(c)(4), the Secretary's decision whether there is a reasonable basis to believe that the requirements for revocation or termination are met;

(iv) If the Secretary's preliminary decision under paragraph (c)(2)(iii) of this section is affirmative, publish with the notice of preliminary results of review, under § 355.22(c)(5), notice of "Intent to Revoke Order (in Part)" or, if appropriate, "Intent to Terminate Suspended Investigation;"

(v) Include in the final results of review, under § 355.22(c)(7), the Secretary's final decision whether the requirements for revocation or termination are met; and

(vi) If the Secretary's final decision under paragraph (c)(2)(v) of this section is affirmative, publish with the notice of final results of review, under

§ 355.22(c)(8), notice of "Revocation of Order (in Part)" or, if appropriate, "Termination of Suspended Investigation."

(3) If the Secretary revokes an order or revokes an order in part, the Secretary will order the suspension of liquidation ended for the merchandise covered by the revocation on the first day after the period under review, and will instruct the Customs Service to release any cash deposit or bond.

(d) *Revocation or termination based on changed circumstances.* (1) The Secretary may revoke an order or terminate a suspended investigation if the Secretary concludes that:

(i) The order or suspended investigation no longer is of interest to interested parties, as defined in paragraphs (i)(3), (i)(4), (i)(5), and (i)(6) of § 355.2; or

(ii) Other changed circumstances sufficient to warrant revocation or termination exist.

(2) If at any time the Secretary concludes from the available information, including an affirmative statement of no interest from the petitioner in the proceeding, that changed circumstances sufficient to warrant revocation or termination may exist, the Secretary will conduct an administrative review under § 355.22(h).

(3) In addition to the requirements of § 355.22(h), the Secretary will:

(i) Publish with the notice of initiation, under § 355.22(h)(1)(i), notice of "Consideration of Revocation of Order (in Part)" or, if appropriate, "Consideration of Termination of Suspended Investigation;"

(ii) If the Secretary's conclusion, as described in paragraph (d)(2) of this section, is not based on a request, the Secretary, not later than the date of publication of the notice described in paragraph (d)(3)(i) of this section, will serve written notice of the consideration of revocation or termination on each interested party listed on the Department's service list and on any other person which the Secretary has reason to believe is a producer or seller in the United States of the like product;

(iii) Conduct a verification, if appropriate, under § 355.36;

(iv) Include in the preliminary results of review, under § 355.22(h)(1)(iv), the Secretary's decision whether there is a reasonable basis to believe that the requirements for revocation or termination based on changed circumstances are met;

(v) If the Secretary's preliminary decision under paragraph (d)(3)(iv) of this section is affirmative, publish with the notice of preliminary results of



review, under § 355.22(h)(1)(v), notice of "Intent to Revoke Order (in Part)" or, if appropriate, "Intent to Terminate Suspended Investigation;"

(vi) Include in the final results of review, under § 355.22(h)(1)(viii), the Secretary's final decision whether the requirements for revocation or termination based on changed circumstances are met; and

(vii) If the Secretary's final decision under paragraph (d)(3)(vi) of this section is affirmative, publish with the notice of final results of review, under § 355.22(h)(1)(ix), a notice of "Revocation of Order (in Part)" or, if appropriate, "Termination of Suspended Investigation."

(4)(i) If for four consecutive annual anniversary months no interested party has requested an administrative review, under § 355.22(a), of an order or suspended investigation, not later than the first day of the fifth consecutive annual anniversary month, the Secretary will publish in the *Federal Register* notice of "Intent to Revoke Order" or, if appropriate, "Intent to Terminate Suspended Investigation."

(ii) Not later than the date of publication of the notice described in paragraph (d)(4)(i) of this section, the Secretary will serve written notice of the intent to revoke or terminate on each interested party listed on the Department's service list and on any other person which the Secretary has reason to believe is a producer or seller in the United States of the like product.

(iii) If by the last day of the fifth annual anniversary month no interested party objects, or requests an administrative review under § 355.22(a), the Secretary at that time will conclude that the requirements of paragraph (d)(1)(i) of this section for revocation or termination are met, revoke the order or terminate the suspended investigation, and publish in the *Federal Register* the notice described in paragraph (d)(3)(vii) of this section.

(5) If the Secretary under paragraph (d) of this section revokes an order or revokes an order in part, the Secretary will order the suspension of liquidation ended for the merchandise covered by the revocation on the effective date of the notice of revocation, and will instruct the Customs Service to release any cash deposit or bond.

(e) *Revocation or termination based on injury reconsideration.* If the Commission determines in an administrative review under section 751(b) of the Act that an industry in the United States would not be materially injured, or would not be threatened with material injury, or the establishment of an industry in the United States would

not be materially retarded, by reason of imports of the merchandise covered by a countervailing duty order or suspension agreement, the Secretary will revoke, in whole or in part, the order or terminate the suspended investigation, and will publish in the *Federal Register* notice of "Revocation of Order (in Part)" or, if appropriate, "Termination of Suspended Investigation."

#### Subpart C—Information and Argument

##### § 355.31 Submission of factual information.

(a) *Time limits in general.* (1) Except as provided in paragraphs (a)(2) and (b) of this section, submissions of factual information for the Secretary's consideration shall be submitted not later than:

(i) For the Secretary's final determination, the day before the scheduled date on which the verification is to commence; or

(ii) For the Secretary's final results of an administrative review, the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review.

(2) Any interested party, as defined in paragraphs (i)(3), (i)(4), (i)(5), and (i)(6) of § 355.2, may submit factual information to rebut, clarify, or correct factual information submitted by an interested party, as defined in paragraph (i)(1) or (i)(2) of § 355.2, at any time prior to the deadline provided in this section for submission of such factual information or, if later, 10 days after the date such factual information is served on the interested party, or, if appropriate, made available under administrative protective order to the interested party.

(3) The Secretary will not consider in the final determination or the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reasons for return of the information.

(b) *Questionnaire responses and other submissions on request.*

(1) Notwithstanding paragraph (a) of this section, the Secretary may request any person to submit factual information at any time during a proceeding.

(2) In the Secretary's written request to an interested party for a response to a questionnaire or for other factual information, the Secretary will specify the time limit for response. The Secretary normally will not consider or retain in the record of the proceeding unsolicited questionnaire responses, and

in no event will the Secretary consider unsolicited questionnaire responses submitted after the date of publication of the Secretary's preliminary determination. The Secretary will return to the submitter, with written notice stating the reasons for return of the document, any untimely or unsolicited questionnaire responses rejected by the Department.

(3) Ordinarily, the Secretary will not extend the time limit stated in the questionnaire or request for other factual information. Before the time limit expires, the recipient of the Secretary's request may request an extension. The request must be in writing and state the reasons for the request. Only the following employees of the Department may approve an extension: the Assistant Secretary for Import Administration, the Deputy Assistant Secretary for Import Administration, the Deputy Assistant Secretary for Investigations, the Deputy Assistant Secretary for Compliance, and the office or division director responsible for the proceeding. An extension must be approved in writing.

(4) Subject to the other provisions of paragraph (b) of this section, questionnaire responses in administrative reviews must be submitted not later than 60 days after the date of receipt of the questionnaire.

(c) *Time limits for certain allegations.* (1) Except for an allegation of upstream subsidies submitted in an investigation (see §§ 355.15(d) and 355.20(b)), the Secretary will not consider any subsidy allegation submitted by the petitioner or other interested party, as defined in paragraph (i)(3), (i)(4), (i)(5), or (i)(6) of § 355.2, later than:

(i) In an investigation, 40 days prior to the scheduled date of the Secretary's preliminary determination; or

(ii) In an administrative review, 120 days after the date of publication of the notice of initiation of the review.

(2) The Secretary will not consider any allegation in an investigation that the petitioner lacks standing unless the allegation is submitted, together with supporting factual information, not later than 10 days before the scheduled date for the Secretary's preliminary determination.

(3) Any interested party may request in writing not later than the time limits specified in paragraph (c)(1) or (c)(2) of this section, as applicable, an extension of those time limits. If the Assistant Secretary for Import Administration concludes that an extension would facilitate the proper administration of the law, the Assistant Secretary may grant an extension of not longer than 10

days in an investigation or 30 days in an administrative review.

(d) *Where to file; time of filing.* Address and submit documents to the Secretary of Commerce, Attention: Import Administration, Central Records Unit, Room B-099, U.S. Department of Commerce, Pennsylvania Avenue and 14th St., NW., Washington, DC 20230, between the hours of 8:30 a.m. and 5:00 p.m. on business days. For all time limits in this part, the Secretary will consider documents received when stamped by the Central Records Unit with the date and time of receipt. If the time limit expires on a non-business day, the Secretary will accept documents that are filed on the next following business day.

(e) *Format and number of copies.* (1) *In general.* Unless the Secretary alters the requirements of this section, submitters shall make all submissions in the format specified in paragraph (e) of this section. The Secretary may refuse to accept for the record of the proceeding any submission that does not conform to the requirements of paragraph (e) of this section.

(2) *Documents.* In an investigation, submit 10 copies of any document, except a computer printout, and, if a person has requested that the Secretary treat portions of the document as proprietary information, submit five copies of a public version of the document, including any public summaries required under § 355.32(b) as substitutes for the portions for which the person has requested proprietary treatment.

In an administrative review, submit seven copies and three copies respectively. In an investigation or administrative review, submit documents, if prepared for that segment of the proceeding, on letter-size paper, single-sided and double-spaced. Securely bind each copy as a single document with any letter of transmittal as the first page of the document. Mark the first page of each document in the upper right hand corner with the following information in the following format:

(i) On the first line, except for a petition, the Department's case number;

(ii) On the second line, the total number of pages in the document including cover pages, appendices, and any unnumbered pages;

(iii) On the third line, state whether the document is for an investigation or an administrative review and, if the latter, the period of review;

(iv) On the fourth and subsequent lines, state whether any portion of the document contains classified, privileged, or proprietary information and, if so, list the applicable page numbers and state

either "Document May Be Released Under APO" or "Document May Not Be Released Under APO" (see §§ 355.32(c) and 355.34); and

(v) For public versions of proprietary documents, complete the marking as required in paragraphs (i)-(iv) above for the proprietary document, but conspicuously mark on the first page "Public Version."

(3) *Computer tapes and printouts.* The Secretary may require submission of factual information on computer tape unless the Secretary decides that the submitter does not maintain records in computerized form and cannot supply the requested information on computer tape without unreasonable additional burden in time and expense. In an investigation or administrative review, the tape shall be accompanied by three copies of any computer printout and three copies of the public version of the printout.

(f) *Translation to English.* Unless the Secretary waives in writing this requirement for an individual document, any document submitted which is in a foreign language must be accompanied by an English translation.

(g) *Service of copies on other parties.* With the exception of petitions, proposed suspension agreements submitted under § 355.18(g)(1)(i), and factual information submitted under § 355.32(a) that is not required to be served on an interested party, the submitter of a document shall serve a copy, by first class mail or personal service, on the government of the affected country and any interested party on the Department's service list. The submitter shall attach to each document a certificate of service listing the parties served and, for each, the date and method of service.

(h) *Service list.* The Central Records Unit will maintain and make available a service list for each proceeding. Each interested party which asks to be on the service list shall designate a person to receive service of documents filed in a proceeding.

(i) *Certifications.* Any interested party which submits factual information to the Secretary must submit with the factual information the certification in paragraph (i)(1) and, if the party has legal counsel or another representative, the certification in paragraph (i)(2) of this section:

(1) For the interested party's official responsible for presentation of the factual information: "I, (name and title), currently employed by (interested party), certify that (1) I have read the attached submission, and (2) the information contained in this

submission is, to the best of my knowledge, complete and accurate."

(2) For interested party's legal counsel or other representative: "I, (name), of (law or other firm), counsel or representative to (interested party), certify that (1) I have read the attached submission, and (2) based on the information made available to me by (interested party), I have no reason to believe that this submission contains any material misrepresentation or omission of fact."

#### § 355.32 Request for proprietary treatment of information.

(a) *Submission and content of request.* (1) Any person who submits factual information to the Secretary in connection with a proceeding may request that the Secretary treat that information, or any specified part, as proprietary.

(2) The submitter shall identify proprietary information on each page by placing brackets around the proprietary information and clearly stating at the top of each page "Proprietary Treatment Requested." The submitter shall provide a full explanation why each piece of factual information subject to the request is entitled to proprietary treatment under § 355.4. The request and explanation shall be a part of or securely bound with the document containing the information.

(b) *Public summary.* All requests for proprietary treatment shall include or be accompanied by:

(1) An adequate public summary of all proprietary information, incorporated in the public version of the document (generally, numeric data are adequately summarized if grouped or presented in terms of indices, or figures within 10 percent of the actual figure, and if an individual portion of the data is voluminous, at least one percent representative of that portion is individually summarized in this manner); or

(2) A statement itemizing those portions of the proprietary information which cannot be summarized adequately and all arguments supporting that conclusion for each portion.

(c) *Agreement to release.* All requests for proprietary treatment shall include either an agreement to permit disclosure under administrative protective order, or a statement itemizing which portions of the proprietary information should not be released under administrative protective order and all arguments supporting that conclusion for each portion. The Secretary ordinarily will not provide the submitter further opportunity for argument on whether to



grant a request for disclosure under administrative protective order.

(d) *Return of information as a result of nonconforming request.* The Secretary may return to the submitter any factual information for which the submitter requested proprietary treatment when the request does not conform to the requirements of this section and in any event will not consider the information. If the Secretary returns the information, the Secretary will provide a written explanation of the reasons why it does not conform and will not consider it unless it is resubmitted with a new request which complies with the requirements of this section not later than two business days after receipt of the Department's explanation for rejection of the information.

(e) *Status during consideration of request.* While considering whether to grant a request for proprietary treatment, the Secretary will not disclose or make public the information. The Secretary normally will decide not later than 14 days after the Secretary receives the request.

(f) *Treatment of proprietary information.* Unless the Secretary otherwise provides, the person to whom the Secretary discloses information shall not disclose the information to any other person. The Secretary may disclose factual information which the Secretary decides is proprietary only to:

(1) A representative of an interested party who requests and is granted an administrative protective order under § 355.34;

(2) An employee of the Department directly involved in the proceeding for which the information is submitted;

(3) An employee of the Commission directly involved in the proceeding for which the information is submitted;

(4) An employee of the Customs Service directly involved in conducting a fraud investigation relating to a countervailing duty proceeding on the merchandise;

(5) Any person to whom the submitter specifically authorizes (in writing) disclosure; and

(6) A charged party or counsel for the charged party under Part 354 of this title (19 CFR Part 354).

(g) *Denial of request for proprietary treatment.* If the Secretary decides that the factual information does not warrant proprietary treatment in whole or in part, the Secretary will notify the submitter. Unless the submitter agrees that the information be considered public, the Secretary will return the information to the submitter with written notice stating the reasons for return of the information and will not consider it in the proceeding.

#### § 355.33 Information exempt from disclosure.

Privileged or classified information is exempt from disclosure to the public or to representatives of interested parties.

#### § 355.34 Disclosure of proprietary information under administrative protective order.

(a) *In general.* The Secretary may disclose, or require to be disclosed, proprietary information under an administrative protective order to an attorney or other representative of a party to the proceeding if the Secretary decides that the representative has stated a sufficient need for disclosure and would adequately protect the proprietary status of the information disclosed. In deciding whether to disclose information under administrative protective order, the Secretary will consider the probable effectiveness of sanctions for violation of the order, including those described in paragraph (b)(4) of this section. The Secretary also will consider the ability of the Secretary to obtain factual information in the future.

(b) *Request for disclosure.* (1) A representative must file a request for disclosure under administrative protective order not later than the later of:

(i) 30 days after the date of publication in the *Federal Register* of the notice of initiation under § 355.11 or § 355.13, or the notice of initiation of administrative review under § 355.22; or

(ii) 10 days after the date the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under § 355.38, are due.

(2) The representative must file the request for disclosure on the standard form provided by the Secretary (Form ITA-367). The standard form will require only such particularity in the description of the requested information as is consistent with both the criteria the Secretary uses to decide whether to disclose, and with the fact that a request may be made for factual information not yet submitted.

(3) The request shall obligate the representative:

(i) Not to disclose the proprietary information to anyone other than the submitter and other persons authorized by an administrative protective order to have access to the information;

(ii) To use the information solely for the segment of the proceeding in which it was submitted;

(iii) To ensure the security of the proprietary information at all times; and

(iv) To report promptly to the Secretary any apparent violation of the terms of the protective order.

(4) The request shall contain an acknowledgement by the representative that:

(i) A representative determined to have violated a protective order may be subject to any or all of the sanctions listed in Part 354 of this title; and

(ii) The firm of which a person determined to have violated a protective order is a partner, associate, or employee, or any partner, associate, employer, or employee of such person, may be subject to any or all of the sanctions listed in Part 354 of this title.

(5) The Secretary normally will decide whether to disclose information under administrative protective order not later than 14 days after the Secretary receives the request for disclosure.

(c) *Opportunity to withdraw proprietary information.* If the Secretary decides to disclose proprietary information under administrative protective order without the consent of the submitter, the Secretary will provide to the submitter written notice of the decision and the reasons thereof and will permit the submitter to withdraw the information from the official record within two business days. The Secretary will not consider withdrawn information.

(d) *Disposition of proprietary information disclosed under administrative protective order.* (1) At the expiration of the time for filing for judicial review of a decision by the Secretary, if there is no filing by any party to the proceeding, or at an earlier date the Secretary decides appropriate, the representative must return or destroy all proprietary information released under this section and all other materials containing the proprietary information (such as notes or memoranda). The representative at that time must certify to the Secretary full compliance with the terms of the protective order and the return or destruction of all proprietary information.

(2) The representative of a party to the proceeding that files for judicial review or intervenes in the judicial review may retain the proprietary information, provided that the party applies for a court protective order for the information not later than 15 days after the Secretary files the administrative record with the court. If the court denies the party's application for a court protective order, the representative must return or destroy the proprietary information and all other materials containing the proprietary information

not later than 48 hours after the court's decision and certify to the Secretary as provided under paragraph (d)(1) of this section.

(e) *Violation of administrative protective order.* The procedures for investigating any alleged violation of an administrative protective order issued under this section and for imposing sanctions for a violation of such order are set forth in Part 354 of this title (19 CFR Part 354).

#### § 355.35 Ex parte meeting.

The Secretary will prepare for the official record a written memorandum of any *ex parte* meeting between any person providing factual information in connection with a proceeding and the person to whom the Secretary has delegated the authority to make the decision in question or the person making a final recommendation to that person. The memorandum will include the date, time, and place of the meeting, the identity and affiliation of all persons present, and a public summary of the factual information submitted.

#### § 355.36 Verification of information.

(a) *In general.* (1) The Secretary will verify all factual information the Secretary relies on in:

(i) A final determination under § 355.18(i) or § 355.20;

(ii) A revocation under § 355.25;

(iii) The final results of an administrative review under § 355.22(c), (h), or (i) if the Secretary decides that good cause for verification exists; and

(iv) The final results of an administrative review under § 355.22(c) if:

(A) An interested party, as defined in paragraph (i)(3), (i)(4), (i)(5), or (i)(6) of § 355.2, not later than 120 days after the date of publication of the notice of initiation of review, submits a written request for verification; and

(B) The Secretary conducted no verification under this paragraph during either of the two immediately preceding administrative reviews.

(2) If the Secretary decides that, because of the large number of producers and exporters included in an investigation or administrative review, it is impractical to verify relevant factual information for each person, the Secretary may select and verify a sample. The Secretary will apply the results of the verification of the sample to all producers and exporters included in the investigation or review.

(b) *Notice of verification.* In publishing a notice of final determination, revocation, or final results of administrative review, the Secretary will report the methods and

procedures used to verify under this section.

(c) *Procedures for verification.* In verifying under this section, the Secretary will notify the government of the affected country in which verification takes place that employees of the Department will visit with producers, exporters, or government agencies in order to verify the accuracy and completeness of submitted factual information. As part of the verification, employees of the Department will request access to all files, records, and personnel of the producers, exporters, or the government agencies which the Secretary considers relevant to factual information submitted by those persons.

#### § 355.37 Best information available.

(a) *Use of best information available.* The Secretary may use the best information available whenever the Secretary:

(1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or

(2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

(b) *What is best information available.* The best information available may include the factual information submitted in support of the petition or subsequently submitted by interested parties, as defined in paragraph (i)(3), (i)(4), (i)(5), or (i)(6) of § 355.2. If an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available.

#### § 355.38 Written argument and hearings.

(a) *Written argument.* The Secretary will consider in making the final determination under § 355.18(i) or § 355.20 or the final results under § 355.22 only written arguments in case or rebuttal briefs filed within the time limits in this section. The Secretary will not consider or retain in the record of the proceeding any written argument, unless requested by the Secretary (and received within the time limit specified by the Secretary), that is submitted after the time limits specified in this section. At any time during the proceeding, the Secretary may request written argument on any issue from any interested party or United States Government agency. The Secretary will return to the submitter, with written notice stating the reasons for return of the document, any written argument submitted after the

time limits specified in this section or by the Secretary.

(b) *Request for hearing.* Not later than 10 days after the date of publication of the Secretary's preliminary determination or preliminary results of administrative review, unless the Secretary alters this time limit, any interested party may request that the Secretary hold a public hearing on arguments to be raised in case or rebuttal briefs. To the extent practicable, a party requesting a hearing shall identify arguments to be raised at the hearing. At the hearing, an interested party may make an affirmative presentation only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments included in that party's rebuttal brief.

(c) *Case brief.* (1) Any interested party or U.S. Government agency may submit a "case brief":

(i) Not later than 50 days after the date of publication of the Secretary's preliminary determination in an investigation, unless the Secretary alters this time limit; or

(ii) Not later than 30 days after the date of publication of the preliminary results of administrative review.

(2) The case brief shall separately present in full all arguments that continue in the submitter's view to be relevant to the Secretary's final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results.

(d) *Rebuttal brief.* Not later than the time limit stated in the notice of the Secretary's preliminary determination or preliminary results, ordinarily five days in an investigation and seven days in an administrative review after the time limit for filing the case brief, any interested party or U.S. Government agency may submit a "rebuttal brief." The rebuttal brief shall separately present in full all rebuttal arguments, responding only to arguments raised in case briefs.

(e) *Service of briefs.* The submitter of either a case or rebuttal brief shall serve a copy of that brief on the government of the affected country, on any interested party on the Department's service list, and on any U.S. Government agency that has submitted in the segment of the proceeding a case or rebuttal brief. If the party has designated under § 355.31(h) an agent in the United States, service shall be either by personal service on the same day the brief is filed with the Secretary or by overnight mail or courier on the next day and, if the party has designated an agent outside the United



States, service shall be by first class airmail. The submitter shall attach to each brief a certificate of service listing the parties (including agents) served and, for each, the date and method of service.

(f) *Hearings.* If an interested party submits a request under paragraph (b) of this section, the Secretary will hold a public hearing on the date stated in the notice of the Secretary's preliminary determination or preliminary results of administrative review, unless the Secretary alters the date. Ordinarily, the hearing will be held, in an investigation, two days after the scheduled date for submission of rebuttal briefs and, in an administrative review, seven days after the scheduled date for submission of rebuttal briefs.

(1) The Secretary will place a verbatim transcript of the hearing in the public and official records of the proceeding and will announce at the hearing how interested parties may obtain copies of the transcript.

(2) One of the following employees of the Department will chair the hearing: the Assistant Secretary for Import Administration, the Deputy Assistant Secretary for Import Administration, the Deputy Assistant Secretary for Investigations, the Deputy Assistant Secretary for Compliance, or the office or division director responsible for the proceeding.

(3) The hearing is not subject to the Administrative Procedure Act. Witness testimony, if any, shall not be under oath or subject to cross-examination by another interested party or witness. During the hearing, the chair may question any interested party or witness and may request interested parties to present additional written argument.

(g) *Where to file; time of filing.* The requirements in § 355.31(d) apply to this section.

(h) *Format and number of copies.* The requirements in § 355.31(e) apply to this section, except that in an administrative review submit 10 copies of each brief and five copies of the public version, including the public summary required under § 355.32(b).

#### § 355.39 Subsidy practice discovered during investigation or review.

(a) *Inclusion in proceeding.* If during an investigation or an administrative review the Secretary discovers a practice which appears to provide a subsidy with respect to the merchandise and the practice was not alleged or examined in the proceeding, the Secretary will examine the practice if the Secretary concludes that sufficient time remains before the scheduled date

for the Secretary's final determination or final results of review.

(b) *Deferral of examination.* If the Secretary concludes that insufficient time remains, before the scheduled date for the Secretary's final determination or final results of review, to examine the practice described in paragraph (a) of this section, the Secretary will:

(1) During an investigation, allow the petitioner to withdraw the petition without prejudice and resubmit it with an allegation with regard to the newly discovered practice; or

(2) During an investigation or review, defer consideration of the newly discovered practice until the next review under § 355.22(c).

(c) *Notice.* The Secretary will notify the parties to the proceeding of any practice the Secretary discovered and whether or not it will be included in the then ongoing proceeding.

#### Subpart D—Quota Cheese Subsidy Determinations

##### § 355.41 Definition of "subsidy."

For purposes of this subpart, "subsidy" means both "subsidy" and "net subsidy" as defined in sections 771(5) and 771(6) of the Act.

##### § 355.42 Annual list and quarterly update.

(a) *Annual list.* Not later than January 1st of each year, the Secretary, in consultation with the Secretary of Agriculture, will determine based on the available information whether any foreign government is providing a subsidy, as defined in § 355.41, with respect to any article of quota cheese, as defined in section 701(c)(1) of the Trade Agreements Act, and will publish in the Federal Register a list of the type and amount of each subsidy. The Secretary will incorporate in each annual list any changes and additional subsidies for the preceding calendar year determined under paragraph (b) of this section or under § 355.43(b).

(b) *Quarterly update.* Not later than April 1st, July 1st, and October 1st of each year, the Secretary, in consultation with the Secretary of Agriculture, will determine based on the available information whether there have been any changes in or additions to the latest annual list, and will publish in the Federal Register a quarterly update of those changes and additions.

##### § 355.43 Determination upon request.

(a) *Request for determination.* Any person, including the Secretary of Agriculture, who has reason to believe there have been changes in or additions to the latest annual list may request in writing that the Secretary determine

whether there are any changes or additions. The person shall file the request at the time and place specified in § 355.31(d). The request shall allege either a change in the type or amount of any subsidy included in the latest annual list or quarterly update or an additional subsidy not included in that list or update provided by a foreign government, and shall contain the following, to the extent reasonably available to the requesting person:

(1) The name and address of the person;

(2) The article of quota cheese allegedly benefitting from the changed or additional subsidy;

(3) The country of origin of the article of quota cheese; and

(4) The alleged subsidy or changed subsidy and relevant factual information (particularly documentary evidence) regarding the alleged changed or additional subsidy including the authority under which it is provided, the manner in which it is paid, and the value of the subsidy to producers or exporters of the article.

The requirements of § 355.31(d) and (f) apply to this section.

(b) *Determination.* Not later than 30 days after receiving an acceptable request, the Secretary will:

(1) In consultation with the Secretary of Agriculture, determine based on the available information whether there has been any change in the type or amount of any subsidy included in the latest annual list or quarterly update or an additional subsidy not included in that list or update is being provided by a foreign government;

(2) Notify the Secretary of Agriculture and the person making the request of the determination; and

(3) Promptly publish in the Federal Register notice of any changes or additions.

##### § 355.44 Complaint of price-undercutting by subsidized imports.

Upon receipt of a complaint filed with the Secretary of Agriculture under section 702(b) of the Trade Agreements Act concerning price-undercutting by subsidized imports, the Secretary will promptly determine, under § 355.43(b), whether or not the alleged subsidies are included in or should be added to the latest annual list or quarterly update. The Department of Agriculture regulations concerning complaints of price-cutting by subsidized imports of quota cheese are published in 7 CFR Part 6.

#### § 355.45 Access to information.

Subpart C of this part applies to factual information submitted in connection with this subpart.

##### Annex I—List of Countries Under the Agreement

1. As of the date of publication of this part, the Agreement applies between the United States and the following countries, as determined under section 2(b) of the Trade Agreements Act of 1979: Australia, Austria, Brazil, Canada, Chile, Egypt, European Economic Community (accepted for member states), Finland, United Kingdom for Hong Kong, India, Indonesia, Israel, Japan, Korea, Norway, Pakistan, Philippines, Sweden, Switzerland, Turkey, and Uruguay. See section 701(b)(1) of the Act.

2. Taiwan and Mexico have assumed obligations with respect to the United States which the President has determined are substantially equivalent to obligations under the Agreement. See section 701(b)(2) of the Act.

3. The following countries are entitled to an injury test under section 701(b)(3) of the Act: Venezuela, Honduras, Nepal, North Yemen, El Salvador, Paraguay, and Liberia.

For further information, contact the Office of Policy, Import Administration, at the address stated in § 355.31(d).

##### Annex II—Time Limits for Submissions Specified in this Part

Description of time limit <sup>1</sup>	Section
Administrative protective order:	
Request for disclosure under.....	355.34(b)
Return of information released under.....	355.34(d)
Withdrawal of information subject to.....	355.34(c)
Administrative review:	
Request for review of all producers or exporters.....	355.22(e)

Description of time limit <sup>1</sup>	Section	Description of time limit <sup>1</sup>	Section
Request for changed circumstances review.....	355.22(h)	Waiver of verification.....	355.15(f)
Request for review of individual producers or exporters.....	355.22(a)	Proprietary information:	
Withdrawal of request for review.....	355.22(a)	Request for treatment as.....	355.32(a)
Commission:		Resubmission of, in proper form.....	355.32(d)
Filing of petition with.....	355.12(c)	Submission of agreement to release under protective order.....	355.32(c)
Request for review of revised suspension agreement.....	355.19(b)	Submission of public summary.....	355.32(b)
Request for review of suspension agreement.....	355.18(f)	Revocation of order:	
Critical circumstances findings:		Request for.....	355.25(b)
Request for.....	355.16(a)	Objections to, in the absence of requests for review.....	355.25(d)
Request for final finding only.....	355.16(d)	Service:	
Request for preliminary and final finding.....	355.16(b)	Preliminary accepted suspension agreements.....	355.18(g)
Exclusion from order:		Case and rebuttal briefs.....	355.38(e)
Request for.....	355.14(a)	Standing:	
Factual information:		Allegation of lack of.....	355.31(c)
Questionnaire responses in administrative reviews.....	355.31(b)	Suspension of investigation:	
Request for disclosure of, under protective order.....	355.34(b)	Request for Commission review of agreement.....	355.18(f)
Request for extension of time limits to submit.....	355.31(b)	Request for Commission review of revised agreement.....	355.19(b)
Request for extension of time limits to submit allegations.....	355.31(c)	Request for termination of.....	355.25(b)
Submission of, regarding preliminary accepted suspension agreements.....	355.18(g)	Request to continue investigation.....	355.18(f)
Submission of subsidy allegations.....	355.31(c)	Service of preliminary accepted agreement.....	355.18(g)
Submission of standing allegations.....	355.31(c)	Submission of factual information.....	355.18(g)
Submissions of, in general.....	355.31(a)	Submission of proposed agreement.....	355.18(g)
Withdrawal of, subject to disclosure under protective order.....	355.34(c)	Submission of written argument.....	355.18(g)
Final determination:		Subsidy allegations:	
Petitioner's request to postpone in simultaneous investigations.....	355.20(c)	Request to investigate additional subsidy.....	355.31(c)
Request to investigate upstream subsidy.....	355.20(b)	Request to investigate upstream subsidy.....	355.15(d)
Hearings:		Request to investigate upstream subsidy.....	355.20(b)
Requests for.....	355.38(b)	Termination of suspended investigation:	
Petition:		Request for.....	355.25(b)
Amendment to.....	355.12(e)	Objections to, in the absence of requests for review.....	355.25(d)
Filing with the Commission.....	355.12(c)	Verification:	
Filing with the Secretary of the Treasury.....	355.12(h)	Request for in administrative reviews.....	355.36(a)
Postponement of determinations:		Waiver of.....	355.15(f)
Petitioner's request to postpone final—simultaneous investigations.....	355.20(c)	Written argument:	
Petitioner's request to postpone preliminary.....	355.15(c)	Submission of case brief.....	355.38(c)
Preliminary determination:		Submission of rebuttal brief.....	355.38(d)
Petitioner's request to postpone.....	355.15(c)	Service of case and rebuttal briefs.....	355.38(e)
Request to investigate upstream subsidy.....	355.15(d)	Submission of, regarding preliminary accepted suspension agreements.....	355.18(g)

<sup>1</sup> Documents are filed when stamped by the Central Records Unit of the Department of Commerce. See § 355.31(d) for hours of operation.

[FR Doc. 88-28154 Filed 12-23-88; 8:45 am]  
BILLING CODE 3510-DS-M



# **federal register**

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Tuesday  
December 27, 1988

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## **Part III**

### **Environmental Protection Agency**

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40 CFR Part 467

Aluminum Forming Point Source  
Category Effluent Limitations Guidelines,  
Pretreatment Standards, and New Source  
Performance Standards; Final Regulation



## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 467

(OW-FRL-3422-4)

## Aluminum Forming Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final regulation.

**SUMMARY:** EPA is promulgating amendments to the regulation which limits effluent discharges to waters of the United States and the introduction of pollutants into publicly owned treatment works by existing and new sources that conduct aluminum forming operations. EPA agreed to propose these amendments in a settlement agreement to resolve a lawsuit challenging the final aluminum forming regulation promulgated by EPA on October 24, 1983 (48 FR 49126). The proposed amendments, which were published in the *Federal Register* on March 19, 1986 (51 FR 9618), are in accordance with the settlement agreement.

These final amendments include: (1) Certain modifications of the effluent limitations for "best practicable technology" (BPT), "best available technology economically achievable" (BAT), and "new source performance standards" (NSPS) for direct dischargers; and (2) certain modifications to the pretreatment standards for new and existing indirect dischargers (PSNS and PSES).

**DATES:** In accordance with 40 CFR 100.01 (45 FR 26048), this regulation shall be considered issued for purposes of judicial review at 1:00 p.m. Eastern time on January 10, 1989. This regulation shall become effective February 9, 1989.

Under Section 509(b)(1) of the Clean Water Act, judicial review of this regulation can be made only by filing a petition for review in a United States Court of Appeals within 120 days after the regulation is considered issued for purposes of judicial review. Under Section 509(b)(2) of the Clean Water Act, the requirements in this regulation may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

**ADDRESSES:** Address questions on this final rule to: Industrial Technology Division (WH-552), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, Attention: Aluminum Forming Rules (WH-552).

The basis for this amendment is detailed in the record. The record for the final rule will be available for public review not later than January 11, 1989, in EPA's Public Information Reference Unit, Room 2904 (Rear) (EPA Library), 401 M Street SW., Washington, DC. The EPA public information regulation (40 CFR Part 2) provides that a reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Questions regarding this notice may be addressed to Mr. Ernst P. Hall at (202) 382-7126.

**SUPPLEMENTARY INFORMATION:****Organization of this notice**

- I. Legal authority
- II. Background of Rulemaking and Settlement Agreement
- III. Amendments to the Aluminum Forming Regulation
- IV. Environmental Impact of the Amendments to the Aluminum Forming Regulation
- V. Economic Impact of the Amendments
- VI. Public Participation and Response to Major Comments
- VII. Executive Order 12291
- VIII. Regulatory Flexibility Analysis
- IX. OMB Review
- X. List of Subjects in 40 CFR Part 467

**I. Legal Authority**

The regulation described in this notice is promulgated under authority of Sections 301, 304, 306, 307, 308, and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 et seq., as amended by the Clean Water Act of 1977, Pub. L. 95-217 and the Water Quality Act of 1987, Pub. L. 100-4).

**II. Background of Rulemaking and Settlement Agreement**

On November 22, 1982, EPA proposed a regulation to establish effluent limitations guidelines based on Best Practicable Control Technology Currently Available (BPT), Best Available Technology Economically Achievable (BAT), and Best Conventional Pollutant Control Technology (BCT) for existing sources; New Source Performance Standards (NSPS) for new direct dischargers; Pretreatment Standards for Existing Sources (PSES); and Pretreatment Standards for New Sources (PSNS) for the aluminum forming point source category (47 FR 52626).

EPA published the final aluminum forming regulation on October 24, 1983 (48 FR 49126). This regulation was estimated to affect 59 direct dischargers and 72 indirect dischargers. The preambles to the proposed and final aluminum forming regulation completely

describe the development of the regulation. Support documents relating to the rulemaking may be obtained from the National Technical Information Service in Springfield, Va. 22161 (703-487-4600). The technical document, Development Document for Effluent Limitations Guidelines and Standards for the Aluminum Forming Point Source Category, is assigned the catalogue number PB 84-244-425. The economics document, Economic Impact Analysis of Effluent Limitations and Standards for the Aluminum Forming Industry, is assigned the catalogue number PB 84-139-757.

After publication of the aluminum forming regulation, the Aluminum Association, Inc., the Aluminum Extruders Council, Kaiser Aluminum and Chemical Corp., Reynolds Metals Company, Cardinal Aluminum Company, General Extrusions Inc., Loxgreen Company, Inc., Macklenburg-Duncan Company, and Pacific Aluminum Corp. ("petitioners") filed petitions to review the regulation. These challenges were consolidated by the United States Court of Appeals for the Sixth Circuit (*Aluminum Association, Inc., et al. v. EPA and Aluminum Extruders Council, et al. v. EPA*, Consolidated Nos. 84-3090/84-3101).

On April 1, 1985, EPA and the petitioners executed a Settlement Agreement to resolve all issues raised with respect to the aluminum forming effluent limitations guidelines and standards. As part of the Settlement Agreement, the parties jointly requested the Court to stay the effectiveness of those portions of 40 CFR Part 467 which EPA agreed to propose to amend. The Court granted this request on October 15, 1985. Copies of the Settlement Agreement have been sent to EPA Regional Offices and to affected State permit-issuing authorities.

Under the Settlement Agreement, EPA agreed to propose to amend portions of the aluminum forming regulation and to propose to add preamble language relating to (1) nonscope waters; (2) discharge allowance for hot water seal; (3) the BAT and PSES pollutant discharge allowances for the cleaning or etching rinse in the extrusion and forging subcategories (Subparts C and D, respectively); (4) the discharge allowance for the alternative monitoring parameter of oil and grease for PSES; (5) the BPT and NSPS requirement for pH in the direct chill casting contact cooling water ancillary operation; and (6) the addition of a definition for hot water seal to the general definitions contained in 40 CFR Part 467. EPA published these proposals in the *Federal Register* on

March 19, 1986, (51 FR 9618). EPA is now taking final action under the Settlement Agreement, and the provisions of these amendments are consistent with the Settlement Agreement. Therefore, the petitioners have agreed to voluntarily dismiss their petitions for review. The petitioners have also agreed not to seek judicial review of any of these amendments that are consistent with the Settlement Agreement.

**III. Amendments to the Aluminum Forming Regulation**

Below are descriptions of those sections of the aluminum forming regulation amended by this rulemaking. All limitations and standards contained in the final aluminum forming regulation published on October 24, 1983, and corrected on March 27, 1984, which are not specifically listed below are not affected by these amendments. EPA is not deleting or amending any of the limitations and standards not specifically addressed in this rulemaking.

**A. Sections 467.33 and 467.35 (Subpart C), and § 467.45 (Subpart D), Flow Allowances for the Cleaning or Etching Rinse**

EPA is revising the BAT and PSES flow bases for the limitations and standards for the Cleaning or Etching Rinse for the Extrusion Subcategory (Subpart C) and the PSES flow basis for the Forging Subcategory (Subpart D). The petitioners claimed that 90 percent flow reduction was not attainable for rinsing irregular shapes but that 72 percent flow reduction could be attained with two-stage countercurrent cascade rinse. The Agency is revising the BAT and PSES flow allowance for cleaning or etching rinses based on two-stage countercurrent cascade rinsing that achieves 72 percent flow reduction, instead of 90 percent, to ensure adequate rinsing for irregular shapes. It is estimated that this change will result in an increase of only 3 percent of the estimated mass that would be discharged by existing sources in the Aluminum Forming Industry in accordance with the existing regulation.

**B. Sections 467.15 (Subpart A), 467.25 (Subpart B), 467.35 (Subpart C), 467.45 (Subpart D), 467.55 (Subpart E) and 467.65 (Subpart F) "Oil and Grease (alternate monitoring parameter)"**

EPA is promulgating a change in the oil and grease alternate monitoring parameter for total toxic organics for PSES. The concentrations of oil and grease on which the alternate monitoring parameter for the promulgated PSES was based were 20

mg/l for the daily maximum and 12 mg/l for the monthly average. The petitioners had asserted that EPA should amend these concentrations to 52 mg/l for the daily maximum and 26 mg/l for the monthly average. This revision in the alternate monitoring parameter will provide adequate assurance that the TTO limits are met when oil and grease is maintained below 52 mg/l for any one day and 26 mg/l average of daily values for any one month.

**C. Sections 467.22, 467.24, 467.32 and 467.34 pH Limits for Direct Chill Casting Contact Cooling Water**

EPA is promulgating a change in the pH requirement from 7.0-10.0 to 6.0-10.0 when certain conditions are met for Direct Chill Casting Contact Cooling Water in each provision. The requirement which, at present, states that "the pH shall be within 7.0 to 10.0 at all times," is revised to state that "the pH shall be maintained within the range of 7.0 to 10.0 at all times except for those situations when this waste stream is discharged separately and without commingling with any other wastewater in which case the pH shall be within the range of 6.0 to 10.0 at all times." The petitioners argued that the effluent limitations for the other pollutant parameters for this waste stream can be met when the pH is in the range of 6.0 to 10.0. The data the Agency collected for this waste stream indicate that it may sometimes be relatively clean and compliance with the BAT limitations may be possible without adjusting the pH. Accordingly, the Agency is promulgating a broader pH requirement for direct chill casting contact cooling water if it is discharged separately without commingling with any other wastewater.

**D. Section 467.02 (Definitions)**

The Agency is adding a definition of "hot water seal". A hot water seal is defined as a heated water bath (heated to approximately 160°F) used to seal the surface coating on formed aluminum which has been anodized and coated. In establishing an effluent allowance for this operation, the hot water seal shall be classified as a cleaning or etching rinse. This reflects the fact that the hot water seal bath has wastewater characteristics more similar to cleaning or etching rinses than to other baths.

**E. Preamble Language to 40 CFR Part 467**

1. *Nonscope waters.* Wastewater streams not given flow allowances in the regulation (such as noncontact cooling water) do not warrant national effluent limitations or standards

because they are generally not contaminated or occur at only one or two plants. The Agency believes these wastewater streams should be handled by the individual permitting authority on a case-by-case basis. Thus, EPA is including the following language in the preamble clarifying the discussion of nonscope waters that was included in the final preamble (48 FR 49140):

To account for site-specific wastewater sources for which the permit writer in his best professional judgment determines that co-treatment with process wastewater is appropriate, the permit writer must quantify the discharge rate of the wastewater stream. The mass allowance provided for the wastewater stream is then obtained from the product of the discharge rate and treatment performance of the technology basis of the promulgated regulation. For example, if the permit writer determines that contaminated ground water seepage requires treatment, he must determine the flow rate of contaminated water to be treated. He then can determine the appropriate model treatment technology by referring to the technical development document. Treatment effectiveness values are presented in Section VII of the Development Document. The product of the discharge rate and treatment performance is then the allowed mass discharge. This quantity can then be added to the other building blocks (i.e., mass discharge for the regulated streams) to determine total allowed mass discharge.

2. *Discharge Allowance for Hot Water Seal.* EPA is clarifying the BPT discussion of miscellaneous wastewater streams (Section V.C. of the October 24, 1983 preamble) by adding a phrase to a sentence which appeared at the end of the bottom paragraph, middle column of the final preamble at 48 FR 49131. This sentence at present reads:

The miscellaneous nondescript wastewater flow allowance is production normalized to a plant's core production and covers waste streams generated by maintenance, clean-up, ultrasonic ingot scalping, processing area scrubbers, and dye solution baths and seal baths (along with any other cleaning or etching bath) when not followed by a rinse.

The Agency is clarifying this sentence as follows:

"The miscellaneous nondescript wastewater flow allowance is production normalized to a plant's core production and covers wastewater streams generated by maintenance, clean-up, ultrasonic testing, roll grinding of caster rolls, ingot scalping, processing area scrubbers, and dye solution baths and seal baths (along with any other cleaning or etching bath, except a hot water seal) when not followed by a rinse.

EPA is also clarifying the response to comment number 7 in Section IX of the October 24, 1983 preamble (48 FR 49141) by including the following sentence in the preamble:

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The hot water seal bath has high flow and, therefore, is not included in the miscellaneous wastewater sources allowance, but is considered as an etch line rinse for the purpose of calculating pollutant discharge allowances.

#### IV Environmental Impact of the Amendments to the Aluminum Forming Regulation

The amendments described above may affect at least 90 and possibly as many as 131 plants. The Agency estimates that this amendment would result in the discharge of an additional 500 kg/year of toxic metal pollutants and cyanide. This is an increase of 3 percent of the estimated mass that would be discharged by existing sources in the Aluminum Forming Industry in accordance with the existing regulation.

#### V. Economic Impact of the Amendments

The amendments do not alter the model technologies for complying with the aluminum forming regulation. The Agency considered the economic impact of the regulation when the final regulation was promulgated (See 46 FR 49134). These amendments do not alter the determinations with respect to the economic impact on aluminum formers.

#### VI. Public Participation and Response to Major Comments

Since proposal of these amendments four commenters have submitted comments on the proposal. These commenters are: Aluminum Association Inc., Aluminum Extruders Council, Reynolds Metal Company, and the State of Georgia. The most significant of these comments are summarized below:

1. Three commenters generally supported the amendments proposed by the Agency and recommended that, at a minimum, these revisions be promulgated.

2. One commenter objected to the revision of the flow allowance (production normalized flow) for the cleaning or etching rinse in the forging and extrusion subcategories. The Agency believed at the time of promulgation of the final regulation that the water flow allowances used as the basis for the final regulation were proper and adequate. Industry argued that for the existing plants in the industry, the water allowances for rinse segments were inadequate.

The proposed revision was based on the arguments and information advanced by the petitioners and was supported by information transferred from the record for the copper forming regulation, 40 CFR Part 468, August 15, 1983. In the copper forming process, certain parts contain cavities which trap

and carry significant amounts of process water into the rinsing operation. This additional process water requires additional rinse water to achieve a level of cleanliness similar to that achievable for parts without cavities. In the extrusion and forging segment of the aluminum forming industry, parts containing cavities also trap and carry large amounts of wastewater into the rinsing operation. After considering comments on the proposed copper forming regulations, the Agency decided to increase the flow allowances for pickling and alkaline rinse water for forged copper parts to take this factor into account. The Agency's proposal to revise the flow allowance for the cleaning or etching rinse in these regulations was consistent with the flow allowance provisions of the copper forming regulations.

The state of Georgia commented that the original flow allowance should not be amended because data from five Georgia extrusion plants operating under state permits based upon 90 percent flow reduction indicate that compliance with the existing regulation is possible with careful management of wastewater treatment facilities. In evaluating these comments, EPA has carefully considered the permit limits and operating data submitted by Georgia with its comment letter and an analysis of Georgia's comments submitted to EPA by the petitioners. EPA obtained the Georgia permits themselves and material of record relating to those permits. EPA also provided the petitioners' analysis of the State of Georgia for comment, but Georgia did not file any additional comments.

Based on a review of the record materials, it is apparent that two of the five Georgia extrusion plants do not consistently meet the BAT effluent limitations contained in their permits. Moreover, two special characteristics of the Georgia plants make it impossible to conclude, based upon Georgia's data, that the requirement for 90 percent flow reduction should be retained. First, all five Georgia plants have in place wastewater treatment systems which exceed the BAT cost model requirements. Second, of the five Georgia plants, four commingle anodizing wastewater streams with direct chill casting wastewater streams. Thus, no conclusion can be drawn about the achievability of limits or flow reductions for anodizing lines alone.

Georgia also commented that its industries have spent "hundreds of thousands of dollars" to comply with the existing effluent limitations guidelines and that a "retreat from existing

treatment levels" would have an anti-competitive effect upon Georgia extruders. The state did not submit data in support of this comment. Since there is no difference in the model treatment technology for either the original or the amended limit, it does not appear to be the case that Georgia's extruders would be disadvantaged.

3. The revision in the oil and grease (O&G) levels for alternate monitoring for TTO was supported by three industry commenters. This revision in the alternate monitoring parameter will provide adequate assurance that the TTO limits are met when oil and grease is maintained below 52 mg/l for any one day and 26 mg/l average of daily values for any one month.

4. Three commenters supported the revision of the pH limits for direct chill casting waters. The state of Georgia encouraged the Agency to expand the coverage of pH limits to include all discharges in the subpart. The efficiency of wastewater treatment in this industry is directly related to the pH of the waste stream. If the Agency followed Georgia's suggestion, the efficiency of the model treatment technology could be affected. Thus, the Agency has decided to promulgate the revised pH limits as proposed.

5. Three commenters supported the revised definition of the hot water seal bath and the guidance regarding non-scope wastewater streams.

#### VII. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. Major rules are defined as rules that impose an annual cost to the economy of \$100 million or more, or meet other economic criteria. This proposed regulation, like the regulation promulgated October 24, 1983, is not major because it does not fall within the criteria for major regulations established in Executive Order 12291.

#### VIII. Regulatory Flexibility Analysis

Public Law 96-354 requires that EPA prepare a Regulatory Flexibility Analysis for regulations that have a significant impact on a substantial number of small entities. In the preamble to the October 24, 1983 final aluminum forming regulation, the Agency concluded that there would not be a significant impact on a substantial number of small entities (48 FR 49135). For that reason, the Agency determined that a formal regulatory flexibility analysis was not required. That conclusion is equally applicable to these

amendments, since the amendments would not alter the economic impact of the regulation. The Agency is not, therefore, preparing a formal analysis for this regulation.

#### OMB Review

This regulation was submitted to the Office of Management and Budget for review as required by Executive Order 12291. Any comments from OMB to EPA and any EPA response to those comments are available for public inspection at Room M2404, U.S. EPA, 401 M Street, SW., Washington, DC 20460 from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding federal holidays.

#### X. List of Subjects in 40 CFR Part 467

Aluminum forming, Water pollution control, Waste treatment and disposal.

Dated: December 15, 1988.

Lee M. Thomas,  
Administrator.

For the reasons stated above, EPA is amending 40 CFR Part 467 as follows:

#### PART 467—ALUMINUM FORMING POINT SOURCE CATEGORY

1. The authority citation for part 467 is revised to read as follows:

Authority: Secs. 301, 304(b), (c), (e), and (g), 306(b) and (c), 307(b) and (c), 308 and 501 of the Clean Water Act (the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977) and the Water Quality Act of 1967 (the "Act"); 33 U.S.C. 1311, 1314(b), (c), (e), and (g), 1316(b) and (c), 1317(b) and (c), 1318 and 1361; 86 Stat. 816, Pub. L. 92-500; 91 Stat. 1567, Pub. L. 95-217; 101 Stat. 7, Pub. L. 100-4.

2. Section 467.02 is amended to add a definition of "hot water seal." Paragraphs (m) through (z) are redesignated (n) through (aa), respectively. A new Paragraph (m) is added to read as follows:

#### § 467.02 General definitions.

(m) Hot water seal is a heated water bath (heated to approximately 180° F) used to seal the surface coating on formed aluminum which has been anodized and coated. In establishing an effluent allowance for this operation, the hot water seal shall be classified as a cleaning or etching rinse.

3. Section 467.15 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" in all of the following tables in this section to read as follows:

#### § 467.15 Pretreatment standards for existing sources.

##### SUBPART A

##### Core Without an Annealing Furnace Scrubber

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rolled with neat oils	
Oil and grease (alternate monitoring parameter).....	2.9	1.5

##### SUBPART A

##### Core With an Annealing Furnace Scrubber

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rolled with neat oils	
Oil and grease (alternate monitoring parameter).....	4.3	2.1

##### SUBPART A

##### Continuous Sheet Casting Spent Lubricant

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cast	
Oil and grease (alternate monitoring parameter).....	0.10	0.052

#### §§ 467.15, 467.25, 467.35, 467.45, 467.55 and 467.65 [Amended]

4. Sections 467.15, 467.25, 467.35, 467.45, 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Solution Heat Treatment Contact Cooling Water" to read as follows:

#### Solution Heat Treatment Contact Cooling Water

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum quenched	
Oil and grease (alternate monitoring parameter).....	110	53

5. Sections 467.15, 467.25, 467.35, 467.45, 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Cleaning or Etching Bath" to read as follows:

#### Cleaning or Etching Bath

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cleaned or etched	
Oil and grease (alternate monitoring parameter).....	9.3	4.7

6. Sections 467.15, 467.25, 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Cleaning or Etching Rinse" to read as follows:

#### Cleaning or Etching Rinse

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cleaned or etched	
Oil and grease (alternate monitoring parameter).....	73	36



7. Sections 467.15, 467.25, 467.35, 467.45, 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Cleaning or Etching Scrubber Liquor" to read as follows:

#### Cleaning or Etching Scrubber Liquor

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cleaned or etched	
Oil and grease (alternate monitoring parameter).....	100	50

#### § 467.22 [Amended]

8. Section 467.22 is amended to revise the footnote for the table titled "Direct Chill Casting Contact Cooling Water" to read as follows:

#### Subpart B

##### Direct Chill Casting Contact Cooling Water

<sup>1</sup> The pH shall be maintained within the range of 7.0 to 10.0 at all times except for those situations when this waste stream is discharged separately and without commingling with any other wastewater in which case the pH shall be within the range of 6.0 to 10.0 at all times.

#### § 467.24 [Amended]

9. Section 467.24 is amended to revise the footnote for the table titled "Direct Chill Casting Contact Cooling Water" to read as follows:

#### Subpart B

##### Direct Chill Casting Contact Cooling Water

<sup>1</sup> The pH shall be maintained within the range of 7.0 to 10.0 at all times except for those situations when this waste stream is discharged separately and without commingling with any other wastewater in which case the pH shall be within the range of 6.0 to 10.0 at all times.

#### § 467.25 [Amended]

10. Section 467.25 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" in the table titled "Core" in this section to read as follows:

#### Subpart B

##### Core

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rolled with emulsions	
Oil and grease (alternate monitoring parameter).....	6.8	3.4

#### § 467.25 [Amended]

11. Section 467.25 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" in the table titled "Direct Chill Casting Contact Cooling Water" to read as follows:

##### Direct Chill Casting Contact Cooling Water

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cast	
Oil and grease (alternate monitoring parameter).....	69	35

#### § 467.32 [Amended]

12. Section 467.32 is amended to revise the footnote for the table titled "Direct Chill Casting Contact Cooling Water" to read as follows:

##### Direct Chill Casting Contact Cooling Water

<sup>1</sup> The pH shall be maintained within the range of 7.0 to 10.0 at all times except for those situations when this waste stream is discharged separately and without commingling with any other wastewater in which case the pH shall be within the range of 6.0 to 10.0 at all times.

#### § 467.33 [Amended]

13. Section 467.33 is amended by revising the table entitled "Cleaning or Etching Rinse" to read as follows:

#### Subpart C

##### Cleaning or Etching Rinse

Pollutant or pollutant property	BAT effluent limitations	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cleaned or etched	
Chromium.....	1.7	0.7
Cyanide.....	1.2	0.5
Zinc.....	5.7	2.4
Aluminum.....	25	13

#### § 467.34 [Amended]

14. Section 467.34 is amended to revise the footnote for the table entitled "Direct Chill Casting Contact Cooling Water" to read as follows:

##### Direct Chill Casting Contact Cooling Water

<sup>1</sup> The pH shall be maintained within the range of 7.0 to 10.0 at all times except for those situations when this waste stream is discharged separately and without commingling with any other wastewater in which case the pH shall be within the range of 6.0 to 10.0 at all times.

#### § 467.35 [Amended]

15. Section 467.35 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" in the table titled "Direct Chill Casting Contact Cooling Water" to read as follows:

##### Direct Chill Casting Contact Cooling Water

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cast	
Oil and grease (alternate monitoring parameter).....	69	35

16. Section 467.35 is amended by revising the table titled "Cleaning or Etching Rinse" to read as follows:

#### Subpart C

##### Cleaning or Etching Rinse

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum cleaned or etched	
Chromium.....	1.7	0.7
Cyanide.....	1.2	0.5
Zinc.....	5.7	2.4
TTO.....	2.7	
Oil & Grease (alternate monitoring parameter).....	200	100

17. Section 467.35 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the following tables to read as follows:

#### Subpart C

##### Core

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum extruded	
Oil and grease (alternate monitoring parameter).....	18	8.8

#### Subpart C

##### Extrusion Press Leakage

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum extruded	
Oil and grease (alternate monitoring parameter).....	77	39

#### Subpart C

##### Press Heat Treatment Contact Cooling Water

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum quenched	
Oil and grease (alternate monitoring parameter).....	110	53

#### § 465.45 [Amended]

18. Section 465.45 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the following tables to read as follows:

#### Subpart D

##### Core

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	Mg/off-kg (lb/million off-lbs) of aluminum forged	
Oil and grease (alternate monitoring parameter).....	2.8	1.3

#### Subpart D

##### Forging Scrubber Liquor

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum forged	
Oil and grease (alternate monitoring parameter).....	4.9	2.5

19. Section 467.45 is amended by revising the table titled "Cleaning or Etching Rinse" to read as follows:

#### Subpart D

##### Cleaning or Etching Rinse

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mb/off-kg (lb/million off-lbs) of aluminum cleaned or etched	
Chromium.....	1.7	0.7
Cyanide.....	1.2	0.5
Zinc.....	5.7	2.4
TTO.....	2.7	
Oil and grease (alternate monitoring parameter).....	200	100

#### § 467.55 [Amended]

20. 40 CFR 467.55 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the table titled "Core" to read as follows:

#### Subpart E

##### Core

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum drawn with neat oils	
Oil and grease (alternate monitoring parameter).....	2.6	1.3

#### §§ 467.55 and 467.65 [Amended]

21. Sections 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Continuous Rod Casting Lubricant" to read as follows:



Continuous Rod Casting Lubricant—

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rod cast	
Oil and grease (alternate monitoring parameter).....	0.10	0.052

22. Sections 467.55 and 467.65 are amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the tables titled "Continuous Rod Casting Contact Cooling Water" to read as follows:

Continuous Rod Casting Contact Cooling Water

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum rod cast	
Oil and grease (alternate monitoring parameter).....	10	5.1

§ 467.65 [Amended]

23. Section 467.65 is amended by revising the values for "Oil and grease (alternate monitoring parameter)" for the table titled "Core" to read as follows:

SUBPART F

Core

Pollutant or pollutant property	PSES	
	Maximum for any 1 day	Maximum for monthly average
	mg/off-kg (lb/million off-lbs) of aluminum drawn with emulsions or soaps	
Oil and grease (alternate monitoring parameter).....	25	12

[FR Doc. 88-29495 Filed 12-23-88; 8:45 am]  
BILLING CODE 6560-50-M

Tuesday  
December 27, 1988

Part IV

Department of the  
Interior

30 CFR Part 761

Surface Mining Control and Reclamation  
Act of 1977; Proposed Rule and Notice  
of Statement of Policy

federal register



## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Part 761

## Areas Unsuitable for Mining; Areas Designated by Act of Congress; Applicability of the Prohibitions of the Surface Mining Act to the Surface Impacts of Underground Coal Mining

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.  
**ACTION:** Proposed rules.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) is proposing to amend those portions of its permanent program regulations at 30 CFR Part 761 which address the circumstances which constitute valid existing rights (VER) to mine in areas where Congress has otherwise prohibited mining under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSMRE is undertaking this action in response to a District Court's decision in Round III of the litigation on OSMRE's permanent program regulations. Specifically, OSMRE is proposing for review and comment two different options for the standard for VER: (1) VER exists when an applicant for a permit to conduct surface coal mining operations has, or had made a good faith effort to obtain, all necessary permits; or (2) VER exists when an applicant has a legal right to the coal resource and has authority to mine by the method intended, as determined by State law. The proposed rule also reorganizes the existing rule for clarity. OSMRE is also proposing for review and comment a rulemaking proposal on the applicability of the prohibitions in section 522(e) of SMCRA to subsidence resulting from underground mining. Section 522(e) prohibits surface coal mining operations on certain lands and within specified distances of certain structures and facilities.

**DATES:** Written comments: OSMRE will accept written comments on the proposed rules until 5:00 p.m. eastern time on March 7, 1989.

**Public hearings:** Upon request, OSMRE will hold public hearings on the proposed rules within the comment period. OSMRE will accept requests for hearings until 5:00 p.m. eastern time on January 17, 1989.

Individuals wishing to attend but not testify at any hearing should contact the person identified under "FOR FURTHER INFORMATION CONTACT" beforehand to verify that the hearing will be held.

**ADDRESSES:** Written comments: Hand-deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record Room 5131L, 1100 L Street, NW., Washington, DC, or mail to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131L, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240.

**Public Hearings:** The addresses and times for any hearings which may be scheduled will be announced prior to the hearings.

**Requests for public hearings:** Submit orally or in writing to the person and address specified under "FOR FURTHER INFORMATION CONTACT" by the time specified under "DATES."

**FOR FURTHER INFORMATION CONTACT:** Dr. Annetta Cheek or Mr. Dermot Winters, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; telephone Dr. Cheek at (202) 343-4006 and Mr. Winters at (202) 343-1928 (Commercial or FTS).

**SUPPLEMENTARY INFORMATION:**

- I. Public Comment Procedures
- II. Discussion of Proposed Rules
  - A. Areas Designated by Act of Congress—Valid Existing Rights
    1. Background
    2. Discussion of Proposed Rule
  - B. Applicability of the Prohibitions of SMCRA to the Surface Impacts of Underground Coal Mining
    1. Background
    2. Discussion of Proposed Rules Options
  - C. Environmental Impact Statement and Regulatory Impact Analysis
  - D. Effect in Federal Program States and on Indian Lands
- III. Procedural Matters

**I. Public Comment Procedures***Written Comments*

Written comments submitted on the proposed rules should be specific, should be confined to issues pertinent to the proposed rules, and should explain the reason for any recommended change. Where practicable, commenters should submit five copies of their comments (see "ADDRESSES"). Comments received after the close of the comment period (see "DATES") may not be considered or included in the Administrative Record for the final rules.

*Public Hearings*

OSMRE will hold public hearings on the proposed rules upon request only. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results included in the Administrative Record.

If a hearing is held, it will continue until all persons wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a written copy of their testimony. To assist OSMRE in preparing appropriate responses, OSMRE also requests that persons who plan to testify submit to OSMRE, at the address previously specified for the submission of written comments (see "ADDRESSES"), an advance copy of their testimony.

**II. Discussion of Proposed Rules***A. Areas Designated by Act of Congress—Valid Existing Rights***1. Background**

Section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*) (SMCRA, or the Act) prohibits surface coal mining operations in certain areas, subject to valid existing rights and except for those operations which existed on August 3, 1977. Lands designated by section 522(e)(1) include any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under § 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress. Lands designated by sections 522(e) (2), (3), (4), and (5) include National Forests, publicly owned parks, properties listed on the National Register of Historic Places, 100-foot buffer zones around public roads and cemeteries, and 300-foot buffer zones around occupied dwellings, public buildings, schools, churches, community or institutional buildings, and public parks.

The term "valid existing rights" is not defined in SMCRA. The legislative history "does not suggest that Congress did not intend to infringe on valid property rights or affect takings through section 522(e)." *NWF v. Hodel*, No. 84-5743, Slip. Op. at pp. 115-116 (D.C. Cir. 1988).

The following discussion relates the history of the major provisions in the current rule for which OSMRE is proposing substantive revisions. Other provisions are discussed only in section 2, *Discussion of Proposed Rule*. That section also discusses the reorganization of the rule which OSMRE is proposing.

**Section 761.5(a)—Definition of "valid existing rights":** OSMRE's first attempt to define VER in 1979 was an unsuccessful effort to limit the

exemption to those property rights in existence on August 3, 1977, the owners of which either had obtained all necessary mining permits on or before August 3, 1977, or could demonstrate that the coal for which the exemption was sought was both needed for, and immediately adjacent to, a mining operation in existence prior to August 3, 1977 (30 CFR 761.5(a), 44 FR 15342 (March 13, 1979)).

On judicial review, the court remanded to the Secretary that portion of the definition requiring the property owner to have obtained all permits necessary to mine. Specifically, the court indicated that "a good faith attempt to have obtained all permits before the August 3, 1977 cut-off date should suffice for meeting the all permits test" (*In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144, Mem. Op. at 20 (D.D.C. February 26, 1980)). To comply with this opinion, OSMRE suspended the definition insofar as it required that all permits must have been obtained prior to August 3, 1977 (45 FR 51547, 51548 (August 4, 1980)). The suspension stated that, pending further rulemaking, OSMRE would interpret the regulation as including the court's suggestion that a good faith effort to obtain all permits would establish VER.

On June 10, 1982 (47 FR 25278), OSMRE proposed three major options for revising the definition of VER, including a "good faith/all permits" test, and three alternatives which were variations of the principal options. All of the proposed options were attempts to identify in a straightforward manner the class or classes of circumstances which would operate to establish VER under section 522(e). These tests are referred to as "mechanical" tests. Commenters on the proposed rule criticized each option as either too broad or too narrow, and many raised the issue of taking without compensation on one or more of the proposed options. These comments led OSMRE to examine the case law applying the "just compensation" clause of the Fifth Amendment. As a result of that examination, OSMRE stated that "because the courts refuse to prescribe set formulas for takings, OSMRE is convinced that it cannot specifically delineate a class of circumstances with the assurance that the class is neither overinclusive nor underinclusive of all potential takings which might result from section 522(e) prohibitions" (48 FR 41314 (September 14, 1983)). Therefore, on September 14, 1983, OSMRE promulgated a broad definition of VER which relied on a general "takings" standard (48 FR 41312).

On judicial review, the court held that the broad takings standard represented such a significant departure from the mechanical tests of the proposed rule that a new notice and comment period was necessary. *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. 1985) (hereinafter *In Re: Permanent (II)*). Accordingly, the court held that the promulgation of the VER definition in 30 CFR 761.5(a) violated the Administrative Procedure Act (APA), 5 U.S.C. 553, and remanded the definition to the Secretary for proper notice and comment (*In Re: Permanent (II)*, Mem. Op. at 11 (March 22, 1985)). In response to this order, OSMRE suspended the definition of VER in 30 CFR 761.5(a) (51 FR 41961 (November 20, 1986)).

The suspension generally had the effect of putting in place the VER test in use before the 1983 definition was promulgated. That test was the 1979 test, including the "needed for and adjacent" test, as modified by the August 4, 1980, suspension notice which implemented the District Court's suggestion that a good faith effort to obtain all permits would establish a VER. Accordingly, OSMRE has been making VER determinations in Federal program States and on Indian lands using the 1980 test. Under 30 CFR 740.4(a)(4) and 745.13(o), the Secretary is responsible for making VER determinations on Federal lands within the boundaries of any areas in section 522(e)(1) or (e)(2) of the Act. Since 30 CFR 740.11(a) makes State programs applicable to Federal lands in that State, OSMRE has been using State program definitions of VER on Federal lands in States with approved programs.

**Section 761.5(c)—"Needed for and adjacent" test.** In its permanent program rules promulgated at 30 CFR 761.5(a)(2)(ii) on March 13, 1979, OSMRE introduced a provision known as the "needed for and adjacent" test for determining VER. Plaintiffs in *In Re: Permanent* (D.D.C. 1980), objected to the provision as unduly expanding the concept of valid existing rights. The court found that the "need and adjacent" component of the rules was consistent with Supreme Court decisions regarding taking of property, and determined that it was a rational method of allowing mining when denial would gravely diminish the value of the entire mining operation, thereby constituting a taking under Supreme Court declarations. (*In Re: Permanent*, Mem. Op. at 21 (February 26, 1980)).

The September 14, 1983 revised regulation included a similar provision (30 CFR 761.5(c), 48 FR 41315-41316).

The 1983 rules amplified the "needed for" portion of the 1979 rule by providing a definition of "needed for." Specifically, the 1983 rule removed the requirement that the operator had to have a right to the coal for which the exemption was sought prior to August 3, 1977. Additionally, the 1983 rule provided that "needed for" meant that the extension of mining was essential to make the surface coal mining operation as a whole economically viable (30 CFR 761.5(c) (1984)).

The court concluded that the rule as promulgated in 1983 did not have adequate notice and comment under the APA, because it was related to the overall VER definition remanded by the court and because nothing in the proposed rule suggested such an extension of the "needed for and adjacent" test. The court therefore remanded the test to the Secretary for notice and comment in accordance with the APA. In order to comply with the court's opinion, OSMRE suspended paragraph (c) of the definition of VER in 30 CFR 761.5 (51 FR 41961 (November 20, 1986)). This had the effect of returning to the "needed for and adjacent" test as promulgated in 1979.

**Section 761.5(d)—Valid existing rights where prohibitions come into effect after August 3, 1977.** Paragraph 761.5(d) was first promulgated on September 14, 1983. It provides for situations where areas come under the protection of section 522(e) after August 3, 1977. This provision has been called "continually created VER," and was intended to protect existing property interests where land came under the protection of section 522(e) sometime after the date SMCRA was passed. For example, if Congress were to designate a new National Forest or National Park, this provision would protect property interests that existed on the date the Park or Forest were created. Similarly, if after August 3, 1977, someone were to construct a home, highway, or any other feature or facility protected by section 522(e), the provision would protect all property interests that existed on the date the new section 522(e) protections came into existence. Section 761.5(d)(1) provides that VER shall be found if on the date the protection comes into existence a validly authorized surface coal mining operation exists on that area. Section 761.5(d)(2), now suspended, provided that VER shall be found if the prohibition as applied to the property interest would effect a taking which would require compensation under the Fifth or Fourteenth Amendments to the Constitution. In effect, then, § 761.5(d)(2) depended upon



the "takings" definition of VER promulgated in § 761.5(a) in 1983, discussed above.

In its 1985 decision cited above, the court upheld the basic concept of "continually created VER," but remanded for further notice and comment that portion of the regulation (§ 761.5(d)(2)) which incorporated the takings test of § 761.5(a). In order to comply with the court's decision, OSMRE suspended paragraph (d)(2) of the definition of VER in 30 CFR 761.5. (51 FR 41961 (November 20, 1986)). However, since paragraph (d)(1) was not suspended, there is still a provision that VER exists where an area comes under the protection of section 522(e) of the Act after August 3, 1977, if a validly authorized surface coal mining operation exists on that area on the date the prohibition against mining comes into existence. As expressed in § 761.5(d)(2), the concept of "continually created VER" was upheld in *NWF v. Hodel*, No. 84-5743, Slip. Op. at 116 (D.C. Cir. 1988).

**Section 761.11—Areas where mining is prohibited or limited.** Section 761.11(h) was promulgated on September 14, 1983 (48 FR 41349) in response to numerous comments from persons concerned that mining or drilling would occur in National Parks or other areas protected under section 522(e)(1) of the Act. Section 761.11(h) provides:

There will be no surface coal mining, permitting, licensing, or exploration of Federal lands in the National Park System, National Wildlife Refuge System, National System of Trails, National Wilderness Preservation System, Wild and Scenic Rivers System, or National Recreation Areas, unless called for by Acts of Congress [Emphasis added.]

The District Court held that there appeared to be no rational basis for distinguishing between Federal and non-Federal lands in this context since section 522(e)(1) prohibits, subject to VER and except for operations existing on August 3, 1977, surface coal mining operations on any lands within the statutorily protected areas (*In Re: Permanent (II)*, Mem. Op. at 15 (March 22, 1985)). The court remanded the rule for lack of proper notice and comment under the APA. In response to the court's order, OSMRE suspended § 761.11(h) (51 FR 41961 (November 20, 1986)). As a result of the suspension, neither Federal nor private lands are subject to the prohibitions found in § 761.11(h).

## 2. Discussion of Proposed Rule

The rule proposed here provides two options for the definition of valid

existing rights in OSMRE's permanent program regulations at 30 CFR 761.5.

As discussed in the preceding section of this preamble, OSMRE has promulgated definitions of VER on two prior occasions: March 13, 1979 (44 FR 15342) and September 14, 1983 (48 FR 41312). Both of these regulations were remanded to the Secretary by the court. OSMRE has reconsidered the administrative record of these promulgations, as well as the legislative history of SMCRA and the various judicial opinions, in developing this proposed rule.

This proposed rule would affect all portions of the definition of "valid existing rights" found in the existing regulations. The proposed rule has been extensively reorganized for clarity and brevity. Substantive revisions are proposed for four concepts in the existing rule, those currently contained in §§ 761.5(a), 761.5(b), 761.5(c) and 761.5(d)(2). The remaining provisions have been reorganized and edited for consistency with other proposed revisions. A description of all rule changes OSMRE is proposing to its permanent program rules follows.

**Introductory Statement—Definition of "valid existing rights."** OSMRE is proposing a new introductory statement in the section on VER. This statement constitutes the basic definition of VER. Unlike earlier "definitions", it does not constitute a "test" which must be met for VER to be found. Rather, it simply defines VER as a right to conduct surface coal mining operations on lands on which, without such a right, mining operations would be prohibited. Subsequent paragraphs contain a set of standards against which individual cases would be measured, to determine whether this right exists.

**Section 761.5(a)—Property rights.** This proposed paragraph provides that a person shall demonstrate that there was a legal right to the coal resource for which VER is sought as of the date of the Act, or as of the date the prohibition against mining came into effect. This provision constitutes the property rights concept which has been an integral part of the VER definition since OSMRE first defined it in 1979. In order to demonstrate VER, a person must show possession of a conveyance, lease, deed, contract, or other document establishing a legal right to the mineral resource. The language "as of the date of the prohibition against mining came into effect" incorporates the "continually created" VER provision currently found in § 761.5(d).

Although this provision is rewritten and reorganized in this proposal, the basic intent and application are not

changed. Essentially, this provision protects property rights where a section 522(e) prohibition or limitation on mining did not exist on the date of enactment, but comes into existence at some later date. It means that in such cases the standards for determining whether VER exists, proposed in following sections, will be applied using the date the prohibition came into existence, rather than the date of the Act. The history of this provision is discussed in more detail above, in the "Background" section of this preamble.

Additionally, paragraph (a) specifies that interpretation of the terms of the documents relied upon to establish the rights to which this paragraph applies shall be based upon applicable State statutory or case law concerning interpretation of documents conveying such rights. The original promulgation of the definition of VER in 1979 included a paragraph discussing the interpretation of the terms of the document relied upon to establish VER. This paragraph was revised in 1983 at 30 CFR 761.5(e) and is discussed in detail in the preamble to that rule (48 FR 41315 (September 14, 1983)). By moving this provision to paragraph (a), OSMRE is not proposing any substantive changes to this paragraph.

Finally, this section specifies that in addition to the property rights test of paragraph (a), at least one of the standards listed in the succeeding subparagraphs, (a) (1) and (2), must be met by a person wishing to conduct surface coal mining operations on lands protected by section 522(e) of SMCRA in order to receive a determination that VER exists. This means that, except as to haulroads covered by paragraph (b), the property rights standard contained in paragraph (a) must be met by all applicants for VER, but that applicants are required to meet only one of the other two standards.

**Section 761.5(a)(1)—"Needed for and immediately adjacent to" test.** OSMRE is proposing to revise the "needed for and adjacent" test by making it substantially the same as the 1979 test. This proposal reinstates the requirement that the property rights in question must have been in existence on August 3, 1977 (or as of the date the section 522(e) prohibitions came into effect, as specified in proposed § 761.5(a), above). Additionally, OSMRE is proposing to remove the definition of "needed for" because we have determined that the definition does not help clarify the intent or application of these provisions. Finally, because of the reorganization of the proposed rule, the "needed for and

immediately adjacent to" provision would become § 761.5(a)(1).

**Section 761.5(a)(2).** OSMRE is proposing two options for the standards for VER in § 761.5(a)(2). Both of these options would apply to all lands designated in § 522(e) of SMCRA.

### VER Option 1: Ownership and Authority Option

**Section 761.5(a)(2)(i).** Under this option OSMRE is proposing at § 761.5(a)(2)(i) that VER exists if the person can demonstrate the right, as determined by the laws of the State in which the mining would occur, to extract the coal by the method that person intends to use. The term "right to mine by the method intended" refers to whether the applicant has the necessary property rights to allow mining by the proposed method. For example, if the applicant proposed to mine by surface methods, the question would be whether the relevant conveyances have given the applicant all of the necessary rights to surface mine the coal, or whether the applicant lacks certain essential property rights or has obtained only the right to undertake underground mining. The right to mine by a certain method is an issue of property rights, and would be evaluated through consideration of the provisions of State property law as they applied to the particular situation.

Under this option, the existence of VER to extract coal would be a function of state property rights. It would not depend upon the holder of such rights having attempted to exercise them by the date of enactment of the Act, or by any other date. Thus an applicant for VER to extract coal would not be required to demonstrate that applications had been made for necessary permits by any particular date.

The standard proposed under this option would also accommodate Congress' concern that the Act not effect takings of property without compensation. As the D.C. Circuit Court of Appeals recently observed in *NWF v. Hodel*, supra, at pp. 115-116, the VER exception was included to protect valid property interests, as well as to avoid takings.

This option finds extensive support in the legislative history of the Surface Mining Act. In its discussions of VER in the legislative history, Congress affirmed on numerous occasions that valid existing property rights were to be preserved, and that the provisions of the bill were not intended to change such rights in any way.

Congress emphasized that the "language 'subject to valid existing rights' in section 522(e) is intended . . .

to make clear that the prohibition on strip mining . . . is subject to previous court interpretations of valid existing rights" (H.R. Rep. No. 216, 95th Cong., 1st sess., at 95 (1977)). In that context the House Report referred to the *Polino* decision (*United States v. Polino*, 131 F. Supp. 772 (N.D. W.Va. 1955)) as one example of a previous court interpretation which should be accepted. In that decision, the Federal district court held that the right to conduct surface mining in a National Forest was to be determined by State property law and that surface mining was not authorized under West Virginia law unless such rights were specifically established.

The language in the Senate report is slightly different. Without citing the *Polino* case, it states that the use of the phrase ["subject to valid existing rights"] "is intended to make clear that the prohibition of strip mining . . . is subject to previous state court interpretation of valid existing rights" (S. Rep. 95-128, 95th Cong., 1st sess., at 94 (1977)). Both reports demonstrate that Congress intended that there must be some deference to State law in determining what constituted VER. Thus, OSMRE is proposing an option for VER within lands affected by the prohibitions of section 522(e) based on and consistent with existing State law concerning property rights. OSMRE believes that it is consistent with Congressional intent for the VER exception to the prohibitions in section 522(e) to be interpreted in this manner.

Congress' deference to State property law is further evidenced by the removal of a provision from H.R. 2 in 1977. The provision removed was an amendment to H.R. 2 that was adopted by the Committee on Interior and Insular Affairs during the first session of the 95th Congress. The provision would have required the permit applicant to submit the written consent of a private surface owner or some other conveyance expressly granting the right to extract coal by surface mining methods. This amendment was intended to supersede the effect of prior State judicial interpretations of the broad form deed and would have imposed "a new concept of Federal property law in an area traditionally reserved to the States." (H.R. Rep. 95-216, 95th Cong., 1st sess., at 184, (1977)). However, this provision was not enacted.

OSMRE has reviewed the law of States where coal mining is conducted to determine whether adoption of the proposed rule would allow surface mining to occur where such a method was not contemplated at the time the mineral estate was severed from the

surface estate. Although generalization from this complex body of State law is difficult, it appears that in most States surface mining where the surface is not owned by the mineral owner is not authorized absent other evidence that such a mining method is consistent with the parties' intentions.

A decision by the Kentucky Supreme Court (*Akers v. Baldwin*, No. 85-SC-392-CL and 85-SC-422-TG, 736 S.W. 2d 294 (Ky., July 2, 1987)), overturned the Kentucky statute limiting mineral rights under certain "broad-form" deeds which do not specify the method of mining to be used. However, an amendment to the Kentucky State Constitution restricting broad form deeds has been adopted. OSMRE intends to evaluate the effect of the Kentucky constitutional amendment on OSMRE's proposed VER definitions.

Such a result was contemplated by Congress. A March 1975 colloquy between Congressman Udall of Arizona and Congressman Hechler of West Virginia concerning an earlier bill which was a predecessor to SMCRA directly addresses the issue of State law and broad form deeds. Mr. Hechler reported on a situation in West Virginia where coal companies which bought land many years ago were coming in and evicting home owners in order to mine the coal, without compensating the home owners. Mr. Hechler went on to request an amendment to the bill that would take care of the rights of homeowners on land where coal was subsequently discovered and the coal company wants to go in and mine. Mr. Udall replied that there had been prior testimony and controversy about the problem of the "so-called broad form deed, but a decision was made by the conferees that this is largely a matter of State property law and State constitutions, and that there is a serious question about the ability of the Federal government to move into such a situation" (121 Cong. Rec. H. 6679 (1975)).

Following this exchange, Congressman Latta of Ohio asked Mr. Udall if he understood correctly that "this bill does not deal with the situation . . . where a private citizen has sold the surface to the Federal Government and has retained the mineral rights." Mr. Latta asked whether "this bill would not in any way affect the mineral rights of that private citizen?" In response, Mr. Udall noted that "This is a bill that deals with how one mines coal in that situation and every other situation, but we do not attempt to change property rights in the situation the gentleman talks about and thus the mineral rights are not affected."



id. Thus, in 1975, Congress clearly contemplated the preservation of mineral rights under State law, even where such rights were created by a broad form deed.

**Section 761.5(a)(2)(ii).** This option would also include, at § 761.5(a)(2)(ii), a standard for VER for preparation plants and other surface coal mining operations not involving the extraction of coal. The standard provides that VER exists for such facilities if the operator had authority to conduct such operations as of the date the section 522 prohibition became effective, as determined by the laws of the State.

This provision uses the phrase "authority to conduct the operations" rather than "right to mine." Determining whether an operator is entitled to conduct certain operations or operate particular offsite facilities may not involve determining whether and to what extent essential mineral rights have been obtained, since the operator may require only a surface property interest. It is likely that State law may have required the existence of some permit, such as a building permit or zoning permit or other specific authority to conduct that particular operation in that particular place. Whether all such applicable prerequisites to operation have been met appears to be the most relevant standard for determining whether the operator has VER for such facilities.

A separate provision for preparation plants and other surface coal mining operations not involving the extraction of coal is needed because a standard based on right to mine by the method intended cannot be applied to operations that do not actually involve the mining of coal. Therefore, this separate provision for such operations would be included if OSMRE promulgated Option 1. The rationale for basing VER in such situations on State law is the same as that discussed above for § 761.5(a)(2)(i). OSMRE specifically invites comments on the need to provide any test for VER for such facilities, and suggestions for modifications to the proposed test for such facilities such as a need to consider zoning restrictions which may have limited the potential uses of that surface estate.

#### VER Option 2: Good Faith-All Permits Option

Under this option, OSMRE is proposing at § 761.5(a)(2) that VER exists if the person desiring to conduct surface coal mining operations has, or has made a good faith effort to obtain, all necessary permits as of the date the prohibition against mining came into effect.

This definition of VER is similar to the one initially promulgated by OSMRE in its first rulemaking on this issue in 1979. That 1979 rule provided that VER consisted of having obtained all necessary permits. Judicial review of this rule (*In Re: Permanent*, Mem. Op. at 20 (February 26, 1980)) resulted in OSMRE issuing a notice suspending the requirement to have obtained all necessary permits, and substituting a requirement that a good faith effort had to have been made to obtain all necessary permits prior to the date the prohibitions went into effect (45 FR 51547, 51548 (August 4, 1980)). This decision is discussed above in the *Background* section. A good faith effort would be considered made if all necessary permits had been applied for prior to the date the prohibitions came into effect.

**Transferability of VER.** OSMRE has, from time to time, received inquiries about whether VER can be transferred from one owner to another. OSMRE has consistently responded to such inquiries in the affirmative. The property rights requirement in this proposed section remains consistent with that position and does not mean that the individual seeking VER must have had the legal right to the coal since the date of the Act, or since the date the prohibition against mining came into effect. To have VER someone must have had a specific right to the coal resource on the date of the Act, or the date the prohibition came into effect, whichever is applicable, and must also meet one of the standards of subparagraphs (a)(1) or (a)(2). However, if a person with a property interest in the coal on August 3, 1977, or as of the date the prohibitions against mining came into effect, had VER, that person may transfer the right to a successor after the date of the Act. The transferred right may suffice as the basis for a finding of VER for the successor in interest.

**Section 761.5(b)—Haul roads.** OSMRE's initial analysis of haul roads revealed that there were two situations in which VER might be established for haul roads. This analysis was discussed in the preamble to the first definition of VER, promulgated in 1979 at 30 CFR 761.5(b) (44 FR 14933 (March 13, 1979)). Except for renumbering, this provision has been unchanged since that promulgation. The only change proposed here is the addition of language clarifying that the "continually created VER" provision applies to haul roads. OSMRE believes that VER would exist if any of the prohibitions of section 522(e) of SMCRA were applied to existing haul roads in cases where the prohibitions

came into effect at some time subsequent to the date SMCRA was passed. Therefore, OSMRE is proposing to amend the haul road portion of the VER definition to provide that VER means (1) a recorded right of way, recorded easement, or a permit for a coal haul road recorded as of August 3, 1977, or as of the date the protection under § 522(e) came into effect, or (2) any other road in existence on August 3, 1977, or as of the date the protection under section 522(e) came into effect.

**Section 761.5(d)(2)—Taking test.** The proposed rule will, when promulgated as a final rule, have the effect of removing § 761.5(d)(2), which set forth a takings test for VER, and which was suspended by OSMRE (52 FR 41961 (November 20, 1986)).

**Section 761.11(h)—Areas where mining is prohibited or limited.** Section 761.11(h), which prohibits mining and other activities on Federal lands within section 522(e)(1) areas, was suspended on November 20, 1986 (51 FR 41961). OSMRE is proposing to remove this language as it is not needed to implement section 522(e)(1). Section 761.11(a) already prohibits surface coal mining operations within section 522(e)(1) areas unless an operator has VER and except for those operations existing on August 3, 1977.

In addition, the Department has made a commitment to prevent surface coal mining operations in the areas covered by section 522(e)(1) of SMCRA. The Department has a variety of tools to protect such lands, including purchase authority, authority to exchange private mineral rights for Federal lands within the same state, and condemnation. Furthermore, as a means of facilitating this policy the Department has proposed legislation which would give the Secretary the authority to exchange certain private coal rights in one State for Federal coal or other mineral rights in another State.

To emphasize the Department's commitment to prevent surface coal mining operations in section 522(e)(1) areas the Department is issuing a policy statement providing that if a person takes action to exercise valid existing rights under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 to conduct surface coal mining operations on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act, and

National Recreation Areas designated by Act of Congress, subject to appropriation the Secretary of the Interior will use available authorities to seek to acquire such rights through exchange, negotiated purchase, or condemnation.

As explained below, a totally new provision is being proposed at (h) which would specify the extent to which subsidence is prohibited by section 522(e) of the Act.

**Standard for Federal VER Determinations.** In the November 20, 1986 Federal Register suspension notice, at 51 FR 41955, OSMRE stated that this rulemaking would address which VER definition would apply when OSMRE makes a VER determination concerning surface coal mining operations on Federal lands. The issue is whether the VER definitions contained in the approved State programs should apply to such Federally-made VER determinations, as is presently the case, or whether one standard should be used nationwide.

In part, the resolution of this issue depends upon what VER standard is ultimately adopted by OSMRE and whether State regulatory authorities will be required to amend their definitions to be consistent with OSMRE's definition. If all State regulatory authorities adopted OSMRE's VER definition, then the same VER definition would be used by OSMRE nationwide, regardless of whether OSMRE used each State program definition.

Comments are solicited on this issue, and also, to the extent determinable, on whether State regulatory authorities should be required to revise their definitions to conform with whatever definition OSMRE adopts.

#### B. Applicability of the Prohibitions of SMCRA to the Surface Impacts of Underground Coal Mining

##### 1. Background

OSMRE is undertaking this rulemaking in part because of Citizen and Environmental Plaintiffs' assertion in the *In Re: Permanent (II)* challenge (which is discussed herein) that the existing rules implementing section 522(e) (4) and (5) of the Act, at 30 CFR 761.11 (d) through (g), are unclear as to the surface impacts of underground mining. Beyond clarifying existing rules, OSMRE is interested in examining policy, economic, environmental and legal considerations concerning application of the mining prohibitions in section 522(e) to subsidence resulting from underground mining. This rulemaking proposal, therefore, addresses the broader issue of whether

and to what degree subsidence is covered by the mining prohibitions set forth in section 522(e) of the Act. The issue is one of great interest and concern for the coal industry and various environmental and citizen groups because the final rule may have substantial economic or significant environmental consequences. Whether the rule would have such consequences depends on which standard for VER proposed for § 761.5(a) is chosen. If the standard for VER proposed in option 1 for § 761.5(a)(2) is adopted, most coal owners would have VER to remove coal by certain underground mining methods, and the prohibitions of section 522(e) of the Act would not apply to coal extraction using such methods. However, if the standard for VER proposed in option 2 for § 761.5(a)(2) is chosen most persons owning coal who did not apply by the applicable date for all necessary permits to conduct underground coal mining would not have VER and the prohibitions would apply.

OSMRE intends to develop rules that are compatible with SMCRA, unambiguous, reasonable to administer and, in striking a reasonable balance between legitimate competing interests, reflective of good public policy and Congressional intent. Two alternative section 522(e) rule options are proposed.

The issue of whether and to what extent subsidence is subject to the prohibitions of section 522(e) of SMCRA depends upon the interrelationship among sections 522(e), 701(28), and 516 of SMCRA and upon the scope of Secretarial discretion to define and interpret statutory provisions when applying the prohibitions to subsidence. Before undertaking the analysis, the next two sections of this preamble establish the context to this rulemaking by briefly describing the *In Re: Permanent (II)* litigation, and the interests potentially affected by this rulemaking.

**In Re: Permanent (II).** As mentioned earlier, this rulemaking derives in part from litigation concerning OSMRE's current rules. Environmental and citizen plaintiffs raised the issue of the applicability of the section 522(e) (4) and (5) prohibitions to underground mining when they contended in *In Re: Permanent (II)*, *supra*, that the regulations at 30 CFR 761.11 (d) through (g) do not "clearly and explicitly prohibit surface impacts of underground mining within the specified protected areas set forth in Section 522." (Citizen Plaintiffs' Mem. in Round III of *In Re: Permanent (II)*, at 56) Disagreement exists over whether and to what extent subsidence and underground coal

extraction operations which cause or are expected to cause subsidence are prohibited, if at all. Environmental and citizen groups have indicated they believe that all subsidence (and, by implication, all underground coal extraction operations expected to cause subsidence) is prohibited. On the other hand, industry groups have indicated that they believe that all subsidence and all underground coal extraction operations causing or expected to cause subsidence are not covered by the prohibitions. In its decision on the issue, the court affirmed the current regulations in §§ 761.11 (d) through (g), stating that they track the statutory language, while noting that the Secretary had committed to a new rulemaking (50 FR 13250 (April 3, 1985)) with respect to the impact of section 522(e) (4) and (5) on underground mining. *In Re: Permanent (II)*, Mem. Op. at 70 (July 15, 1985)).

**Interests Affected.** The coal industry is greatly concerned because of its perceptions about the potential impairment that applying the prohibitions to subsidence could pose to availability of minable reserves, and productivity, and particularly about the effect of such prohibitions on the longwall method of underground mining. The underground coal mining industry regards the increased use of longwall mining as essential to its future economic viability, inherently safer for underground workers, more productive, and much higher recovery ratio of the resource than the standard room and pillar method of mining. The longwall method results in planned, controlled, and almost immediate surface subsidence in contrast to the less predictable subsidence resulting from the room and pillar method of mining. However, longwall mining does not allow the operator to leave coal pillars for support beneath surface features, facilities, and structures. Thus, the coal industry is especially concerned about whether or not they would be able to mine beneath those structures and features enumerated in section 522(e) (4) and (5) since such are widely distributed in the eastern and midwestern coal fields.

Environmental and citizen groups have expressed opposition to the use by industry of longwall mining because they are concerned with the disruption and damage to buildings, surface uses and surface lands and other surface features and facilities. Consequently, they believe that all subsidence, in addition to the other surface impacts of underground mining, should be prohibited in the areas specified in



section 522(e) of the Act. Quite clearly these interests are at variance with those of the coal industry.

Further complicating the issue of conflicting interests are property rights conflicts which exist between surface estate and mineral estate owners under the varying laws of the different coal mining states. Especially troubling are those issues regarding the right to subside the surface and how and when that right may have been acquired by the mineral owner from a surface owner.

Because this rulemaking covers sections 522(e) (1), (2) and (3) areas, as well as (e) (4) and (5) areas, constituent groups interested in the protection afforded by all of section 522(e) could be affected by this rulemaking.

**Statutory Analysis.** The prohibitions of section 522(e) of SMCRA are established by general introductory language and the five subparagraphs (e)(1) through (e)(5). Subject to VER and except for operations existing on August 3, 1977, the general introductory language extends the prohibitions in each of the five subparagraphs to "surface coal mining operations." Thus an understanding of the definition of the term "surface coal mining operations" in section 701(28) is required to determine the scope of the prohibitions.

The term "surface coal mining operations" is defined in section 701(28) and includes certain aspects of underground coal mining. Section 701(28) states in relevant part:

"surface coal mining operations" means—  
(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, \* \* \* ; and

(B) the areas upon which such activities disturb the natural land surface \* \* \*

The terms "surface impacts incident to an underground coal mine" and "areas upon which such activities disturb the natural land surface" as they appear in section 701(28) (A) and (B), respectively, are not defined in SMCRA. In this proposal, OSMRE is suggesting two alternative options, each of which is based upon a slightly different statutory construction as to the degree of subsidence which is considered a surface coal mining operation. The first option treats subsidence as a surface coal mining operation only when it results in, or could reasonably be expected to result in, a functional impairment of the surface or surface features, facilities or structures. The second option treats as a surface coal mining operation any subsidence which affects, or could reasonably be expected

to affect, the surface, or surface features, facilities, or structures.

The Secretary has the authority to adopt either interpretation of the undefined terms if his interpretation is consistent with Congressional intent as evinced by the terms of the legislation, the overall statutory scheme, and the legislative history. Such Secretarial discretion recently has been strongly reaffirmed by the United States Court of Appeals for the District of Columbia Circuit at numerous places in its January 29, 1988 decision in *NWF v. Hodel*, No. 84-5743 (D.C. Cir. 1988). For example, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. at 842-43 (1984), the Court reaffirmed the principle that great deference should be given to the Secretary, in matters which Congress has left to the interpretation of the agency. *NWF v. Hodel*, No. 84-5743, at 95 and at 111.

OSMRE believes that the first option is legally supportable. No evidence exists that Congress was concerned about subsidence except where a functional impairment of surface use, facility, or value would occur. Section 516, the section of the Act expressly dealing with subsidence, treats subsidence as a surface impact to be regulated only to the extent that it (1) causes material damage (section 516(b) (1)), or (2) diminishes the value or the reasonably foreseeable uses of the surface (section 516(b) (1)), or (3) creates imminent danger (section 516(c)). The legislative history of SMCRA indicates that Congress was only concerned with subsidence insofar as it causes environmental or safety problems, disrupts land uses, or diminishes land values. See, H.R. Rep. No. 218, 95th Cong., 1st sess. 128 (1977).

Further, inclusion of subsidence which does not cause material damage in the definition of "surface coal mining operations" at section 701(28) could be regarded as failing to accommodate congressional intent regarding underground mining and longwall mining in particular. The application of the prohibitions in section 522(e) to subsidence not causing material damage could substantially impede longwall and other full-extraction mining methods. The language of SMCRA demonstrates that Congress intended to encourage underground mining, and especially full-extraction methods such as longwall mining. In section 101(b) of SMCRA, 30 U.S.C. 1201(b), Congress found that "the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and

economically healthy underground mining industry; \* \* \* ." With regard to this finding, in section 102(k), 30 U.S.C. 1202(k), Congress declared one purpose of SMCRA is to "encourage the full utilization of coal resources through the development and application of underground extraction technologies; \* \* \* "

The legislative history also demonstrates congressional contemplation that SMCRA would allow full extraction methods such as longwall mining. Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No. 218, *supra*. Such techniques involve planned subsidence. Therefore, it is possible to conclude that Congress intended only subsidence which causes functional impairment to be regulated under SMCRA.

It is also possible to develop reasoning that the section 701(28) definition means that all measurable subsidence is included in the term "surface coal mining operations," is subject to regulation under section 516, as applicable.

**Relevant Regulatory Provisions.** The treatment of subsidence also should be examined in the context of existing rules and past agency interpretations. Sections 522(e) (4) and (5) are implemented by 30 CFR 761.11 (d) through (g) which provide that, subject to valid existing rights and an exemption for mines existing on August 3, 1977, no surface coal mining operations shall be conducted within the specified distances, "measured horizontally," of the listed features and facilities. The rules which became final on March 13, 1979 (44 FR 15343) prohibited (subject to certain exceptions) surface coal mining operations—

(d) Within 100 feet measured horizontally of the outside right-of-way line of any public road, \* \* \*

(e) Within 300 feet measured horizontally from any occupied dwelling, \* \* \*

(f) Within 300 feet measured horizontally of any public building, school, church, community or institutional building or public park; or

(g) Within 100 feet measured horizontally of a cemetery.

With the exception of the placement of commas before and after the phrase "measured horizontally" in paragraphs (d) and (e), the above portions of the prohibitions were unchanged by OSMRE's 1983 regulatory revisions. It is clear because of the use of the phrase "measured horizontally" that in 1979 OSMRE did not intend to preclude

underground coal extraction activities beneath the areas protected by 30 CFR 761.11 (d) through (g). The language "measured horizontally," was added in response to a comment to clarify that underground mining beneath a public road would not be prohibited. In accepting the suggestion, OSMRE stated it believed mining under a road should not be prohibited where it would be "safe to do so" (44 FR 14994 (March 13, 1979)). Based upon the parallel construction, it seems that the "safe to do so" standard applied to all the §761.11 (d) through (g) areas. However, there was no further clarification as to what is meant by "safe to do so."

The Section 701(28) definition is implemented at 30 CFR 700.5. Section 700.5 defines "surface coal mining operations" as "Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, \* \* \* ;" and "[T]he areas upon which the activities described in Paragraph (a) of this definition occur or where such activities disturb the natural land surface \* \* \* ."

The phrase "surface operations and \* \* \* impacts incident to an underground mine," which is found in section 522(e)(2)(A) of SMCRA, is defined in 30 CFR 761.5 as " \* \* \* all activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in 30 CFR 700.5 \* \* \* ." This definition was promulgated specifically to apply to 30 CFR 761.11(b), the rule which implements the section 522(e)(2) prohibition against mining on Federal lands in National forests. OSMRE indicated in its 1978-79 rulemaking that, at a minimum, subsidence causing material damage was prohibited in section 522(e)(2) areas (43 FR 41826 (September 18, 1978), and 44 FR 14990, (March 13, 1979) See also the comment response at 44 FR 14990 (March 13, 1979)). No regulatory definition for "surface operations and surface impacts incident to an underground mine," the phrase in § 701(28)(A) of SMCRA, has been established for any of the other section 511(e) areas.

## 2. Discussion of Proposed Rule Options

A discussion follows of the two section 522(e) options being considered in this proposed rule. These options

would have practical applicability to underground coal mines which do not have VER and did not exist on August 3, 1977. Irrespective of the option ultimately selected, subsidence will continue to be regulated by the permitting requirements at 30 CFR 784.20 and the performance standards at 30 CFR 817.121 and 817.122.

OSMRE also considered an option which would include a complete ban on underground extraction beneath protected areas and an option that would not apply the prohibitions of section 522(e) to subsidence at all (See scoping notice of June 19, 1985 (50 FR 25473)).

**Section 522(e) Option 1:** Subsidence causing material damage within the protected areas covered by the section 522(e) prohibitions.

Under this option only those underground coal extraction operations which produce, or are expected to produce, subsidence causing material damage in the section 522(e) areas would be prohibited. Material damage would be defined to mean a functional impairment of the surface, features, facilities, or structures. Thus, impairment of function would include, for example, diminution of values or of reasonably foreseeable use. It would also include any situation in which an imminent danger to person would be created. Subsidence which does not, or is not expected to, produce material damage in the section 522(e) areas would not be prohibited. Thus, if a permit applicant could satisfactorily demonstrate that an underground coal extraction operation would not reasonably be expected to produce subsidence causing material damage, the underground coal mining operation would not be prohibited. The degree of surface disturbances constituting material damage for certain section 522(e) areas may be very different from that for other section 522(e) areas. The material damage threshold would be implemented by creating a new 30 CFR 761.11(h) which would read:

(h) *Provided*, with regard to subsidence, this section applies to the extent such subsidence results in, or could reasonably be expected to result in, material damage to the land surface, or the protected features, facilities, or structures. Material damage means a functional impairment of the surface, features, facilities or structures.

A material damage threshold is consistent with a number of past agency actions. For instance, the 1979 rules did not prohibit underground mining in section 522(e) (4) and (5) areas because such mining should be allowed where it "would be safe to do so." (44 FR 14994

(March 13, 1979)). The material damage option also accords with the Department's position filed with the D.C. Circuit Court of Appeals in its December 24, 1980 brief in *In Re: Permanent Surface Mining Regulation Litigation* No.'s 80-1810, 80-1811, 80-1812, 80-1813, and 80-1823 (D.C. Cir.), at p. 135. The material damage threshold is also consistent with OSMRE's initial view of a VER request to mine in the Otter Creek Wilderness area, an area covered by the section 522(e)(i) prohibitions. In the May 1980 Affidavit of then-OSMRE Director Walter Heine submitted to the U.S. Court of Claims in *Otter Creek Coal Company v. U.S.*, No. 83-79L, Director Heine stated that "it is possible that a coal company could conduct underground coal mining operations to remove coal deposits underlying a wilderness area without violating the requirements of the Act." Following that statement, in a January 19, 1981 letter, OSMRE set forth the conditions under which mining would be allowed in the wilderness area. OSMRE stated that "[s]ubsidence from mining activities under wilderness areas is acceptable so long as it does not significantly affect surface features."

OSMRE continues to believe, as it has since promulgation of the final permanent program regulations on March 13, 1979, that individual determinations of what would constitute a functional impairment should be "left to the regulatory authority under its regulatory program, so that the term is applied in a manner appropriate for subsidence problems in each jurisdiction." (See 44 FR 15075, (March 13, 1979)). Thus, a determination of what would constitute "material damage" would be made by the regulatory authority on a case by case basis at the appropriate point in the regulatory process.

Under this option only subsidence causing material damage is a "surface impact" within the meaning of section 701(28). Only subsidence causing material damage would be included in the definition of "surface coal mining operations." If this option were adopted, only subsidence causing, or which could reasonably be expected to cause, material damage (i.e. resulting in functional impairment) would be subject to the section 522(e) prohibitions. Such an approach is consistent with the purposes of the Act, and especially section 516 which regulates only subsidence which causes problems on the surface.

**Section 522(e) Option 2:** Any subsidence which affects, or could reasonably be expected to affect, the



land surface, or protected features, facilities or structures is covered by the section 522(e) prohibitions.

Under this option all subsidence which affects, or could reasonably be expected to affect the section 522(e) areas would be prohibited. This option would have the effect of banning both underground coal extraction operations in the section 522(e) areas which cause or could cause subsidence, and underground coal extraction taking place outside of section 522(e) areas which could be expected to produce subsidence within those areas. (The concept of "angle of draw" as it relates to surface subsidence due to underground coal extraction is discussed in the draft EIS.) Planned subsidence and subsidence not producing material damage would also be prohibited in section 522(e) areas under this option. Consequently, all underground coal extraction operations producing or expected to produce any measurable degree of subsidence in the section 522(e) areas would be prohibited unless they existed on August 3, 1977, or could establish VER. Thus, the practical effect of this rule depends upon the VER definition adopted.

This option would be implemented by creating a new 30 CFR 761.11(h) which would read:

(h) *Provided*, with regard to subsidence, this section applies to any subsidence which affects, or could reasonably be expected to affect the land surface, or the protected features, facilities, or structures.

Under this option, any measurable subsidence would be considered a "surface impact" as used in the Act's section 701(28) definition of surface coal mining operations, which includes "surface impacts incident to an underground coal mine," and areas "where such activities disturb the natural land surface." This proposed option would establish that measurable subsidence is always a "surface coal mining operation." Therefore, under this option, subsidence would be subject to the section 522(e) prohibitions, and, indirectly, all underground coal extraction operations expected to result in subsidence would be subject to the section 522(e) prohibitions.

#### C. Environmental Impact Statement and Regulatory Impact Analysis

Following the April 3, 1985 Federal Register notice of intent to propose a rule, OSMRE published a "Notice of intent to prepare a draft environmental impact statement (EIS) and a preliminary regulatory impact analysis (RIA) and to hold scoping meetings" (50 FR 25473 (June 19, 1985)). Public scoping

meetings were held on August 1, 1985 in Pittsburgh, Pennsylvania, August 6, 1985 in St. Louis, Missouri, and on August 9, 1985 in Washington, DC. Public comments on the proposal were received through September 10, 1985. Based on comments received OSMRE decided to combine the VER and section 522(e) rules for purposes of analysis under the National Environmental Policy Act (NEPA). Subsequently a new scoping notice was published in the Federal Register (52 FR 2421 (January 22, 1987)). Comments received and both a draft EIS and a preliminary RIA have been prepared for public review and comment.

For an analysis of the economic and environmental consequences of alternative rule options the reader is referred to OSMRE's preliminary Regulatory Impact Analysis (RIA) and draft Environmental Impact Statement (EIS) which have been prepared in conjunction with this proposed rulemaking and may be examined in OSMRE's Administrative Record office. The draft EIS is also available upon request from Catherine Roy, Division of Technical Services (5121-L), 1951 Constitution Avenue NW., Washington, DC. 20240. Likewise, the preliminary RIA is available upon request from Nancy Broderick, Division of Technical Services (5121-L), 1951 Constitution Avenue NW., Washington, DC. 20240.

#### D. Effect in Federal Program States and on Indian Lands

The rules proposed today, if adopted, would be applicable through cross-referencing in those States with Federal programs and on Indian lands. The States with Federal programs are Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR Parts 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947, respectively. The Indian lands program appears at 30 CFR Part 750.

Comments are specifically solicited as to whether unique conditions exist in any of these States or on Indian lands relating to these proposed rules which should be reflected either as changes to the national rules or as specific amendments to any or all of the Federal programs or Indian lands program.

OSMRE has proposed (52 FR 39594 (October 22, 1987)) to implement a Federal program for the State of California. The proposed rule would apply through cross-referencing to the Federal program for California. Comments also are specifically solicited as to whether conditions exist in

California that should be reflected in the proposed Federal program for that State.

#### III. Procedural Matters

##### Federal Paperwork Reduction Act

There are no new information collection requirements in the proposed rules for 30 CFR Part 761 requiring submittal to the Office of Management and Budget under 44 U.S.C. 3507.

##### Executive Order 12291

The DOI has examined the proposed rules according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that they are major and do require a regulatory impact analysis. The determination was made previously in connection with the preparation of the notice of intent to conduct rulemaking and continues to be valid (50 FR 13250) (April 3, 1985); see also "Intent to Prepare a Draft Environmental Impact Statement and a Preliminary Regulatory Impact Analysis on the Proposed Rule Defining the Applicability of the Prohibitions in section 552 to Underground Coal Mining: Notice of Scoping Meeting," 50 FR 25473 (June 19, 1985).

##### Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rules will have significant economic impact on a substantial number of small entities and requires the preparation of an initial Small Entity Flexibility Analysis (SBFA) which is available in the Administrative Record. This too is a continuation of a determination made in April 1985 (50 FR 13250 (April 3, 1985)). The combined preliminary RIA and initial SBFA have been placed in the Administrative Record. The combined preliminary RIA and initial SBFA are available for inspection in the Administrative Record Office, Room 5131L, 1100 L Street, NW., Washington, DC.

##### National Environmental Policy Act

OSMRE has determined that the proposed rules require the preparation of an environmental impact statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C) (50 FR 25473, (June 19, 1985)). The draft EIS is available for inspection in the Administrative Record, Room 5215, 1100 L Street, NW., Washington, DC. Single copies are available upon request from Catherine Roy, Division of Technical Services (5121-L), 1951 Constitution Avenue, NW., Washington, DC (telephone (202) 343-5143).

##### Executive Order 12630

In accordance with Executive Order 12630 (53 FR 8859, March 18, 1988) and the Attorney General's Guidelines For the Evaluation of Risk and Avoidance of Unanticipated Takings issued June 30, 1988, the Department has prepared a takings implication assessment (TIA). The TIA is available for inspection in the Administrative Record, Room 5215, 1100 L Street, NW., Washington, DC.

##### Effect on State Programs

Following promulgation of the final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of the Act to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

##### Agency Approval

Section 516(a) of the Act requires that, with regard to rules directed toward the surface effects of underground mining, OSMRE must obtain written concurrence from the head of the department which administers the Federal Mine Safety and Health Act of 1977, the successor to the Federal Coal Mine Health and Safety Act of 1969. OSMRE will obtain the written concurrence of the Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, on the final rule to be promulgated following analysis of public comments received on this proposal.

##### Authors

The authors of this regulation are Dr. Annetta Cheek, Division of Technical Services; and Mr. Dermot Winters, Regulatory Development and Issues Management Staff, Office of the Director, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone Dr. Cheek at (202) 343-4006; Telephone Mr. Winters at (202) 343-1928 (Commercial or FTS).

##### List of Subjects in 30 CFR Part 761

Coal mining, Historic preservation, Monuments and memorials, National forests, National parks, Surface mining, Underground mining, Wildlife refuges.

Accordingly, it is proposed that 30 CFR Part 761 be amended as set forth below.

Date: May 6, 1988.

James E. Cason,  
Acting Assistant Secretary for Land and Minerals Management.

#### SUBCHAPTER F—AREAS UNSUITABLE FOR MINING

##### PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

1. The authority citation for Part 761 is revised to read as follows:

Authority: Pub. L. 95-87 (30 U.S.C. 1201 *et seq.*), and Pub. L. 100-34.

2. The definition of valid existing rights in § 761.5 is revised to read as follows:

##### § 761.5 Definitions.

*Valid existing rights* means that a person has a right, subject to the requirements of the Act, to conduct surface coal mining operations on lands where, in the absence of that right, such operations would be prohibited by section 522(e) of the Act. Valid existing rights shall be established by application of the following standards.

(a) Except as provided in paragraph (b) of this definition, to establish valid existing rights, a person intending to conduct surface coal mining operations which will extract coal on lands protected by section 522(e) of the Act shall demonstrate a legally binding conveyance, lease, deed, contract, or other document which establishes a right to the coal resource as of August 3, 1977, or as of the date of the prohibitions became effective for lands that come under the protection of section 522(e) of the Act at a subsequent date. Interpretation of the terms of the documents relied upon to establish the rights to which this paragraph applies shall ordinarily be based upon applicable State statutory or case law concerning interpretation of documents conveying such rights. In addition, a person intending to conduct surface coal mining operations on lands protected by section 522(e) of the Act shall demonstrate that one of the following standards is met.

(1) The coal is both needed for, and immediately adjacent to, a validly authorized surface coal mining operation existing as of August 3, 1977, or as of the date the section 522(e) prohibitions became effective; or

##### Option 1: Ownership and Authority Option

(2) The person can demonstrate that, as of the date the section 522(e)

prohibitions became effective, he had, as determined by the laws of the State in which the mining would occur, (i) the right to extract the coal by the method he intends to use; or (ii) for preparation plants and other surface coal mining operations not involving the extraction of coal, the authority to operate the plants or conduct the operations.

##### Option 2: Good Faith-All Permits Option

(2) The person had, or had made a good faith effort to obtain, all necessary permits prior to the date the section 522(e) prohibitions became effective.

[End of option 2]

(b) For haul roads, valid existing rights means—

(1) A recorded right of way, recorded easement or a permit for a coal haul road recorded as of August 3, 1977, or as of the date the section 522(e) prohibitions became effective; or

(2) Any other road in existence as of August 3, 1977, or as of the date the section 522(e) prohibitions became effective.

3. Section 761.11 is amended by revising paragraph (h) to read as follows:

##### § 761.11 Areas where mining is prohibited or limited.

Option 1: Section 522(e) Prohibitions Apply to Operations Which Are Expected to Result in Subsidence Causing Material Damage Within the Protected Areas

(h) *Provided*, with regard to subsidence, this section applies to the extent such subsidence results in, or could reasonably be expected to result in, material damage to the land surface, or the protected features, facilities or structures. Material damage means a functional impairment of the surface, features, facilities, or structures.

Option 2: Section 522(e) Prohibitions Apply To Underground Coal Extraction Operations Which are Expected to Cause Subsidence Within the Protected Areas

(h) *Provided*, with regard to subsidence, this section applies to any subsidence which affects, or could reasonably be expected to affect, the land surface, or the protected features, facilities or structures.

[FR Doc. 88-29547 Filed 12-22-88; 10:18 am]  
BILLING CODE 4310-05-M



## DEPARTMENT OF THE INTERIOR

**Departmental Policy Pertaining to the Exercise of Valid Existing Rights in Areas Covered by Section 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977**

AGENCY: Department of the Interior.

ACTION: Notice of Statement of Policy.

**SUMMARY:** Section 522(e)(1) of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*) prohibits surface coal mining operations in certain areas, subject to valid existing rights and except for operations which existed on August 3, 1977. The policy outlined below specifically addresses situations where valid existing rights exist and are about to be exercised in an area that is protected under section 522(e)(1). This policy is also reflected and discussed in a proposed rulemaking

issued on this date by the Office of Surface Mining Reclamation and Enforcement, Department of the Interior, that addresses areas unsuitable for coal mining and defines valid existing rights. That rulemaking contains detailed background information and discussions of the applicable statutory provisions and issues that relate to this policy. The policy reads as follows.

**Policy To Prevent Coal Mining in the Areas Covered by Section 522(e)(1) of the Surface Mining Control and Reclamation Act**

If a person initiates action to exercise valid existing rights under section 522(e) of the Surface Mining Control and Reclamation Act of 1977 to conduct surface coal mining operations on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National

Wilderness Preservation System, the National Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act, and National Recreation Areas designated by Act of Congress, subject to appropriation the Secretary of the Interior will use available authorities to seek to acquire such rights through exchange, negotiated purchase or condemnation.

**FOR FURTHER INFORMATION CONTACT:** Barbara Wyman, Special Assistant to the Assistant Secretary for Fish and Wildlife and Parks, 18th and C Streets NW., Washington, DC 20240; Telephone: 202-343-9211.

Date: September 22, 1988.

**Earl E. Gjelle,**  
*Under Secretary of the Interior.*  
[FR Doc. 88-29546 Filed 12-22-88; 10:18 am]  
BILLING CODE 4310-70-M

# federal register

Tuesday  
December 27, 1988

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**Part V****Department of  
Education**

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**Institutional Quality Control Pilot  
Program; Notice of Deadline Date for  
Participation and Updating of Selection  
Criteria**



## DEPARTMENT OF EDUCATION

## Institutional Quality Control Pilot Project

**AGENCY:** Department of Education.

**ACTION:** Notice of deadline date for participation in the Institutional Quality Control Pilot Project and updating of selection criteria.

**SUMMARY:** The Secretary issues a deadline date for the submission of a written notice by an institution that it wishes to participate in the Institutional Quality Control Pilot Project (Pilot Project). The criteria used to select institutions for the Pilot Project were published in the *Federal Register* of December 1, 1986, 51 FR 43334-43335. However, the Secretary is updating certain information contained in those selection criteria.

The Pilot Project is an experiment under which a participating institution develops and implements a quality control system in connection with its administration of the Pell Grant, campus-based [Perkins Loan (formerly National Direct Student Loan), College Work-Study, and Supplemental Educational Opportunity Grant], and Stafford Loan (formerly Guaranteed Student Loan) Programs.

**EFFECTIVE DATE:** These selection criteria take effect either on or before February 10, 1989 or later if Congress takes certain adjournments. If you want to know the effective date of these criteria, call or write the Department of Education contact person. These selection criteria apply to the award year beginning July 1, 1989 and ending June 30, 1990.

**DEADLINE DATE FOR REQUEST TO PARTICIPATE IN PILOT PROJECT:** There are no application forms from the Department of Education that must be used to apply to participate in the Pilot Project. An institution applies to participate in the Pilot Project by sending a written notice to the Secretary of its request to participate. An institution must submit its request to participate in the Pilot Project by February 27, 1989.

**FOR FURTHER INFORMATION CONTACT:** Barbara Mroz, Division of Quality Assurance, U.S. Department of Education, 400 Maryland Avenue SW., [Regional Office Building 3, Room 5042], Washington, DC 20202-5243. Telephone Number: (202) 732-4439.

**SUPPLEMENTARY INFORMATION:** The Secretary has extended the Pilot Project through the end of the 1990-91 award year. An institution that is selected to

participate in the Pilot Project is exempt for the period of its participation in the Pilot Project, from selected requirements set forth in the verification regulations of Subpart E of the Student Assistance General Provisions Regulations, 34 CFR Part 668.

The Secretary published Final Selection Criteria for participation in the Pilot Project in the *Federal Register* of December 1, 1986, 51 FR 43334-43335. When the Secretary published the Final Selection Criteria he indicated that to administer the Pilot Project properly, the number of institutions participating in the Pilot Project should not exceed 102. Currently there are 60 institutions participating in the Pilot Project; therefore, if all 60 of the current participants choose to remain in the Pilot Project, the Secretary will select no more than 42 new institutions.

The selection criteria indicated that selected institutions should have experience in the Pell Grant, campus-based [Perkins Loan formerly National Direct Student Loan], College Work-Study, and Supplemental Educational Opportunity Grant], and Guaranteed Student Loan (now Stafford Loan) Programs and in dealing with a significant number of students and Federal dollars in all those programs. Accordingly, the selection criteria required that an institution be a participant in the above programs during the current award year (the 1988-87 award year) and have participated in all five programs during the preceding two award years (the 1984-85 and 1985-86 award years).

The Secretary is keeping those criteria but updating the award years. Therefore, for institutions that wish to participate in the Pilot Project for the first time during the 1989-90 award year, they must be participating in the five programs during the 1988-89 award year, and have participated in all five programs during the 1986-87 and 1987-88 award years.

The Secretary encourages participation in the Pilot Project by junior and community colleges, and by two- and four-year colleges serving predominantly low-income populations, provided that these institutions otherwise qualify under the Final Selection Criteria. Any institution applying to participate should have a strong interest in increasing the quality of its management and award of student financial assistance dollars.

The Secretary is republishing only Final Selection Criteria I and II. The Secretary will select all institutions that meet the selection criteria unless more than 42 institutions apply. In the event

that more than 42 institutions apply to participate in the Pilot Project, the Secretary will select applicants on the basis of additional criteria published under Final Selection Criterion III in the *Federal Register* of December 1, 1986.

## Waiver of Rulemaking

In accordance with section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)), and the Administrative Procedure Act, 5 U.S.C. 553, it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed rules. However, the changes to the criteria are technical in nature and establish no new substantive policy. Therefore, pursuant to 5 U.S.C. 553(b)(A) the Secretary finds that publication of proposed selection criteria is unnecessary and contrary to the public interest.

## Final Selection Criteria I and II

I. In order to be selected to participate in the Pilot Project, an institution must:

1. Participate in the Pell Grant, campus-based [Perkins Loan (formerly National Direct Student Loan), College Work-Study and Supplemental Educational Opportunity Grant] and Stafford Loan (formerly Guaranteed Student Loan) Programs during the 1988-89 award year and have participated in all five programs during the 1986-87 and 1987-88 award years;

2. Have had, in the aggregate, at least 2000 Pell Grant and campus-based program recipients during the 1986-87 award year;

3. Have awarded, in the aggregate, at least \$2 million under the Pell Grant and campus-based programs in the 1986-87 award year; and

4. Have submitted and had approved by the Secretary its most recent audit report in which the reported liability was less than \$150,000.

II. If not more than 42 applicants meet the above criteria, the Secretary selects all the applicants who meet the criteria to participate in the Pilot Project.

(Catalog of Federal Domestic Assistance Numbers: Number 84.007, Supplemental Educational Opportunity Grant Program; Number 84.032, Guaranteed Student Loan Program; Number 84.033, College Work-Study Program; Number 84.038, Perkins Loan Program; Number 84.063, Pell Grant Program.)

Authority: 20 U.S.C. 1070 *et seq.*  
Dated: November 30, 1988.

Lauro F. Cavazos,

Secretary of Education.

[FR Doc. 88-29665 Filed 12-23-88; 8:45 am]

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# **federal register**

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**Tuesday  
December 27, 1988**

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## **Part VI**

### **Department of Energy**

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**Office of Conservation and Renewable  
Energy**

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**10 CFR Part 420  
State Energy Conservation Program; Final  
Rulemaking**



## DEPARTMENT OF ENERGY

## Office of Conservation and Renewable Energy

## 10 CFR Part 420

[Docket No. CE-RM-87-101]

## State Energy Conservation Program

AGENCY: Department of Energy.

ACTION: Notice of final rulemaking.

**SUMMARY:** The Department of Energy (DOE) is today issuing final amendments to the regulations of the State Energy Conservation Program (SECP) by modifying the prohibition on the use of SECP funds to purchase or install equipment or materials for energy conservation building retrofits or weatherization. The changes permit up to 33 percent of funds allocated to SECP in any given year from all sources, including petroleum violation escrow (PVE) monies, to be used to promote the purchase and installation of equipment and materials for energy conservation building retrofits and weatherization. Such funds can be used only for financial incentive mechanisms such as regular and revolving loans, loan buy-downs and rebates of up to 509 percent. Within the 33 percent limit funds can be used for retrofitting State and local government buildings but cannot be used to supplant retrofit activities conducted under DOE's Weatherization Assistance Program or Institutional Conservation Program, commonly known as the Schools and Hospitals Program. The changes also add new provisions for subawards and for State cost-sharing requirements.

EFFECTIVE DATE: December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Sandra Monje, Office of Energy Management and Extension, Department of Energy, Mail Stop CE-221, 6A-087, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586-8295.

**SUPPLEMENTARY INFORMATION:**

- I. Introduction
- II. Amendments to the State Energy Conservation Program
- III. Other Matters

**I. Introduction**

When first enacted, what is now Part D of Title III of the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 932, provided financial assistance to develop and implement State energy conservation plans. Part D was subsequently amended by Part B of Title IV of the Energy Conservation and Production Act (ECPA), Pub. L. 94-385, 90 Stat. 1158, which provided financial

assistance to develop and implement supplemental State energy conservation plans. Together, these EPCA and ECPA provisions constitute the State Energy Conservation Program (SECP), 42 U.S.C. 6321-27, 10 CFR Part 420.

Implementation of SECP was begun on February 26, 1976, 41 FR 8335. Since that time, the regulation has been revised several times: 41 FR 4825, November 3, 1976; 42 FR 26413, May 24, 1977; and 44 FR 20055, April 4, 1979. The current regulation was published on August 30, 1983, 48 FR 39356.

Today DOE is easing some of the provisions regarding prohibited expenditures under SECP,<sup>1</sup> stimulated primarily by the vast petroleum violation escrow sums which the States may apply to the SECP. The States hold these funds in trust for the benefit of their citizens found to have been injured by various petroleum pricing and allocation violations. In late 1982 Congress enacted the Warner Amendment, section 155 of the Further Continuing Appropriations Act, 1983, Pub. L. 97-377, 96 Stat. 1830, as a means of disbursing to the States \$200 million

<sup>1</sup> These provisions are contained within 10 CFR 420.12. For the convenience of the reader, the currently effective text of § 420.12 is set forth here in its entirety.

**§ 420.12 Prohibited expenditures.**

(a) No financial assistance provided to a State under this part shall be used:

- (1) For construction, such as construction of mass transit systems and exclusive bus lanes, or for construction or repair of buildings or structures;
- (2) To purchase land, a building or structure or any interest therein;
- (3) To subsidize fares for public transportation;
- (4) To subsidize utility rate demonstrations or State tax credits for energy conservation;
- (5) To conduct or purchase equipment to conduct research, development or demonstration of conservation techniques and technologies not commercially available; or
- (6) To purchase or install equipment or materials for energy conservation building retrofits or weatherization, except that this provision shall not prevent such financial assistance from being used to reduce the interest rate charged on loans of non-SECP funds made by a State or financial institutions to fund the purchase or installation, or both, of equipment or materials for energy conservation building retrofits or weatherization.

(b) No more than 20 percent of the financial assistance awarded to the State for this program shall be used to purchase office supplies, library materials, or other equipment whose purchase is not otherwise prohibited by this section.

(c) Demonstrations of commercially available conservation techniques and technologies are permitted, and are not subject to the prohibitions of § 420.12(a) (1) and (6), or to the limitation on equipment purchases of § 420.12(b).

(d) A State may use regular or revolving loan mechanisms to fund SECP services which are consistent with this part and which are included in the State's approved SECP plan. The State may use loan repayments and any interest on the loan funds only for activities which are consistent with this part and which are included in the State's approved SECP plan.

obtained from the settlement of petroleum overcharge cases, and specified SECP as one of the programs eligible to receive those monies. 96 Stat. at 1919.

In March 1983, the United States District Court for the District of Columbia found Exxon Corporation liable for overcharges on sales of certain domestic crude oil.<sup>2</sup>

The Court adopted the Warner Amendment as the general framework for restitutionary use of the Exxon overcharge monies. This allowed Exxon monies to be applied to SECP in the States, as well as to four other Federal energy conservation programs. These four programs are the Energy Extension Service (EES), 10 CFR Part 465; the Low-Income Weatherization Assistance Program (WAP), 10 CFR Part 440; the Schools and Hospitals Program, 10 CFR Part 455; and the Low-Income Home Energy Assistance Program, which is administered by the Department of Health and Human Services, 45 CFR Part 96, Subparts A-F, H.

In May 1986, several States petitioned the Exxon Court to clarify and modify its judgment concerning prohibited expenditures under SECP, as well as three other points. Regarding prohibited expenditures, the States asked the Court to permit additional restitutionary expenditures under the SECP and the EES by providing that certain DOE regulations which prohibit or limit expenditures of appropriated funds for the purchase of energy conservation equipment or materials would not apply to the funds made available to the States in the Exxon proceeding. Those regulations, found at 10 CFR 420.12(a)(5), (a)(6) and (b) for the SECP and at 10 CFR 465.11(a)(5), (a)(6) and (b) for the EES, read identically as provided *supra* note 1. Subsequently, the States modified their request to use Exxon funds for equipment and materials, by limiting such expenditures to not more than 50 percent of the funds spent on such programs by each jurisdiction.

The Court denied the States' motion in this regard and indicated that any changes with respect to prohibited expenditures should be done by DOE rulemaking.<sup>3</sup>

The States raised the restrictions in § 420.12 with the Department as well as the Exxon Court. In December 1986, the National Association of State Energy

<sup>2</sup> *United States v. Exxon Corp.*, 581 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied*, 106 S. Ct. 892 (1986), *reh'g denied*, 106 S. Ct. 1526 (1986).

<sup>3</sup> Order and Memorandum filed June 10, 1986, *id.* (No. 78-1035).

Officials (NASEO) petitioned DOE to amend the SECP rules to allow purchase and installation of equipment and materials for buildings energy conservation, in line with certain criteria. NASEO advocated the use of up to 33 percent of a State's annual SECP allocation for eligible expenditures related to State buildings. Further, the NASEO petition specified eligible measures; stipulated that, to be funded, projects must be expected to pay for themselves through savings in one to seven years; prohibited duplication of services available under the Energy Extension Service, the Institutional Conservation Program, and the Low-Income Weatherization Program; and allowed expenditures through a variety of financial assistance mechanisms. Finally, the NASEO proposal required any interest earnings from SECP funds to be limited to eligible SECP uses only.

The Department agrees that rule review is an appropriate role for it to play in helping assure the best use of Exxon and similar funds. The Department further believes that many States have demonstrated cost-effective uses of such funds for heretofore prohibited materials and equipment expenditures.

The restrictions on materials and equipment for building retrofits and weatherization were not required by statute, but were administratively adopted at a time when it was deemed appropriate to concentrate limited program resources on establishing an energy planning and technical assistance network at the State level. 41 FR 48325, November 3, 1976 (§ 420.3(a)(1)).

On October 16, 1987, the Department issued a notice of proposed rulemaking (NPR) and notice of public hearing on the State Energy Conservation Program, 52 FR 39604, 39610. The NPR proposed a number of amendments to the program regulations, but stipulated that they would apply only to so-called eligible petroleum violation escrow (PVE) funds, and not to annual appropriated funds, remaining Warner Amendment funds, or SECP funding via the Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA). The principal provisions of the proposal included:

- (1) No eligible PVE funds could be used for weatherizing or retrofitting State or local government buildings;
- (2) No eligible PVE funds could be used to duplicate retrofit activities under DOE's weatherization (WAP) program or schools and hospitals (ICP) programs;
- (3) The amount of eligible PVE funds to be used for retrofits and weatherization could not exceed 25 percent of funds allocated to SECP in

any given year from all sources (PVE, PODRA, State appropriations, etc.); and

(4) The eligible PVE funds would be used only for financial incentive mechanisms (e.g., regular and revolving loans, loan buy-downs and rebates up to 50 percent); no direct purchase of equipment or materials would be permitted, nor were grants to be permitted.

The proposed changes also included technical changes which made provision for subawards and for State cost-sharing requirements.

In response to this proposal the Department received 50 letters of comment and heard testimony from five organizations at a public hearing held December 9, 1987, in Washington, DC. As a result of the comments received, a number of significant changes have been made to the amendments proposed, and these changes are reflected herein.

**II. Amendments to the State Energy Conservation Program**

The NPR provided that only those monies defined as "eligible petroleum violation escrow funds" could be expended under the proposed amendments; that appropriated, PODRA or remaining Warner Amendment funds could not be used in this manner. This "bifurcated" approach was designed to accomplish meaningful long-term improvements in energy conservation and efficiency and reduce the need for further Federal assistance without creating demands for enduring and increased appropriations. During the NPR comment period, however, some comments were critical of bifurcation and even questioned DOE's authority to treat PVE funds differently from appropriated (and Warner Amendment) funds. In developing the final rule, the Department reassessed its position and determined that a "unified" rule would most appropriately serve the Exxon court, the Department and State and local program managers. This position also is consistent with the provisions of Executive Order 12612 (October 26, 1987) on Federalism, which favors State administrative discretion, in this case over all program funds rather than only eligible PVE funds. To ensure that national program goals are kept in focus, those funds spent under the relaxed provisions continue to be limited by a percentage cap and by the requirement that such funds be expended only for financial incentive mechanisms.

**Section 420.2 Definitions**

In the NPR the Department proposed adding definitions of "eligible petroleum violation escrow funds" and "State or local government building."

The definition of "eligible petroleum violation escrow funds" has been slightly modified and retained as "petroleum violation escrow funds." "Eligible petroleum violation escrow funds" referred primarily to the bifurcated rule which has been abandoned in favor of a unified rule. The current definition is relevant in only two contexts, for purposes of exempting petroleum violation escrow funds from the matching requirements of § 420.3(e) and § 420.12(b).

The term "State or local government building" has been retained and streamlined and includes all buildings owned and primarily occupied by offices or agencies of a State, as well as buildings which could be defined as buildings owned by units of local government and public care institutions under Title III, Part H, of the EPCA which is the companion program to the Schools and Hospitals Program. Since the definition requires buildings to be owned and occupied, no leased or seasonal-use buildings are eligible.

**Section 420.3 Financial Assistance**

Two technical provisions are added. DOE is adding a new provision § 420.3(e) to reflect the requirement of 42 U.S.C. 6323a, a 1984 amendment to EPCA, for a matching contribution from States equal to at least 20 percent of the amount of funds appropriated by the U.S. Congress for the State's base SECP program.

This provision does not mandate a match of PVE funds, for which matching requirements are typically excluded. The contribution may be in cash or in kind or a combination of the two. Several of the comments received reflected a mistaken perception that this provision represented a new program requirement. That is not the case. The requirement has been a part of SECP policy and practice for some time, and this change is simply a formal recognition of that practice, not a change in the program. No matching funds could be used for the prohibited expenditures listed in § 420.12(a). Matching funds, however, would not be subject to the 20 percent limitation on equipment and office supplies found in § 420.12(b). PVE funds would be subject to neither the match, nor pursuant to § 420.12(b), the office materials limit.

A new provision, § 420.3(f), authorizes the use of subawards so long as they are a part of an approved State SECP plan or supplemental plan.

The language of § 420.4(b)(1), concerning the annual State plan, has been amended to emphasize the importance of incorporating energy



conservation goals that include estimated energy savings wherever possible. The addition of such language does not represent a program change but rather underscores existing program protocol.

#### Section 420.12 Prohibited Expenditures

Today DOE is modifying the general prohibition in § 420.12(a)(8) on the use of funds to purchase or install equipment or materials for energy conservation building retrofits or weatherization by adding a new § 420.12(e). This section allows up to 33 percent of all funds allocated annually to SECP to be used for financial incentives to promote (i.e., help finance) the purchase and installation of equipment and materials for energy conservation building retrofits and weatherization. Financial incentives are intended to promote—but not to completely fund—the purchase and installation of equipment and materials for the energy conservation building retrofits and weatherization work. While these funds may be used to supplement activities under DOE's Weatherization Assistance Program or Schools and Hospitals Program, they cannot be used to supplant activities under these programs. The funds expended under § 420.12(e), may not exceed 33 percent of all funds allocated to SECP by the State regardless of source, and can include, without necessarily being limited to, funds from Federally appropriated, State appropriated, PVE or other sources. Further, these funds must be used exclusively through selected financial incentive mechanisms which take a variety of forms including, but not limited to, regular and revolving loans, loan buy-downs, and up to 50 percent rebates for qualifying materials and equipment. With respect to rebates, the States are required to set appropriate restrictions and limits to ensure their most efficient use. Partial or matching grants are prohibited, as are loan guarantees and the direct purchase of materials and services.

Most of the comments contained in the 50 letters received and in the five statements presented during the public hearing addressed the following proposed provisions in § 420.12: The 25 percent limitation on expenditure of funds; the restrictions against supplanting activities under DOE's Weatherization Assistance Program and Schools and Hospitals Program; the exclusion of State and local government buildings as eligible recipients of financial incentives for retrofits and weatherization; and the list of eligible financial incentive mechanisms.

More than 30 comments were received on the provision that would limit expenditures under the proposed revision to 25 percent of all funds applied by a State to SECP in a given year. While some wanted to change the amount of the percentage to 33 or 50 percent, or even 70 or 80 percent, and a scant few agreed with DOE's proposal of 25 percent, most commenters favored elimination of the cap, giving the State maximum flexibility to develop programs which would best suit their individual needs. The DOE proposal of a 25 percent limit was based on the premise that the limit would be applied against a very substantial amount of PVE funds available to the States but would not alter the character of the existing SECP. It is reported, however, that in a few States the amount of PVE funds applied to SECP is far less than the State's total PVE funds and that 25 percent of such an amount is negligible. Other States complained that to apply 25 percent of the PVE funds to the activities proposed requires that three times that much (75 percent) be allocated to regular SECP activities. DOE has determined to raise the limitation from 25 to 33 percent of all funds applied to the SECP in any given year. The Department feels this change responds to the State needs for flexibility to design programs suitable to their individual situations while at the same time preserving the character of the SECP.

The topic of permissible activities to supplement the Weatherization Assistance Program (WAP) and the Institutional Conservation Program (ICP), or Schools and Hospitals Program, also received in excess of 30 comments, almost all of which made arguments for increased State flexibility. A number of the commenters pointed out that by proposing that no PVE funds could be used to duplicate retrofit activities conducted under ICP and WAP, we would be preventing some legitimate supplementation of these programs. For example, we heard from schools which had received an ICP grant for an energy audit, but lacked the funds necessary to install the recommended energy conservation measures. This rule change could provide that needed capital through a loan program, for example. Similarly, a multifamily building partially weatherized under the WAP could be completed, thereby increasing its energy efficiency, through a financial incentive program. The problem was how to provide for legitimate supplementation of these programs without running the risk of supplanting them. Our solution is to require the State

to document in its plan, to be submitted to DOE for approval, how alternative programs would be coordinated with either ICP or WAP and to explain how such efforts would supplement but not supplant the existing programs. One difference that obviously minimizes the risk is that both ICP and WAP are grant programs whereas the amendments provide financial incentive mechanisms, but not grants, and could therefore have different applications. Further, to the extent funds under this part are used to finance technical analyses which will be used to support applications for energy conservation measures under the ICP, recipients are advised that requirements governing performance of those analyses, as defined in 10 CFR 455.40, must be met. And it should be reiterated that, as in the case of schools and hospitals activities, the Department expects to approve use of PVE funds for financial incentives to purchase and install materials and equipment, but expenditures for operations and maintenance activities will not be permitted.

Approximately 25 comments were directed at the proposed provision prohibiting the use of PVE funds to assist State and local government buildings. We received over 20 comments which expressed the desire to have the prohibition eliminated entirely. The reasons cited included the significant energy savings potential of these buildings (savings which could be documented); the opportunity to provide retrofit financing to a largely ignored sector, which according to testimony received at the public hearing, comprises 16 percent of the buildings in this country and pays \$4 billion in utility bills each year; and the ability to provide energy efficiency improvements without reducing citizen services. This has long been a controversial issue in SECP. Congress has never chosen to provide funds for the weatherization of these buildings, but neither has Congress specifically prohibited it. And, in fact, the arguments in favor of permitting such activities have never been more compelling. In view of the significantly expanded resources available to State SECP programs it would seem short-sighted to ignore the potential benefits of very sizable energy savings in a largely ignored buildings sector. DOE has determined, therefore, to allow financial incentives for the retrofit of State and local government buildings, as defined by this rule amendment, on generally the same terms as other buildings.

At § 420.12(e) (5) and (6) DOE is requiring that eligible funds spent on

energy conservation building retrofit or weatherization activities be expended only through selected financial incentive mechanisms. In this category more than 30 comments were received. The comments were seeking maximum flexibility and leveraging opportunities. A common theme was doing away with all restrictions and letting the States choose. Many of the commenters wrote to request that grants of up to 100 percent be added to the list of financing options. Other commenters questioned prohibiting a partial grant but permitting a partial rebate and asked why, if we supported the one, we hadn't included the other. They argued that the only real difference was the need, in the case of rebates, for the up-front purchase price, which low-income people often do not have. The Department chose to include rebates to provide consumers with an incentive to purchase more energy efficient products. States also are required to set appropriate restrictions and limits to ensure the most efficient use of rebates. For example, the amount of the rebate might be set at the marginal cost of the more energy efficient unit. Grants for retrofitting and weatherization, on the other hand, are available through the ICP and WAP, and have not been included here because the Department does not wish to promote overlapping program activities nor encourage wholesale defections of PVE funds from one program to the other.

A number of comments recommended that DOE add loan guarantees to the list of eligible financial incentive mechanisms. This option was rejected at the outset and continues to be rejected because of previous default experiences. And a number of commenters wrote to support direct purchase of materials and equipment. This option was rejected as well because it does not offer the leveraging capacity of a financial incentive mechanism. Unlike funds spent on direct purchase and installation, monies spent as financial incentives can often be recycled, enabling more people and organizations to benefit, stimulating the private sector and facilitating the energy conservation marketplace.

Section 420.12(e)(7) provides that repayments, including interest, to States of any loans made for qualifying materials and equipment must be reused only for approved SECP activities.

A State may seek approval to use financial incentive mechanisms not specified on the list of eligible options through the normal State plan approval process, either during the consideration of the annual State plan or amendments thereto. As part of this process the State

will be expected to identify the energy savings anticipated for any proposed measure. Approval may not, however, be sought for a financial incentive mechanism that has been prohibited in these amendments.

Section 420.12(e)(4) prohibits funds under this part from being used to supplant retrofit activities conducted under two other DOE programs which are also eligible to receive Exxon and other PVE funds. DOE believes financial incentives under SECP can be used to complement or supplement the services that such programs provide, given careful planning and coordination between the programs. This could provide greater flexibility in reaching needy populations and in utilizing a broader range of technologies to meet the needs of low-income households, schools, and hospitals. These activities would have to be designed to supplement but not supplant existing programs or program features and States would have to specify in their State plans how their proposed activities would accomplish this requirement. Additionally, as in the case of schools and hospitals activities, the Department would expect to approve use of PVE funds for financial incentive mechanisms to be used to purchase and install materials and equipment, but expenditures for operations and maintenance activities would not be permitted. Nor does it mean to imply that any SECP funds, including PVE funds, may be used to satisfy matching requirements in other programs.

The States also petitioned the Exxon Court for relaxation of § 420.12(a)(5) (prohibition on research, development, or demonstration of any technique or technology which is not commercially available) and of § 420.12(b) (20 percent limit on office supplies, library materials, and other equipment). The Department has made no changes in these two provisions because, in the case of § 420.12(a)(5), the focus of SECP is on supporting energy conservation programs which are very likely to generate energy savings, particularly near-term energy savings, rather than on supporting research into energy conservation hardware which may not begin producing energy savings until some time in the distant future, if at all. In the case of § 420.12(b) DOE has concluded that in view of the large amounts of PVE funds available, the 20 percent limit on office supplies, library materials, and other equipment is both reasonable and sufficient. Moreover, PVE funds are not subject to this 20 percent library materials limit nor, as

stated in § 420.3(e), are State matching funds.

The Department does not intend, however, that any expenditures under the 20 percent limit in § 420.12(b) cause the 33 percent limit in § 420.12(e)(2) on retrofit and weatherization materials and equipment to be exceeded. The 33 percent limit is intended to be the program-wide maximum on these materials and equipment expenditures.

The provisions contained in these amendments have no effect on existing SECP demonstration projects. Although this rule is expected to remove the need for many demonstrations, the demonstration option under the standard SECP program still exists.

### III. Other Matters

#### A. Environmental Review

In accordance with requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, DOE has determined that these amendments fall within the range of actions addressed in existing environmental assessments and environmental impact statements prepared for the State Energy Conservation Program, the Weatherization Assistance Program, the Schools and Hospitals Program, the Residential Energy Conservation Service, 10 CFR Part 456, and the Commercial and Apartment Conservation Service, 10 CFR Part 458, and will clearly have no significant impact on the quality of the human environment.

#### B. Executive Order 12291

Section 3 of Executive Order (E.O.) 12291, 46 FR 13193, February 19, 1981, requires that DOE determine whether a rule is a "major rule," as defined by section 1(b) of E.O. 12291, and prepare a preliminary regulatory impact analysis for rules which fall within that definition. DOE reviewed the current SECP rule, 48 FR 39356, August 30, 1983, and concluded that it was not a "major rule" under this Executive Order. DOE has concluded that today's amendments do not constitute a "major rule" either, because they will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.



DOE has based its decision on the following. Today's amendments allow States more flexibility under SECP. States are allowed, but not required, to use up to 33 percent of their SECP funds, including PVE monies, to provide financial incentives for building retrofits or weatherization. Consequently, DOE cannot estimate the amount of funds which will be used for this purpose. Even if the amount were to exceed \$100 million annually, there should not result major increases in costs or prices or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. In fact, the reverse may be true in many respects. The amendments will likely have the effect of increasing energy conservation and hence of decreasing energy costs for beneficiaries of these funds and in the economy generally. Incremental improvements in national productivity and competitiveness may also be expected, as well as increased employment of suppliers and installers of conservation materials and equipment.

The final rule was submitted to the Director of the Office of Management and Budget pursuant to E.O. 12291. The Director has concluded his review under that Executive Order and has no objection to the rule.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.*, requires, in part, that agencies prepare an initial regulatory flexibility analysis for any proposed rule unless it determines that the rule will not have a "significant economic impact on a substantial number of small entities." In the event that such an analysis is not required for a particular rule, the agency must publish a certification and explanation of that determination in the Federal Register.

The revisions to this rule involve changes to prohibited expenditure requirements and do not change the basic types of activities supported by SECP. Funding levels for SECP cannot be predicted because of the States' discretion over the allocation of petroleum violation escrow funds. Any impacts, however, are likely to be diffuse and beneficial. Accordingly, pursuant to section 605(b) of the Regulatory Flexibility Act, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

#### D. Federalism

Executive Order 12612 requires that regulations or rules be reviewed for any substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among various levels of government. If there are sufficient "substantial direct effects," then Executive Order 12612 requires preparation of a Federalism Assessment to be used in all decisions involved in promulgating and implementing a regulation or a rule.

The Department has identified substantial direct effects by today's regulatory amendments on State governments which are significant in that they have a positive impact on the States vis-a-vis Federalism. Identified effects include broader discretion in the use of program funds, more flexibility to design and implement State programs to meet the needs of individual States and their citizenry, and the ability to aggressively pursue energy savings in the buildings sector. Because these effects in no way tend to diminish State sovereignty, but are considered to enhance the States' scope of authority, the Department has concluded that preparation of a Federalism Assessment is not warranted in this instance.

#### E. Paperwork Reduction Act

These changes require no modification of the program's information collection requirements within the meaning of the Paperwork Reduction Act, as amended, 44 U.S.C. 3501 *et seq.*

#### F. The Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the State Energy Conservation Program is 81.041.

#### List of Subjects in 10 CFR Part 420

Energy conservation, Grant programs—energy, Reporting and recordkeeping requirements, Technical assistance.

In consideration of the foregoing, Part 420 of Title 10 of the Code of Federal Regulations is amended as set forth below.

Issued in Washington, DC, December 20, 1988.

John R. Berg,  
Assistant Secretary, Conservation and Renewable Energy.

10 CFR Part 420 is amended as follows:

1. The authority citation for Part 420 continues to read as follows:

Authority: Title III, Part C, as amended, of the Energy Policy and Conservation Act (42 U.S.C. 6321 *et seq.*); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*).

2. 10 CFR 420.2 is amended by adding definitions of "Petroleum violation escrow funds" and "State or local government building" in the proper alphabetical order, as follows:

#### § 420.2 Definitions.

"Petroleum violation escrow funds." For purposes of exempting petroleum violation escrow funds from the matching requirements of § 420.3(e) and § 420.12(b), "petroleum violation escrow funds" means any funds distributed to the States by the Department of Energy or any court and identified as Alleged Crude Oil Violation funds, together with any interest earned thereon by the States, but excludes any funds designated as "excess funds" under section 3003(d) of the Petroleum Overcharge Distribution and Restitution Act, Subtitle A of Title III of the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, and the funds distributed under the "Warner Amendment," section 155 of Pub. L. 97-377.

"State or local government building" means any building owned and primarily occupied by offices or agencies of a State; and any building of a unit of local government or a public care institution which could be covered by Part H, Title III, of the Energy Policy and Conservation Act, 42 U.S.C. 6372-6372i.

3. 10 CFR 420.3 is amended by adding paragraphs (e) and (f) to read as follows:

#### § 420.3 Financial assistance.

(e) Each State shall provide cash, in kind contributions, or both for SECP activities in an amount totalling not less than 20 percent of the financial assistance allocated to the State under paragraph (b) of this section. Cash and in-kind contributions used to meet this State cost-sharing requirement are subject to the limitations on expenditures described in § 420.12(a), but are not subject to the 20 percent limitation in § 420.12(b). The type and amount of State cost sharing shall be identified in the annual application with respect to a plan. Nothing in this paragraph shall be read to require a match for petroleum violation escrow funds used under this part.

(f) Subawards which are included in a State's approved SECP plan or

supplemental plan are authorized under this part.

4. 10 CFR 420.4 is amended by revising paragraph (b)(1) and adding paragraph (b)(4) to read as follows:

#### § 420.4 Annual State applications.

(b) \* \* \* (1) A description of the energy conservation goals to be achieved, including wherever practicable, an estimate of the energy to be saved by implementation of the State plan, why they were selected, how the attainment of the goals will be measured by the State, and how the program measures included in the State plan represent a strategy to achieve these goals.

(4) For program measures involving purchase or installation of materials or equipment for energy conservation or weatherization of low-income housing or schools and hospitals, an explanation of how these measures would supplement and not supplant the two existing DOE programs in these areas.

5. 10 CFR 420.12 is amended by removing paragraph (a)(6); by adding "or" at the end of (a)(4) and at the end of (a)(5) changing "; or" to a period, by adding a final sentence to paragraph (b); and by adding paragraph (e) to read as follows:

#### § 420.12 Prohibited expenditures.

(b) \* \* \* Nothing in this paragraph shall be read to apply this 20 percent

limitation to petroleum violation to escrow funds used under this part.

(e) A State may use funds under this part to promote the purchase and installation of equipment and materials for energy conservation building retrofits or weatherization, subject to the following terms and conditions:

(1) Such use must be included in the State's approved plan or supplemental plan and, if funded by petroleum violation escrow funds, must be consistent with any judicial or administrative terms and conditions imposed upon State use of such funds;

(2) A State may use for these purposes no more than 33 percent of all funds allocated by the State to SECP in any given year, regardless of source;

(3) Subject to the restrictions of this part, State and local government buildings, as defined in § 420.2, are eligible for energy conservation building retrofits and weatherization under this section;

(4) Funds must be used to supplement and no funds may be used to supplant energy conservation building retrofits or weatherization activities under the Weatherization Assistance Program for Low-Income Persons, 42 U.S.C. 6861 *et seq.*, or the Institutional Conservation Program, 42 U.S.C. 6371 *et seq.*, nor to find operation and maintenance activities in any building which is eligible for assistance under the Institutional Conservation Program;

(5) Subject to paragraph (e)(6) of this section, a State may use a variety of financial incentives to fund purchases and installation of materials and equipment under this paragraph including, but not limited to, regular loans, revolving loans, loan buy-downs, and rebates;

(6) The following mechanisms are not allowed for funding the purchase and installation of materials and equipment under this paragraph:

(i) Direct purchases of goods and services by a State or contractors or others working for the State;

(ii) Rebates for more than 50 percent of the total cost of purchasing and installing materials and equipment (States shall set appropriate restrictions and limits to insure most efficient use of rebates);

(iii) Grants;

(iv) Loan guarantees; and

(v) Any otherwise allowable funding mechanism if the contract for the purchase and installation of materials and equipment was entered into before December 27, 1988; and

(7) A State may use loan repayments, including any interest, only for activities which are included in the State's approved SECP plan or supplemental plan.

[FR Doc. 88-29648 Filed 12-23-88; 8:45 am]

BILLING CODE 6450-01-M



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<sup>4</sup> The July 1, 1985 edition of 32 CFR Parts 1-189 contains a note only for Parts 1-39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1-39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

<sup>5</sup> No amendments to this volume were promulgated during the period July 1, 1986 to June 30, 1988. The CFR volume issued as of July 1, 1986, should be retained.

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Presidential Documents

Title 3—

The President

Proclamation 5926 of December 23, 1988

National Commissioned Corps of the Public Health Service Centennial Day, 1989

By the President of the United States of America

A Proclamation

On January 4, 1989, the members of the Commissioned Corps of the United States Public Health Service celebrate a century of service to Americans and to all mankind. The rest of us can join in this celebration as well, to express our thanks and pride at their successes over the past 100 years.

Those successes have been notable. They include playing a key role in many breakthroughs in health care; battling diseases such as smallpox, tuberculosis, and pellagra; developing vaccines; performing with efficiency and courage during emergencies, epidemics, and similar situations; and working in fields such as disease control and prevention, research, environmental intervention, and health care delivery and program management.

Commissioned Corps members' broad training and experience make them an effective team of medical and health experts. The Corps offers health care for American Indians, Native Alaskans, the Coast Guard, the Merchant Marine, and the Bureau of Prisons and helps provide consumer protection.

Every member of the Commissioned Corps, past and present, deserves the heartfelt congratulations of the American people for outstanding accomplishment in public health. That is a debt we should be only too happy to pay, on the centennial of the Corps and always.

The Congress, by Public Law 100-852, has designated January 4, 1989, as "National Commissioned Corps of the Public Health Service Centennial Day" and authorized and requested the President to issue a proclamation in observance of this event.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim January 4, 1989, as National Commissioned Corps of the Public Health Service Centennial Day, and I call upon all Americans to observe this day with appropriate ceremonies and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

Ronald Reagan

[FR Doc. 88-3003j  
Filed 12-27-88; 10:35 am]  
Billing code 3195-01-M



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Martin Luther King, Jr., Day, 1989

By the President of the United States of America

### A Proclamation

During January, America celebrates a national holiday in honor of the birthday of the Reverend Doctor Martin Luther King, Jr. We do so in memory of a man who asked to be recalled by his countrymen not for any earthly honors he had won but as "a drum major for justice." That title he deemed greater than any other because earning it would mean that he had not lived his life in vain.

Today, America does remember Dr. King as a drum major for justice, as a giant whose life was far from being in vain. In a sermon on the eve of his assassination, he surely described his own mission when he asked, "Who is it that is supposed to articulate the longings and aspirations of the people more than the preacher? Somehow the preacher must be an Amos, and say, 'Let justice roll down like waters and righteousness like a mighty stream.'" Martin Luther King, Jr., did exactly that. He gave eloquent voice and powerful leadership to the long-cherished hopes of millions as he headed a crusade to end bigotry, segregation, and discrimination in our land; to foster equal opportunity; and to make universal America's promise of liberty and justice for all.

Dr. King's work is not done, but neither is his witness stilled. He urged again and again that all of us come to love and befriend one another, to live in brotherhood and reconciliation, to nourish each and every individual's dignity and self-respect. We must reaffirm in every generation the lessons of justice and charity that Dr. King taught with his unflinching determination, his complete confidence in the redeeming power of love, and his utter willingness to suffer, to sacrifice, and to serve. We must, and we can, all be drum majors for justice. That is our duty and our glory as Americans. On Martin Luther King, Jr., Day and every day let us unite in prayer and promise to be true to the American Dream he loved and renewed.

By Public Law 98-144, the third Monday in January of each year has been designated as a public holiday in honor of the "Birthday of Martin Luther King, Jr."

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim Monday, January 16, 1989, as Martin Luther King, Jr., Day.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-third day of December, in the year of our Lord nineteen hundred and eighty-eight, and of the Independence of the United States of America the two hundred and thirteenth.

*Ronald Reagan*



# Rules and Regulations

Federal Register

Vol. 53, No. 249

Wednesday, December 28, 1988

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

## FARM CREDIT ADMINISTRATION

### 12 CFR Part 614

#### Loan Policies and Operations

**AGENCY:** Farm Credit Administration.

**ACTION:** Final rule; correction.

**SUMMARY:** The Farm Credit Administration (FCA) is correcting a typographical error in the final rule which amended the regulation relating to borrower rights. The final rule appeared in the Federal Register on September 14, 1988 (53 FR 35427).

**EFFECTIVE DATE:** October 14, 1988.

**FOR FURTHER INFORMATION CONTACT:** Andrea J. Call, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102-5090, (703) 883-4020, TDD (703) 883-4444.

**SUPPLEMENTARY INFORMATION:** In typing the final rule for submission to the Federal Register, two typographical errors were inadvertently made in the amended language of § 614.4522 (53 FR 35456).

### PART 614—LOAN POLICIES AND OPERATIONS

1. Section 614.4522, Subpart N, paragraphs (c)(2) and (c)(3) are correctly added to read as follows:

#### Subpart N—Loan Servicing Requirements; State Agricultural Loan Mediation Programs; Right of First Refusal

#### § 614.4522 Right of first refusal.

(c) \* \* \*

(2) Shall accept an offer from the previous owner to purchase the property at the appraised value, within 15 days after the receipt of such offer, and sell the property to the previous owner, if

the offer was received within 30 days of the notification required in paragraph (c)(1) of this section.

(3) Shall consider an offer from a previous owner to purchase the acquired property at a price less than the appraised value, if the offer was received within 30 days of the notification required in paragraph (c)(1) of this section. Notice of the decision to accept or reject such offer must be provided to the previous owner within 15 days of receipt of such offer. If the institution rejects such an offer, the institution may not sell the property to any other person.

Date: December 22, 1988.

David A. Hill,

Secretary, Farm Credit Administration Board.

[FR Doc. 88-29857 Filed 12-27-88; 8:45 am]

BILLING CODE 6705-01-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Airspace Docket Number 88-ACE-17]

#### Alteration of Transition Area; Pocahontas, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The nature of this Federal action is to alter the Pocahontas, Iowa, transition area by deleting therefrom the 1,200-foot airspace designation. Since the Iowa transition area already provides for that airspace, it is superfluous to repeat it in the Pocahontas, Iowa, transition area description.

**EFFECTIVE DATE:** 0901 u.t.c. June 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 801 East 12th Street, Kansas City, Missouri 64108, Telephone (816) 426-3408.

#### SUPPLEMENTARY INFORMATION:

##### The Rule

The purpose of this amendment to Subpart G of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is to alter the transition area at

Pocahontas, Iowa. This transition area presently includes a 1,200-foot airspace description. Since the Iowa transition area already provides for that airspace, it is unnecessary to have it reiterated in the Pocahontas, Iowa, transition area designation. Accordingly, action is taken herein to make this deletion. Since this rulemaking action eliminates a redundancy, does not require charting changes, and decreases the size of the transition area, notice and public procedure hereon, under 5 U.S.C. 553(b), are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the FAR (14 CFR Part 71) is amended as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

#### § 71.181 [Amended]

2. By amending § 71.181 as follows:

##### Pocahontas, Iowa [Revised]

That airspace extending upward from 700 feet above the surface within a 5-mile radius of Pocahontas Municipal Airport (lat. 42°44'45"N., long. 94°38'45"W.); within 3 miles



each side of the 280° bearing from the Pocahontas Municipal Airport, extending from the 5-mile radius to 8 miles west of the airport; within 2 miles each side of the 118° bearing from the Pocahontas Municipal Airport; extending from the 5-mile radius to 8 miles southeast of the airport.

This amendment becomes effective at 0901 u.t.c. June 1, 1989.

Issued in Kansas City, Missouri, on December 13, 1988.  
Billy G. Peacock,  
Acting Manager, Air Traffic Division.  
[FR Doc. 88-29680 Filed 12-27-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket No. 88-ACE-18]

##### Alteration of Transition Area; Sioux City, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.  
**ACTION:** Final rule.

**SUMMARY:** The nature of this Federal action is to alter the transition area at Sioux City, Iowa. The Sioux City, Iowa, Municipal Airport is being renamed to Sioux Gateway Airport. Accordingly, the transition area description is being altered to reflect this name change.

**EFFECTIVE DATE:** 0901 u.t.c., June 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

##### SUPPLEMENTARY INFORMATION:

##### The Rule

The purpose of this amendment to Subpart G of Part 71 of Federal Aviation Regulations (14 CFR Part 71) is to alter the transition area at Sioux City, Iowa. The Sioux City, Iowa, Municipal Airport is being renamed the Sioux Gateway Airport. Accordingly, alteration of the Sioux City transition area description is necessary to reflect this name change. Since this action is not significant, is minor in nature, and imposes no additional burden on any person, notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3)

does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

##### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

##### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the FAR (14 CFR Part 71) is amended as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

##### § 71.181 [Amended]

2. By amending Section 71.181 as follows:

Sioux City, Iowa [Revised]

That airspace extending upward from 700 feet above the surface within a 19-mile radius of Sioux Gateway Airport (lat. 42°24'03" N., long. 96°22'55" W.); within 5 miles southwest and 9½ miles northeast of the Sioux City VORTAC 140° radial, extending from the 19-mile radius area to 24½ miles southeast of the VORTAC; within 4½ miles southwest and 9½ miles northeast of the Sioux City ILS localizer northwest and southeast courses, extending from the 19-mile radius area to 24½ miles southeast of the OM; within 4½ miles northeast and 11½ miles southwest of the Sioux City VORTAC 320° radial, extending from the VORTAC to 35 miles northwest of the VORTAC.

This amendment becomes effective at 0901 u.t.c. June 1, 1989.

Issued in Kansas City, Missouri, on December 13, 1988.  
Billy G. Peacock,  
Acting Manager, Air Traffic Division.  
[FR Doc. 88-29679 Filed 12-27-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket Number 88-ACE-15]

##### Alteration of Transition Area; Dubuque, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.  
**ACTION:** Final rule.

**SUMMARY:** The nature of this Federal action is to alter the Dubuque, Iowa, transition area by deleting therefrom the 1,200-foot transition area designation. Since the Iowa transition area already provides for that airspace, it is superfluous to repeat it in the Dubuque, Iowa, transition area description.

**EFFECTIVE DATE:** 0901 u.t.c., June 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, telephone (816) 426-3408.

##### SUPPLEMENTARY INFORMATION:

##### The Rule

The purpose of this amendment to Subpart G of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is to alter the transition area at Dubuque, Iowa. This transition area presently includes a 1,200-foot airspace description. Since the Iowa transition area already provides for that airspace, it is unnecessary to have it reiterated in the Dubuque, Iowa transition area designation. Accordingly, action is taken herein to make this deletion. Since this rulemaking eliminates a redundancy, does not require charting changes, and decreases the size of the transition area, notice and public procedure, under 5 U.S.C. 553(b), are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

##### List of Subjects in 14 CFR Part 71

Aviation Safety, Transition Areas.

##### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the FAR (14 CFR Part 71) is amended as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

##### § 71.181 [Amended]

2. By amending § 71.181 as follows:

Dubuque, Iowa [Revised]

That airspace extending upward from 700 feet above the surface within an 8½-mile radius of the Dubuque Municipal Airport (lat. 42°24'10" N., long. 90°42'32" W.); and within 3 miles on either side of the Dubuque VORTAC 321° radial, extending from the VORTAC to 8 miles northwest of the airport reference point; and within 3½ miles on either side of the Dubuque VORTAC 131° radial, extending from the VORTAC to 15½ miles southeast of the airport reference point.

This amendment becomes effective at 0901 u.t.c. June 1, 1989.

Issued in Kansas City, Missouri, on December 13, 1988.  
Billy G. Peacock,  
Acting Manager, Air Traffic Division.  
[FR Doc. 88-29681 Filed 12-27-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket Number 88-ACE-14]

##### Alteration of Transition Area—Clarinda, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.  
**ACTION:** Final rule.

**SUMMARY:** The nature of this Federal Action is to alter the Clarinda, Iowa, transition area by deleting therefrom the 1,200-foot airspace designation. Since the Iowa transition area already provides for that airspace, it is superfluous to repeat it in the Clarinda, Iowa, transition area description.

**EFFECTIVE DATE:** 0901 u.t.c. June 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

##### SUPPLEMENTARY INFORMATION:

##### The Rule

The purpose of this amendment to Subpart G of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is

to alter the transition area at Clarinda, Iowa. This transition area presently includes a 1,200-foot airspace description. Since the Iowa transition area already provides for that airspace, it is unnecessary to have it reiterated in the Clarinda, Iowa, transition area description. Accordingly, action is taken herein to make this deletion. Since this rulemaking eliminates a redundancy, does not require charting changes and decreases the size of the transition area, notice and public procedure hereon, under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

##### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

##### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the FAR (14 CFR Part 71) is amended as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

##### § 71.181 [Amended]

2. By amending § 71.181 as follows:

Clarinda, Iowa [Revised]

That airspace extending upward from 700 feet above the surface within a 5-mile radius of Schenck Field (lat. 40°43'30" N., long. 95°01'30" W.); within 3 miles each side of the 169° bearing from Clarinda Municipal Airport extending from the 5-mile radius to 8 miles south of the airport.

This amendment becomes effective at 0901 u.t.c. June 1, 1989.

Issued in Kansas City, Missouri, on December 13, 1988.  
Billy G. Peacock,  
Acting Manager, Air Traffic Division.  
[FR Doc. 88-29682 Filed 12-27-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 71

[Airspace Docket Number 88-ACE-16]

##### Alteration of Transition Area; Fort Dodge, IA

**AGENCY:** Federal Aviation Administration (FAA), DOT.  
**ACTION:** Final rule.

**SUMMARY:** The nature of this Federal action is to alter the Fort Dodge, Iowa, transition area by deleting therefrom the 3,500-foot airspace designation. Since the Iowa transition area already provides for that airspace, it is superfluous to repeat it in the Fort Dodge, Iowa, transition area description.

**EFFECTIVE DATE:** 0901 u.t.c., June 1, 1989.  
**FOR FURTHER INFORMATION CONTACT:** Lewis G. Earp, Airspace Specialist, Traffic Management and Airspace Branch, Air Traffic Division, ACE-540, FAA, Central Region, 601 East 12th Street, Kansas City, Missouri 64106, Telephone (816) 426-3408.

##### SUPPLEMENTARY INFORMATION:

##### The Rule

The purpose of this amendment to Subpart G of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is to alter the transition area at Fort Dodge, Iowa. This transition area presently includes a 3,500-foot airspace description. Since the Iowa transition area already provides for that airspace, it is unnecessary to have it reiterated in the Fort Dodge, Iowa, area description. Accordingly, action is taken herein to make this deletion. Since this rulemaking eliminates a redundancy, does not require charting changes, and decreases the size of the transition area, notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a



routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Part 71 of the FAR (14 CFR Part 71) is amended as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) [Revised Pub. L. 97-449, January 12, 1983]; 14 CFR 11.69.

#### § 71.181 [Amended]

2. By amending § 71.181 as follows:

#### Fort Dodge, Iowa [Revised]

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Fort Dodge Municipal Airport (lat. 42°33'05" N., long. 94°11'10" W.).

This amendment becomes effective at 0901 u.t.c. June 1, 1989.

Issued in Kansas City, Missouri, on December 13, 1988.

Billy G. Peacock,

Acting Manager, Air Traffic Division.

[FR Doc. 88-29683 Filed 12-27-88; 8:45 am]

BILLING CODE 4910-13-M

#### Research and Special Programs Administration

#### 14 CFR Parts 217 and 241

[Docket No. 44999; Amendment No. 217-2; 241-57]

[RIN 2137-AA97, 2137-AB01]

**Aviation Economic Regulations; Report of Traffic and Capacity Statistics; Collection of Service Segment and Charter Data; the "T-100 System."**

**AGENCY:** Research and Special Programs Administration, Office of the Secretary, DOT.

**ACTION:** Notice of suspension of effective date for foreign air carriers and clarification of effective date for U.S. air carriers.

**SUMMARY:** The Department is suspending the January 1, 1989, effective

date of the T-100 system final rule (Part 217) published in the *Federal Register* on November 16, 1988 (53 FR 46284) which pertains to foreign air carriers, in order for the Department to consider petitions for reconsideration. The Department clarifies that the amendments to Part 241 as published November 16, 1988 are effective January 1, 1990.

**FOR FURTHER INFORMATION CONTACT:** Donald Bright or Richard King, Office of Aviation Information Management, DAI-10, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-4384, or 366-4375, respectively.

**SUPPLEMENTARY INFORMATION:** The Department has received individual petitions for reconsideration of the final rule from Air Canada and Thai Airways International Limited, and a joint petition from Air Canada, Air Jamaica Limited, Balair Ltd., Cathay Pacific Airways Limited, Lloyd Aereo Boliviano, SA, and Philippine Airlines. Among other things, the petitioners state that the January 1, 1989 date for the T-100 system is impractical, and they cite their inability to comply.<sup>1</sup>

The Department is suspending the effective date of the final rule for all foreign air carriers pending review of the petitions for reconsideration on their merits. Pursuant to 14 CFR 302.38 and 49 CFR Part 5, these petitions will be considered as requests for the repeal or amendment of a rule. A Federal Register notice will be published to advise the industry of DOT's action on the petitions. Until the Department issues a final determination, the foreign air carriers are reminded to continue filing Form 217 "Report of Civil Aircraft Charters Performed by U.S. Certificated and Foreign Air Carriers."

Therefore, the effective date for foreign air carriers of January 1, 1989, on 53 FR 46284 is suspended. A new effective date will be established in a subsequent notice.

Issued in Washington, DC on December 22, 1988.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration, DOT.

[FR Doc. 88-29601 Filed 12-27-88; 8:45 am]

BILLING CODE 4910-02-M

<sup>1</sup> Yugoslav Airlines filed a waiver request with the Director, Office of Aviation Information Management, asking for immediate relief from reporting Form 41 Schedule T-100(f). The European Civil Aviation Conference sent a letter to the Department of State requesting deferral of the effective date.

#### CONSUMER PRODUCT SAFETY COMMISSION

#### 16 CFR Part 1014

#### Privacy Act Regulations; Amendment

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission is amending its Privacy Act Regulations to accurately reflect its current location and current personnel assignments pertaining to Privacy Act matters. No changes in substance or procedure are involved.

**EFFECTIVE DATE:** December 28, 1988.

**ADDRESSES:** Consumer Product Safety Commission, Office of the Secretary, Washington, DC 20207.

**FOR FURTHER INFORMATION CONTACT:** Joseph F. Rosenthal, Office of the General Counsel, Consumer Product Safety Commission, Washington, DC 20207, telephone 301-492-6980.

**SUPPLEMENTARY INFORMATION:** Since this rule relates solely to internal agency management, pursuant to 5 U.S.C. 553(b), notice and other public procedures are not required and it is effective immediately upon publication in the *Federal Register*. Further, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612, and, thus, is exempt from the provisions of the Act.

#### List of Subjects in 16 CFR Part 1014

Privacy.

Accordingly, Part 1014 is amended as set forth below.

1. The authority citation for Part 1014 continues to read as follows:

Authority: Privacy Act of 1974 (5 U.S.C. 552a).

2. Section 1014.3 is amended by revising paragraphs (a), (c), and the introductory text of paragraph (d) to read as follows:

#### § 1014.3 Procedures for requests pertaining to individual records.

(a) Any individual may request the Commission to inform him or her whether a particular record system named by the individual contains a record pertaining to him or her. The request may be made by mail or in person during business hours (8:30 a.m. to 5 p.m.) to the Freedom of Information/Privacy Act Officer, Office of the Secretary, Consumer Product Safety Commission, 5401 Westbard Avenue, Bethesda, Maryland (mailing address: Consumer Product Safety Commission, Washington, DC 20207.)

(c) A Commission officer or employee or former employee who desires to review or obtain a copy of a personnel record pertaining to him or her may make a request by mail or in person at the Division of Personnel's Processing Unit in Room 337, 5401 Westbard Avenue, Bethesda, Maryland (mailing address: Consumer Product Safety Commission, Washington, DC 20207.)

(d) Each individual requesting the disclosure of a record or a copy of a record shall furnish the following information to the extent known with the request to the Freedom of Information/Privacy Act Officer or to the Division of Personnel's Processing Unit, as applicable:

Dated: December 22, 1988.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 88-29780 Filed 12-27-88; 8:45 am]

BILLING CODE 6335-01-M

#### FEDERAL TRADE COMMISSION

#### 16 CFR Part 13

[Dkt. 9210]

#### New York State Chiropractic Association; Prohibited Trade Practices, and Affirmative Corrective Actions

**AGENCY:** Federal Trade Commission.

**ACTION:** Consent order.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, the New York State Chiropractic Association from conspiring to coerce higher payments for chiropractors from Group Health Inc., a third-party payer of health care benefits, through mass departicipation.

**DATE:** Complaint issued September 9, 1987. Order issued November 11, 1988.<sup>1</sup>

**FOR FURTHER INFORMATION CONTACT:** Jonathan B. Banks, FTC/S-3115, Washington, DC 20580. (202) 326-2773.

**SUPPLEMENTARY INFORMATION:** On Tuesday, August 30, 1988, there was published in the *Federal Register*, 53 FR 34776, a proposed consent agreement with analysis in the Matter of New York State Chiropractic Association, for the purpose of soliciting public comment. Interested parties were given sixty (60)

<sup>1</sup> Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission made its jurisdictional findings and entered an order to cease and desist in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Boycotting Seller-Suppliers: § 13.302 Boycotting sellers-suppliers. Subpart—Coercing And Intimidating: § 13.345 Competitors; 13.367 Members. Subpart—Combining Or Conspiring: § 13.384 Combining or conspiring; § 13.385 To boycott seller-suppliers; § 13.430 To enhance, maintain or unify prices; § 13.470 To restrain and monopolize trade; § 13.497 To terminate or threaten to terminate contracts, dealings, franchises, etc. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-20 Disclosures; § 13.533-N-45 Maintain records; § 13.533-45(k) Records, in general; § 13.533-50 Maintain means of communication; § 13.533-60 Release of general, specific, or contractual restrictions, requirements, or restraints.

#### List of Subjects in 16 CFR Part 13

Chiropractors, Trade practices.

(Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies Sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Donald S. Clark

Secretary.

[FR Doc. 88-29688 Filed 12-27-88; 8:45 am]

BILLING CODE 8750-01-M

#### 16 CFR Part 13

[Dkt. 9211]

#### Pacific Resources, Inc.; Prohibited Trade Practices, and Affirmative Corrective Actions

**AGENCY:** Federal Trade Commission.

**ACTION:** Consent order.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, Pacific Resources, Inc. ("PRI"), from acquiring, without prior Commission approval, any substantial Hawaiian wholesale terminal from a competitor or from entering into any terminating agreement for more than fifty percent of the capacity of such terminal.

**DATE:** Complaint issued November 25, 1987. Order issued November 4, 1988.<sup>1</sup>

**FOR FURTHER INFORMATION CONTACT:** Arthur J. Nolan, FTC/S-3302, Washington, DC 20580. (202) 326-2615.

**SUPPLEMENTARY INFORMATION:** On Tuesday, August 30, 1988, there was published in the *Federal Register*, 53 FR 33142, a proposed consent agreement with analysis in the Matter of Pacific Resources, Inc., for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission made its jurisdictional findings and entered an order to cease and desist in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Acquiring Corporate Stock Or Assets: § 13.5 Acquiring corporate stock or assets; § 13.5-20 Federal Trade Commission Act. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-45 Maintain records; § 13.533-45(k) Records, in general; § 13.533-50 Maintain means of communication; § 13.533-60 Release of general, specific, or contractual restrictions, requirements, or restraints.

#### List of Subjects in 16 CFR Part 13

Gas, Oil, Trade practices.

(Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply Sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

Donald S. Clark

Secretary.

[FR Doc. 88-29689 Filed 12-27-88; 8:45 am]

BILLING CODE 8750-01-M

#### 16 CFR Part 305

#### Rules for Using Energy Cost and Consumption Information Used in Labeling and Advertising of Consumer Appliances Under the Energy Policy and Conservation Act

**AGENCY:** Federal Trade Commission.

**ACTION:** Final rule revision.

**SUMMARY:** The Federal Trade Commission's Appliance Labeling Rule requires that the table in § 305.9, which

<sup>1</sup> Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.



sets forth the representative average unit energy costs for four residential energy sources, be revised periodically on the basis of updated information provided by the Department of Energy ("DOE").

This notice revises the table to incorporate the latest figures for average unit energy costs as published by DOE in the *Federal Register* on December 7, 1988.

**EFFECTIVE DATE:** The revised Table 1 is effective December 28, 1988. The mandatory dates for using these revised DOE cost figures are detailed below.

**FOR FURTHER INFORMATION CONTACT:** James Mills, 202-326-3035 or Neil J. Blickman, 202-326-3038, Attorneys, Division of Enforcement, Federal Trade Commission, Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** On November 19, 1979, the Federal Trade Commission issued a final Appliance Labeling Rule (44 FR 66466) in response to a directive in section 324 of the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. 6201 (1975). The Appliance Labeling Rule was subsequently amended on December 10, 1987 (52 FR 46888) to add a new category of appliances to the Rule—central air conditioners (which include heat pumps). The rule requires the disclosure of energy efficiency or cost information on labels and in retail sales catalogs for eight categories of appliances, and mandates that these energy costs or energy efficiency ratings be based on standardized test procedures developed by DOE. The cost and efficiency information obtained by following the test procedures is derived by using the representative average unit energy costs provided by DOE. Table 1

in § 305.9 of the rule sets forth the representative average unit energy costs to be used for all requirements of the rule. As stated in § 305.9(b), the Table is intended to be revised periodically on the basis of updated information provided by DOE.

On December 7, 1988, DOE published the most recent figures for representative average unit energy costs (53 FR 49349). Accordingly, Table 1 is revised to reflect these latest cost figures as set forth below.

The dates when use of the figures in Revised Table 1 becomes mandatory in calculating cost disclosures for use in reporting, labeling and advertising products covered by the Commission's rule and/or EPCA are as follows:

*For 1989 Submissions of Data Under § 305.8 of the Commission's Rule:* The new cost figures must be used in all 1989 submissions.

*For Labeling and Advertising of Products Under the Commission's Rule:* Based on 1989 submissions using the 1989 DOE cost figures, the staff will determine whether to publish new ranges. Any products for which new ranges are published must be labeled with estimated annual cost figures calculated using the 1989 DOE cost figures. If such new ranges are published, the effective date for labeling new products will be ninety days after publication of the ranges in the *Federal Register*. Products that have been labeled prior to the effective date of any range modification need not be relabeled. Advertising for such products will also have to be based on the new costs and ranges beginning ninety days after publication of the new ranges in the *Federal Register*.

*Advertising of Products Covered by EPCA but not by the Commission's Rule:* Manufacturers of products covered by section 323(c) of EPCA, but not by the Appliance Labeling Rule (clothes dryers, television sets, kitchen ranges and ovens, humidifiers and dehumidifiers, and space heaters) must use the 1989 representative average unit costs for energy in all representations effective March 28, 1989.

#### List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

#### PART 305—[AMENDED]

Accordingly, 16 CFR Part 305 is amended as follows:

1. The authority citation for Part 305 is revised to read as follows:

Authority: Sec. 324 of the Energy Policy and Conservation Act, (Pub. L. 94-163) (1975), as amended by the National Energy Conservation Policy Act, (Pub. L. 95-619) (1978), the National Appliance Energy Conservation Act, (Pub. L. 100-12) (1987), and the National Appliance Energy Conservation Amendments of 1988, (Pub. L. 100-357) 1988, 42 U.S.C. 6294; section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

2. Section 305.9(a) is amended by revising Table 1 to read as follows. The introductory text of (a) is republished for the convenience of the reader.

#### § 305.9 Representative average unit energy costs.

(a). Table 1, below, contains the representative unit energy costs to be utilized for all requirements of this part.

TABLE 1.—REPRESENTATIVE AVERAGE UNIT COSTS OF ENERGY FOR FOUR RESIDENTIAL ENERGY SOURCES (1989)

Type of energy	In common terms	As required by DOE test procedure	Dollars per million Btu <sup>1</sup>
Electricity.....	7.70¢/kWh <sup>2,3</sup>	\$0.0770/kWh.....	\$22.57
Natural Gas.....	55.2¢/therm <sup>4</sup> or \$5.68/MCF <sup>5,6</sup>	\$0.0000552/Btu.....	5.52
No. 2 heating oil.....	\$0.78/gallon <sup>7</sup>	\$0.0000562/Btu.....	5.62
Propane.....	\$0.72/gallon <sup>8</sup>	\$0.0000786/Btu.....	7.88

<sup>1</sup> Btu stands for British thermal unit.

<sup>2</sup> kWh stands for kilowatt hour.

<sup>3</sup> 1 kWh=3,412 Btu.

<sup>4</sup> 1 therm=100,000 Btu.

<sup>5</sup> MCF stands for 1,000 cubic feet.

<sup>6</sup> For the purposes of this table, 1 cubic foot of natural gas has an energy equivalence of 1,029 Btu.

<sup>7</sup> For the purposes of this table, 1 gallon of No. 2 heating oil has an energy equivalence of 138,690 Btu.

<sup>8</sup> For the purposes of this table, 1 gallon of liquid propane has an energy equivalence of 91,333 Btu.

Donald S. Clark,

Secretary.

[FR Doc. 88-29687 Filed 12-27-88; 8:45 am]

BILLING CODE 9750-01-M

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Part 1000

#### Commission Organization and Functions

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rule.

**SUMMARY:** The Consumer Product Safety Commission is amending its statement of organization and functions to reflect editorial and address changes made since the changes published May 17, 1988, 53 FR 17453.

**EFFECTIVE DATE:** December 28, 1988.

**ADDRESS:** Consumer Product Safety Commission, Office of the Secretary, Washington, DC 20207.

**FOR FURTHER INFORMATION CONTACT:** Joseph F. Rosenthal, Office of the General Counsel, Consumer Product Safety Commission, Washington, DC 20207, telephone 301-492-6980.

**SUPPLEMENTARY INFORMATION:** Since this rule relates solely to internal agency management, pursuant to 5 U.S.C. 553(b), notice and other public procedures are not required and it is effective immediately upon publication in the *Federal Register*. Further, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612, and, thus, is exempt from the provisions of the Act.

#### List of Subjects in 16 CFR Part 1000

Organization and functions (Government agencies).

Dated: December 22, 1988.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

Accordingly, Part 1000 is revised to read as follows:

### PART 1000—COMMISSION ORGANIZATION AND FUNCTIONS

Sec.

- 1000.1 The Commission.
- 1000.2 Laws administered.
- 1000.3 Hotline.
- 1000.4 Commission addresses.
- 1000.5 Petitions.
- 1000.6 Commission decisions and records.
- 1000.7 Advisory opinions and interpretations of regulations.
- 1000.8 Meetings and hearings; public notice.
- 1000.9 Quorum.
- 1000.10 The Chairman and Vice Chairman.
- 1000.11 Delegation of functions.
- 1000.12 Organizational structure.
- 1000.13 Directives system.

Sec.

- 1000.14 Office of the General Counsel.
- 1000.15 Office of Congressional Relations.
- 1000.16 Office of the Secretary.
- 1000.17 Office of Internal Audit.
- 1000.18 Office of Equal Employment Opportunity and Minority Enterprise.
- 1000.19 Office of the Executive Director.
- 1000.20 Office of Program Management and Budget.
- 1000.21 Office of Planning and Evaluation.
- 1000.22 Office of Information and Public Affairs.
- 1000.23 Directorate for Epidemiology.
- 1000.24 Directorate for Economic Analysis.
- 1000.25 Directorate for Engineering Sciences.
- 1000.26 Directorate for Health Sciences.
- 1000.27 Directorate for Compliance and Administrative Litigation.
- 1000.28 Directorate for Administration.
- 1000.29 Directorate for Field Operations.

Authority: U.S.C. 552(a).

#### § 1000.1 The Commission.

(a) The Consumer Product Safety Commission is an independent regulatory agency which was formed on May 14, 1973, under the provisions of the Consumer Product Safety Act (Pub. L. 92-573, 86 Stat. 1207, as amended (15 U.S.C. 2051, et seq.)). The purposes of the Commission under the CPSA are:

(1) To protect the public against unreasonable risks of injury associated with consumer products;

(2) To assist consumers in evaluating the comparative safety of consumer products;

(3) To develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) To promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

(b) The Commission is composed of five members appointed by the President, by and with the advice and consent of the Senate, for terms of seven years.

#### § 1000.2 Laws administered.

The Commission administers five acts:

(a) The Consumer Product Safety Act (Pub. L. 92-573, 86 Stat. 1207, as amended (15 U.S.C. 2051, et seq.)).

(b) The Flammable Fabrics Act (Pub. L. 90-189, 87 Stat. 111, as amended (15 U.S.C. 1191, et seq.)).

(c) The Federal Hazardous Substances Act (Pub. L. 86-613, 74 Stat. 380, as amended (15 U.S.C. 1261, et seq.)).

(d) The Poison Prevention Packaging Act of 1970 (Pub. L. 91-601, 84 Stat. 1670, as amended (15 U.S.C. 1471, et seq.)).

(e) The Refrigerator Safety Act of 1956 (Pub. L. 84-630, 70 Stat. 953, 15 U.S.C. 1211, et seq.).

#### § 1000.3 Hotline.

(a) The Commission operates a toll-free telephone Hotline by which the public can communicate with the Commission. The number for use in all 50 states is 1-800-638-CPSC (1-800-638-2772).

(b) The Commission also operates a toll-free Hotline by which deaf or speech-impaired persons can communicate by teletypewriter with the Commission. The teletypewriter number for use in all states except Maryland is 1-800-638-8270. The teletypewriter number for use in Maryland is 1-800-492-8104.

#### § 1000.4 Commission addresses.

(a) The principal offices of the Commission are at 5401 Westbard Avenue, Bethesda, Maryland. All written communications with the Commission should be addressed to the Consumer Product Safety Commission, Washington, DC 20207, unless otherwise specifically directed.

(b) The Commission has 3 Regional Centers which are located at the following addresses and which serve the states indicated:

(1) Central Regional Center, 230 South Dearborn St., Room 2944, Chicago, Illinois 60604; Alabama, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Wisconsin.

(2) Eastern Regional Center, 6 World Trade Center, Vesey Street, Room 301, New York, New York 10048; Connecticut, Delaware, District of Columbia, Florida, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, and Virgin Islands.

(3) Western Regional Center, U.S. Customs House, 555 Battery St., Room 415, San Francisco, California 94111; Alaska; American Samoa, Arizona, Arkansas, California, Colorado, Guam, Hawaii, Idaho, Louisiana, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming.

#### § 1000.5 Petitions.

Any interested person may petition the Commission to issue, amend, or



revoke a rule or regulation by submitting a written request to the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

#### § 1000.6 Commission decisions and records.

(a) Each decision of the Commission, acting in an official capacity as a collegial body, is recorded in Minutes of Commission meetings or as a separate Record of Commission action. Copies of Minutes or of a Record of Commission action may be obtained upon written request from the Secretary, Consumer Product Safety Commission, Washington, DC 20207, or may be examined in the public reading room at Commission headquarters. Requests should identify the subject matter of the Commission action and the approximate date of the Commission action, if known.

(b) Other records in the custody of the Commission may be requested in writing from the Office of the Secretary pursuant to the Commission's Procedures for Disclosure or Production of Information under the Freedom of Information Act (16 CFR Part 1015).

#### § 1000.7 Advisory opinions and interpretations of regulations.

(a) *Advisory opinions.* Upon written request, the General Counsel provides written advisory opinions interpreting the acts the Commission administers. Advisory opinions represent the legal opinions of the General Counsel and may be changed or superseded by the Commission. Requests for issuance of advisory opinions should be sent to the General Counsel, Consumer Product Safety Commission, Washington, DC 20207. Requests for copies of particular previously issued advisory opinions or a copy of an index of such opinions should be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

(b) *Interpretations of regulations.* Upon written request, the Associate Executive Director for Compliance and Administrative Litigation will issue written interpretations of Commission regulations pertaining to the safety standards and the enforcement of those standards. Interpretations of regulations represent the interpretations of the staff and may be changed or superseded by the Commission. Requests for such interpretations should be sent to the Associate Executive Director for Compliance and Administrative Litigation, Consumer Product Safety Commission, Washington, DC 20207. Requests for interpretations of administrative regulations (e.g., Freedom of Information Act regulations) should

be sent to the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

#### § 1000.8 Meetings and hearings; public notice.

(a) The Commission may meet and exercise all its powers in any place.

(b) Meetings of the Commission are held as ordered by the Commission and, unless otherwise ordered, are held at the principal office of the Commission at 5401 Westbard Avenue, Bethesda, Maryland. Meetings of the Commission for the purpose of jointly conducting the formal business of the agency, including the rendering of official decisions, are generally announced in advance and open to the public, as provided by the Government in the Sunshine Act (5 U.S.C. 552b) and the Commission's Meetings Policy (16 CFR Part 1012).

(c) The Commission may conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States. It will publish notice of any proposed hearing in the Federal Register and will afford a reasonable opportunity for interested persons to present relevant testimony and data.

(d) Notices of Commission meetings, Commission hearings, and other Commission activities are published in a Public Calendar, as provided in the Commission's Meetings Policy (16 CFR Part 1012).

#### § 1000.9 Quorum.

Three members of the Commission constitute a quorum for the transaction of business.

#### 1000.10 The Chairman and Vice Chairman.

(a) The Chairman is the principal executive officer of the Commission and, subject to the general policies of the Commission and to such regulatory decisions, findings, and determinations as the Commission is by law authorized to make, he or she exercises all of the executive and administrative functions of the Commission.

(b) The Commission annually elects a Vice Chairman to act in the absence or disability of the Chairman or in case of a vacancy in the Office of the Chairman.

#### § 1000.11 Delegation of functions.

Section 27(b)(9) of the Consumer Product Safety Act (15 U.S.C. 2076(b)(9)) authorizes the Commission to delegate any of its functions and powers, other than the power to issue subpoenas, to any officer or employee of the Commission. Delegations are published in the Commission's Directives System.

#### § 1000.12 Organizational structure.

The Consumer Product Safety Commission is composed of the principal units listed in this section.

(a) The following units report directly to the Chairman of the Commission:

- (1) Office of the General Counsel;
- (2) Office of Congressional Relations;
- (3) Office of the Secretary;
- (4) Office of Internal Audit;
- (5) Office of Equal Employment Opportunity and Minority Enterprise;
- (6) Office of the Executive Director.

(b) The following units report directly to the Executive Director of the Commission:

- (1) Office of Program Management and Budget;
- (2) Office of Planning and Evaluation;
- (3) Office of Information and Public Affairs;
- (4) Directorate for Epidemiology;
- (5) Directorate for Economic Analysis;
- (6) Directorate for Engineering Sciences;
- (7) Directorate for Health Sciences;
- (8) Directorate for Compliance and Administrative Litigation;
- (9) Directorate for Administration;
- (10) Directorate for Field Operations;

#### § 1000.13 Directives system.

The Commission maintains a Directives System which contains delegations of authority and descriptions of Commission programs, policies, and procedures. A complete set of directives is available for inspection in the public reading room at Commission headquarters.

#### § 1000.14 Office of the General Counsel.

The Office of the General Counsel provides advice and counsel to the Commissioners and organizational components of the Commission on matters of law arising from operations of the Commission. It prepares the Commission's legislative program and comments on relevant legislative proposals originating elsewhere. The Office, in conjunction with the Department of Justice, is responsible for the conduct of all Federal court litigation to which the Commission is a party. The Office also advises the Commission on administrative litigation matters. The Office provides final legal review of and makes recommendations to the Commission on proposed product safety standards, rules, regulations, petition actions, and substantial hazard actions. It also provides legal review of certain procurement, personnel, and administrative actions and drafts documents for publication in the Federal Register.

#### § 1000.15 Office of Congressional Relations.

The Office of Congressional Relations is the principal contact with the committees and members of Congress. It performs liaison duties for the Commission, provides information and assistance to Congress on matters of Commission policy, and coordinates testimony and appearances by Commissioners and agency personnel before Congress.

#### § 1000.16 Office of the Secretary.

The Office of the Secretary prepares the Commission's agenda, schedules and coordinates Commission business at official meetings, and records, issues, and stores the official records of Commission actions. The Office prepares and publishes the Public Calendar under the Commission's Meetings Policy. The Office exercises joint responsibility with the Office of the General Counsel for the interpretation and application of the Privacy Act, Freedom of Information Act, and the Government in the Sunshine Act, and prepares reports required by these acts. It issues Commission decisions, orders, rules, and other official documents; including Federal Register notices, for and on behalf of the Commission and controls the use of the Commission seal. The Office supervises and administers the dockets of adjudicative proceedings before the Commission. The Office maintains the records of continuing guaranties of compliance with applicable standards of flammability issued under the Flammable Fabrics Act (FFA) which are filed with the Commission in accordance with provisions of section 8(a) of the FFA (15 U.S.C. 1197(a)). Upon request, the Office of the Secretary provides appropriate forms to persons and firms desiring to execute continuing guaranties under the FFA. The Office also supervises and administers the public reading room.

#### § 1000.17 Office of Internal Audit.

This Office reviews, analyzes, and reports on Commission programs and organization to assess compliance with relevant laws, regulations, and principles of efficiency, effectiveness, and economy.

#### § 1000.18 Office of Equal Employment Opportunity and Minority Enterprise.

The Office of Equal Employment Opportunity and Minority Enterprise assures the agency complies with all laws, regulations, rules and internal policies relating to equal employment opportunity. It assures compliance with the Small Business Act as it relates to small and disadvantaged business

utilization. The Office also conducts the Upward Mobility Program.

#### § 1000.19 Office of the Executive Director.

The Executive Director with the assistance of the Deputy Executive Director, under the broad direction of the Chairman and in accordance with Commission policy, acts as the chief operating manager of the agency, supporting the development of the agency's budget and operating plan before and after Commission approval, and managing the execution of those plans. The Executive Director has direct line authority over the following directorates and offices: Epidemiology, Economic Analysis, Engineering Sciences, Health Sciences, Compliance and Administrative Litigation, Administration, and Field Operations; the Office of Program Management and Budget; the Office of Planning and Evaluation; and the Office of Information and Public Affairs.

#### § 1000.20 Office of Program Management and Budget.

(a) The Office of Program Management and Budget is responsible for implementing the Commission's regulatory decisions, overseeing the development of the Commission's budget, program goals and objectives, and hazard program plans. The Office, in consultation with other offices and directorates, prepares, for the Commission's approval, the annual budget requests to Congress and the Office of Management and Budget and the operating plan for each fiscal year. It manages the execution of the Commission's budget. The Office recommends to the Office of the Executive Director actions to enhance effectiveness of the Commission's programs and activities.

(b) The Office of Program Management and Budget is also responsible for managing the hazard-related programs contained in the Commission's operating plan and carries out other tasks assigned by the Executive Director. The Office is responsible for Information Resources Management activities and for international liaison activities relating to consumer safety. Program Managers within the Office provide overall direction to all hazard program projects, including those involving mandatory and voluntary standards, petitions, and emerging hazards. This is especially true where functional responsibility extends across the organizational lines of other Commission offices and directorates. The Program Managers' authority complements the functional authority vested in the Associate Executive

Directors and other Office Directors to assure that relevant legal, technical, environmental, economic, and social impacts of projects are comprehensively and objectively presented to the Commission for decision. The Office carries out regular program reviews assessing the progress of individual projects to reach goals established by the Commission. The Office consults with the other staff directorates and offices in developing strategies to meet these goals. It is responsible for resolving issues that arise among the directorates and other offices in carrying out hazard program goals.

#### § 1000.21 Office of Planning and Evaluation.

The Office of Planning and Evaluation reports to the Executive Director and is responsible for the Commission's planning and evaluation activities. It develops integrated short and long range plans for achieving the Commission's goals and objectives. The Office is responsible for the development and analysis of both major policy and operational issues. Evaluation studies are conducted to determine how well the Commission fulfills its mission. These studies include impact and process evaluations of Commission programs, projects, functions, and activities. Recommendations are made to the Executive Director for changes to improve their efficiency and effectiveness. Management analyses and special studies are also conducted. These cover, but are not limited to, internal controls, organizational performance, structure, and productivity measurement. Recommendations are made to the Executive Director for improving management efficiency and effectiveness.

#### § 1000.22 Office of Information and Public Affairs.

The Office of Information and Public Affairs is responsible for the development, implementation, and evaluation of a comprehensive national information and public affairs program designed to promote product safety. This includes responsibility for developing and maintaining relations with a wide range of national groups such as consumer organizations; business groups; trade associations; state and local government entities; labor organizations; medical, legal, scientific and other professional associations; and other Federal health, safety and consumer agencies. The Office also manages the Commission's Hotline, described in § 1000.3 of this chapter. The Office also is responsible for



implementing the Commission's media relations program nationwide. The Office serves as the Commission's spokesperson to the national print and broadcast media, develops and disseminates the Commission's news releases, and organizes Commission news conferences.

#### § 1000.23 Directorate for Epidemiology.

The Directorate for Epidemiology, which is managed by the Associate Executive Director for Epidemiology, is responsible for injury and human factors data analysis to identify hazards or hazard patterns. The Directorate collects data on consumer product-related hazards and potential hazards, determines the frequency, severity, and distribution of the various types of injuries, and investigates their causes. It assesses the effects of product safety standards and programs on consumer injuries and conducts epidemiological and human factors studies and research in the fields of consumer product-related injuries. The Directorate provides statistical support for all other Commission organizations, including, but not limited to, standards development, certification programs, and sampling for field inspection programs. It performs risk assessments based on accident data for physical, thermal, and electrical hazards in consumer products. It maintains an injury data clearinghouse and manages the National Electronic Injury Surveillance System (NEISS).

#### § 1000.24 Directorate for Economic Analysis.

The Directorate for Economic Analysis, which is managed by the Associate Executive Director for Economic Analysis, is responsible for providing the Commission with advice and information on economic and environmental matters and on the economic, social and environmental effects of Commission actions. It analyzes the potential effects of CPSC actions on consumers and on industries, including effects on competitive structure and commercial practices. The Directorate acquires, compiles, and maintains economic data on movements and trends in the general economy and on the production, distribution, and sales of consumer products and their components to assist in the analysis of CPSC priorities, policies, actions, and rules. It plans and carries out economic surveys of consumers and industries. It studies the costs of accidents and injuries. It evaluates the economic, societal, and environmental impact of product safety rules and standards. It performs such regulatory analyses and

such studies of costs and benefits of CPSC actions as are required by the Consumer Product Safety Act, The National Environmental Policy Act, the Regulatory Flexibility Act and other Acts, and by policies established by the Consumer Product Safety Commission.

#### § 1000.25 Directorate for Engineering Sciences.

The Directorate for Engineering Sciences, which is managed by the Associate Executive Director for Engineering Sciences, is responsible for developing technical policy and implementing the Commission's engineering programs. The Directorate provides engineering and physical science support to all of the Commission organizations, activities and programs. The Directorate is responsible for the development and evaluation of product safety standards, and product safety tests and test methods, based on engineering and other physical sciences, to support general agency regulatory activities. The Directorate develops and evaluates performance criteria, design specifications, and quality control standards for certain consumer products. It provides engineering and technical expertise to the Commission, conducts engineering tests and studies of the safety of consumer products, and evaluates industry voluntary standards efforts. It performs and monitors research in engineering and other physical sciences and manages the Commission's engineering laboratory and engineering test facility. The Directorate provides engineering services in support of the Commission's enforcement activities and monitors state laboratory testing contracts. It coordinates engineering research, testing, and evaluation activities with the National Institute of Standards and Technology and other federal agencies, private industry, and consumer interest groups. The Directorate conducts statistical analyses for the engineering aspects of standards development, quality control, and sampling for field inspection programs. The Directorate provides technical supervision and direction of all engineering activities including tests and analyses conducted in the field. The Directorate analyzes accident data, develops accident scenarios, and recommends solutions.

#### § 1000.26 Directorate for Health Sciences.

The Directorate for Health Sciences, which is managed by the Associate Executive Director for Health Sciences, is responsible for developing science policy and implementing the Commission's Health Sciences program. The Directorate's functional

responsibilities include development and evaluation of the scientific content of product safety standards and test methods based on the chemical, biological and medical sciences, and the conduct and evaluation of specific product testing to support general agency regulatory activity. The Directorate also provides scientific and medical expertise to the Commission and it develops and evaluates performance criteria, design specifications, and quality control standards for certain consumer products. It conducts and evaluates scientific tests and test methods, participates in the scientific development of product safety standards, and provides advice on proposed standards. It collects scientific and medical data, reviews and evaluates toxicological, medical, and chemical hazards, and determines exposure, uptake and metabolism, including identification of the toxicological and physiological bases which cause some population segments to be at special risk. It performs risk assessments for chemical hazards, and physical hazards based on medical injury modeling, in consumer products. It performs or monitors research, and conducts studies of the safety of, or of improving the safety of, consumer products. It provides the Commission's primary source of technical expertise for implementation of the Poison Prevention Packaging Act. It provides the Commission's expertise on manufacturing practices and quality assurance for chemical consumer products and it provides scientific and laboratory support to the Commission's and other laboratories' and other chemical or toxicological testing facilities. It provides scientific and medical support to all Commission organizations, activities, and programs. The Directorate provides scientific liaison with the National Toxicological Program, the National Cancer Institute, the Environmental Protection Agency, other federal agencies and programs, and organizations concerned with reducing the risks to consumers from exposure to chemical hazards. It also manages activities of the Commission's advisory committees such as Chronic Hazard Advisory Panels.

#### § 1000.27 Directorate for Compliance and Administrative Litigation.

The Directorate for Compliance and Administrative Litigation, which is managed by the Associate Executive Director for Compliance and Administrative Litigation, conducts or supervises the conduct of compliance

and administrative enforcement activity under all administered acts, provides advice and guidance to regulated industries on complying with all administered acts and reviews proposed standards and rules with respect to their enforceability. The Directorate's responsibility also includes identifying and acting on safety hazards in consumer products already in distribution, promoting industry compliance with existing safety rules, and conducting litigation before an administrative law judge relative to administrative complaints. It directs the enforcement efforts of the field offices and provides program guidance, advice, and case guidance to field offices and participates in the development of standards before their promulgation to assure enforceability of the final product. It enforces the Consumer Product Safety Act requirement that firms identify and report product defects which could present possible substantial hazards. It reviews consumer complaints, in-depth investigations, and other data to identify those consumer products containing such hazards or which do not comply with existing safety requirements. The Directorate negotiates and subsequently monitors corrective action plans designed to recall defective or non-complying products subject to the reporting requirements of section 15 of the Consumer Product Safety Act and the Federal Hazardous Substances Act, gives public warning to consumers where appropriate, and provides guidelines and directs the field in negotiating and monitoring corrective action plans designed to recall products which fail to comply with specific regulations. It gathers information on generic product hazards which may lead to subsequent initiation of safety standard setting procedures. The Directorate develops surveillance strategies and programs designed to assure compliance with Commission standards and regulations. It originates instructions to field offices and provides subsequent interpretations or guidance for field surveillance and enforcement activities.

#### § 1000.28 Directorate for Administration.

The Directorate of Administration, which is managed by the Associate Executive Director for Administration, is responsible for general administrative policy; maintenance of timeliness, quality, and efficiency of services; planning input, review; and administrative control within his or her functional area of responsibility. The Directorate's functional responsibility includes all general and delegated

administrative functions supporting the Commission in the areas of financial management, management and organizational analysis, personnel, training, automated data systems, telecommunications, the reference library, and the physical plant. The Directorate is responsible for the execution of payment, financial control, accounting, and reporting of all expenditures within the Commission. It is responsible for all aspects of personnel management for the Commission, including recruitment and placement, classification standards and policies, and employee and labor-management relations. It evaluates the need for, develops, and implements all training programs for the Commission, including employee training, executive development, and training programs involving outside parties. The Directorate designs, implements, and operates all automated data systems and telecommunications. It provides support services for space management, supply and property management, security, printing and reproduction, records management, transportation, warehousing, utilities, and mail. It is responsible for all CPSC contracts and procurement of services and supplies. It develops, implements, and maintains management information systems and distributes summary reports on data accumulated by those systems. The Directorate also maintains and updates the reference library, performs data and bibliographic research for the agency and its constituency, and administers the ordering, receiving, and distribution of all publications requested by or for CPSC personnel.

#### § 1000.29 Directorate for Field Operations.

(a) The Directorate for Field Operations, which is managed by the Associate Executive Director for Field Operations, has direct line authority over all Commission field operations; develops, issues, approves, or clears proposals and instructions affecting the field activities; and provides a central point within the Commission from which Headquarters officials can obtain field support services. The Directorate provides direction and leadership to the Regional Center Directors and promulgates policies and operational guidelines which form the framework for management of Commission field operations. The Directorate works closely with the other Headquarters functional units, the Regional Centers, and other field offices to assure effective Headquarters-field relationships, proper allocation of resources to support Commission priorities in the field, and effective performance of field tasks. It

represents the field and prepares field program documents. It coordinates direct contact procedures between Headquarters offices and Regional Centers. The Directorate is also responsible for liaison with State, local, and other Federal agencies on product safety programs in the field.

(b) Regional Centers are responsible for carrying out investigative, compliance, and consumer information and public affairs activities within their areas. They encourage voluntary industry compliance with the laws and regulations administered by the Commission and implement wide-ranging public information and education programs designed to reduce consumer product injuries. They also provide support and maintain liaison with components of the Commission, other Regional Centers, and appropriate Federal, State, and local government offices.

[FR Doc. 88-29779 Filed 12-27-88; 8:45 am]  
BILLING CODE 6335-01-M

## DEPARTMENT OF THE TREASURY

### Customs Service

#### 19 CFR Part 146

[T.D. 89-4]

### Interpretation of Exportation for Purpose of Foreign-Trade Zones Act

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule.

**SUMMARY:** This document gives notice of Customs final determination that imported merchandise cannot be considered to be exported pursuant to the Foreign-Trade Zones Act when it is sent to a foreign-trade zone in the United States for manufacturing. Accordingly, two Customs rulings, C.S.D. 84-97, republished as C.S.D. 85-10, as well as ORR letter ruling 218551, which permitted this expressly to obtain the payment of duty drawback or to cancel a temporary importation bond, are revoked as being without support in the law.

**EFFECTIVE DATE:** February 27, 1989.

**FOR FURTHER INFORMATION CONTACT:** William G. Rosoff, Entry Rulings Branch (202-566-5856).

#### SUPPLEMENTARY INFORMATION:

##### Background

Foreign-trade zones (zones) are secured areas within the United States to which certain foreign and domestic



merchandise may be brought for some purposes without being subject to the Customs laws of the United States. Their purpose is to attract and promote international trade and commerce. The Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. 81 a-u) ("the FTZA") provides for the establishment and regulation of foreign-trade zones in the U.S. Section 3 of the Act (19 U.S.C. 81c), allows foreign and domestic merchandise to be brought into a zone without being subject to the Customs laws of the U.S. The fourth proviso to that section expressly provides that for the purpose of the drawback laws, the warehousing laws and the laws on temporary importations under bond, merchandise may be considered exported, when admitted into a zone for the sole purpose of exportation, destruction or storage. Part 146, Customs Regulations (19 CFR Part 146), governs the admission of merchandise into a zone; the manipulation, manufacture, destruction, or exhibition of merchandise in a zone; the exportation of merchandise from a zone; and the transfer of merchandise from a zone into the customs territory.

Schedule 8, Part 5, Subpart C, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202), provides for temporary importations under bond (TIB's). Under these provisions, merchandise to be repaired, altered or processed in the U.S., may be admitted into the U.S. under bond without the payment of duty, provided the merchandise is exported within one year from the date of importation. If merchandise entered under a TIB is not exported before the expiration of the bond period, liquidated damages in the amount of the bond may be assessed against the importer.

Section 313, Tariff Act of 1930, as amended (19 U.S.C. 1313), provides for the refund of customs duty on certain imported merchandise. This refund is known as "drawback," and is generally dependent on exportation of the imported merchandise or an article manufactured from the imported merchandise.

Section 101.1(k), Customs Regulations (19 CFR 101.1(k)), defines "exportation" as a severance of goods from the mass of things belonging to this country with the intention of uniting them with the mass of things belonging to some foreign country.

On June 22, 1984, Customs issued ORR ruling letter 216727, which held that merchandise that is imported under a temporary importation bond (TIB), processed in the customs territory of the U.S. as defined in General Headnote 2, TSUS, and § 101.1(e), Customs Regulations (19 CFR 101.1(e)), and then

transferred into a U.S. zone for manufacturing is "considered" exported. Accordingly, merchandise manufactured in a zone may be entered from the zone for consumption upon payment of proper duty. It is implicit in this ruling that because shipment of merchandise to a zone for the purpose of manufacture is considered an exportation, a TIB covering such merchandise could be cancelled or a claim for drawback perfected upon the transfer of the merchandise.

The ruling was published as C.S.D. 84-97 on June 24, 1984 (18 Cust. Bull. 1069), and republished on February 13, 1985 (19 Cust. Bull. 509), as C.S.D. 85-10. ORR letter ruling 218551 dated January 29, 1986, also followed the reasoning of C.S.D. 84-97/C.S.D. 85-10, for purposes of duty drawback.

In response to a petition from three domestic trade associations, comprised of U.S. steel and automotive parts manufacturers, which requested the revocation of these rulings as being contrary to law and prejudicial to their members' competitive posture, Customs decided that comments should first be solicited before making a final determination in this matter. Consequently, on March 4, 1988, Customs published a notice of this effect in the *Federal Register* (53 FR 6996), and by subsequent notice on May 11, 1988 (53 FR 16730), the comment period was extended until June 17, 1988.

#### Discussion of Comments

In all, 98 comments from the public were received in response to the notice, 90 of which advocate the retention of the rulings, seven advocating their revocation. Substantial Congressional interest was also generated on both sides of this issue. One comment, which is beyond the scope of the notice, recommends that the term "exportation" in the Customs Regulations be expanded for drawback purposes to include imported duty-paid merchandise sent to the Virgin Islands.

#### Comments Favoring Retention

Virtually all those commenting in favor of retention state that the rulings promote the underlying policy of the Foreign-Trade Zones Act, as amended, 19 U.S.C. 81a-u (FTZA), to encourage domestic manufacturing and employment, and that revocation of the rulings could have the opposite effect. In particular, motor vehicle manufacturers located in special-purpose zones, or subzones, contend that they could be forced to transfer to foreign plants certain operations now performed on their behalf in this country by companies not using zones. The

consequence of revocation according to this view would, if anything, be the importation directly to zones of more elaborate components already finished.

Although a number of commenters insist that no legal issue is involved, only one of "policy," various legal arguments in support of the rulings are advanced by several commenters. It is initially asserted that the rulings find justification, as they themselves set forth, in the plain general language of section 3 of the FTZA, as amended, 19 U.S.C. 81c(a), which allows foreign and domestic merchandise of every description, except that prohibited by law, to be brought to a zone and manufactured; merchandise entered under a temporary importation bond (TIB) for initial processing, could thus lawfully be sent to a zone for manufacturing, and would thereby be considered exported, as required to satisfy the statutory bond requirement; and duty-paid merchandise would similarly be considered exported as necessary for drawback purposes if placed in a zone subject to the third proviso to section 3, which requires that domestic, including duty-paid, merchandise be treated as foreign, if its identity in the zone is lost.

These commenters also perceive the rulings as founded upon a concept of actual exportation, albeit as modified by Customs, which has been done from time to time assertedly to accommodate changing technology and business conditions. For example, merchandise sent to the Trust Territory of the Pacific Islands, T.D. 56545(3), and merchandise assembled into a communications satellite sent into permanent orbit in outer space, T.D. 68-206(1), have been stated to be exported for drawback purposes, notwithstanding that neither destination constitutes a foreign country, and § 101.1(k), Customs Regulations (19 CFR 101.1(k)), in line with long settled judicial precedent, dictates, in part, that to be exported there be an intent to unite the goods with the commerce of "some foreign country."

In any event, these commenters distinguish the fourth proviso to section 3 of the FTZA, which expressly allows merchandise to be regarded as exported, by declaring that this proviso is limited to its specific purposes (exportation, storage or destruction), and that is not concerned with merchandise intended for manufacture in a zone.

In addition, the following arguments are made: inasmuch as the FTZA was amended in October 1984, subsequent to C.S.D. 84-97 (85-10), and again in October 1986, subsequent to ORR Ruling

218551, without adverse impact on either ruling, Congress has impliedly acquiesced in and accepted them; it has not been demonstrated that the rulings are "clearly wrong" as required by § 177.10(b), Customs Regulations (19 CFR 177.10(b)); the March 4, 1988, notice of reconsideration (53 FR 6996) does not give the public a fair opportunity to understand the issues and comment meaningfully—it should be withdrawn and a new notice published.

#### Comments Favoring Revocation

Those commenting in favor of revocation state that the rulings are without foundation in the FTZA, that, indeed, the only authority for considering merchandise exported under the Act is contained in the fourth proviso to section 3 thereof, which limits the merchandise so sent to exportation, storage or destruction, and prohibits its manufacture. Some of these commenters also observe that the rulings in effect confer de facto zone status upon domestic (nonzone) businesses which supply zone users, without an application for zone status having been approved by the Foreign-Trade Zones (FTZ) Board at the Department of Commerce, as required by law.

Also, the three trade associations comprised of steel and automotive parts manufacturers, which originally petitioned for revocation, contend that the rulings facilitate the importation and domestic consumption of foreign steel and automotive parts at lower rates of duty than would otherwise be possible, at variance with the Congressional intent underlying both the TIB provisions and the drawback statute, and adversely affecting their members' competitive posture.

#### Customs Analysis

After a thorough review of the Foreign-Trade Zones Act, its plain meaning as well as legislative history, Customs is constrained to agree that the fourth proviso to section 3 of the Act, as amended, 19 U.S.C. 81c(a), contains the exclusive authority thereunder for considering merchandise sent to a zone as exported, as required either for cancelling a temporary importation bond (TIB) (Schedule 8, Part 5, Subpart C, item 864.05, TSUS; 19 U.S.C. 1202), or for obtaining the payment of duty drawback under 19 U.S.C. 1313. The rulings under reconsideration are therefore without support in the law, and they will be revoked.

#### "Considered" Exported

Section 3 of the FTZA was amended in 1950 by Pub. L. 81-566 to authorize manufacturing in a zone, and to add a

fourth proviso whereby merchandise sent to a zone could be considered to be exported in part "for the purpose of— . . . the drawback, warehousing, and bonding . . . provisions of the Tariff Act of 1930 . . ."

To obtain the benefits of the fourth proviso, however, requires compliance with its restrictions. Merchandise may not be entered from the zone for domestic consumption absent a finding of public interest by the FTZ Board, and then only upon payment of a duty equal to that from which the proviso relieved the merchandise. S. Rept. 81-1107, reprinted in, 1950 U.S. Code Cong. & Admin. News 2533, 2537-2538. In addition, merchandise subject to the proviso is confined solely to being exported, destroyed or stored in the zone. On its plain face, the proviso precludes manufacturing, and this is so even if merchandise subject thereto were destined for actual exportation. "The benefits would not extend to articles taken into a zone for manipulation or manufacture prior to exportation." *Ibid.*, 2537.

Nevertheless, the rulings interpret the FTZA as generally allowing merchandise to also be considered exported for item 864.05 TIB or drawback purposes, if sent to a zone for manufacturing, following which the products could be entered for consumption upon payment of "applicable" duty, which could be considerably less than the duty from which the rulings relieved the merchandise.

It is Customs' view that the rulings are inconsistent with the prohibition against manufacturing, and to this extent the other restrictions inherent as well, in the fourth proviso. As such, the rulings result in the effective partial repeal of the proviso, which runs contrary to "the elementary canon of construction . . . that a statute . . . be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); and *cf.*, *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976).

Consequently, except for the fourth proviso, TIB merchandise, because it must either be exported or destroyed (19 U.S.C. 1557(c)), would be "prohibited by law" from admission to a zone. See C.S.D. 81-71.

Duty-paid merchandise, though, may ordinarily be admitted to a zone. If it loses its identity therein, the third proviso prescribes that it be treated as foreign. But this does not permit such merchandise to be treated as exported. On the contrary, foreign merchandise in a zone is imported, and, other than under the fourth proviso, is correctly

considered as such, a fact routinely recognized by Congress in the legislative history of the statute, and by Customs in its regulations and rulings. See, e.g., S. Rept. 905, 73d Cong., 2d Sess., 2 ("[A foreign-trade zone] aims to foster the dealing in foreign goods that are imported . . ." (emphasis added)); 19 CFR 146.1(b)(11); C.S.D. 83-21; ORR Ruling 76-0067. Moreover, a party may not "choose" foreign status for such merchandise pursuant to the third proviso, as ORR Ruling 218551 improperly allows. See C.S.D. 82-112.

#### Actually Exported

The rulings in question, C.S.D. 84-97 (85-10), and ORR Ruling 218551, are not properly founded, in that there is no authority in the FTZA for "considering" merchandise exported if sent to a zone for manufacturing; they do not rely upon any notion of actual exportation as defined in the Customs Regulations, § 101.1(k), whether modified or otherwise. Even if the rulings did depend upon a concept of actual exportation, their attempted justification on this basis would be equally without merit. It would be fundamentally incompatible with the Congressional and administrative recognition, *supra*, that foreign merchandise placed in a zone is actually imported, not exported, these naturally being mutually exclusive propositions.

#### Congressional Acquiescence

The amendments to the FTZA in October 1984 (19 U.S.C. 81c(b), as amended; 19 U.S.C. 81c(e), as amended; Pub. L. 98-573) and in October 1986 (19 U.S.C. 81c(c), as amended; Pub. L. 99-514), and accompanying legislative history (reprinted in 1984 U.S. Code Cong. & Admin. News 4910; 1986 U.S. Code Cong. & Admin. News 4075), did not to any extent reference or discuss the subject matter currently under review. In the face of a silent Congressional record, as here exists, administrative action would, at a minimum, have to be long-standing before it could be fairly inferred that Congress has acquiesced in it, and, in this connection, Customs has concluded that the decisions in C.S.D. 84-97 (85-10), dated June 22, 1984, and ORR Ruling 218551, dated January 29, 1986, were not "long-standing" at the time of the March 4, 1988, official notice of reconsideration (53 FR 6996). Compare, *Toyota Motor Sales U.S.A., Inc. v. United States*, 7 CIT 178, 193-194 (1984), *aff'd*, 3 Fed. Cir. 93 (1985) (three-year practice not long-standing).

Moreover, where an agency interpretation of existing legislation is



plainly erroneous, as in the present instance, it is well settled that Congress must give express consideration or make some specific reference to the interpretation in the later legislation, in order to ratify it. See, *Kristensen v. McGrath*, 179 F.2d 796, 803-804 (D.C. Cir. 1949), *aff'd.*, 340 U.S. 162; *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 280 (1929). Implied repeal, which, as already noted, would otherwise be the case here, is not a preferred principle of statutory construction. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

#### Policy Considerations

While a general purpose, or policy, of the FTZA may be said, at least partly, to be to assist American business and labor through the encouragement of manufacturing, it must be remembered that the purpose of a law may properly be achieved only within its established statutory framework. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 392 (1970), and cannot sanction the disregard of specific statutory requirements (in this case, those of the fourth proviso) merely because they are perceived as inimical or unsuited to achieving this purpose in a particular case. *Commissioner of Internal Revenue v. Gordon*, 391 U.S. 83, 91-93 (1968). In this regard, the rulings under review amount, in fact, to a legislative amendment, rather than an interpretation, of the FTZ law currently in force, which is the exclusive province of Congress. *Accord, e.g., Petri v. F.E. Creelman Lumber Co.*, 199 U.S. 487, 495 (1905).

#### "Clearly Wrong" Standard

The rulings are not subject to the "clearly wrong" standard of § 177.10(b) because they are not rulings regarding a rate of duty or charge within the contemplation of this regulation. *accord, American Air Parcel Forwarding Co. v. United States*, 7 CIT 231, 234-235 (1984) (a ruling relating to the valuation of merchandise, and not to its classification, held not covered by § 177.10(b)); *Old Republic Ins. Co. v. United States*, 645 F. Supp. 943, 948 (CIT 1986). Nonetheless, it is Customs' view that because the Rulings are without support in the law, the "clearly wrong" standard would be met if it were applicable.

There is no need for the publication of another notice of reconsideration. In addition to the fact that the March 4, 1988, Federal Register notice (53 FR 6996) fully and fairly articulated the subject matter concerned, as evidenced by the depth and detail of the many comments submitted by those

participating in this administrative process, another notice would be unwarranted and pointless in any event because "comments from the public at large cannot change the essentially legally correct result." *National Juice Products Association v. United States*, 628 F. Supp. 978, 994 (CIT 1986).

#### Conclusion

In view of the foregoing, and following careful consideration of the comments received and further review of the matter, Customs has determined to revoke C.S.D. 84-87, C.S.D. 85-10 and ORR letter ruling 218551, inasmuch as there is no authority in the Foreign Trade Zones Act permitting imported merchandise to be considered exported when it is sent to a foreign trade zone in the United States for manufacturing.

#### Drafting Information

The principal author of this document was Russell A. Berger, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development. William von Raab, Commissioner of Customs.

Approved: November 18, 1988.

John P. Simpson,  
Acting Assistant Secretary of the Treasury.  
[FR Doc. 88-29718 Filed 12-27-88; 8:45 am]

BILLING CODE 4820-02-M

#### DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

##### Office of the Assistant Secretary for Community Planning and Development

##### 24 CFR Part 570

[Docket No. R-88-1374; FR-2381]

##### Urban Development Action Grant (UDAG) Application From Consortia of Small Cities

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Final rule.

**SUMMARY:** This rule makes final a previously published proposed rule permitting consortia of geographically proximate cities of less than 50,000 to apply for grants on behalf of a member city that is otherwise eligible for assistance but unable to handle independently the administrative or financial burden of a desired project.

**EFFECTIVE DATE:** Under section 7(o)(3) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(o)(3)),

this final rule cannot become effective until after the first period of 30 calendar days of continuous session of Congress which occurs after the date of the rule's publication. HUD will publish a notice of the effective date of this rule following expiration of the 30-session-day waiting period. Whether or not the statutory waiting period has expired, this rule will not become final until HUD's separate notice is published announcing a specific effective date.

**FOR FURTHER INFORMATION CONTACT:** Stanley Newman, Director, Office of Urban Development Action Grants, Room 7262, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, (202) 755-8290. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** This rule makes final a previously published proposed rule permitting geographically proximate communities of less than 50,000 population to apply jointly for UDAG assistance on behalf of an eligible distressed city and thereby provide the management framework necessary to carry out the project. This rule would implement the statutory change by setting forth departmental policies and procedures governing applications for, and the awarding of grants to, consortia of communities.

The Department published a proposed rule on August 12, 1988 (53 FR 30442) seeking public comment. No comments were received by HUD.

#### Finding and Certifications

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the National Environment Policy Act of 1969. The rule implements an amendment to section 119(1) of the Housing and Community Development Act of 1974, 42 U.S.C. 5318 and will not result in significant impacts on the human environment. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of Rules Docket Clerk at the above address.

This rule does not constitute a "major rule" as that term is defined in section 1(b) of Executive Order 12291 issued by the President on February 17, 1981. Analysis of the proposed rule indicates that it does not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse

effect on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Under the Regulatory Flexibility Act (5 U.S.C. 601), the undersigned certifies that this rule would not have a significant economic impact on a substantial number of small entities because the number of applications expected would not be substantial. The funding for the UDAG program has been reduced in recent years, and only one-fourth of the funding is allocated to small cities. Applications submitted because of the consortia arrangement will have to compete with individual small cities applications and the Department does not that there will be very many for consideration.

The General Counsel, as the Designated Official under Executive Order 12806, *The Family*, has determined that the rule will not have a significant impact on the family. The final rule allows geographically proximate small cities to apply jointly for UDAG assistance on behalf of a member city and will have little, if any, impact on family formation, maintenance or general well-being.

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12811, *Federalism*, has determined that the final rule does not involve the preemption of State law by Federal statute or regulation, and does not have federalism implications. The final rule does not have federalism implications. The final rule allows geographically proximate small cities to apply jointly for UDAG assistance on behalf of a member city and will not have any direct impact on the States. The rule is listed as item number 1018 in the Department's Semiannual Agenda of Regulations published October 24, 1988 (53 FR 41974, 42001) under Executive Order 12291 and the Regulatory Flexibility Act.

The Catalogue of Federal Domestic Assistance number is 14.221-Urban Development Action Grants.

#### List of Subjects in 24 CFR Part 570

Community development block grants, Grant programs: housing and community development, Loan programs: housing and community development, Low and moderate income housing, New communities, Pockets of poverty, Small cities.

Accordingly, the proposed rule published in the Federal Register on August 12, 1988 (53 FR 30442) is adopted as final without change as set forth below.

1. The authority citation for Part 570 continues to read as follows:

**Authority:** Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301-5320); sec. 7(d), Department of HUD Act (42 U.S.C. 3535(d)).

2. A new § 570.467 is added to read as follows:

#### § 570.467 Specific provisions for consortia of small cities applying for UDAG funds.

(a) *General.* Beginning with the July, 1988 funding round (represented in the table in § 570.460(a) as the May 1-31 application period, the June 1-July 31 review period, and the July 31 decision date), geographically proximate cities of less than 50,000 population may combine to apply for grants on behalf of a member city that is otherwise eligible for assistance under this subpart. Grants awarded to such consortia shall be administered in compliance with eligibility requirements applicable to individual cities, as set forth in this subpart. For purposes of this section, a consortium may include county governments that are not urban counties. To be eligible, the following general requirements must be met:

(1) Member communities of a consortium must be geographically proximate (i.e. located with normal commuting distance to the project) to the eligible distressed city or cities for which the application is being submitted, as determined by the appropriate HUD field office based on data and analysis supplied by the applicant.

(2) The project site must be located in an area which is within the jurisdiction of a member of the consortium;

(3) At least 51% of the jobs and taxes must go to an eligible distressed city or cities.

(4) All the jobs and taxes to be generated by the project will be counted in the calculation of project selection points.

(b) *Additional requirements.* In addition to the general requirements set forth in paragraph (a) of this section, the following requirements must be met:

(1) The application must include, in addition to the requirements of § 570.458, an executed cooperation agreement signed by all member communities and designating the member unit of government whose chief executive officer will be administratively responsible for the project and the responsible federal official for NEPA, historic preservation and other statutory and regulatory requirements, as set forth in § 570.458(c)(14). The cooperation agreement must also identify the

expected project benefits, i.e., jobs, taxes and repayment and how these project benefits will be allocated among the member communities and the distressed city or cities.

(2) The application must include certification as to each member's authority to enter into the cooperation agreement.

(3) Each member of the consortium must meet all the Fair Housing and Equal Opportunity requirements set forth in this subpart.

(4) UDAG repayments either must go to the eligible city or eligible cities receiving project benefits or must be used entirely for the benefit of these eligible cities.

(c) *Other considerations.* If the benefits go to one eligible city, then the impact and distress rankings of that city will be used. If more than one eligible distressed city is receiving benefits, the impact and distress scores will be recalculated based on the combined characteristics of the communities receiving benefits.

Date: December 19, 1988.

Jack R. Stokvis,

General Deputy, Assistant Secretary for Community Planning and Development.

[FR Doc. 88-29734 Filed 12-27-88; 8:45 am]

BILLING CODE 4210-01-M

#### DEPARTMENT OF LABOR

##### Occupational Safety and Health Administration

##### 29 CFR Part 1952

##### Virginia State Plan; Final Approval Determination; Correction

**AGENCY:** Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

**ACTION:** Final State plan approval.

**SUMMARY:** In FR Doc. 88-27480, published November 30, 1988, OSHA amended Subpart EE of 29 CFR Part 1952 to reflect the Assistant Secretary's decision to grant final approval to the Virginia State plan and to make related revisions. In revising the table of contents for Subpart EE, the listing of § 1952.377, "Changes to approved plans," was inadvertently omitted from the revised table of contents. This notice will correct that error by revising the table of contents to include the omitted section number and heading.

**EFFECTIVE DATE:** December 28, 1988.

**FOR FURTHER INFORMATION CONTACT:** James Foster, Director, Office of Information and Consumer Affairs,



Occupational Safety and Health Administration, U.S. Department of Labor, Room N-3637, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 523-8148.

#### List of Subjects in 29 CFR Part 1952

Intergovernmental relations, Law enforcement, Occupational safety and health.

(Authority: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, (Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR Part 1902, Secretary of Labor's Order No. 9-83 (48 FR 35736)).

Signed at Washington, DC, this 15th day of December 1988.

John A. Pendergrass,  
Assistant Secretary.

#### PART 1952—(CORRECTED)

Accordingly, the revised table of contents for Subpart EE of 29 CFR Part 1952 appearing in the Federal Register of November 30, 1988, is hereby corrected by adding an entry for § 1952.377 to read as follows:

#### Subpart EE—Virginia

§ 1952.377 Changes to approved plans.  
[FR Doc. 88-29790 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-26-M

#### VETERANS ADMINISTRATION

##### 38 CFR Part 14

#### Recognition of Organizations, Representatives, Attorneys, and Agents

AGENCY: Veterans Administration.  
ACTION: Final rule.

**SUMMARY:** The Veterans Administration (VA) has adopted the following regulations to revise and clarify existing procedures and requirements regarding recognition of service organizations and their representatives and other individuals, agents, and attorneys representing claimants for benefits administered by the VA. The revised regulations are designed to improve the VA's ability to assure the availability of high quality representation of claimants.  
**EFFECTIVE DATE:** December 28, 1988.

**FOR FURTHER INFORMATION CONTACT:** Andrew J. Mullen, Deputy Assistant General Counsel (022A), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 233-2440.

**SUPPLEMENTARY INFORMATION:** On pages 8472 through 8476 in the Federal Register of March 18, 1987, the VA

published proposed amendments to Title 38, Code of Federal Regulations, including the establishment of new criteria for recognition as a national veterans' service organization, in addition to the current requirement that an organization be congressionally chartered. Further, new information submission provisions were proposed, including a requirement that an organization requesting recognition state in writing that it would not represent to the public that VA recognition of the organization was for any purpose other than claim representation. Other amendments concerned representation of claimants by attorneys, permission for participation in the representation process of paralegals, law clerks, and law students, and the allocation of space and office facilities at VA regional offices to recognized organizations.

The VA received comments from four veterans' service organizations and two individuals, one of whom is an attorney. The significant comments and recommendations with respect to the proposed amendments are summarized below, with the Agency's responses.

#### Comments and Recommendations

##### Section 14.627 Definitions

No comments, suggestions, or objections were received with regard to the definitions.

##### Section 14.628 Recognition of organizations

One commenter noted that no procedures were set forth for "decertifying" an already-recognized organization and suggested, in broad outline, provisions that should be made in the event the VA intends to maintain the authority to terminate recognition. Another commenter viewed the absence of codified procedures for termination of an organization's recognition as an acknowledgement that the VA lacks authority to do so. In response to these comments, it is pertinent to note that the VA has never taken adverse action to terminate the recognition status of a service organization. The Agency's statutory authority to recognize organizations is discretionary, however, and the lack of explicit rules for effecting termination of such recognition should not be interpreted as an indication to the contrary. We simply perceive no reason, at present, for setting forth such procedures, absent any historical demonstration of necessity for them.

Two commenters expressed uncertainty whether, in essence, the requirements for the purpose of recognition as a national organization

pursuant to § 14.628(a)(2)(i)-(v), (d), and (e) are one-time or ongoing in nature. Their apprehension, evidently, is that data and information to be submitted under these provisions will be required on a periodic basis (such as annually), even from organizations who have secured VA recognition under § 14.628. In response to these concerns, we point out that § 14.628 is concerned generally (as indicated by its introductory sentence and the heading of § 14.628(e)) with establishing the terms and conditions of initial recognition, that is, with one-time requirements for recognition. We perceive no grounds for inferring a requirement of repeated, ongoing submissions. We do emphasize, however, that the Administrator or his/her designee is authorized under new § 14.628(g) to request further information from any recognized organization. This provision, necessary to responsible monitoring by the VA, is not tantamount to a formal, ongoing reporting requirement.

A commenter suggested amendment of § 14.628(e)(7)(i) to indicate that a volunteer attorney in private practice, who occasionally represents VA claimants on behalf of a recognized organization, is not prevented from charging a fee for "service to a claimant" in a non-VA matter or in a Federal Tort Claims Act malpractice suit against the VA. We agree with the implication of this suggestion that the fee limitation statute does not bar an attorney from charging a veteran a fee for services not involving an administrative claim for benefits under Title 38, United States Code. The provision in question, however, is intended to address an organization's accredited representatives rather than non-accredited attorneys. To clarify the point, we have revised § 14.628(e)(7)(i) accordingly.

The attorney commenter objected, in general, to what he described as "bodycount criteria" in § 14.628 as the basis for organization recognition. He questions, in essence, whether there is a connection between thoroughness and competence in representation of a veteran and the number of veterans represented. Our response is twofold: First, we believe that the number of veterans represented is a valid, logical gauge of an organization's capacity to provide quality representation. Demonstrated competence resources, and experience are closely related to "a sizable organizational membership" and "performance of . . . a veterans' services to a sizable number of veterans," as required in § 14.628(d)(2). Second, under § 14.630, "[A]ny person

may be authorized to prepare, present, and prosecute a particular claim," and under § 14.629(c), an attorney may be so authorized by a claimant, without reference to how many others the attorney has represented. We would further note that § 14.628(d)(2) pre-existed the current amendments, and is unaffected by them.

##### Section 14.629 Requirement for accreditation of representatives, agents, and attorneys

One commenter, a veterans' organization, opined that proposed revisions of § 14.629 impose inadequate controls upon legal interns, law students, and paralegals, who will be authorized to assist in the claims process. The commenter considered insufficient the requirement of § 14.631(c)(3) that these individuals be under the direct supervision of a claimant's attorney when assisting in the preparation, presentation, or prosecution of a claim. It is argued that attorneys may lack competence in VA-benefit-related matters or that they may be deficient in supervisory capability. However, VA is convinced that the principle of accountability is adequately served by the proposed revisions. Clearly, the changes preserve ultimate answerability for the consequences of malfeasance or misfeasance by legal interns, law students, or paralegals with the supervising attorney, or the law firm or legal service office by which he or she is employed. Like other Federal agencies, VA is required to accept an attorney's membership in a State bar as sufficiently indicative of competency to represent claimants, 5 U.S.C. 500(b). Once recognized to represent a claimant, a licensed attorney is subject to the provisions of § 14.633, which sets out grounds for termination of such recognition.

The aforementioned veterans' organization also argued that accredited nonlawyer representatives should be empowered to oversee legal interns, law students, and paralegals in the same manner as attorneys are authorized to do, and asserted that the proposed rules are too vague as regards the definition of these "legal assistants" and the degree of supervision to be exercised over them by their supervising attorneys. We would note that it is common practice for attorneys to avail themselves of the assistance of legal interns, law students, and paralegals, whether on a paid or volunteer basis. This practice is prevalent in law school clinical training programs. While no precise definitions appear necessary, we view a legal intern as a law school graduate not yet admitted to a State bar,

a law student as an individual pursuing a Juris Doctor degree at a school approved by a recognized accrediting association, and a paralegal as a graduate of paralegal training approved by a recognized accrediting association. Authority for assistance of this type for attorneys representing VA claimants has existed at the appellate level for over five years, under the rules of practice of the Board of Veterans Appeals (BVA), 38 CFR 19.156. The BVA has recently proposed a regulatory amendment to clarify that attorneys employed by recognized organizations may utilize such assistance to the same extent as attorneys recognized independently. See 53 FR 20653. Consistent with the practice of the BVA, we believe it appropriate that only attorneys be authorized to supervise legal interns, law students, and paralegals. As for the precise degree of control over these legal assistants, we rely upon the integrity of the attorneys involved to assure that claimants receive a high quality of representation, and that the attorneys closely supervise the activities of their assistants in the claim process.

##### Section 14.630 Authorization for a particular claim

No comments, suggestions, or objections were received with regard to this proposed rule.

##### Section 14.631 Powers of attorney

One commenter thought clarification was needed concerning language in § 14.631(c)(2) regarding the precise role of an attorney acting under a power of attorney obtained by a service organization in accordance with § 14.631(a). Specifically, it was thought unclear whether the term "employ," as used in § 14.631(c)(2), was meant to include only attorneys who are paid employees of the service organization or to include any attorney, paid or unpaid, selected by the service organization to handle the case. VA is of the view that the policy of accountability underlying the regulations pertaining to recognition of representatives of claimants requires that "employ" be defined to encompass a situation in which an attorney is retained by a service organization for the purpose of pursuing a person's claim for entitlement to a VA benefit. An attorney lacking any accredited, employment, or retainer relationship with a recognized organization, who wishes to represent a claimant, should either secure a power of attorney under § 14.631(a) or submit a declaration of representation under § 14.629(c).

Another commenter felt that § 14.631(c)(3) should be modified to

permit legal interns, law students, and paralegals to be present at a hearing without a supervising attorney. Since VA is of the judgment that such a change would excessively reduce the responsibility of the attorney of record for direct oversight and supervision of pursuit of a veterans' benefit claim, we cannot concur in this proposal. The commenter further expressed concern about § 14.631(d), pertaining to the situation wherein an attorney submits a letter of representation under § 14.629 regarding one specific benefit, without thereby automatically revoking existing powers of attorney regarding other benefits. The concern apparently is that information regarding the specific claim might be disseminated to a service organization, thus possibly violating the Privacy Act. VA deems this essentially an administrative concern, not appropriately dealt with by regulation amendment.

Another commenter, a service organization, questioned the sagacity of the proposed revision to § 14.631(d) insofar as it permits an attorney to submit a letter of representation under § 14.629 regarding one specific benefit, without such action automatically constituting revocation of existing powers of attorney concerning other benefits. The commenter regarded this amendment as ill-advised and dangerous, on the ground that only a review of a case in its entirety will afford a claimant due process and assure that all benefits for which he/she may be eligible are realized. If the proposed revision is put in effect, the service organization thought it would be in the claimant's best interests for it to terminate its representation authority in favor of the attorney. VA views this concern as exaggerated, in light of an attorney's obligation to afford the best representation possible to his/her client. We believe that a competent attorney would consider the claimant's entire record, since the requirements of sound advocacy entail consideration of all potentially relevant evidence.

VA's own review of the proposed § 14.631, in the perspective of Agency experience with the current regulation, has indicated several problems. Some representatives of service organizations have felt that, once a limited power of attorney is executed by an appellant in favor of an attorney, the general power of attorney to the service organization is revoked. Also, when a claim appealed to the Board of Veterans Appeals by an attorney holding a limited power of attorney is remanded to a regional office, a question sometimes arises as to who will represent the claimant at the



regional office level regarding the specific claim. Further, once a decision in a claim subject to a specific authorization or power of attorney is handed down, the question has arisen as to who is now the claimant's recognized representative, with some service organizations considering their original power of attorney revoked. In order to clarify this situation, we have reworded the third sentence of § 14.631(d) and added a fourth to reflect: (1) That representation of a claimant either by an attorney submitting a letter of representation for a particular claim under § 14.629(c) or by a person submitting an authorization for a particular claim under § 14.630 does not automatically constitute revocation of an existing general power described in 38 CFR 14.631(a); and (2) that these "limited" powers respecting a "particular claim" are operative only during the pendency of the claim, after which the "general" power governs prospective claims (subject, of course, to claimants' rights to confer limited powers in the future). We feel these amendments should resolve some of the uncertainties which have arisen.

#### Section 14.632 Letters of accreditation

No comments, suggestions, or objections were received with regard to proposed changes to this rule.

#### Section 14.633 Termination of accreditation of agents, attorneys, and representatives

One commenter urged that language be added to § 14.633(c)(4) to prohibit solicitation of membership in an organization by the organization's representative while he/she represents a claimant. VA's view is that this action is unnecessary and that solicitation of membership during handling of a claim is satisfactorily subsumed under the present regulatory language forbidding "[A]ny other unlawful, unprofessional, or unethical practice." We recognize, of course, an organization's interest in securing new members. However, it is important that claimants feel no pressure to join an organization simply because it is representing him/her in a claim. Accordingly, we would note that any membership solicitation conducted by an accredited representative should clearly disclaim any relationship between the veteran's claim and whether or not the veteran chooses to join or contribute to the organization.

#### Section 14.634 Fees and expenses

One commenter recommended that a description of allowable expenses be included in § 14.634(b), to include fees paid for experts, typing, copying,

postage, travel, and researchers. VA prefers a case-by-case approach, with the understanding that routine overhead-cost items are not reimbursable, while costs clearly generated by and attributable to the claim are.

This commenter further requested that § 14.634 be modified to reflect current official interpretations of the scope of 38 U.S.C. 3404. Specifically, he referred to the inapplicability of the \$10 fee limitation to third parties not standing to benefit from a veteran's claim and to benefit-overpayment cases brought in court. VA concurs in this suggestion, which has been accomplished by addition of two sentences of § 14.634(a).

#### Section 14.635 Reconsideration of denial of fees and expenses

No comments, suggestions, or objections were received with regard to this section.

#### Section 14.637 Office space and facilities

One commenter recommended that § 14.637 should clarify a practice of providing VA office space to employees of recognized State organizations through the accreditation of these employees to a national organization. VA Regional Offices in a few states do provide space to employees of State organizations accredited to national organizations. VA has no objection to the minor modification requested, and has inserted a clause in effect recognizing the existing practice.

Two commenters questioned the use in § 14.637(a)(3) of the number of claimants for whom an organization holds powers of attorney as a criterion for allocating office space. Rather, they advised that the number of organization representatives seeking space and the estimated frequency of use should be the major criteria. They felt that factoring in numbers of powers of attorney favors entrenched service organizations. However, VA regards the number of claimants represented by an organization as worthy of being accorded great weight in assigning office space. It is fully as substantial a consideration as the number of full-time paid representatives permanently assigned to the office. Moreover, regional office space is a quite limited resource, subject to intensive use. Nonetheless, in order to accommodate the commenter's objections, VA has added § 14.637(a)(4), which provides that requests for office space should include any data the requesting organization deems significant to allocation of such space.

Another commenter objected that proposed § 14.637 was too restrictive in limiting office space use to assisting veterans in the preparation, presentation, and prosecution of claims for veterans' benefits "and no other purpose." It is suggested that service organizations furnish a variety of types of assistance not directly related to pursuit of VA benefits, and that such activities ought to be permissible in the office space provided in VA facilities. It was further posited that VA would be acting counter to decades of accepted practice in amending its rule to restrict the uses to which the Government space and facilities may be applied. The commenter asserted that it appears VA is advancing an undisclosed intention to prohibit membership solicitation activities by accredited service organization representatives, without explaining why. In response, we would stress that no significant change in policy was contemplated in the amendment to § 14.637; the language added in the proposed rulemaking was merely intended to clarify the regulation and make it more closely conform to the governing statute. Section 3402 of Title 38, United States Code, authorizes the Administrator to recognize organizations to represent individuals "in the preparation, presentation, and prosecution of claims" for VA benefits, and to "furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized." This statutory mandate clearly expresses congressional intent to permit private, nongovernmental organizations to use taxpayer-supported facilities for a particular purpose, i.e., claim representation. The commenter advanced two principal rationales for interpreting the statute to permit organizations to use their VA-provided space for soliciting new members: first, the longstanding agreements whereby disabled veterans are provided on-the-job training (OJT) as claim representatives by recognized veterans' organizations under the vocational rehabilitation programs in chapter 31 of Title 38, which training may include a small block of instruction on chapter activities such as membership drives; and, second, the importance of strong veterans' organizations to act in a "quasi-governmental" role in oversight of veterans' benefits legislation and administration, which function is enhanced by growing membership strength.

Neither rationale is compelling. We have reviewed current OJT agreements, and find no explicit indication that all

training of novice claim representatives is to be conducted in VA space, nor that membership solicitation is to comprise a significant part of such training. And, without in any way devaluing the contributions of veterans' organizations to oversight of government programs, we must be mindful that the statutory mandate regarding the use of free VA space and office facilities clearly indicates that claim representation is intended to be the primary activity conducted there. Accordingly, the final rule retains the language stating that the basic purpose of the grant of space and facilities is for organizations "assisting veterans in the preparation, presentation, and prosecution of claims for veterans' benefits." However, we acknowledge that other, secondary activities may take place there on occasion as well, such as counseling and assistance on other veteran-services-related matters, include the OJT vocational rehabilitation training discussed above. Any activities involving membership solicitation should be minimal in VA space, and should be clearly distinguished from claim activities.

A commenter criticized § 14.637(b) for giving a VA-facility Director too much latitude of authority in withdrawing allocation of space from an organization and reassigning it either to the VA or another service organization, based on potential better use. It was submitted that a displaced service organization should be given the right to appeal to the Chief Benefits Director or other VA Central Office official, including the right to a hearing. We have modified the language of § 14.637(b) to clarify that the final decision on such space-allocation issues rests with the Chief Benefits Director, as to office space under control of the Department of Veterans Benefits. However, under 38 U.S.C. 3402(a)(2), the right of the Administrator to furnish office space is explicitly discretionary, and has been since enactment in 1945. Accordingly, there is no basis for an expectation of entitlement to space allocation, giving rise to due-process rights upon adverse action concerning such space.

We appreciate the comments and suggestions of those concerned individuals and organizations that responded to publication of the proposed rules, and we acknowledge their contribution in developing these final rules. The proposed rules are, therefore, adopted with the amendments noted above and minor amendments of a technical nature. The final rules are set forth below.

#### Executive Order 12291

In accordance with Executive Order 12291, Federal Regulation, the VA has determined that these proposed regulations are nonmajor for the following reasons:

- (1) They will not have an effect on the economy of \$100 million or more;
- (2) They will not cause a major increase in cost or prices;
- (3) They will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### Regulatory Flexibility Act (RFA)

The Administrator hereby certifies that these regulations do not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. Therefore, pursuant to 5 U.S.C. 605(b), these regulations are exempt from the initial and final regulatory-flexibility-analyses requirements of §§ 603 and 604. The reason for this certification is that these regulations impose no regulatory burden on small entities, and only claimants for VA benefits will be directly affected.

#### Information Collection

The information collection contained in § 14.628(e) has been approved by the Office of Management and Budget under OMB control number 2900-0439.

#### List of Subjects in 38 CFR Part 14

Administrative practice and procedure, Claims, Lawyers, Organization and functions of government agencies, Veterans.

Approved: November 23, 1988.

Thomas K. Turnage,  
Administrator.

38 CFR Part 14, Legal Services,  
General Counsel, is amended as follows:

#### PART 14—[AMENDED]

1. The undesignated center heading following § 14.619 which reads "Recognition of Organizations, Accredited Representatives, Attorneys, Agents; Rules of Practice and Information Concerning Fees, 38 U.S.C. Chapter 59" and the note which follows it are removed.

2. The undesignated center heading preceding § 14.628 is revised to read as follows:

**Representation of Veterans Administration Claimants; Recognition**

#### of Organizations; Accreditation of Representatives, Attorneys, Agents; Rules of Practice and Information Concerning Fees, 38 U.S.C. 3401-3405

3. Section 14.627 is revised to read as follows:

#### § 14.627 Definitions.

As used in regulations on representation of Veterans Administration claimants:

(a) "Accreditation" means recognition by the Veterans Administration of representatives, attorneys, and agents to represent claimants.

(b) "Agent" means a person who has met the standards and qualifications outlined in § 14.629(b).

(c) "Attorney" means a member in good standing of a State bar.

(d) "Benefit" means any payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the Veterans Administration pertaining to veterans, dependents, and survivors.

(e) "Cancellation" means termination of authority to represent claimants.

(f) "Claim" means application made under Title 38, United States Code, and implementing directives, for entitlement to Veterans Administration benefits, reinstatement, continuation, or increase of benefits, or the defense of a proposed agency adverse action concerning benefits.

(g) "Claimant" means a person who has filed a written application for determination of entitlement to benefits provided under Title 38, United States Code, and implementing directives.

(h) "Recognition" means certification by the Veterans Administration of organizations to represent claimants.

(i) "Representative" means a person who has been recommended by a recognized organization and accredited by the Veterans Administration.

(j) "State" includes any State, possession, territory, or Commonwealth of the United States, and the District of Columbia.

(k) "Suspension" means temporary withholding of authority to represent claimants.

4. Section 14.628 is revised to read as follows:

#### § 14.628 Recognition of organizations.

Authorized officers of an organization may request recognition by letter to the Administrator of Veterans Affairs.

(a) *National organization.* An organization may be recognized as a national organization if:

(1) It was recognized by the Veterans Administration prior to October 10, 1978, and continues to satisfy the



requirements of § 14.628(d) of this section, or

(2) It is chartered by act of Congress and satisfies the following requirements:

(i) Requirements set forth in paragraph (d) of this section, including information required to be submitted under paragraph (e) of this section;

(ii) In the case of a membership organization, membership of 2,000 or more persons, as certified by the head of the organization;

(iii) Sizable number of claimants for which powers of attorney for claim representation are held;

(iv) Present capability to represent claimants before the Board of Veterans Appeals in Washington, DC; and

(v) Geographic diversification, i.e., sizable number of chapters or offices in more than one State.

(b) *State organization.* An organization created by a State government for the purpose of serving the needs of veterans of that State may be recognized. Only one such organization may be recognized in each State.

(c) *Other organization.* An organization other than a State or national organization as set forth in paragraphs (a) and (b) of this section may be recognized when the Veterans Administration has determined that it is a veterans' service organization primarily involved in delivering services connected with either Title 38, United States Code, benefits and programs or other Federal and State programs designed to assist veterans. The term "veteran" as used in this paragraph shall include veterans, former armed forces personnel, and the dependents or survivors of either. Further, the organization shall provide responsible, qualified representation in the preparation, presentation, and prosecution of claims for Title 38, United States Code, benefits.

(d) *Requirements for recognition.* In order to be recognized under paragraph (a) or (c) of this section the organization shall:

(1) Have as a primary purpose services to veterans; and

(2) Demonstrate a substantial service commitment to veterans either by showing a sizable organizational membership or by showing performance of those veterans' services to a sizable number of veterans; and

(3) Commit a significant portion of its assets to veterans' services; and

(4) Establish either that complete claims service will be provided to each veteran requesting representation, or shall give written notice of any limitation in its claims service with advice concerning alternate service.

Complete claims service includes the ability to assure representation before the Board of Veterans Appeals.

However, representation before the Board of Veterans Appeals may be provided by agreement with another organization recognized by the Veterans Administration; and

(5) Take affirmative action, including training and monitoring of its accredited representatives, to ensure proper handling of claims.

(e) *Information to be submitted by organizations requesting recognition.* In order for an organization to be recognized under paragraphs (a) or (c) of this section, the following information shall be supplied:

(1) *Purpose.* A statement outlining the purpose of the organization, the extent of services provided, and the manner in which veterans would benefit by recognition.

(2) *Service commitment.* (i) The number of members and number of posts, chapters, or offices and their addresses; and

(ii) A copy of the articles of incorporation, constitution, charter, and bylaws of the organization, as appropriate; and

(iii) The type of Title 38, United States Code, services performed or to be performed, with an approximation of the number of veterans and dependent clients served by the organization in each type of service designated; and/or

(iv) The type of services, if any, performed in connection with other Federal and State programs which are designed to assist former armed forces personnel and their dependents, and an approximation of the number of veteran and dependent clients served by the organization under each program designated.

(3) *Assets.* (i) A copy of the last financial statement of the organization indicating the amount of funds allocated for conducting veterans' services; and

(ii) A statement indicating that use of the organization's funding is not subject to limitations imposed under any Federal grant or law which would prevent it from representing claimants before the Veterans Administration.

(4) *Training.* (i) A statement of the skills, training, and other qualifications for handling veterans' claims of paid or volunteer staff personnel; and

(ii) A plan for recruiting and training qualified claim representatives, including the number of hours of formal classroom instruction, the subjects to be taught, the period of on-the-job training, a schedule or timetable for such training, the projected number of trainees for the first year, and the name(s) and qualifications of the

individual(s) primarily responsible for the training.

(5) *Complete claims service.* (i) The record of representation before a discharge review board, or other proof of ability to represent claimants before the Veterans Administration; and

(ii) Proof of capability to provide representation before the Board of Veterans Appeals; or

(iii) Proof of association or agreement for the purpose of representation before the Board of Veterans Appeals with a recognized service organizations, or the proposed method of informing claimants of the limitations in service that can be provided, with advice concerning alternative service.

(6) *Supervision.* The organization shall execute an agreement which states that it shall take affirmative action, including training and monitoring of its accredited representatives, to ensure proper handling of claims.

(7) *Other.* (i) A statement that neither the organization nor its accredited representatives will charge or accept a fee or gratuity for service to a claimant and that the organization will not represent to the public that Veterans Administration recognition of the organization is for any purpose other than claimant representation;

(ii) The names, titles, and addresses of officers and the officials authorized to certify representatives; and

(iii) The names, titles, and addresses of full-time paid employees who are qualified to act as accredited representatives.

(f) *Recognition or denial.* A notice of the Administrator's determination on a request for recognition will be sent to an organization within 90 days of receipt of all information to be supplied. The notice will state that recognition is solely for the purpose of claimant representation before the Veterans Administration. If recognition is denied an organization, the Veterans Administration will set forth an explanation of the reasons for denial. A denial of recognition may be appealed to the Administrator within 90 days of the denial. The Veterans Administration will consider the appeal within 30 days of receiving such request. The organization will have an opportunity to fully document its position, and the appeal will cover all aspects of the application for recognition and the denial.

(g) *Requests for further information.* The Administrator or the Administrator's designee may request further information from any recognized organization, including progress reports, updates, or verifications.

(Authority: 38 U.S.C. 3402).

(Information collection requirements contained in paragraph (e) were approved by the Office of Management and Budget under control number 2900-0439).

5. Section 14.629 is revised to read as follows:

**§ 14.629 Requirements for accreditation of representatives, agents, and attorneys.**

The District Counsel will resolve any question of current qualifications of a representative, agent, or attorney. The claimant; the representatives, agent, or attorney, or an official of the organization for which such person acts; or the appropriate Veterans Administration officials may appeal such determination to the General Counsel.

(a) *Representatives.* A recognized organization shall file with the Office of the General Counsel Veterans Administration Form 2-21 (Application for Accreditation as Service Organization Representative) for each person it desires accredited as a representative of that organization. In recommending a person, the organization shall certify that the designee:

(1) Is of good character and reputation; and

(i) Has successfully completed a Veterans Administration approved course of instruction on veterans' benefits; or

(ii) Has passed an examination approved by the Veterans Administration; or

(iii) Has otherwise demonstrated an ability to represent claimants before the Veterans Administration;

(2) Is either a member in good standing or a full-time paid employee of such organization, or is accredited and functioning as a representative of another recognized organization; and

(3) Is not employed in any civil or military department or agency of the United States.

(b) *Agents.* Individuals desiring accreditation as agents must file an application with the Office of the General Counsel and establish that they are of good character and reputation. In addition, applicants shall pass a written examination concerning laws administered by the Veterans Administration which shall be prepared and graded in the Office of the General Counsel. The examination may be taken at any convenient District Counsel office under the supervision of the District Counsel. No applicant shall be allowed to sit for the examination more than twice in any 6-month period.

(c) *Attorneys.* (1) An attorney engaged by a claimant shall state in writing on

his or her letterhead that the attorney is authorized to represent the claimant in order to have access to information in the claimant's file pertinent to the particular claim presented. For an attorney to have complete access to all information in an individual's records, the attorney must provide a signed consent from the claimant or the claimant's guardian. The consent shall be equivalent to an executed power of attorney.

(2) If the claimant so consents, an attorney associated or affiliated with the claimant's attorney of record or employed by the same legal services office as the attorney of record may assist in representation and may have access to the claimant's records in the same manner as the attorney of record.

(3) Legal interns, law students, and paralegals may not be independently accredited to represent claimants under this paragraph. (See § 14.630; see also § 19.156).

(4) Unless revoked by the claimant, consent provided under paragraph (c)(2) of this section or § 14.631(c)(iii) shall remain effective in the event the claimant's original attorney is replaced as attorney of record by another member of the same law firm or an attorney employed by the same legal services office.

(Authority: 38 U.S.C. 210(c), 3401, 3404)

6. Section 14.630 is revised to read as follows:

**§ 14.630 Authorization for a particular claim.**

Any person may be authorized to prepare, present, and prosecute a particular claim. A proper power of attorney, and a statement signed by the person and the claimant that no compensation will be charged or paid for the services, shall be filed with the office where the claim is presented. A signed writing, which may be in letter form, identifying the claimant and the type of benefit or relief sought, specifically authorizing a named individual to act as the claimant's representative, and further authorizing direct access to records pertinent to the claim, will be accepted as a power of attorney. A person accredited under this section shall represent only one claimant; however, in unusual circumstances, appeal of such limitation may be made to the General Counsel.

(Authority: 38 U.S.C. 3403)

7. In § 14.631, the introductory text of paragraph (a) and paragraphs (c) and (d) are revised to read as follows:

**§ 14.631 Powers of attorney.**

(a) A power of attorney, executed on either Veterans Administration Form 23-22 (Appointment of Veterans Service Organization as Claimant's Representative) or Veterans' Administration Form 2-22a (Appointment of Attorney or Agent as Claimant's Representative), is required to represent a claimant, except when representation is by an attorney who complies with § 14.629(c) or when representation by an individual is authorized under § 14.630. The power of attorney shall meet the following requirements:

(c)(1) Only one organization, agent, or attorney will be recognized at one time in the prosecution of a particular claim. Except as provided in § 14.629(c) and paragraphs (c)(2) and (c)(3) of this section, all transactions concerning the claim will be conducted exclusively with the recognized organization, agent, or attorney of record until notice of a change, if any, is received by the Veterans Administration.

(2) An organization named in a power of attorney executed in accordance with paragraph (a) of this section may employ an attorney to represent a claimant in a particular claim. Unless the attorney is an accredited representative of the organization, the written consent of the claimant shall be required.

(3) Legal interns, law students, and paralegals may assist in the preparation, presentation, or prosecution of a claim under the direct supervision of a claimant's attorney of record designated under § 14.629(c), or an attorney who is either employed by or an accredited representative of an organization named in a power of attorney executed in accordance with paragraph (a) of this section. However, prior to their participation, the claimant's written consent must be furnished to the Veterans Administration. Such consent must specifically state that a legal intern, law student, or paralegal furnishing written authorization from the attorney of record or the organization named in the power of attorney may have access to the claimant's records and that such person's participation in all aspects of the claim is authorized. The supervising attorney, or an attorney authorized under § 14.629(c)(2), must be present at any hearing in which a legal intern, law student, or paralegal participates.

(d) A power of attorney may be revoked at any time, and an attorney may be discharged at any time. Unless a



claimant specifically indicates otherwise, the receipt of a new power of attorney shall constitute a revocation of an existing power of attorney. If an attorney submits a letter of representation under § 14.629 regarding a particular claim, or a claimant authorizes a person to provide representation in a particular claim under § 14.630, such specific authority shall constitute a revocation of an existing general power of attorney filed under paragraph (a) of this section only as it pertains to, and during the pendency of, that particular claim. Following the final determination of such claim, the general power of attorney shall remain in effect as to any new or reopened claim.

(Authority: 38 U.S.C. 210(c), 3402, 3404)

8. Section 14.632 is revised to read as follows:

**§ 14.632 Letters of accreditation.**

If challenged, the qualifications of prospective representatives or agents shall be verified by the District Counsel of jurisdiction. The report of the District Counsel, if any, including any recommendation of the Veterans Administration station director, and the application shall be transmitted to the General Counsel for final action. If the designee is disapproved by the General Counsel, the reasons will be stated and an opportunity will be given to submit additional information. If the designee is approved, letters of accreditation, or an identification card, will be issued by the General Counsel or the General Counsel's designee and will constitute authority to prepare, present, and prosecute claims in all Veterans Administration installations. Letters of accreditation to former employees of the Federal Government will advise such individuals of the restrictions and penalties concerning post-employment conflict of interest provided in Title 18, United States Code. Record of accreditation will be maintained in the Office of the General Counsel.

(Authority: 38 U.S.C. 3402, 3404).

9. Section 14.633 is revised to read as follows:

**§ 14.633 Termination of accreditation of agents, attorneys, and representatives.**

(a) Accreditation may be canceled at the request of an agent, attorney, representative, or organization.

(b) Accreditation shall be canceled at such time a determination is made that any requirement of § 14.629 is no longer met by an agent, attorney, or representative.

(c) Accreditation shall be canceled when the General Counsel finds, by clear and convincing evidence, one of the following:

(1) Violation of or refusal to comply with the laws administered by the Veterans Administration or with the regulations governing practice before the Veterans Administration;

(2) Knowingly presenting or prosecuting a fraudulent claim against the United States, or knowingly providing false information to the United States;

(3) Demanding or accepting unlawful compensation for preparing, presenting, prosecuting, or advising or consulting, concerning a claim;

(4) Any other unlawful, unprofessional, or unethical practice. (Unlawful, unprofessional, or unethical practice shall include but not be limited to the following—deceiving, misleading or threatening a claimant or prospective claimant; neglecting to prosecute a claim for 6 months or more; failing to furnish a reasonable response within 90 days of request for evidence by the Veterans Administration, or willfully withholding an application for benefits.)

(d) Accreditation shall be canceled when the General Counsel finds an agent's, attorney's, or representative's performance before the Veterans Administration demonstrates a lack of the degree of competence necessary to adequately prepare, present, and prosecute claims for veteran's benefits.

(e) As to cancellation of accreditation under paragraphs (b), (c) or (d) of this section, upon receipt of information from any source indicating failure to meet the requirements of § 14.629, improper conduct, or incompetence, the District Counsel of jurisdiction shall initiate an inquiry into the matter. If the matter involves an accredited representative of a recognized organization, this inquiry shall include contact with the representative's organization.

(1) If the result of the inquiry does not justify further action, the District Counsel will close the inquiry and maintain the record for 3 years.

(2) If the result of the inquiry justifies further action, the District Counsel shall take the following action:

(i) As to representatives, suspend accreditation immediately and notify the representative and the representative's organization of the suspension and of an intent to cancel accreditation. The notice to the representative will also state the reasons for the suspension and impending cancellation, and inform the representative of a right to request a hearing on the matter or to submit additional evidence within 10 working

days following receipt of such notice. Such time may be extended for a reasonable period upon a showing of sufficient cause.

(ii) As to agents or attorneys, inform the General Counsel of the result of the inquiry and notify the agent or attorney of an intent to cancel accreditation. The notice will also state the reason(s) for the impending cancellation and inform the party of a right to request a hearing on the matter or to submit additional evidence within 10 working days of receipt of such notice. Such time may be extended for a reasonable period upon a showing of sufficient cause.

(iii) In the event that a hearing is not requested, the District Counsel shall forward the record to the General Counsel for final determination.

(f) If a hearing is requested, a hearing officer will be appointed by the Director of the regional office involved. The hearing officer shall not be from the Office of the District Counsel. The hearing officer will have authority to administer oaths. A member of the District Counsel's office will present the evidence. The party requesting the hearing will have a right to counsel, to present evidence, and to cross-examine witnesses. Upon request of the party requesting the hearing, an appropriate Veterans Administration official designated in § 2.1 of this chapter may issue subpoenas to compel the attendance of witnesses and the production of documents necessary for a fair hearing. The hearing shall be conducted in an informal manner and court rules of evidence shall not apply. Testimony shall be recorded verbatim. The hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the District Counsel within 10 working days after the close of the hearing. The District Counsel will immediately forward the entire record to the General Counsel for decision.

(g) The decision of the General Counsel is final. The effective date for termination of accreditation shall be the date upon which a final decision is rendered. The records of the case will be maintained in the General Counsel's office for 3 years.

(Authority: 38 U.S.C. 210(c), 3402, 3404)

10. Section 14.634 is revised to read as follows:

**§ 14.634 Fees and expenses.**

Accredited representatives of national, State, or other recognized organizations, and individuals authorized for a particular claim, shall

not be entitled to receive fees. Attorneys and agents are entitled to receive fees as provided in paragraphs (a) and (b) of this section.

(Authority: 38 U.S.C. 3404(c))

(a) *Amount of fees.* For the successful prosecution of claims, attorneys and agents accredited under § 14.629(b) or (c) may receive the fee permitted by statute. The fee will be paid to the attorney or agent of record at the time of allowance, by deduction from the benefit allowed, after approval by the Veterans Administration. Questions concerning the amount or proper payee of fees allowed will be resolved by the District Counsel, or the District Counsel's designee, who will consider the quality, nature, and extent of the services. The fee-limitation statute applies in all Veterans Administration administrative proceedings involving Veterans Administration beneficiaries or claimants; it does not apply in any court proceeding except a suit involving Government life insurance. An attorney may receive a fee or salary in excess of the statutory limit from an organization, governmental entity, or other disinterested third party for representation of a claimant.

(Authority: 38 U.S.C. 784, 3404, 3405)

(b) *Expenses.* Notwithstanding paragraph (a) of this section, an agent, attorney, or person authorized under § 14.630, who incurs an expense in the prosecution of a claim, may be reimbursed for that expense by the claimant. However, prior to demanding or accepting such reimbursement, the agent, attorney, or person must submit a sworn itemized statement of the expense to the Veterans Administration, and reimbursement of the expense must be approved by the District Counsel, or the District Counsel's designee. The statement of expense and a copy of the District Counsel's determination will be retained in the claims folder as part of the permanent record. Notice of the action taken shall be transmitted to the requestor by the service handling the claim.

(Authority: 38 U.S.C. 3404)

11. Section 14.635 is revised to read as follows:

**§ 14.635 Reconsideration of denial of fees and expenses.**

A request for reconsideration of a denied fee, or statement of expenses, must be received by the General Counsel within 1 year of the date of denial. If agreement cannot be reached and a hearing is requested, a hearing officer will be appointed by the Director

of the regional office involved. The hearing officer shall not be from the Office of the District Counsel. The hearing officer will have authority to administer oaths. A member of the District Counsel's office will present the evidence. The complainant will have a right to counsel, to present evidence, and to cross-examine witnesses. Upon request of the complainant, an appropriate Veterans Administration official designated in § 2.1 of this chapter may issue subpoenas to compel the attendance of witnesses and the production of documents necessary for a fair hearing. The hearing shall be conducted in an informal manner and court rules of evidence shall not apply. Testimony shall be recorded verbatim. Within 10 working days after the close of the hearing, the hearing officer shall submit the entire hearing transcript, any pertinent records or information, and a recommended finding to the General Counsel, who will immediately forward the entire record to the General Counsel for decision. The decision of the General Counsel is final.

(Authority: 38 U.S.C. 210(c), 3404)

12. Section 14.637 is revised to read as follows:

**§ 14.637 Office space and facilities.**

The Administrator may furnish office space and facilities, if available, for the use of paid full-time representatives of recognized national organizations, and for employees of recognized State organizations who are accredited to national organizations, for purposes of assisting veterans in the preparation, presentation, and prosecution of claims for veterans' benefits.

(a) Request for office space should be made by an appropriate official of the organization to the Director of the Veterans Administration facility in which space is desired and should set forth:

(1) The number of full-time paid representatives who will be permanently assigned to the office;

(2) The number of secretarial or other support staff who will be assigned to the office;

(3) The number of claimants for whom the organization holds powers of attorney whose claims are within the jurisdiction of the facility or who reside in the area served by the facility, the number of such claimants whose claims are pending, and the number of claims prosecuted during the previous three years; and

(4) Any other information the organization deems relevant to the allocation of office space.

(b) When in the judgment of the Director office space and facilities previously granted could be better used by the Veterans Administration, or would receive more effective use or serve more claimants if allocated to another recognized national organization, the Director may withdraw such space or resign such space to another organization. In the case of a facility under control of the Department of Veterans Benefits, the final decision on such matters will be made by the Chief Benefits Director.

(Authority: 38 U.S.C. 3402).

[FR Doc. 88-29696 Filed 12-27-88; 8:45 am]  
BILLING CODE 8320-01-M

**GENERAL SERVICES ADMINISTRATION**

**41 CFR Ch. 201**

[FIRM Temp. Reg. 10, Supp. 2]

**Triennial Review of Agency Administration and Operation of Information Resources Management Activities**

**AGENCY:** Information Resources Management Service, GSA.

**ACTION:** Temporary regulation, supplement.

**SUMMARY:** Federal Information Resources Management Temporary Regulation 10 established the Federal Information Resources Management Review Program. Supplement 1, making pen and ink revisions and extending the effective date to December 31, 1988, was published in the Federal Register on February 19, 1987. This supplement extends the temporary rule for an additional two years and describes an alternative procedure for small agencies to report on their information resources management review activities. The intent is to continue temporary implementation of the Federal Information Resources Management Review Program to allow additional program experience to be incorporated into the codification amendment.

**DATES:** Effective date: January 1, 1989, but may be observed earlier. Expiration date: December 31, 1990. Comments are due: January 27, 1989.

**ADDRESS:** Comments should be addressed to the General Services Administration (KMPR), Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Carolyn A. Thomas, Regulations Branch (KMPR), Information Resources



Management Service, telephone (202) 566-0194 or FTS, 566-0194.

**SUPPLEMENTARY INFORMATION:** (1) A notice of proposed rulemaking was published in the *Federal Register* (40 FR 33906, August 27, 1984) and the comments received were considered in the initial promulgation of this temporary rule. Supplement 1 was published in the *Federal Register* (52 FR 5113, February 19, 1987) making pen and ink changes and extending the expiration date and comment period.

(2) Supplement 2 extends the expiration date of the rule to December 31, 1990, to allow time to incorporate additional program experience into the codification amendment. The supplement also describes an alternate reporting procedure for small agencies to use in the triennial review process. The alternate procedure provides for those very small Federal agencies that may not have the resources necessary to meet the full reporting requirements currently prescribed by the IRM Review Program. Additional comments on the temporary rule are welcome and may be submitted no later than January 27, 1989. All comments received during the comment period will be considered in the codification amendment.

(3) The General Services Administration has determined that this rule is not a major rule for the purposes of Executive Order 12291 of February 17, 1981. GSA decisions are based on adequate information concerning the need for, and the consequences of the rule. The rule is written to ensure maximum benefits to Federal agencies. This is a Governmentwide management regulation that will have little or no cost effect on society. The temporary rule is therefore not likely to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### List of Subjects in 41 CFR Ch. 201

Government information resources activities, Government procurement. Information resources management reviews.

(Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c) and Sec. 101(f), 100 Stat. 1783-345; 40 U.S.C. 751(f).)

In 41 CFR Chapter 201, the following FIRM Temporary Regulation 10, Supplement 2 is added to Appendix A at the end of the chapter.

#### FIRM Temporary Regulation 10, Supplement 2

December 1, 1988.

To: Heads of Federal Agencies.

**Subject: Information Resources Management Reviews.**

1. **Purpose.** This supplement extends the expiration date of FIRM Temporary Regulation 10 for an additional two years and describes an alternate procedure for small agencies to report on their information resources management (IRM) activities under the Federal IRM Review Program. The extension will permit additional program experience to be incorporated into the codification amendment. The intent is to modify and codify this temporary regulation as a FIRM amendment by the end of calendar year 1990.

2. **Expiration date.** The expiration date of this temporary regulation is extended from December 31, 1988, to December 31, 1990.

3. **Alternate reporting procedure.** Temporary Regulation 10, paragraph 10, describes the triennial process for agencies to review and report on their IRM activities under the Federal IRM Review Program. Although all agencies are responsible for meeting the review requirements of the program, small agencies (those with fewer than 50 IRM personnel and less than \$5 million in IRM obligations for the first year review cycle) may elect to waive submission of the initial plan and interim update reports, and use the alternate reporting procedure provided for in this supplement. Agencies electing to use the alternate reporting procedure are only required to report as follows:

- Notify GSA (in writing) of the decision to use the alternate reporting procedure no later than November 1 in year one of the review cycle, and
- Submit a final triennial report to GSA at the end of the cycle.

Richard G. Austin,  
Acting Administrator of General Services.  
(FR Doc. 88-29728 Filed 12-27-88; 8:45 am)  
BILLING CODE 6320-25-M

#### DEPARTMENT OF THE INTERIOR

##### Bureau of Land Management

##### 43 CFR Public Land Order 6694

[UT-942-09-4114-10; U-62507]

##### Withdrawal of Public Lands for Westwater Canyon Corridor of the Colorado River; UT

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order withdraws 4,707.44 acres of public land from surface entry

and mining for a period of 5 years for the Bureau of Land Management to protect recreational, scenic, and cultural values of the Westwater Canyon corridor of the Colorado River in aid of legislation amending the Wild and Scenic Rivers Act. The lands have been and remain open to mineral leasing.

**EFFECTIVE DATE:** December 28, 1988.

**FOR FURTHER INFORMATION CONTACT:** Michael L. Barnes, Lands and Mining Claims Adjudication Section, BLM Utah State Office, 324 South State, Suite 301, Salt Lake City, UT 84111, 801-524-4036.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, the following described public lands are hereby withdrawn from settlement, sale, location, and entry under the general land laws, including the United States mining laws (30 U.S.C. Ch. 2), but not from leasing under mineral leasing laws, to protect the lands in aid of a Wild and Scenic River Act legislative amendment:

##### Salt Lake Meridian

- T. 21 S., R. 24 E.,  
Sec. 24, lots 11 to 21, inclusive, and NE $\frac{1}{4}$  SE $\frac{1}{4}$ ;  
Sec. 25, lot 2 and N $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ .  
T. 20 S., R. 25 E.,  
Sec. 22, lots 1, 2, and 4 to 8, inclusive, and E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ ;  
Sec. 23, lots 7 and 8, and SW $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 26, lots 1 to 5, inclusive, NW $\frac{1}{4}$ NW $\frac{1}{4}$ , W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , and W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ ;  
Sec. 27, lots 1 to 5, inclusive, and SW $\frac{1}{4}$  NE $\frac{1}{4}$ ;  
Sec. 33, lots 1 to 4, inclusive, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , and E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ ;  
Sec. 34, lots 1 to 8, inclusive, NW $\frac{1}{4}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ , N $\frac{1}{2}$ NE $\frac{1}{4}$  SE $\frac{1}{4}$ , and SE $\frac{1}{4}$ SW $\frac{1}{4}$ ;  
Sec. 35, lots 1 and 2, W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ , and SW $\frac{1}{4}$ NW $\frac{1}{4}$ .  
T. 21 S., R. 25 E.,  
Sec. 3, lots 1 to 4, inclusive, SW $\frac{1}{4}$ NE $\frac{1}{4}$ , N $\frac{1}{2}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ , NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , W $\frac{1}{2}$ SW $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ , E $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ , and W $\frac{1}{2}$ E $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 4, lots 1 and 5;  
Sec. 8, SE $\frac{1}{4}$ NE $\frac{1}{4}$  and E $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 9, lots 1 to 15, inclusive, SE $\frac{1}{4}$ SW $\frac{1}{4}$ , and N $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 10, lots 1 to 8, inclusive, W $\frac{1}{2}$ NE $\frac{1}{4}$  NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ , W $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , and N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ ;  
Sec. 16, lots 1 to 4, inclusive;  
Sec. 17, lots 1, 2, 3, and 5 to 12, inclusive, N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ ;  
Sec. 18, SE $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 19, lots 1, 2, and 6 to 13, inclusive, NE $\frac{1}{4}$ SE $\frac{1}{4}$ , and SW $\frac{1}{4}$ SE $\frac{1}{4}$ ;  
Sec. 20, lots 1 to 3, inclusive, and W $\frac{1}{2}$ NE $\frac{1}{4}$  NW $\frac{1}{4}$ ;  
Sec. 30, lot 1 and N $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ .

The areas described aggregate 4,707.44 acres in Grand County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resource other than under the mining laws.

3. This withdrawal will expire 5 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be extended.

J. Steven Griles,  
Assistant Secretary of the Interior.  
December 19, 1988.

[FR Doc. 88-29731 Filed 12-27-88; 8:45 am]  
BILLING CODE 4310-DQ-M

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 1

[FCC 88-156; RM-5167]

##### Amendment of Section of Part 1 of the Commission's Rules as They Apply to Applications To Be Included in Public Land Mobile and Cellular Lotteries

**AGENCY:** Federal Communication Commission (FCC).

**ACTION:** Final rule.

**SUMMARY:** In this Order, the FCC amends § 1.823(a) of its rules concerning lotteries in the Public Land Mobile and Domestic Cellular Telecommunications Services. The FCC is taking this action because, after ranking the applicants pursuant to the rule, it has rarely had to go to the second ranked applicant to find a qualified selectee from mutually exclusive applications. The effect of the FCC's action is to provide the Chief of the Common Carrier Bureau and the Managing Director the authority to determine the number of applicants to be selected in each lottery on a case by case basis.

**EFFECTIVE DATE:** May 18, 1988.

**ADDRESS:** Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** David H. Siehl, Mobile Services Division, Common Carrier Bureau; tele: 202-632-6450.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's further order on reconsideration adopted April 29, 1988, and released May 4, 1988.

The text of this Commission decision is included in **SUPPLEMENTARY INFORMATION** below. The complete text of this decision, as released, may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, D.C. 20037.

1. (The FCC is) by this order amending § 1.823(a) of its rules. This section provides, *inter alia*, that when the Commission holds lotteries to select permittees in the Public Land Mobile and Domestic Cellular Radio Telecommunications Services, after the winner is selected, the process will be repeated until each mutually exclusive applicant is ranked.<sup>1</sup> The rationale for this requirement is that if the first ranked applicant is found to be unqualified there will be alternative selectees available and thus, there will be no need to conduct additional lotteries. (FCC) experience in conducting several hundred Cellular Radio and Public Land Mobile lotteries has been that only in very few cases has it been necessary to go to the second ranked applicant. For this reason, and for reasons of administrative convenience, (the FCC) concludes that it is in the public interest to amend § 1.823(a) to provide the Chief of the Common Carrier Bureau and the Managing Director the authority to determine on a case by case basis the number of applicants to be selected in each lottery.

2. The amendment of § 1.823 relates to matters of agency practice and procedure. Therefore, there is no need for Federal Register publication or service prior to the effective date of this order. See Section 553(b)(A) of the Administrative Procedure Act, 5 U.S.C. 553(b)(A).

3. Authority for this action is contained in Section 4 (i) and (j) and 303(r) of the Communications Act of 1934, as amended. (The FCC) hereby finds that the public interest would be served by making this order effective immediately upon its release.

4. Accordingly, it is ordered that, § 1.823(a) is amended as set forth herein.

5. The secretary is directed to cause a copy of the Order to be published in the Federal Register.

<sup>1</sup> The lottery selection procedure actually consists of two steps. First, the lottery official selects the winning applicant, and then, the Mobile Services Division further reviews the application to see if it is in compliance with the Commission's cellular rules and indeed acceptable for filing. If the Division finds that the application so complies, it announces the winning applicant as the tentative selectee.

Federal Communications Commission.

William F. Caton,  
Acting Secretary.

#### List of Subjects in 47 CFR Part 1

Administrative Practice and Procedure.

#### Rules Section

Part 1 of 47 CFR is amended as follows:

#### PART 1—PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read:

Authority: 47 U.S.C. 154, 303.

2. Section 1.823 (a) is amended by removing the third sentence (following the words "Common Carrier Bureau.") and adding in its place the following:

§ 1.823 Random selection procedures for the public land mobile and domestic public cellular radio telecommunications services.

(a) \* \* \* The designated Lottery Official shall select the winning applicant from among mutually exclusive applicants. The Lottery Official may select in rank order a number of additional applicants. The number of additional applicants selected will be determined by the Chief of the Common Carrier Bureau and the Managing Director.

[FR Doc. 88-29708 Filed 12-27-88; 8:45 am]  
BILLING CODE 6712-01-M

#### 47 CFR Part 73

[FCC 88-416]

##### Broadcast Services; Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. 1464 on a Twenty-Four Hour Per Day Basis

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; Order promulgating new rule.

**SUMMARY:** Pursuant to a recent Congressional directive, the Commission takes this action to promulgate a regulation prohibiting the broadcast of indecent or obscene material at any time of the day in accordance with the restrictions contained in 18 U.S.C. 1464. In effect, the Commission will now enforce its obscenity and indecency restrictions twenty-four hours a day as required by the express language of this new legislation.

**EFFECTIVE DATE:** January 27, 1989.



**ADDRESS:** Federal Communications Commission, Washington, DC 20554.  
**FOR FURTHER INFORMATION CONTACT:** Michele Farquhar, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order concerning enforcement of prohibitions against broadcast obscenity and indecency in 18 U.S.C. 1464, adopted December 19, 1988 and released December 21, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

#### Summary of Order

1. On October 1, 1988, the President signed into law Pub. L. No. 100-459, which contains appropriations for the Commission for fiscal year 1989. *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other purposes*, Pub. L. No. 100-459 (signed October 1, 1988). This legislation also contains the following provision:

By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

2. In compliance with this law, we are adopting a new rule pursuant to which the Commission will enforce the provisions of section 1464 of the United States Criminal Code on a twenty-four hour a day basis.

3. Under previous interpretations of section 1464, the Commission and the courts had applied this law to prohibit the broadcast of obscene programming during the entire day and indecent programming only when there was a reasonable risk that children might be in the audience. Initially, the Commission had suggested that this risk might be sufficiently diminished after 10 p.m. to permit broadcasts aired after that time. In a 1987 ruling, however, the Commission stated that its current thinking was that such broadcasts

would not be permissible until after 12:00 midnight. Thereafter, the United States Court of Appeals for the District of Columbia Circuit remanded two Commission rulings concerning post-10 p.m. indecent broadcasts in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT"), for a further explanation justifying its "new, more restrictive channeling approach." The court instructed the Commission to create a more complete and thorough record to support channeling prescriptions. In order to comply with the explicit mandate of the recent legislation, however, we must now abandon our plans to initiate a proceeding in response to the concerns raised by the court's decision.

4. The directive of the appropriations language affords us no discretion. It directs us to exercise our authority under the Communications Act to enforce the restrictions of Section 1464 of the Criminal Code on a twenty-four hour a day basis. Consequently, in accordance with this legislative mandate and pursuant to our authority under Title 47, we will now enforce the indecency restrictions of section 1464 twenty-four hours a day under our new rule. In enforcing this rule, the Commission will continue to apply its generic definition of indecency, which has been upheld by the courts. Under this definition, broadcast indecency is language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

5. Pursuant to the Administrative Procedure Act, 5 U.S.C. 553, the Commission finds good cause for promulgating the rule herein without prior public notice and comment. Section 553(b)(3)(B) provides that an agency may promulgate a rule without notice and comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). Because the recently enacted appropriations legislation mandates implementation of a twenty-four hour indecency ban, the Commission's task in promulgating the rule is purely ministerial and leaves no room for discretion. No purpose would thus be served by affording the public an opportunity to comment on this rule before its promulgation.

#### Paperwork Reduction Act Statement

6. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

#### Ordering Clauses

7. Authority for the action taken herein is contained in sections 4(i), 303(r), 312(a)(6), 312(b), and 503(b)(1)(D) of the Communications Act of 1934, as amended, and Pub. L. No. 100-459 (signed October 1, 1988).

8. Accordingly, *It is ordered* that Part 73 of the Commission's Rules and Regulations is amended as described above and set forth below.

9. *It is further ordered* that pursuant to the Administrative Procedure Act, 5 U.S.C. 553(d)(1), the amendments to the Commission's Rules and Regulations shall become effective 30 days after publication in the Federal Register.

#### List of Subjects in 47 Part 73

Radio broadcasting, Television broadcasting.

#### Rule Amendments

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

10. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. Sections 154, 303, 312, and 503.

11. A new § 73.3999 is added to the Commission's Rules, which will read as follows:

**§ 73.3999 Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene or indecent language).**

The Commission will enforce the provisions of section 1464 of the United States Criminal Code, 18 U.S.C. 1464, on a twenty-four hour per day basis in accordance with Pub. L. No. 100-459.

Federal Communications Commission  
 William F. Caton,  
*Acting Secretary.*  
 [FR Doc. 88-29707 Filed 12-27-88; 8:45 am]  
 BILLING CODE 6712-01-M

## Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 71

[Airspace Docket No. 88-AWP-22]

#### Proposed Revision to Transition Area, Vacaville, CA

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to revise the transition area at Vacaville, California. This action will provide controlled airspace for aircraft executing instrument approach procedures to the Nut Tree Airport.

**DATE:** Comments must be received on or before February 9, 1989.

**ADDRESSES:** Send comments on the proposal in triplicate to: Federal Aviation Administration, Attn: Manager, Airspace and Procedures Branch, AWP-530, Docket No. 88-AWP-22, Air Traffic Division, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009.

The official docket may be examined in the Office of the Regional Counsel, Western-Pacific Region, Federal Aviation Administration, Room 6W14, 15000 Aviation Boulevard, Lawndale, California.

An informal docket may also be examined during normal business hours at the Office of the Manager, Airspace and Procedures Branch, AWP-530, Air Traffic Division at the above address.

**FOR FURTHER INFORMATION CONTACT:** Daniel K. Martin, Airspace and Procedures Specialist, Airspace and Procedures Branch, AWP-530, Air Traffic Division, Western-Pacific Region, Federal Aviation Administration, 15000 Aviation Boulevard, Lawndale, California 90261, telephone (213) 297-0166.

#### SUPPLEMENTARY INFORMATION:

#### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AWP-22." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Airspace and Procedures Branch, Air Traffic Division, 15000 Aviation Boulevard, Lawndale, California 90261, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRM's**  
 Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Airspace and Procedures Branch, P.O. Box 92007, Worldway Postal Center, Los Angeles, California 90009. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2 which describes the application procedure.

#### Availability of NPRM's

**The Proposal**  
 The FAA is considering an amendment to § 71.181 of Part 71 of the Federal Aviation Regulations (14 CFR

Federal Register

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Part 71) to revise the transition area at Vacaville, CA. This will provide controlled airspace for aircraft executing instrument approaches to the Nut Tree Airport. Section 71.181 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6D dated January 4, 1988.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 28, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 71

Aviation safety, Transition areas.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE, AND REPORTING POINTS

1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

#### § 71.181 [Amended]

2. Section 71.181 is amended as follows:

#### Vacaville, CA [Revised]

That airspace extending upward from 700 feet above the surface within a 3-mile radius of Nut Tree Airport, CA, (lat. 38°22'18"N., long. 121°57'33"W.), and within 2.5 miles each side of the Sacramento VORTAC 259° radial, extending from the 3-mile radius area to 13 miles W. of the VORTAC and within 3 miles

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each side of the 017° bearing (001°T) of the Nut Tree Airport extending from the 3-mile radius area to 10 miles north northeast of the airport.

Issued in Los Angeles, California, on December 12, 1988.

Jacqueline L. Smith,

Manager, Air Traffic Division, Western-Pacific Region.

[FR Doc. 88-29678 Filed 12-27-88; 8:45 am]

BILLING CODE 4910-13-M

#### 14 CFR Part 91

[Docket No. 25753; Summary Notice No. PR-88-16]

**Summary of Rulemaking Petition Received From Aircraft Owners and Pilots Association, Experimental Aircraft Association, and Helicopter Association International**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petition for rulemaking.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for rulemaking (14 CFR Part 11), this notice contains a summary of a petition by the Aircraft Owners and Pilots Association, Experimental Aircraft Association, and Helicopter Association International. The petitioners seek to reduce the size of the areas associated with a terminal control area (TCA) where aircraft are required to be equipped with a Mode C transponder. Additionally, the petitioners request a revision of the minimum en route altitude requirement for altitude reporting equipment. Further the petitioners request a delay of certain effective dates associated with Mode S transponder installation and manufacturing. The purpose of this notice is to improve the public's awareness of this aspect of FAA's regulatory activities. Neither the publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition of its final disposition.

**DATE:** Comments received on this petition must identify the petition docket number involved and be received on or before February 27, 1989.

**ADDRESSES:** Send comments on the petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 25753, 800 Independence Avenue, SW., Washington, DC 20591.

**FOR FURTHER INFORMATION CONTACT:** Mr. Reginald C. Matthews, Airspace-Rules and Aeronautical Information Division, ATO-200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-8783.

**SUPPLEMENTARY INFORMATION:** The Petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915, FAA Headquarters Building (FOB-10A), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

#### The petition

The Aircraft Owners and Pilots Association, Experimental Aircraft Association, and Helicopter Association International seek to revise certain final rules dealing with aircraft transponders and automatic altitude reporting equipment which are not yet effective. Specifically, these final rules are: the Air Traffic Control Radar Beacon System and Mode S Transponder Requirements in the National Airspace System (Amdt. Nos. 43-26, 91-198, 121-190, 127-41, 135-22) and the Transponder With Automatic Altitude Reporting Capability Requirement (Amdt. No. 91-203). These rules are also commonly referred to as the "Mode S Rule" and the "Mode C Rule," respectively.

The Mode C Rule, effective July 1, 1989, in pertinent part, requires aircraft (1) operating within 30 miles of any TCA and (2) operating at and above 10,000 feet above mean sea level (MSL) to be equipped with a Mode C transponder. Petitioners' request would modify the Mode C rule by replacing the Mode C transponder 30-mile veil with "buffers" around and below each TCA and by excluding en route operations from the en route Mode C transponder requirement when operating at an below 10,500 feet MSL vice below 10,000 feet MSL. Aircraft without a transponder and altitude reporting equipment would be able to operate without the equipment outside and below the buffers.

In pertinent part, the Mode S Rule: (1) Requires that non-Mode S transponders manufactured after January 1, 1990, may not be installed in aircraft; and (2) requires that after January 1, 1992, all newly installed transponders must meet the requirements of the technical standard order for airborne Mode S transponder equipment. Petitioners seek to allow the installation of non-Mode S transponders provided they are manufactured prior to January 1, 1994,

rather than January 1, 1990, and to continue to allow installation of non-Mode S transponders indefinitely or until the transponder inventory is depleted, rather than by January 1, 1992.

Issued in Washington, DC on December 21, 1988.

Donald Byrne,

Deputy Assistant Chief Counsel.

[FR Doc. 88-29676 Filed 12-27-88; 8:45 am]

BILLING CODE 4910-13-M

#### CONSUMER PRODUCT SAFETY COMMISSION

##### 16 CFR Parts 1061, 1604, and 1704

#### Application for Exemption From Preemption

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Consumer Product Safety Commission is proposing to withdraw 16 CFR Part 1604, dealing with applications for exemption from preemption under the Flammable Fabric Act, and Part 1704, dealing with applications for exemption from preemption under the Poison Prevention Packaging Act, and to add a new Part 1061, dealing with applications for exemption from preemption under the Flammable Fabrics Act as well as applications for exemption from preemption under three other acts: the Consumer Product Safety Act, the Federal Hazardous Substances Act, and the Poison Prevention Packaging Act.

The proposed regulation establishes procedures for the Commission to evaluate and decide applications from State and local governmental entities for exemptions from the preemptive effect of Commission statutes, standards, and regulations. This proposed rule specifies in detail, the form and content of the evidence required to demonstrate that the State or local requirement provides a higher degree of protection and does not unduly burden interstate commerce.

**DATE:** Comments must be received by January 27, 1989.

**ADDRESSES:** Comments should be sent to the Consumer Product Safety Commission, Office of the Secretary, Washington, DC 20207. Comments may be examined during normal business hours in the Commission's public reading room at 5401 Westbard Avenue, Bethesda, Maryland.

**FOR FURTHER INFORMATION CONTACT:** Stephen Lemberg, Office of the General Counsel, Consumer Product Safety

Commission, Washington, DC 20207, telephone 301-492-6980.

#### SUPPLEMENTARY INFORMATION:

##### Background

Four of the acts administered by the Consumer Product Safety Commission, the Consumer Product Safety Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act, include specific preemption provisions.

These provisions are not completely identical, but each generally provides that when there is a product safety requirement in effect under one of the acts administered by the Commission that deals with a risk of injury from a product covered by one of these four acts, no State or local government may, except as it may apply to such products obtained for its own use, enforce a statute or regulation dealing with the same risk of injury as that of a Commission requirement, unless the statute or regulation is identical to the Commission requirement. This nullification of a State or local statute by a federal statute or regulation is known as preemption.

Each of the four acts also contains provisions that authorize the Commission, upon application, to issue a regulation exempting a State or local statute or regulation from the preemptive effect of a Commission statute, standard, or regulation if the Commission finds that the State or local statute or regulation provides a significantly higher degree of protection and does not unduly burden interstate commerce.

In 1976 the Commission published interim regulations concerning applications for exemption from preemption under the Flammable Fabrics Act, 41 FR 31569, July 29, 1976, 16 CFR Part 1604 and the Poison Prevention Packaging Act, 41 FR 37128, September 2, 1976, 16 CFR Part 1704. The Commission is now proposing to remove those interim regulations and replace them with a new Part 1061 dealing with applications for exemption under all four statutes.

#### Scope of Proposal

##### 1. Threshold for an Application for an Exemption

Section 1061.4 provides that applications for exemption from preemption will be considered on their merits where the applicant demonstrates that the State or local requirement for which exemption is sought has been enacted or issued in final form by an authorized body, where the application is made by that

authorized body, and where the State or local requirement is actually preempted by a Commission statute, standard or regulation.

##### 2. Form and Content of an Application for Exemption

Section 1061.5 through 1061.10 specify the required form and content of an application for exemption. Section 1061.5 requires that an application identify the specific State or local requirement for which exemption is sought, the specific Commission statute, standard, or regulation that preempts the State or local requirement, and the authorized State or local contact person. Section 1061.6 requires applicants to explain the absence of otherwise required information. Section 1061.7 requires that an application include a copy of the State or local requirement and any available legislative history concerning the requirement. Section 1061.8 requires applicants to provide various kinds of information on the risk of injury the local requirement is intended to address and to demonstrate that the State or local requirement provides a higher degree of protection than the Commission statute, standard, or regulation. Section 1061.9 requires applicants to provide various kinds of information to demonstrate the effect of the State or local requirement on interstate commerce. Section 1061.10 requires applicants to provide a statement which identifies potentially affected individuals or groups.

##### 3. Incomplete Applications

Section 1061.11 specifies how the Commission will handle incomplete applications.

##### 4. Grant or Denial of an Application for Exemption

Section 1061.12 describes the procedures the Commission will follow in considering an application for exemption on its merits. In general, if the Commission proposes to grant an exemption it will publish a proposed regulation in the *Federal Register* and provide an opportunity for written and oral comments. If, after considering any comments received, it grants an application, it will publish a final exemption regulation, which will include its findings. If it rejects an application, before or after soliciting public comments, it will publish its reasons.

#### Regulatory Flexibility Act

The proposed regulation establishes procedures for the Commission to evaluate and decide applications from State and local governmental entities for exemptions from the preemptive effect

of Commission statutes, standards, and regulations. This proposed rule specifies in detail, the form and content of the evidence required to demonstrate that the State or local requirement provides a higher degree of protection and does not unduly burden interstate commerce. While states and larger counties and municipalities may have the capabilities to provide this sort of information, smaller government entities may have difficulty doing so. However, local governments rarely have product specific safety regulations (with the exception of fireworks), and would generally not need to submit applications for exemption from preemption. Therefore these small governmental organizations would ordinarily remain unaffected by the rule the Commission proposes to issue. In the event a small governmental organization is affected by the rule, the Commission staff is willing to assist those entities with preparation of the documents necessary to support an application. Accordingly, the Commission certifies that this regulation, if issued in final form, will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects

##### 16 CFR Part 1061

Administrative practice and procedure, Consumer protection, Intergovernmental relations.

##### 16 CFR Parts 1604 and 1704

Clothing, Flammable materials, Infants and children, Poison prevention, Textiles.

For the reasons set forth in the preamble, the Consumer Product Safety Commission proposes to amend Title 16, Chapter II, as follows:

#### PART 1604—[REMOVED]

1. Part 1604 is removed.

#### PART 1704—[REMOVED]

2. Part 1704 is removed.
3. Part 1061 is added to read as follows:

#### PART 1061—APPLICATIONS FOR EXEMPTION FROM PREEMPTION

- Sec.
- 1061.1 Scope and purpose.
  - 1061.2 Definitions.
  - 1061.3 Statutory considerations.
  - 1061.4 Threshold requirements for applications for exemption.
  - 1061.5 Form of applications for exemption.
  - 1061.6 Contents of applications for exemption.



- Sec.  
1061.7 Documentation of the state or local requirement.  
1061.8 Information on the heightened degree of protection afforded.  
1061.9 Information about the effect on interstate commerce.  
1061.10 Information on affected parties.  
1061.11 Incomplete or insufficient applications.  
1061.12 Commission consideration on merits.

Authority: 15 U.S.C. 2075; 15 U.S.C. 1261n; 15 U.S.C. 1203; 15 U.S.C. 1476.

#### § 1061.1 Scope and purpose.

(a) This part applies to the submission and consideration of applications by State and local governments for exemption from preemption by statutes, standards, and regulations of the Consumer Product Safety Commission.

(b) This part implements section 26 of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2075), section 18 of the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261n), section 16 of the Flammable Fabrics Act (FFA) (15 U.S.C. 1203), and section 7 of the Poison Prevention Packaging Act (PPPA) (15 U.S.C. 1476), all as amended.

#### § 1061.2 Definitions.

For the purposes of this part:

- (a) "Commission" means the Consumer Product Safety Commission.  
(b) "Commission's statutory preemption provisions" and "statutory preemption provisions" mean section 26 of the CPSA (15 U.S.C. 2075), section 18 of the FHSA (15 U.S.C. 1261n), section 16 of the FFA (15 U.S.C. 1203) and section 7 of the PPPA. (15 U.S.C. 1476).  
(c) "Commission statute, standard, or regulation" means a statute, standard, regulation or requirement that is designated as having a preemptive effect by the Commission's statutory preemption provisions.  
(d) "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, Wake Island, Midway Island, Kingman Reef, Johnston Island, the Canal Zone, American Samoa, or the Trust Territory of the Pacific Islands.  
(e) "Local government" means any political subdivision of a State having the authority to establish or continue in effect any standard, regulation or requirement that has the force of law and is applicable to a consumer product.  
(f) "State or local requirement" means any statute, standard, regulation, ordinance, or other requirement that applies to a product, that is issued by a State or local government, and that is intended to have the force of law when in effect.

#### § 1061.3 Statutory considerations.

(a) The Commission's statutory preemption provisions provide, generally, that whenever consumer products are subject to certain Commission statutes, standards, or regulations, a State or local requirement applicable to the same product is preempted, i.e., superseded and made unenforceable, if both are designed to protect against the same risk or injury or illness, unless the State or local requirement is identical to the Commission's statutory requirement, standard, or regulation. A State or local requirement is not preempted if the product it is applicable to is for the State or local government's own use and the requirement provides a higher degree of protection than the Commission's statutory requirement, standard, or regulation.

(b) The Commission's statutory preemption provisions provide, generally, that if a State or local government wants to enforce its own requirement that is preempted, the State or local government must seek an exemption from the Commission before any such enforcement. The Commission may, by regulation, exempt a State or local requirement from preemption if it finds that the State or local requirement affords a significantly higher degree of protection than the Commission's statute, standard, or regulation, and that it does not unduly burden interstate commerce. Such findings must be included in any exemption regulation.

#### § 1061.4 Threshold requirements for applications for exemption.

- (a) The Commission will consider an application for preemption on its merits, only if the application demonstrates all of the following:  
(1) The State or local requirement has been enacted or issued in final form by an authorized official or instrumentality of the State or local government. For purposes of this section, a State or local requirement may be considered to have been enacted or issued in final form even though it is preempted by a Commission standard or regulation.  
(2) The applicant is an official or instrumentality of a State or local government having authority to act for, or on behalf of, that government in applying for an exemption from preemption for the safety requirement referred to in the application.  
(3) The State or local requirement is preempted under a Commission statutory preemption provision by a Commission statute, standard, or regulation. A State or local requirement is preempted if the following tests are met:

- (i) There is a Commission statute, standard, or regulation in effect that is applicable to the product covered by the State or local requirement.  
(ii) The Commission statute, standard, or regulation is designated as having a preemptive effect under a statutory preemptive provision.  
(iii) The State or local requirement is designed to protect against the same risk of injury or illness as that addressed by the Commission statute, standard, or regulation.  
(iv) The State or local requirement is not identical to the Commission statute, standard, or regulation.  
(b) State or local governments may contact the Commission's Office of the General Counsel to obtain informal advice on whether a State or local requirement meets the threshold requirements of paragraph (a) of this section.

#### § 1061.5 Form of applications for exemption.

- An application for exemption shall:  
(a) Be written in the English language.  
(b) Clearly indicate that it is an application for an exemption from preemption by a Commission statute, standard, or regulation.  
(c) Identify the State or local requirement that is the subject of the application and give the date it was enacted or issued in final form.  
(d) Identify the specific Commission statute, standard, or regulation that is believed to preempt the State or local requirement.  
(e) Contain the name and address of the person, branch, department, agency, or other instrumentality of the State or local government that should be notified of the Commission's actions concerning the application.  
(f) Document the applicant's authority to act for, or on behalf of, the State or local government in applying for an exemption from preemption for the particular safety requirement in question.  
(g) Be signed by an individual having authority to apply for the exemption from federal preemption on behalf of the applicant.  
(h) Be submitted, in five copies, to the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

#### § 1061.6 Contents of applications for exemption.

Applications for exemption shall include the information specified in §§ 1061.7 through 1061.10. More generally, a State or local government seeking an exemption should provide the Commission with the most complete

possible information in support of the findings the Commission is required to make in issuing an exemption regulation. If any of the specified information is omitted because it is unavailable or not relevant, such omission should be explained in the application.

#### § 1061.7 Documentation of the State or local requirement.

An application for an exemption from preemption shall contain the following information:

- (a) A copy of the State or local requirement that is the subject of the application. Where available, the application shall also include copies of any legislation history or background materials used in issuing the requirement, including hearing reports or studies concerning the development or consideration of the requirement.  
(b) A written explanation of why compliance with the State or local requirement would not cause the product to be in violation of the applicable Commission statute, standard, or regulation.

#### § 1061.8 Information on the heightened degree of protection afforded.

An application for an exemption from preemption shall also contain information demonstrating that the State or local requirement provides a significantly higher degree of protection from the risk of injury or illness than the preempting Commission statute, standard, or regulation. More specifically, an application shall contain:

- (a) A description of the risk of injury or illness addressed by the State or local requirement.  
(b) A detailed explanation of the State or local requirement and its rationale.  
(c) An analysis of differences between the State or local requirement and the Commission statute, standard, or regulation.  
(d) A detailed explanation of the State or local test method and its rationale.  
(e) Information comparing available test results for the Commission statute, standard, or regulation and the State or local requirement.  
(f) Information to show hazard reduction as a result of the State or local requirement, including injury data and results of accident simulation.  
(g) Any other information that is relevant to applicant's contention that the State or local requirement provides a significantly higher degree of protection than does the Commission statute, standard, or regulation.

(h) Information regarding enforcement of the State or local requirement and sanctions that could be imposed for noncompliance.

#### § 1061.9 Information about the effect on interstate commerce.

An application for exemption from preemption shall provide information on the effect on interstate commerce a granting of the requested exemption would be expected to cause, including the extent of the burden and the benefit to public health and safety that would be provided by the State or local requirement. More specifically, applications for exemption shall include, where available, information showing:

- (a) That it is technologically feasible to comply with the State or local requirement. Evidence of technological feasibility could take the form of:  
(1) Statements by affected persons indicating ability to comply with the State or local government requirement.  
(2) Statements indicating that other jurisdictions have established similar requirements that have been, or could be, met by persons affected by the requirement that is the subject of the application.  
(3) Information as to technological product or process modifications necessary to achieve compliance with the state or local requirement.  
(4) Any other information indicating the technological feasibility of compliance with the state or local requirement.

(b) That it is economically feasible to comply with the State or local requirement, i.e., that there would not be significant adverse effects on the production and distribution of the regulated products. Evidence of economic feasibility could take the form of:  
(1) Information showing that the State or local requirement would not result in the unavailability (or result in a significant decline in the availability) of the product, either in the interstate market or within the geographic boundary of the State or local government imposing the requirement.  
(2) Statements from persons likely to be affected by the State or local requirement concerning the anticipated effect of the requirement on the availability or continued marketing of the product.  
(3) Any other information indicating the economic impact of compliance with the State or local requirement, such as projections of the anticipated effect of the State or local requirement on the

sales and price of the product, both in interstate commerce and within the geographic area of the State or local government.

(c) The present geographic distribution of the product to which the State or local requirement would apply, and projections of future geographic distribution. Evidence of the geographic distribution could take the form of governmental or private information or data (including statements from manufacturers, distributors, or retailers of the product) showing advertising in the interstate market, interstate retailing, or interstate distribution.

(d) The probability of other States or local governments applying for an exemption for a similar requirement. Evidence of the probability that other States or local governments would apply for an exemption could take the form of statements from other States or local governments indicating their intentions.

(e) That specified local conditions require the State or local government to apply for the exemption in order to adequately protect the public health or safety of the State or local area.

#### § 1061.10 Information on affected parties.

An application for an exemption from preemption shall include a statement which identifies in general terms, parties potentially affected by the State or local requirement, especially small businesses, including manufacturers, distributors, retailers, consumers, and consumer groups.

#### § 1061.11 Incomplete or insufficient applications.

(a) If an application fails to meet the threshold requirements of § 1061.4(a), the Office of General Counsel will inform the applicant and return the application without prejudice to its being resubmitted.

(b) If an application fails to provide all the information specified in §§ 1061.5 through 1061.10 of this part, and fails to fully explain why it has not been provided, the Office of General Counsel will either (1) return it to the applicant without prejudice to its being resubmitted, (2) notify the applicant and allow it to provide the missing information, or (3) if the deficiencies are minor and the applicant concurs, forward it to the Commission for consideration on its merits.

(c) If the Commission or the Commission staff believes that additional information is necessary or useful for a proper evaluation of the



application, the Commission or Commission staff will promptly request the applicant to furnish such additional information.

(d) If an application is not returned under paragraphs (a) or (b) of this section, the Commission will consider it on its merits.

#### § 1061.12 Commission consideration on merits.

(a) If the Commission proposes to grant an application for exemption it will, in accordance with 5 U.S.C. 553, publish a notice of that fact in the Federal Register, including a proposed exemption regulation, and provide an opportunity for written and oral comments on the proposed exemption by any interested party.

(b) The Commission will evaluate all timely written and oral submissions received from interested parties, as well as any other available and relevant information on the proposal.

(c) The Commission's evaluation will focus on:

(1) whether the State or local requirement provides a significantly higher degree of protection than the Commission statute or regulation from the risk of injury or illness that they both address,

(2) whether the State or local requirement would unduly burden interstate commerce if the grant of the exemption from preemption allows it to go into effect. The Commission will evaluate these factors in accordance with the Commission's statutory preemption provisions and their legislative history, and

(3) whether compliance with the State or local requirements would not cause the product to be in violation of the applicable Commission statute, standard, or regulation.

(d) If, after evaluating the record, the Commission determines to grant an exemption, it will publish a final exemption regulation, including the findings required by the statutory preemption provisions, in the Federal Register.

(e) If the Commission denies an application, whether or not published for comment, it will publish its reasons for doing so in the Federal Register.

Dated: December 20, 1988.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 88-29595 Filed 12-27-88; 8:45 am]

BILLING CODE 6335-01-M

## DEPARTMENT OF THE TREASURY

### Customs Service

#### 19 CFR PART 122

#### Withdrawal of Proposed Customs Regulations Amendment Concerning the Reporting Requirements for Aircraft

**AGENCY:** Customs Service, Department of the Treasury.

**ACTION:** Withdrawal of proposed rule.

**SUMMARY:** This document withdraws a proposal to amend the Customs Regulations relating to the reporting requirements for aircraft arriving in the U.S. from a foreign location. Customs had proposed that certain information regarding the passengers on such aircraft generally be required to be submitted to Customs prior to the arrival of the aircraft at the first port of entry. It was noted that this would permit Customs to query the Treasury Enforcement Communications System (TECS) prior to the arrival of air passengers and to thereby more efficiently and effectively process those persons.

After consideration of the comments received in response to the proposed rule, proposals for a voluntary and evolutionary advance passenger information program received from national and international airline trade associations and inquiries of several airlines indicating a willingness to participate in testing such a program, Customs has concluded that it should encourage the airline industry effort to voluntarily explore the benefits which an advance passenger information program will provide. Therefore, the proposal is being withdrawn.

**DATE:** Withdrawal effective December 28, 1988.

**FOR FURTHER INFORMATION CONTACT:** Robert Heiss, Office of Passenger Enforcement and Facilitation (202) 566-5607.

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 14, 1988, Customs published a notice in the Federal Register (53 FR 26604), proposing to amend § 122.42, Customs Regulations (19 CFR 122.42), relating to the entry of aircraft arriving in the U.S. from a foreign location.

The proposal would have implemented a portion of the arrival and reporting provisions of the Anti-Drug Abuse Act of 1988 (Pub. L. 99-570) as to aircraft arriving from a foreign location and carrying passengers. The aircraft pilot, or person authorized on his behalf,

would have been required to provide a list of passengers, along with their respective dates of birth and passport numbers, to Customs at the airport of first arrival prior to the arrival of the aircraft.

The proposal noted that the procedures established by the regulatory amendment would permit Customs to query the Treasury Enforcement Communications System (TECS) and to thereby more efficiently and effectively process arriving air passengers.

#### Discussion of Comments

Seventy-one comments were received in response to the proposed rule. Commenters included governmental and nongovernmental organizations as well as airline trade associations, individual airlines, and general aviation interests. Although the proposal would not have applied to general aviation aircraft being flown on a noncommercial basis, comments from that source indicated some confusion on the matter. The comments received from other commenters generally noted that, while the purpose of the proposal was commendable, they could not support it. They noted legal impediments, operational and technical difficulties, associated costs, and that the proposal would be anti-facilitative. Further, trade associations representing the major commercial U.S. flag and foreign flag airlines have proposed a voluntary and evolutionary advance passenger information program and several airlines have indicated a willingness to participate in testing such a program.

#### Conclusion

In accordance with the above discussion and in order to pursue the airline industry proposal for a voluntary participation program, Customs is withdrawing the proposal to amend § 122.42, Customs Regulations (19 CFR 122.42).

#### Drafting Information

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

William von Raab,

Commissioner of Customs.

Approved December 6, 1988.

John P. Simpson,

Acting Assistant Secretary of the Treasury.

[FR Doc. 88-29719 Filed 12-27-88; 8:45 am]

BILLING CODE 4820-02-M

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Parts 761, 765, 816 and 817

#### Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Areas Unsuitable for Mining; Surface Mining Activities; Underground Mining Activities

**AGENCY:** Office of Surface Mining, Reclamation and Enforcement, Interior.

**ACTION:** Proposed rule; extension of comment period.

**SUMMARY:** On October 31, 1988, the Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior published a proposed rule to amend its permanent program regulations in five general subject areas. The five subject areas deal with values incompatible with surface coal mining operations, AOC variances, disposal of excess spoil on preexisting benches, coal mine waste, and contemporaneous reclamation/backfilling and grading. The comment period was scheduled to close on December 30, 1988. OSMRE is now extending the comment period.

**DATES:** OSMRE will accept written comments on the proposed rule until 5:00 p.m. Eastern time on January 30, 1989.

**ADDRESSES:** Written Comments may be hand-delivered to: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131, 1100 L Street, NW., Washington, DC; or mailed to: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 5131-L, 1951 Constitution Avenue, NW., Washington, DC 20240.

**FOR FURTHER INFORMATION CONTACT:** Dermot Winters, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone (202) 343-5241 (Commercial of FTS).

**SUPPLEMENTARY INFORMATION:** On October 31, 1988 (53 FR 43970), OSMRE published a proposed rule to amend its permanent program regulations. The comment period for the proposed rule was scheduled to close on December 30, 1988. OSMRE has received a request to extend the comment period and is therefore extending it until January 30, 1989.

The proposed rule would amend OSMRE's permanent program regulations in five general subject areas.

In the subject area of values incompatible with surface coal mining operations, the proposed rule would amend the definition of no significant recreational, timber, economic, or other values incompatible with surface coal mining operations by removing the phrase "beyond an operator's ability to repair." This would eliminate reclamation as a criterion in determining compatibility with surface coal mining operations.

In the subject area of AOC variances, the proposed rule would revise regulations governing permits incorporating variances from AOC restoration requirements to limit their application to steep slope mining.

In the subject area of disposal of excess soil on preexisting benches, the proposed rule would revise regulations governing the disposal of excess soil on preexisting benches to conform them with the general requirements for backfilling and grading.

In the subject area of coal mine waste, the proposed rule would revise the general requirements of governing the disposal of coal mine waste to add to the existing requirement that is to be placed in a controlled manner the additional requirement that it be hauled or conveyed. This addition would prohibit the end or side dumping of coal mine waste. Also in this subject area, the rule would remove regulations requiring the handling of hazardous noncoal mine waste in accordance with the Resource Conservation and Recovery Act and its implementing regulations.

Finally, in the subject area of contemporaneous reclamation/backfilling and grading, the proposed rule would add new regulations reinstating backfilling and grading time and distance requirements. It would require the completion of backfilling and grading within a certain time or distance following coal removal, or under a schedule established by the regulatory authority. Also in this subject area, the rule would define thin overburden and thick overburden using general standards relating to the restoration of AOC, and would establish performance standards governing the backfilling and grading of thin and thick overburden.

Date: December 22, 1988.

Robert E. Boldt,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

[FR Doc. 88-29720 Filed 12-27-88; 8:45 am]

BILLING CODE 4310-05-M

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 199

[DoD Regulation 6010.8-R]

#### Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); CHAMPUS Peer Review Organization (PRO Program)

**AGENCY:** Office of the Secretary, DoD.

**ACTION:** Proposed amendment of rule.

**SUMMARY:** This proposed rule provides certain rules and procedures for the CHAMPUS PRO program. The major areas covered by this proposed rule are a set of special payment and financial liability rules relating to certain PRO determinations pertaining to PRO operations and a series of procedural requirements.

**DATE:** Written public comments must be received on or before January 27, 1989.

**ADDRESS:** Send comments to the Office of the Assistant Secretary of Defense (Health Affairs), Directorate of Demonstrations and Special Projects, The Pentagon, Room 1B657, Washington, DC 20301.

**FOR FURTHER INFORMATION CONTACT:** Nancy Gidley or LT A.R. Miller, MSC, USN, Office of the Assistant Secretary of Defense (Health Affairs), telephone (202) 697-8975.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

##### A. Overview of CHAMPUS PRO Program

Under 10 U.S.C. 1079(j)(2)(A) CHAMPUS is authorized to use a diagnosis-related group (DRG) based payment system, similar to that used for Medicare, for institutional providers. The Comprehensive Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, established the "Medicare link" that requires hospitals participating in the Medicare program to also participate in the CHAMPUS program. Consistent with Congressional intent, the CHAMPUS DRG-based payment system, implemented October 1, 1987, is modeled after the Medicare prospective payment system (PPS).

The CHAMPUS PRO program is established as a collateral program to the CHAMPUS DRG-based payment system. As the CHAMPUS DRG-based payment system is modeled after the Medicare PPS, the CHAMPUS PRO program is modeled after the Medicare PRO program. Through a memorandum of understanding between the



Department of Defense (DoD) and the Department of Health and Human Services (DHHS), the CHAMPUS PRO program quality assurance and utilization review will be conducted by the same Peer Review Organizations (PROs) that also conduct review for Medicare. The Medicare PRO program is the Federal Government's primary program of medical peer review, operating under the careful oversight of Congress.

Under the CHAMPUS PRO program, the PROs will review care provided in acute care hospitals for which payment is made under the CHAMPUS DRG-based payment system. PROs will conduct both quality assurance and utilization review specifically focusing on determining if the care met professionally recognized standards of care, if the admission was medically necessary, if the services were appropriate, and if the care was provided in the most appropriate setting. Cases reimbursed under the DRG system will be subject to varied reviews, including generic quality screen reviews, admission and discharge reviews, and DRG validation. A major objective of these multiple types of review is to guard against premature discharge or inappropriate admission. The peer review system uses criteria which have been developed on both national and local levels to determine the adequacy and appropriateness of care and are specific to the CHAMPUS population.

#### B. Note on Legal Authority

In contrast to the Medicare program, Congress has not specifically spelled out detailed requirements for the CHAMPUS PRO program. Thus, specific provisions of our current rule relating to utilization and quality control reviews of services covered by the DRG-based payment system as well as specific provisions of this proposed rule do not, unlike many parts of the Medicare PRO program, rest on specific statutory provisions. Rather, the existing and proposed rules that establish requirements for the CHAMPUS PRO program are built upon our more general statutory authorities for operating CHAMPUS.

These more general authorities include 10 U.S.C. 1079(j)(2), which authorizes CHAMPUS to promulgate regulations establishing payment methods for inpatient care like Medicare's prospective payment system rules, and section 1866(a)(1)(j) of the Social Security Act, which requires hospitals under Medicare to be CHAMPUS participating providers in accordance with admission practices and payment provisions prescribed in

CHAMPUS regulations. In addition to those provisions linking CHAMPUS to Medicare rules and procedures for paying for inpatient care, other statutory provisions establish additional legal authority for the CHAMPUS PRO program. These include 10 U.S.C. 1079(a)(13), which prohibits CHAMPUS from paying for services not medically necessary. The CHAMPUS PRO program implements new procedures necessary and proper to assure that CHAMPUS beneficiaries receive only high quality care that is also medically necessary and provided in an appropriate setting.

The absence of numerous particular statutory provisions to correspond to regulatory provisions might appear out of the ordinary for those familiar with the Medicare model of a greater degree of detailed, specific direction by Congress. However, the lack of such statutory specificity is the norm for CHAMPUS, which has established detailed regulations for the entire program pursuant to only general statutory direction.

#### II. Provisions of the Proposed Rule

As mentioned above, the existing CHAMPUS regulation, specifically 32 CFR 199.14(a)(1)(iv), prescribes the basic rules and procedures applicable to what is referred to in the regulation as "quality of care reviews," which we now refer to as the PRO program. This proposed rule supplements the existing regulation applicable to services covered by the CHAMPUS DRG-based payment system with a series of additions and clarifications that essentially fall into three broad categories. The first is a set of rules, very similar to those applicable to Medicare, allowing payment or limiting financial liability under certain circumstances for services determined by the PRO to be potentially excludable. Those circumstances relate to cases in which the provider and/or beneficiary did not know and could not reasonably have been expected to know that the services were excludable by the PRO.

The second category also addresses the matter of limiting beneficiary responsibility for charges, this time in the context of questionable premature discharge. The proposed rule would follow the Medicare model of limiting charges to beneficiaries, including the provision of a two day "grace period" of continued care in order to give the PRO a chance to review the case and make a determination about the appropriateness of a proposed hospital discharge.

The third broad category of provisions included in this proposed rule is a set of procedures that are necessary and

appropriate to augment the existing requirements and facilitate successful implementation of the PRO program. These procedures are generally modeled after those applicable to the Medicare PRO program.

A general theme underlying most of our existing PRO program rule and this proposed rule is that successful and smooth implementation of the CHAMPUS PRO program, from the perspectives of beneficiaries, hospitals, the PROs and the Government, will be facilitated to the extent we follow the path already established by the Medicare program. Thus, we frequently incorporate by reference provisions of the Medicare statute or regulations.

#### A. Payment and Liability for Certain Potentially Excludable Services

The Conference Report on the Fiscal Year 1989 Department of Defense Appropriations Act, H. Conf. Rept., No. 100-1002, 100th Cong., 2d. Session 34, called for the Department to "issue directives/regulations governing cases in which the PRO determines that medically unnecessary or inappropriate care has been provided." Specifically, the conferees said "the Department should provide a waiver of liability, especially for beneficiaries, similar to that provided under the Medicare program."

We propose to provide relief for both a provider and beneficiary providing or accepting services potentially excludable on the grounds of being not medically necessary or provided at an inappropriate level.

Where both the provider and the beneficiary did not know, and had no reason to know, that the services would be considered to be not medically necessary, payment would be made. However, in making such a payment the provider and patient will be put on notice that that type of service under those circumstances is excludable. In subsequent cases involving similar situations, no payment will be made.

In cases in which the provider, but not the beneficiary, knew or could reasonably have been expected to know that the services were excludable, CHAMPUS will not pay and the provider may not require the beneficiary to pay either the amount CHAMPUS disallowed or the usual beneficiary cost share amount. In such cases, the provider would be told that the provider could seek reconsideration of the PRO's decision both as to the medical necessity of the services and the provider's knowledge.

The proposed rule further adopts a set of criteria for determining whether

beneficiaries and providers know or should have known that services were excludable. These criteria are substantially the same as those applicable to Medicare under 42 CFR 405.334 and 405.336, and are intended to establish the same substantive standards as are followed under Medicare.

The limitation of liability only applies to cases in which the hospital services portion is covered by the CHAMPUS DRG-based payment system (although the payment and liability rules apply to both institutional and individual providers involved in the care) and in which a determination was made by the PRO that the care rendered was not medically necessary.

#### B. Limitation on Charges to Beneficiaries for Continued Hospital Stays

The proposed rule would establish a limitation on charges (other than the normal cost sharing amount) to beneficiaries for continued hospital stays essentially the same as that applicable to Medicare. These provisions are part of a process to assure that patients are not prematurely discharged and that providers are making appropriate discharge decisions.

Under this process, if the hospital determines that a patient no longer needs inpatient hospital care, the hospital will seek the agreement of the patient's attending physician. If the attending physician does not agree, the hospital may request immediate review by the PRO. If the hospital obtains the agreement of either the attending physician or the PRO, the hospital will then give the beneficiary written notice of the hospital's intention to proceed with the discharge and that if the patient prefers to remain in the hospital, the patient will be responsible for the charges for continued care beyond the second day following the date of the notice.

This two-day grace period gives the beneficiary the opportunity to request immediate PRO review without risk of financial responsibility for those two days of care. If the PRO review determines that continued inpatient services are needed, the beneficiary will not be charged for those services. Under the proposed rule, it is only in cases in which the PRO agrees with the hospital determination that the further hospitalization is not necessary that the beneficiary can be charged for the continued services, and then only beginning the third day after the required notice.

#### C. PRO Procedures

The proposed rule includes a set of procedures for the PRO program and a number of clarifications to our existing regulation. These are summarized below.

##### 1. "Peer Review Organization Program"

The proposed rule would adopt "Peer Review Organization program" as the title for the program.

##### 2. Beneficiary Information

The proposed rule would clarify that Medicare's documentation requirements regarding the PRO program information that hospitals must provide to beneficiaries also apply to CHAMPUS. The information hospitals must give beneficiaries informs them of their rights in connection with the PRO program, including the procedure to seek PRO review of any quality of care problems. (Medicare program officials are now considering revision to the documentation requirements. We intend to follow the Medicare lead should revisions be adopted.)

##### 3. Physician Attestation and Acknowledgement

The proposed rule would clarify that attestation and acknowledgment statement requirements for Medicare also apply to CHAMPUS and that the same statements may be used. This provision clarifies the reference to these statements in the current CHAMPUS regulation at § 199.14(a)(1)(iv)(C)(2)(iii).

##### 4. M.O.U. Required

The proposed rule would clarify that, as under Medicare, hospitals must execute a memorandum of understanding with the PRO providing appropriate procedures for the PRO program.

##### 5. Authority to Deny Payment

The proposed rule would clarify the authority to deny payment for unnecessary services.

##### 6. DRG Validation

The proposed rule would clarify authority to correct coding errors and make appropriate payment adjustments in connection with DRG validation activities of the PRO.

##### 7. Procedures for Initial Determinations and Reconsiderations

The proposed rule would adopt procedures for initial determinations and reconsiderations by PROs substantially identical to those that apply under Medicare. These procedures provide fair process for both beneficiaries and providers and appear

most appropriate for the CHAMPUS PRO program. The applicable Medicare procedures for initial determinations are at 42 CFR 468.83 to 468.104 and for reconsiderations are at 42 CFR 473.14 to 473.34. Also following the Medicare example, PRO reconsidered determinations are final for providers but generally appealable for beneficiaries.

We propose to follow the model Congress established for Medicare regarding the finality of PRO reconsidered determinations for providers because, as under the Medicare PRO program, the procedures give providers ample opportunity to participate in the decision making process and reasonably assure the accuracy of the fact finding process. These procedures include an opportunity to discuss the matter with the PRO physician advisor prior to the initial determination and full consideration.

##### 8. Appeals and Hearings

The proposed rule provision would handle beneficiary appeals and hearings regarding adverse PRO decisions in the same manner beneficiary appeals and hearings are generally handled under existing CHAMPUS procedures, which are at § 199.10 of the CHAMPUS regulation. PRO reconsidered determinations would be treated as the procedural equivalent to a formal review determination under the normal CHAMPUS appeals and hearings procedures.

##### 9. Acquisition, Protection and Disclosure of Peer Review Information

The proposed rule would adopt for the CHAMPUS PRO program the same rules and procedures for acquisition, protection and disclosure of peer review information as the PROs are currently following for Medicare. The only exception is the Medicare PRO provision for penalties, which is dependent upon a Medicare-specific statutory provision that cannot be adopted for CHAMPUS without a specific statutory basis. We believe in this regard that our existing contractual authority over the PROs provides a sufficient deterrent to abuses.

##### 10. Additional Provisions Regarding Confidentiality of Records and Limitations on Liability of Participants

The proposed rule sets forth our interpretation that 10 U.S.C. section 1102 applies to the CHAMPUS PRO program as it does to the external peer review activity that reviews medical care provided in military hospitals. This



section of law, enacted as part of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, section 705(a), assures the confidentiality of medical quality assurance records created by or for the Department of Defense for the purpose of assessing the quality of medical care and limits the civil liability of participants in quality assurance activities. Although CHAMPUS had not, at the time this provision was enacted, yet announced plans to implement a PRO program, the external peer review program for military hospitals was then being developed. It is DoD's interpretation that 10 U.S.C. 1102 applies to both civilian PRO programs (in addition to its application to internal quality assurance programs of military hospitals).

#### 11. Obligations, Sanctions and Procedures

The proposed rule would establish a process for making sanction recommendations to OCHAMPUS for cases identified under the CHAMPUS PRO program. The thrust of this sanction process is to adopt the substantive standards and PRO procedures applicable to Medicare. Thus, the proposed rule incorporates by reference obligations of providers to provide and document medically necessary, quality care as required under Medicare. Further, it adopts the same substantive grounds for sanctions as Congress has adopted for Medicare. Additionally, PROs will, as they do for Medicare, give providers the opportunity for discussions and make sanctions recommendations. However, whereas under Medicare such recommendations are made to the HHS Inspector General, CHAMPUS sanctions recommendations will be made to OCHAMPUS and will be handled in accordance with normally applicable sanction case hearing procedures. In considering our sanction process, we are mindful of the much more limited size of our PRO program, the likely number of sanctions cases and the current role of HHS in identifying providers that should be excluded from Federal reimbursement programs. We expect to confer with HHS, as appropriate, to avoid duplication of effort in connection with potentially sanctionable matters of interest to both Medicare and CHAMPUS.

#### D. Effective Date and Special Transition Rule

Finally, readers should be aware of several noteworthy provisions regarding the effective date and a special transition rule. In keeping with usual rule making procedures, the rule would be effective not less than 30 days after

publication of a final rule to the extent that it establishes new obligations on the public. However, much of the rule establishes obligations on DoD and the PROs, which have contractual relationship with the government. These provisions are intended to guide DoD and PRO actions in connection with the operation of the PRO program since it began October 1, 1988.

Thus, our proposal is to make the rule effective April 1, 1989 (this assumes our final rule will be published on or about March 1) to the extent it establishes new obligations on beneficiaries or providers. However, to the extent it establishes requirements on DoD and the PROs, all parties can be assured that these requirements are effective for all PRO operations beginning October 1, 1988.

A special aspect regarding the effective date relates to the process for allowing CHAMPUS payment or limiting beneficiary liability for certain potentially excludable services. We want to assure that beneficiaries not be held liable for any services determined by the PRO prior to April 1 to have been not medically necessary. Thus, we intend to deem all such services as qualifying for payment by CHAMPUS under the special payment provision of the new § 199.4(h)(2). Thus, these determinations by PROs prior to April 1 will not "count" for purposes of denying or recouping CHAMPUS payment. However, they will count as establishing notice to providers for purposes of future (after April 1) determinations of unnecessary services, as well as for all other PRO program requirements.

Further, to maintain consistency, we intend to provide the Director, OCHAMPUS with authority to establish similar special transaction rules for PROs that start work after April 1, 1988. It is our intention that for the first 60 days of operations for those PROs, denial determinations will not "count" for purposes of payment, but will be subject to all other PRO program requirements, such as reconsideration procedures. This is similar to the approach initially taken by PROs under Medicare.

#### III. Regulatory Procedures

##### A. Paperwork Reduction Act

This notice does not impose new information collection requirements. Therefore, it does not need to be reviewed pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3511).

#### B. E.O. 12291 and the Regulation Flexibility Act

This proposed rule is not a major rule for the purposes of Executive Order 12291. As required by the Regulatory Flexibility Act, it is hereby certified that this proposed rule will not have a significant impact on small business entities. This proposed rule does not establish new coverage rules or payment methods. Rather, it merely establishes procedures for effectuating basic requirements of quality care and medical necessity. Because the vast majority of care to which these procedures apply conforms to applicable requirements, this proposed rule will not cause large scale changes in operations. In addition, the procedures proposed to be adopted are very similar to procedures providers are currently following under Medicare.

In an effort to roughly quantify the potential impact on providers our PRO program, of which this proposed rule is a part, we took note of the Medicare experience regarding the number of cases for which the PROs denied payment. On the basis of these denial rates and the projected percentage of CHAMPUS claims the PROs will review, we anticipate a CHAMPUS revenue impact arising from the PRO program to be well under \$10 million per year. Thus, we conclude that this proposed rule does not involve significant impacts on providers.

#### List of Subjects in 32 CFR Part 199

Claims, Handicapped, Health Insurance, Military personnel.

#### PART 199—[AMENDED]

Accordingly, 32 CFR Part 199 is proposed to be amended as follows:

1. The authority citation for Part 199 continues to read as follows:

Authority: 10 U.S.C. 1079, 1086, 1102, 5 U.S.C. 301.

2. Section 199.4 is amended by removing paragraph (f)(6) and adding a new paragraph (h), to read as follows:

#### § 199.4 Basic program benefits.

(h) *Payment and liability for certain potentially excludable services under the Peer Review Organization program.*

(1) *Applicability.* This subsection provides special rules that apply only to services retrospectively determined under the Peer Review Organization (PRO) program (see § 199.14(a)(1)(iv)) to be potentially excludable (in whole or in part) from the basic program under paragraph (g) of this section. Services may be excluded by reason of being not

medically necessary (paragraph (g)(1) of this section), at an inappropriate level (paragraph (g)(3) of this section), custodial care (paragraph (g)(7) of this section) or other reason relative to reasonableness, necessity or appropriateness (which services shall throughout the remainder of this subsection, be referred to as "not medically necessary"). (Also throughout the remainder of the subsection, "services" includes items and "provider" includes supplier).

(2) *Payment for certain potentially excludable expenses.* Services determined under the PRO program to be potentially excludable by reason of the exclusions in paragraph (g) of this section for not medically necessary services will not be determined to be excludable if neither the beneficiary to whom the services were provided nor the provider (institutional or individual) who furnished the services knew, or could reasonably have been expected to know, that the services were subject to those exclusions. Payment may be made for such services as if the exclusions did not apply.

(3) *Liability for certain excludable services.* In any case in which items or services are determined excludable by the PRO program by reason of being not medically necessary and payment may not be made under paragraph (h)(2) of this section because the requirements of paragraph (h)(2) of this section are not met, the beneficiary may not be held liable (and shall be entitled to a full refund from the provider of the amount excluded and any cost share amount already paid) if:

(i) The beneficiary did not know and could not reasonably have been expected to know that the services were excludable by reason of being not medically necessary; and

(ii) The provider knew or could reasonably have been expected to know that the items or services were excludable by reason of being not medically necessary.

(4) *Criteria for determining that beneficiary knew or could reasonably have been expected to have known that services were excludable.* A beneficiary who receives services excludable by reason of being not medically necessary will be found to have known that the services were excludable if the beneficiary has been given written notice that the services were excludable or that similar or comparable services provided on a previous occasion were excludable and that notice was given by the OCHAMPUS, CHAMPUS PRO or fiscal intermediary, a group or committee responsible for utilization

review for the provider, or the provider who provided the services.

(5) *Criteria for determining that provider knew or could reasonably have been expected to have known that services were excludable.* An institutional or individual provider will be found to have known or been reasonably expected to have known that services were excludable under this subsection under any one of the following circumstances:

(i) The PRO or fiscal intermediary had informed the provider that the services provided were excludable or that similar or reasonably comparable services were excludable.

(ii) The utilization review group or committee for an institutional provider or the beneficiary's attending physician had informed the provider that the services provided were excludable.

(iii) The provider had informed the beneficiary that the services were excludable.

(iv) The provider had received written materials, including notices, manual issuances, bulletins, guides, directives or other materials, providing notification of PRO screening criteria specific to the condition of the beneficiary. Attending physicians who are members of the medical staff of an institutional provider will be found to have also received written materials provided to the institutional provider.

(v) The services that are at issue are the subject of what are generally considered acceptable standards of practice by the local medical community.

3. Section 199.14(a)(1) is amended by revising paragraph (iv) introductory text, and adding new paragraphs (iv)(B) (1), (2), (3), and (4), and by revising paragraph (iv)(D)(1) (i), and adding new paragraph (iv)(D)(3), and by adding new paragraphs (iv) (E) through (J), as follows:

#### § 199.14 Provider reimbursement methods.

(a) \* \* \*

(1) \* \* \*

(iv) *Peer Review Organization program.* This paragraph establishes rules and procedures applicable to the CHAMPUS Peer Review Organization (PRO) program for utilization and quality review of services provided in hospitals for which the hospital care is covered by the CHAMPUS DRG-based payment system.

(B) *Hospital cooperation.*

(1) Documentation that the beneficiary has received the required information about the CHAMPUS PRO program

must be maintained in the same manner as is the notice required for the Medicare program by 42 CFR 466.76(c).

(2) The physician attestation and physician acknowledgement required for Medicare under 42 CFR 412.40 and 412.46 is also required for CHAMPUS and may be satisfied by the same statements as required for Medicare, with substitution or addition of "CHAMPUS" when the word "Medicare" is used.

(3) Participating hospitals must execute a memorandum of understanding with the PRO providing appropriate procedures for implementation of the PRO program.

(4) Participating hospitals may not charge a CHAMPUS beneficiary for inpatient hospital services excluded on the basis of § 199.4(g)(1) (not medically necessary), § 199.4(g)(3) (inappropriate level), or § 199.4(g)(7) (custodial care) unless all of the conditions established by 42 CFR 412.42(c) with respect to Medicare beneficiaries have been met with respect to the CHAMPUS beneficiary.

(D) *Actions as a result of review.*

(1) *Findings related to individual claims.*

(i) Deny payment for or recoup (in whole or in part) any amount claimed or paid for the inpatient hospital and professional services related to such determination.

(3) *Revision of coding relating to DRG validation.* The following provisions apply in connection with the DRG validation process set forth in paragraph (a)(1) (iv)(C)(2) of this section.

(i) If the diagnostic and procedural information attested to by the attending physician is found to be inconsistent with the hospital's coding or DRG assignment, the hospital's coding on the CHAMPUS claim will be appropriately changed and payments recalculated on the basis of the appropriate DRG assignment.

(ii) If the information attested to by the physician as stipulated under paragraph (a)(1) (iv)(B)(2) of this section is found not to be correct, the PRO will change the coding and assign the appropriate DRG on the basis of the changed coding.

(E) *Procedures regarding initial determinations.* The CHAMPUS PROs shall establish and follow procedures for initial determinations that are substantively the same or comparable to the procedures applicable to Medicare under 42 CFR 466.83 to 466.104. In



addition, these procedures shall provide that a PRO's determination than an admission is medically necessary is not a guarantee of payment by CHAMPUS; normal CHAMPUS benefit and procedural coverage requirements must also be applied.

(F) *Procedures regarding reconsiderations.* The CHAMPUS PROs shall establish and follow procedures for reconsiderations that are substantively the same or comparable to the procedures applicable to reconsiderations under Medicare pursuant to 42 CFR 473.15 to 473.34, except that the time limit for requesting reconsideration (see 42 CFR 473.20(a)(1)) shall be 90 days. A PRO reconsidered determination is final and binding upon all parties to the reconsideration except to the extent of any further appeal for beneficiaries pursuant to paragraph (a)(1)(iv)(G) of this section. A PRO reconsidered determination may not be further appealed by a provider.

(G) *Appeals and hearings.* Beneficiaries may appeal a PRO reconsideration determination to OCHAMPUS and obtain a hearing on such appeal to the extent allowed and under the procedures set forth in § 199.10(d). For purposes of the hearing process, a PRO reconsidered determination shall be considered as the procedural equivalent of a formal review determination under § 199.10. The provisions of § 199.10(e) concerning final action shall apply to hearings cases.

(H) *Acquisition, protection and disclosure of peer review information.* The provisions of 42 CFR Part 476, except § 476.108, shall be applicable to the CHAMPUS PRO program as they are to the Medicare PRO program.

(I) *Additional provision regarding confidentiality of records and limitation on liability of participants.* The provisions of 10 U.S.C. 1102 regarding the confidentiality of medical quality assurance records and the qualified immunity for participants shall apply to the activities of the CHAMPUS PRO program as they do to the activities of the civilian PRO program that reviews medical care provided in military hospitals.

(J) *Obligations, sanctions and procedures.*

(1) The obligations of health care practitioners and providers set forth in section 1156(a) of the Social Security Act (42 U.S.C. 1320C-5(a)) shall apply to providers of care that is the subject of review under the CHAMPUS PRO program.

(2) It shall be a basis for suspension or exclusion from CHAMPUS if a provider has failed in a substantial number of

cases substantially to comply with any obligation arising from paragraph (a)(1)(iv)(J)(2) of this section or has grossly and flagrantly violated any such obligation in one or more instances, and it is determined that the provider has demonstrated an unwillingness or lack of ability substantially to comply with such obligations.

(3) In any case in which the PRO determines, after having provided reasonable notice and opportunity for discussion, that a provider should be subject to a sanction under paragraph (a)(1)(iv)(J)(2) of this section, the PRO shall forward to the Director, OCHAMPUS (or designee) a recommendation to that effect, supported by information and documentation pertinent to the matter.

(4) The Director of CHAMPUS shall determine whether to impose a sanction pursuant to paragraph (a)(1)(iv)(J)(2) of this section. Providers may appeal adverse sanctions decisions under the procedures set forth in § 199.10(d).

Linda Bynum,  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.  
December 21, 1988.  
[FR Doc. 88-29664 Filed 12-27-88; 8:45 am]  
BILLING CODE 3810-01-M

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

#### 37 CFR Part 10

[Docket No. 81146-8246]

#### Exhaustion of Administrative Remedies in Patent and Trademark Office; Disciplinary Proceedings

**AGENCY:** Patent and Trademark Office, Commerce.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This notice of proposed rulemaking sets forth proposed amendments to 37 CFR 10.155 and 10.157. The purpose of the amendments is to clarify that a respondent dissatisfied with the initial decision by the administrative law judge in a Patent and Trademark Office (PTO) disciplinary proceeding must exhaust available administrative remedies, i.e., appeal to the Commissioner of Patents and Trademarks, before seeking judicial review under 35 U.S.C. 32. Interested parties are invited to comment on the proposed amendments.

**DATES:** Written comments must be received on or before February 27, 1989

to insure consideration. No oral hearing will be conducted.

**ADDRESS:** Address written comments to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231, marked to the attention of Harris A. Pitlick.

**FOR FURTHER INFORMATION CONTACT:** Harris A. Pitlick by telephone at (703) 557-4035 or by mail marked to his attention and addressed to Box 8, Commissioner of Patents and Trademarks, Washington, DC 20231.

#### SUPPLEMENTARY INFORMATION:

It is possible that present rules may be interpreted not to explicitly require a respondent dissatisfied with the decision of the administrative law judge (initial decision) in a PTO disciplinary proceeding to file an appeal with the Commissioner of Patents and Trademarks as a condition precedent to filing a petition for review in the United States District Court for the District of Columbia under 35 U.S.C. 32.

Under present 37 CFR 10.154(a), in the absence of an appeal to the Commissioner, the initial decision will, without further proceedings, become the decision of the Commissioner thirty (30) days therefrom. Under 35 U.S.C. 32, Local Rule 213 of the United States District Court for the District of Columbia and present 37 CFR 10.157, review of the final decision of the Commissioner may be obtained by filing a petition in that court within 30 days of the date of final agency action. Thus, as presently constituted, the rules could be construed to permit a respondent dissatisfied with the initial decision to bypass review by the Commissioner and directly seek judicial review within 60 days of the date of the initial decision.

The purpose of 37 CFR 10.154-10.157 is to outline the steps for seeking review of an initial decision in a disciplinary proceeding. There is no provision for bypassing a determination by the Commissioner unless both parties accept the decision and do not desire any further review of the initial decision. 37 CFR 10.155 and 10.157 are proposed to be amended to clarify that a respondent must exhaust available administrative remedies by appeal to the Commissioner before judicial review can be considered ripe.

Section 10.155 is proposed to be amended by adding a new paragraph (d), which provides that absent an appeal by the Director, failure by the respondent to appeal under the provisions of this section shall be deemed to be both an acceptance of the initial decision and a waiver of the right

to further administrative or judicial review.

Section 10.157 is proposed to be amended by making paragraph (a) thereof subject to paragraph (d) of 37 CFR 10.155.

#### Other Considerations

The proposed rule change is in conformity with the requirements of the Regulatory Flexibility Act (Pub. L. 96-354), Executive Orders 12291 and 12612 and the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

The General Counsel has certified to the Chief Counsel for Advocacy, Small Business Administration that this proposed rule change is not expected to have a significant adverse economic impact on a substantial number of small entities (Regulatory Flexibility Act, Pub. L. 96-354).

The Patent and Trademark Office has determined that this proposed rule change is not a major rule under Executive Order 12991. The annual effect on the economy will be less than \$100 million. There will be no major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. There will be no adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Patent and Trademark Office has also determined that this notice has no federalism implications affecting the relationship between the national government and the State as outlined in Executive Order 12612.

This proposed rule change does not contain a collection of information subject to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

#### List of Subjects in 37 CFR Part 10

Administrative practice and procedure, Courts, Inventions and patents, Lawyers, Trademarks.

For the reasons set out in the preamble, it is proposed to amend 37 CFR Part 10 as follows wherein removals are indicated by brackets and additions by arrows:

#### PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

1. The authority citation for 37 CFR Part 10 would continue to read as follows:

Authority: 5 U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 8, 31, 32, 41.

2. Section 10.155 is proposed to be amended by adding new paragraph (d) as follows:

#### § 10.155 Appeal to the Commissioner.

(d) In the absence of an appeal by the Director, failure by the respondent to appeal under the provisions of this section shall be deemed to be both acceptance by the respondent of the initial decision and waiver by the respondent of the right to further administration or judicial review.

3. Section 10.157 is proposed to be amended by revising paragraph (a) as follows:

#### § 10.157 Review of Commissioner's final decision.

(a) Review of the Commissioner's final decision in a disciplinary case may be had by, subject to § 10.155(d), by a petition filed in the United States District Court for the District of Columbia. See 35 U.S.C. 32 and Local Rule 213 of the United States District Court for the District of Columbia.

Dated: December 21, 1988.

Donald J. Quigg,

Assistant Secretary and Commissioner of  
Patents and Trademarks.

[FR Doc. 88-29850 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-16-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[FRL-3492-2]

#### Approval and Promulgation of Implementation Plans; State of Kansas

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rulemaking.

**SUMMARY:** Section 123 of the Clean Air Act, as amended, requires EPA to promulgate regulations to ensure that the degree of emission limitation required for the control of any pollutant under an applicable state implementation plan (SIP) is not affected by that portion of any stack which exceeds good engineering practice (GEP) or by any other dispersion technique.

On March 27, 1988, the Kansas Department of Health and Environment (KDHE) submitted regulations K.A.R. 28-19-18 through 28-19-18f pertaining to stack heights. The state also submitted an analysis of existing stacks which shows that stack heights or other dispersion techniques were not a consideration for establishing the

emission limitations contained in the applicable Kansas SIP.

Today's action proposes to approve the Kansas stack height provisions contained in K.A.R. 28-19-18 through 28-19-18f. EPA also proposes to approve the definition of "emission limitation and emission standard" at K.A.R. 28-19-7(g) and the state's negative declaration. EPA is soliciting public comments on this proposed rulemaking.

**DATE:** Comments must be received no later than January 27, 1989.

**ADDRESSES:** Copies of the state submission are available for inspection during normal business hours at the following locations: Environmental Agency, Region VII, Air Branch, 726 Minnesota Avenue, Kansas City, Kansas 66101; and the Kansas Department of Health and Environment, Bureau of Air Quality and Radiation Control, Forbes Field, Topeka, Kansas 66620.

**FOR FURTHER INFORMATION CONTACT:** Robert J. Chanslor at (913) 236-2893; FTS 757-2893.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 123 of the Clean Air Act, as amended, regulates the manner in which techniques for dispersion of pollutants from a source may be considered in setting emission limitations. Specifically, Section 123 requires that the degree of emission limitation shall not be affected by that portion of a stack which exceeds GEP or by "any other dispersion technique." The Act defines GEP or by "any other dispersion technique." The Act defines GEP, with respect to stack height, as:

The height necessary to insure that emissions from the stack do not result in excessive concentrations of any air pollutant in the immediate vicinity of the source as a result of atmospheric downwash, eddies or wakes which may be created by the source itself, nearby structure or nearby terrain obstacles . . .

Section 123 also provides that GEP stack height shall not exceed two and one-half times the height of the source (2.5H) unless a demonstration is performed showing that a higher stack is needed to avoid "excessive concentrations." Section 123 provides that the Administrator shall regulate only stack height credits; i.e., the portion of the stack height used in calculating an emissions limit, rather than the actual stack heights.

The Act is less specific with respect to "other dispersion techniques." It only states that the term shall include intermittent and supplemental control systems (ICS and SCS), but otherwise



leaves the definition of that term to the discretion of the Administrator.

The Act delegates to the Administrator the responsibility for defining key phrases including "excessive concentrations" and "nearby", with respect to both structures and terrain obstacles, and other dispersion techniques. The Administrator must also define the requirements of an adequate demonstration justifying stack height credits in excess of the 2.5H formula.

EPA promulgated a regulation implementing section 123 on February 8, 1982 (47 FR 5864). On November 9, 1982, the state of Kansas submitted regulations intended to comply with EPA stack height regulations. These regulations were generally approvable. These regulations (K.A.R. 28-19-18 through 28-19-18f) became final on May 1, 1983. Because of pending litigation action on the Kansas stack height rule was not commenced.

EPA's regulations were challenged in the U.S. Court of Appeals for the D.C. Circuit by the Sierra Club Legal Defense Fund, Inc., the Natural Resources Defense Council, Inc., and the Commonwealth of Pennsylvania in *Sierra Club v. EPA*, 719 F.2d 438. On October 11, 1983, the Court issued its decision ordering EPA to reconsider portions of the stack height regulations, reversing certain portions and upholding other portions.

On February 28, 1984, the electric power industry filed a petition for a writ on certiorari with the U.S. Supreme Court. On July 2, 1984, the Supreme Court denied the petition (104 S. Ct. 3357), and on July 18, 1984, the Court of Appeals' mandate formally issued, implementing the Court's decision and requiring EPA to promulgate revisions to the stack height regulations within six months. The promulgation deadline was ultimately extended to June 27, 1985.

Revisions to the stack height regulations were proposed on November 9, 1984 (49 FR 44878) as finalized on July 8, 1985 (50 FR 27892). The revisions redefine a number of specific terms including "excessive concentrations", "dispersion techniques", "nearby", and other important concepts, and modified some of the bases for determining GEP stack height.

Pursuant to section 406(d)(2) of the Act, all states were required to: (1) Review and revise, as necessary, their SIPs to include provisions that limit stack height credit and dispersion techniques in accordance with the revised regulations, and (2) review all existing emission limitations to determine whether any of these limitations have been affected by stack

height credits above GEP or any other dispersion techniques. For any limitations so affected, states were to prepare revised limitations consistent with their revised SIPs. All SIP revisions and revised emissions limits were to be submitted to EPA within nine months of promulgation, as required by section 406.

Subsequently, EPA issued detailed guidance on carrying out the necessary reviews. For the review of emission limitations, states were to prepare inventories of stacks greater than 65 meters in height and sources with emissions of SO<sub>2</sub> in excess of 5,000 tons per year (TPY). These limits correspond to the *de minimis* GEP stack height and the *de minimis* SO<sub>2</sub> emission exemption from prohibited dispersion techniques. These sources were then subjected to detailed review for conformance with the revised regulations. State submissions were to contain an evaluation of each stack and source in the inventory.

On August 23, 1985, the Region VII office advised KDHE of EPA's newly promulgated stack height regulations, and requested the KDHE to prepare and submit an action plan for revising and submitting the state's stack height regulations. In response to this request, the KDHE submitted its action plan on October 11, 1985. This action plan committed to a submittal of the revised regulations by April 8, 1988. The final permanent rules were to be submitted on or after May 1, 1988.

The KDHE action plan was also to include an inventory of stacks greater than the *de minimis* 65 meter height and sources which exceed 5,000 TPY allowable SO<sub>2</sub> emissions. The KDHE was to provide a modeling analysis of stacks with heights greater than GEP. The modeling would use the GEP height and allowable emissions to estimate whether ground level concentrations could exceed the National Ambient Air Quality Standards (NAAQS).

On December 9, 1985, the KDHE submitted its "first-cut" inventory of sources affected by the revised stack height regulations. This inventory identified 18 facilities having allowable SO<sub>2</sub> emissions greater than 5,000 TPY, and 11 facilities whose stacks exceed 65 meters height.

#### Review of State Regulations

On March 27, 1986, the KDHE submitted revised regulations K.A.R. 28-19-18 through 28-19-18f pertaining to stack heights. These regulations were initially adopted after a public hearing held on November 22, 1985. These regulations were subsequently revised after notice and public hearing on

November 13, 1987. The public hearing satisfies the EPA requirements of 40 CFR 51.102. These revisions were adopted to satisfy deficiencies in those regulations adopted in 1985.

K.A.R. 28-19-18, Stack heights, specifies that emission limitations of any source must not be affected by the portion of any source's stack height that exceeds good engineering practice or any other dispersion technique. Stack heights in existence on or before December 31, 1970, are exempted. Good engineering practice stack heights are determined under the remaining portions of the rules. This rule is approvable.

K.A.R. 28-19-18a, Stack height credit, limits the credit for plume dispersion analysis when used in applications for PSD permits to a stack height of 65 meters or a height not exceeding GEP. Stack heights in existence before December 31, 1970, are exempted from this rule. This rule is consistent with 40 CFR 51.184 and the exemption is consistent with 40 CFR 51.118(b). This rule is approvable.

K.A.R. 28-19-18b, Definitions, contains definitions that are consistent with the definitions found in 40 CFR 51.100 as revised on November 7, 1986, at 51 FR 40662. This rule is approvable.

K.A.R. 28-19-18c, Methods for determining good engineering practice stack height, establishes 65 meters as a minimum GEP height and formulae for determining GEP for heights greater than 65 meters. The rule allows 2.5H for stacks in existence on January 12, 1979, and  $Ht = H + 1.5L$  for stacks constructed after January 12, 1979. The rule regarding stacks constructed subject to the post January 12, 1979, formula provides for a field study or fluid modeling to verify the formula. This is consistent with 51.100(hh)(3), and is approvable.

K.A.R. 28-19-18d, Fluid modeling, references EPA guideline documents pertaining to fluid modeling. This rule adopts those documents by reference. This rule is approvable.

K.A.R. 28-19-18e was part of the stack height rules adopted by the KDHE in 1983 and pertained to plume impactions credit. This rule was revoked to be consistent with the EPA stack height rule revisions of July 8, 1985 (50 FR 28792).

K.A.R. 28-19-18f, Notification requirements, prohibits credit for a GEP stack height based upon fluid modeling or field study until after a public notice and an opportunity for a public hearing. This regulation satisfies the notice and hearing requirements at 40 CFR 51.118(a) and 51.184. This rule is approvable.

The approved Kansas SIP contains regulations which require permits to construct in nonattainment areas and areas designated attainment or unclassified. Each of these new source permit rules contains provisions which require an opportunity for a public hearing before a permit may be issued. In addition, K.A.R. 28-19-18f prohibits credit for a GEP height determined by fluid modeling or a field study until after there is an opportunity for a public hearing. Therefore, EPA believes the state's plan provides adequate public notification requirements which will also include stacks in excess of GEP and emissions limits which are revised because of such stack heights.

EPA's initial review of the Kansas stack height regulations found that the state regulations contained no definitions equivalent to 40 CFR 51.100(z), Emission limitation and emission standard. On January 6, 1988, the KDHE submitted regulation K.A.R. 28-19-7(g), Emissions limitation and emission standard, which is consistent with the EPA's definition. This definition is approvable.

Although the EPA proposes approval of Kansas' stack height rules on the grounds that they satisfy 40 CFR Part 51, the EPA also provides notice that this action may be subject to modification when EPA completes rulemaking to respond to the decision in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988). If the EPA's response to the NRDC remand modifies the July 8, 1985, regulations, the EPA will notify the state of Kansas that its rules must be changed to comport with the EPA's modified requirements. This may result in revised emission limitations or may affect other actions taken by Kansas and source owners or operators.

#### Review of the State's Stack Height Analysis

The stack height analysis submitted by the state included all SO<sub>2</sub> sources emitting 5,000 tons SO<sub>2</sub> per year or greater. EPA believes the state identified all major SO<sub>2</sub> emitting sources in its inventory.

The state's emissions limit for SO<sub>2</sub> from coal-fired boilers is found at K.A.R. 28-19-31. This regulation was adopted by the state and submitted as a revision to its SIP as required under the 1970 Clean Air Act. SIP requirements under the Clean Air Act were published at 36 FR 15486 on August 14, 1971. Those SIP regulations allowed states to use an example region approach for establishing emissions limits for pollutant sources. The state of Kansas used this approach in its SIP approved by EPA on May 21, 1971 (37 FR 10867).

The example region approach allowed states to assume that if emissions limits in the example region were sufficient to attain or maintain air quality standards in the example region, then such standards should be sufficient to attain or maintain air quality standards in all areas of the state. The example region selected by the state was the Kansas portion of the Kansas City Metropolitan Area because it was the most heavily populated and industrialized area of the state.

At the time the state adopted its SO<sub>2</sub> emissions limit for existing sources, there were two coal-fired electric generating facilities in the example region. EPA has reviewed the structural dimensions of these facilities and finds that the stack heights at these facilities are less than GEP. Further, the state assures EPA that there are no dispersion techniques other than stack heights employed at these facilities. Thus, it seems clear that excessive stack heights and other prohibited dispersion techniques were not a consideration for establishing the state's SO<sub>2</sub> emissions limit.

EPA's review of the state's 1971 SIP submittal finds that the "example region" apparently had measured SO<sub>2</sub> air quality that was better than NAAQS. Thus, the SIP was only required to provide for maintenance of the SO<sub>2</sub> standard. EPA's approval of the SIP appears to acknowledge that the emissions limit would provide for maintenance of the standard.

EPA's review of the state's stack height analysis and other pertinent data find that since the two power generating facilities in the example region have stack heights less than GEP and use no prohibited dispersion techniques, the SO<sub>2</sub> limit was not based on excessive stack heights or other prohibited dispersion techniques. Thus, a negative declaration is appropriate for the stacks included in the state's analysis.

The Region VII office performed a screening analysis on the several stacks exceeding GEP at the appropriate GEP formula height ( $H + 1.5L$ ) without considering other prohibited dispersion techniques. The predicted impacts were substantially less than NAAQS and PSD increments. Thus, a negative declaration is in order for those stacks. However, the state reevaluated its stack height analysis for the LaCygne Power Station with respect to ground-level SO<sub>2</sub> concentrations at the GEP formula height. Unit 1 is subject to the statewide limit of 1.5 lbs sulfur per million BTU of heat input. Unit 2 is subject to the new source performance standard. The state modeled units 1 and 2 at the applicable formula height, and considering

combined plumes of units 1 and 2, found no exceedances of the SO<sub>2</sub> ambient air quality standard. The state assured EPA that all data substantiating its negative declaration are available in its files.

The EPA's stack height regulations were challenged in *NRDC v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988). On January 22, 1988, the U.S. Court of Appeals for the D.C. Circuit issued its decision affirming the regulations in large part, but remanding three provisions to the EPA for reconsideration. These are:

1. Grandfathering pre-October 11, 1983, within-formula stack height increases from demonstration requirements [40 CFR 51.100(kk)(2)];
2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks [40 CFR 51.100(hh)(2)(ii)(A)]; and
3. Grandfathering pre-1979 use of the refined  $H + 1.5L$  formula [40 CFR 51.100(ii)(2)].

EPA's review of the January 22, 1988, court remand and the Kansas stack height analysis finds that the remand is not applicable to the Kansas negative declaration.

**PROPOSED ACTION:** EPA proposes to approve K.A.R. 28-19-18, 28-19-18a, 28-19-18b, 28-19-18c, 28-19-18d, and 28-19-18f. EPA proposes to approve deletion of 28-19-18e since deletion is consistent with EPA's July 8, 1985, revisions. EPA proposes to approve K.A.R. 28-19-7(g), Emission limitation and standard. EPA proposes to issue a negative declaration with respect to a need to revise the existing Kansas SO<sub>2</sub> SIP emissions limits since dispersion techniques were not a consideration when those limits were adopted, and stacks greater than GEP are not found to cause SO<sub>2</sub> standards to be exceeded when modeled at the GEP formula height.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant impact on a substantial number of small entities. (See 46 FR 8709.)

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

#### List of Subjects in 40 CFR Part 52

Air pollution control, Sulfur oxides, Particulate matter.

Authority: 42 U.S.C. 7401-7642.

Date: July 8, 1988.

William Rice,

Acting Regional Administrator.

[FR Doc. 88-28776 Filed 12-27-88; 8:45 am]

BILLING CODE 5560-50-M



## 40 CFR Part 52

(FRL-3498-4)

## Approval and Promulgation of Implementation Plan; Ohio

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to disapprove permits for eight total suspended particulate (TSP) fugitive emission sources (plant roadways and parking areas, material handling, baseball diamonds) in the Middletown area of Ohio. These eight sources are: American Aggregates Corporation; City of Middletown (Goldman, Jefferson, and Smith Parks); Cohen Brothers, Inc.; McGraw Construction; Moraine Materials; Sorg Paper Company; Texas Eastern Transmission Corporation; and Triasco Corporation. These permits are required to meet the terms of a March 31, 1981 (46 FR 19468) conditional approval on the TSP Part D plan for the Armco Middletown Works Plant.

USEPA has determined that the permits are unacceptable because the controls required by the permits are unenforceable. Additionally, the sources in the Middletown area are not controlled to a level of performance reflecting the application of reasonably available control technology (RACT), which is required by Part D of the Clean Air Act and, therefore, the Part D plan for the Middletown area is no longer approvable.

The purpose of this notice is to discuss USEPA's evaluation of the eight permits and what the State must do to make these permits acceptable. The USEPA will withdraw this notice of proposed disapproval and will approve the permits if the State submits revised permits during the public comment period and if the USEPA subsequently determines that such permits are acceptable. However, if the State does not submit the revised permits, USEPA will take final action to disapprove the permits, withdraw its previous conditional approval of the Part D TSP plan for Middletown, Ohio, and disapprove the plan.

The purpose of this notice is also to discuss USEPA's evaluation of the eight permits and to solicit public comments on this rulemaking action.

**DATE:** Comments must be received by January 27, 1989.

**ADDRESSES:** Copies of the SIP revisions are available at the following addresses: (It is recommended that you telephone the contact person listed below before visiting the Region V office of USEPA.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604.

Ohio Environmental Protection Agency, Office of Air Pollution Control, 1800 WaterMark Drive, P.O. Box 1049, Columbus, Ohio 43268-0149.

Written comments should be sent to: Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:** Delores Sieja, U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6038.

**SUPPLEMENTARY INFORMATION:** On October 5, 1978 (43 FR 46011), the City of Middletown in Butler County was designated as nonattainment of the primary total suspended particulate (TSP) National Ambient Air Quality Standards (NAAQS).<sup>1</sup> Part D of the Clean Air Act, which was added by the 1977 Amendments, requires each State to revise its State Implementation Plan (SIP) to meet specific requirements for areas designated as nonattainment. The nonattainment plan SIP revisions mandated by Part D must provide for attainment of the primary NAAQS as expeditiously as practicable.

On March 31, 1981 (46 FR 19468), USEPA conditionally approved the TSP Part D nonattainment plan for the Armco Middletown Works Plant in the City of Middletown (Butler County), Ohio. The conditional approval required the State to submit individual enforceable control programs or permits for each of the fugitive emission sources (e.g., plant roadways, packing areas, and material handling) located in the particulate nonattainment area.

<sup>1</sup> The USEPA revised the particulate matter standard on July 1, 1987, (52 FR 24684) and eliminated the TSP ambient air quality standard. The revised standard is expressed in terms of particulate matter with a nominal diameter of 10 micrometers or less (PM<sub>10</sub>). However, at the State's option, USEPA will continue to process TSP SIP revisions which were in process at the time the new PM<sub>10</sub> standard was promulgated. In the policy published on July 1, 1987, (p. 24679, column 2) USEPA stated that it would regard existing TSP SIPs as necessary interim particulate matter plans during the period preceding the approval of State plans specifically aimed at PM<sub>10</sub>. If USEPA judges these TSP SIPs to include more stringent provisions than those in the existing TSP plan, thus resulting in better control of PM<sub>10</sub> as well, then it is USEPA's general policy to approve the SIP revisions. However, if the provisions would relax the SIP or do not substantively define a quantitative level of control, e.g., they are unenforceably vague, USEPA will disapprove the revision.

surrounding the Armco Middletown Works in the City of Middletown. On July 3, 1986, the State submitted final permits to operate for the following eight sources: American Aggregates Corporation; City of Middletown (Goldman, Jefferson and Smith Parks); Cohen Brothers, Inc.; McGraw Construction; Moraine Materials; Sorg Paper Company; Texas Eastern Transmission Corporation; and Triasco Corporation. The Southwestern Ohio Air Pollution Control Agency (SWOAPCA) had determined that these eight sources were the only significant potential emitters in the particulate nonattainment area surrounding the Armco Middletown Works, and USEPA agreed with this determination. It is noted that the City of Middletown was redesignated to secondary nonattainment on April 4, 1983 (48 FR 14379). However, the State of Ohio has not submitted individual enforceable control plans or permits that are approvable for such fugitive emission sources.

USEPA's criteria for approving the permits under Part D of the Clean Air Act are: (1) Sources must be controlled to a RACT-level of performance; and (2) the RACT-level performance must be enforceable. An example of an acceptable RACT-level of control performance for all eight applicable fugitive emission sources, assured by use of an appropriate enforcement mechanism, is:

- a 5 percent opacity limit averaged over 3 minutes of readings taken in compliance with proposed Ohio Rule 3745-17-03(B)(4). [Ohio Rule 3745-17-03(B)(4) specifies measurement methods and procedures for determining compliance with applicable provisions of draft Rule 3745-17-07, which, among other things, establishes visible emission limitations for fugitive dust sources.]

Examples of acceptable RACT-level performance and enforcement mechanisms for these sources are:

- controlling emissions from unpaved roads, material handling, stock piles, and ball diamonds by the application of dust suppressant chemicals in a specific program [applicable to the situation] coupled with the 5 percent opacity limit described above.
- controlling emissions from flyash storage with sludge lagoons and a zero percent opacity limitation.

USEPA reviewed the eight permits and determined that they were not acceptable either under Part D or under the "more stringent" Post-PM<sub>10</sub> criterion. Because the technical support document for this rulemaking action contains a

very detailed discussion of the deficiencies in each of the eight permits, USEPA is not discussing the permits individually in today's notice. However, the following general deficiencies were found throughout all eight permits:

- (1) Watering of unpaved roads only every three days;
- (2) A speed limit of 15 miles per hour with no enforcement mechanism; and
- (3) No definition of "minimize visible emissions" which assures a RACT-level control performance.

Generally, the language in the permits includes a set of minimum control requirements that are enforced by mandatory recordkeeping procedures, along with a clause requiring as much additional control as necessary to "minimize or eliminate visible emission of fugitive dust. . . ." This two-phased approach (enforceable minimum work practice reinforced by a visible emissions performance standard) is a good one and closely approaches USEPA's criteria as discussed above. However, the lack of a specific definition for "minimize" in these permits is the source of the permit deficiencies. The word "minimize" is used in the permits as a performance criterion. To be used in this manner, "minimize" must be coupled to a clearly defined level of performance (such as 90 percent minimum instantaneous control or 5 percent opacity). Without such a connection, the meaning of the word "minimize" is vague, is not enforceable, and does not assure RACT-level control performance.

The State of Ohio can correct all of the deficiencies in the permits by specifying an acceptable definition for the word "minimize". Thus, the permits must be modified to include provisions such as the following:

- A 5% opacity limit (3-minute average) to define "minimize visible emissions". (USEPA notes that the 5% opacity limit is based upon the technical docket Ohio has generated that supports its draft Rule 3745-17-07, which contains a 5% opacity limit for certain fugitive dust sources.)
- A visible emission reading technique to ensure that the 5% opacity limit is enforceable. The reading technique in draft Rule 3745-17-03 as proposed for approval on January 2, 1987, at 52 FR 94 would be acceptable.

Furthermore, USEPA's review of the permits has shown that several sources allow waste oil to be used as a means of reducing dust on roadways. The recordkeeping requirements in the permits specify that each load of waste oil must be analyzed for polychlorinated biphenols (PCB) content. (PCBs are toxic chemicals and are found in such

products as electrical transformer oil and capacitor dielectrics.) However, the permit requirements do not prevent the use of the oil if the analysis shows it contains PCBs. The USEPA, pursuant to the Resource Conservation and Recovery Act (RCRA) and the Toxic Substances Control Act (TSCA), has the authority to regulate the disposal and use of PCB laden waste oil. Thus, although the State may revise the permit(s) to meet all Clean Air Act requirements, the USEPA will require compliance with RCRA and TSCA before it approves permits that do not provide for the proper disposal or use of PCB laden waste oil for dust control.

If the State submits revised permits during the public comment period and USEPA determines they are acceptable, USEPA will withdraw its notice of proposed disapproval and approve the permits under the Clean Air Act.

However, if the State does not submit acceptable revised permits, USEPA will take final rulemaking action to disapprove the permits for the eight sources under the Clean Air Act. It would also withdraw its previous conditional approval of Ohio's Part D plan for the Middletown area and disapprove the plan for this area. This action has been described in the March 31, 1981, notice as the appropriate action that USEPA would take if the State did not fulfill the condition in USEPA's conditional approval of the Middletown Part D TSP plan.

If USEPA ultimately disapproves the Middletown Part D TSP plan, the Clean Air Act section 110(a)(2)(I) construction ban will not apply because USEPA's promulgation of a PM<sub>10</sub> standard has generally superseded the TSP standards. New sources will be permitted in compliance with USEPA's transition policy described in the July 1, 1987, Federal Register.

Interested parties are invited to submit comments on this proposed approval. USEPA will consider all comments submitted within 30 days of publication of this notice.

Under Executive Order 12291, today's action is not "Major". It has been submitted to the Office of Management and Budget (OMB) for review. Any written comments from OMB to USEPA, and any written USEPA response, are available for public inspection at the Region V office listed at the beginning of this notice.

Pursuant to the provisions of 5 U.S.C. 605(b), I certify that disapproval of the Middletown fugitive plan will not have a significant economic impact on a substantial number of small entities because it only affects eight sources (See 46 FR 8709). Further, disapproval of

Ohio's Part D TSP plan will not affect the area, because these requirements were superseded by USEPA's promulgation of a PM<sub>10</sub> standard.

Authority: 42 U.S.C. 7401-7642.

Dated: March 31, 1988.

Frank M. Covington,  
Acting Regional Administrator.

Editorial note: This document was received by the Office of the Federal Register December 22, 1988.

[FR Doc. 88-29778 Filed 12-27-88; 8:45 am]  
BILLING CODE 6560-50-M

## 40 CFR Part 721

(OPTS-50569; FRL-3498-7)

## Mixture of 1,3-Benzenediamine, 2(or 4)-Methyl-4,6(or 2,6)-Bis(Methylthio)-; Proposed Determination of Significant New Uses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** EPA is proposing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for the chemical substance: Mixture of 1,3-benzenediamine, 2(or 4)-methyl-4,6(or 2,6)-bis(methylthio)-, which was the subject of premanufacture notice (PMN) P-88-1322 and a TSCA section 5(e) consent order issued by EPA. EPA believes that this substance may be hazardous to human health and that the uses described in this proposed rule may result in significant human exposure. As a result of this proposed rule, certain persons who intend to manufacture, import, or process this substance for a significant new use would be required to notify EPA at least 90 days before commencing that activity. The required notice would provide EPA with the opportunity to evaluate the intended uses and, if necessary, prohibit or limit those activities before they occur.

**DATE:** Written comments must be submitted by February 27, 1989.

**ADDRESS:** Since some comments are expected to contain confidential business information (CBI), all comments must be sent in triplicate to: Document Processing Center (TS-790), Office of Toxic Substances, Environmental Protection Agency, Rm. L-100, 401 M St., SW., Washington, DC 20460.

Comments should include the docket control number OPTS-50569. Nonconfidential versions of comments received on this proposal will be available for reviewing and copying



from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, in Rm. NE-G004 at the address given above. For further information regarding the submission of comments containing CBI see Unit XII of this preamble.

**FOR FURTHER INFORMATION CONTACT:** Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Environmental Protection Agency, Rm. EB-44, 401 M St., SW., Washington, DC 20460, (202) 554-1404, TDD: (202) 554-0551.

**SUPPLEMENTARY INFORMATION:** This proposed rule describes significant new uses and recordkeeping requirements for certain persons who intend to manufacture, import, or process the chemical substance: Mixture of 1,3-benzenediamine, 2(or 4)-methyl-4,6(or 2,6)-bis(methylthio)-, which was the subject of premanufacture notice (PMN) P-86-1322 and a TSCA section 5(e) consent order issued by EPA. EPA believes that this substance may be hazardous to human health and that the uses described in this proposed rule may result in significant human exposure. A requirement to notify EPA at least 90 days before commencing significant new uses would provide EPA with the opportunity to evaluate the intended uses and, if necessary, prohibit or limit those activities before they occur.

Public reporting burden for this collection of information is estimated to average 8 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

#### I. Authority

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2). Once EPA determines that a use of a chemical substance is a significant new

use, section 5(a)(1)(B) of TSCA requires persons to submit a notice to EPA at least 90 days before they manufacture, import, or process the substance for that use.

Persons subject to the final SNUR would comply with the same notice requirements and EPA regulatory procedures as submitters of PMNs under section 5(a)(1)(A) of TSCA. In particular, these requirements include the information submission requirements of section 5(b) and (d)(1), the exemptions authorized by section 5(h) (1), (2), (3), and (5), and the regulations at 40 CFR Part 720. Once EPA receives a SNUR notice, EPA may take regulatory action under section 5(e), 5(f), 6, or 7 to control the activities on which it has received a SNUR notice. If EPA does not take action, section 5(g) of TSCA requires the EPA to explain in the Federal Register its reasons for not taking action.

Persons who intend to export a substance identified in a proposed or final SNUR are subject to the export notification provisions of TSCA section 12(b). The regulations that interpret section 12(b) appear at 40 CFR Part 707.

#### II. Applicability of General Provisions

In the Federal Register of September 5, 1984 (49 FR 35011), EPA promulgated general regulatory provisions applicable to SNURs (40 CFR Part 721, Subpart A). In the Federal Register of July 27, 1988 (53 FR 28354), EPA promulgated amendments to the general provisions. The general provisions are discussed in the two documents in detail, and interested persons should refer to those documents for further information. EPA is proposing that these general provisions apply to this SNUR, except as discussed in this preamble and as set forth in proposed § 721.557.

#### III. Summary of this Proposed Rule

The chemical substance which is the subject of this proposed SNUR is identified as mixture of 1,3-benzenediamine, 2(or 4)-methyl-4,6(or 2,6)-bis(methylthio)-, and is listed as such on the TSCA inventory. It was the subject of PMN P-86-1322. EPA is proposing to designate the following as significant new uses of the substance: Use other than for industrial uses; any method of disposal of the uncured substance other than by incineration; production at an aggregate volume of the substance greater than that permitted the PMN submitter under the terms of the consent order, without performing the toxicity testing required in that order; and manufacturing, importing, or processing without establishing a program whereby (1)

persons who may be exposed dermally to the substance wear gloves, eye protection, and protective clothing, and persons who may be exposed by inhalation wear a National Institute for Occupational Safety and Health approved, Category 19C air supplied respirator, (2) potentially exposed individuals are informed of the possible hazards and required protective equipment, and (3) containers of the substance which may be distributed in commerce are labeled.

#### IV. Background

On July 18, 1986, EPA received a PMN which EPA designated as P-86-1322. EPA announced receipt of the PMN in the Federal Register of August 12, 1986 (51 FR 28875). The PMN submitter currently intends to manufacture the substance for use as a chain extender for polyurethane cast molded elastomer production, polyurethane reaction injection molding elastomers, polyurethane foams, polyurethane coatings, adhesives, polyurethane sealants, polyurethane/epoxy copolymers, chemical intermediate, epoxy coating, epoxy composite matrices, or epoxy tooling resins.

The PMN submitter initially claimed the following as confidential business information (CBI): chemical identity, production volume, and process information. The PMN submitter withdrew the confidentiality claim for chemical identity when it submitted a Notice of Commencement of Manufacture under 40 CFR 720.102. Under Section 14(a)(4) of TSCA, EPA may disclose CBI relevant to any proceeding. "[D]isclosure in such a proceeding shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding." EPA is not convinced that this rulemaking will be so impaired by the remaining confidentiality claims as to justify disclosure of CBI. Therefore, EPA has decided not to disclose any of the CBI at this time. EPA specifically requests comment on this approach for this SNUR rulemaking. For purposes of clarity, the substance will be referred to by its specific name and PMN number.

Based upon results obtained from bioassays on structurally similar substances, 2,4-diaminotoluene and 2,6-diaminotoluene, EPA believes P-86-1322 may cause cancer and chronic organ and systemic effects. A detailed discussion of these conclusions appears in the toxicity support document available in the public record for this rulemaking (See Unit XI). During review of the PMN, EPA concluded that the uncontrolled manufacture, import,

processing, distribution in commerce, use, and disposal of the substance may present an unreasonable risk of injury to human health. Therefore, EPA regulated the substance under section 5(e) of TSCA pending the development of information sufficient to make a reasoned evaluation of the health effects.

EPA concluded that the use of appropriate protective equipment and disposal methods will significantly reduce exposure and potential risks to human health. A section 5(e) consent order requiring the use of appropriate controls was negotiated with the PMN submitter. The order became effective May 23, 1987. The terms of the proposed SNUR are approximately the same as those of the consent order.

By issuing a section 5(e) consent order that allows controlled commercial production of the substance, EPA has taken a regulatory approach which is appreciably less burdensome than an order prohibiting manufacture of the substance until additional data are submitted. At the same time, the section 5(e) consent order protects human health by requiring precautionary controls pending the development of the data needed for a reasoned evaluation of the risks associated with the substance.

Section 5(e) orders apply only to the PMN submitter. When the PMN submitter began commercial manufacture of the substance and submitted a Notice of Commencement of Manufacture, EPA added the substance to the TSCA Chemical Substance Inventory maintained pursuant to section 8(b) of TSCA. When a substance is listed on the Inventory, it is no longer a "new chemical substance" for which a PMN would be required under section 5(a)(1)(A). Thus, other persons may manufacture, import, or process the substance without controls. Therefore, EPA is proposing to designate the uses set forth in the proposed § 721.557(a)(2) as significant new uses so the EPA can review these uses before they occur.

Through a SNUR, EPA would ensure that all manufacturers, importers, and processors are subject to similar reporting requirements. In addition, a SNUR would afford EPA the opportunity to review exposure and toxicity information on the substance before a significant new use occurs and, if necessary, take action to ensure that persons will not be exposed to levels of the substance that are potentially hazardous.

#### V. Determination of Proposed Significant New Uses

To determine what would constitute significant new uses of P-86-1322, EPA considered relevant information about the toxicity of the substance, likely exposures associated with possible uses, and the four factors listed in section 5(a)(2) of TSCA. Based on these considerations, EPA proposes to designate the significant new uses of P-86-1322, as set forth in proposed § 721.557(a)(2).

EPA has already determined in the section 5(e) order that unrestricted manufacture, import, processing, distribution in commerce, use, and disposal of the substance may present an unreasonable risk of injury to human health. While such a finding is not necessary to promulgate a SNUR, it strongly supports a determination that the uses designated in this proposed rule would be significant new uses of the substance.

#### VI. Recordkeeping

To ensure compliance with this proposed rule and to assist enforcement efforts, EPA is proposing, under its authority in sections 5 and 8(a) of TSCA, that in addition to meeting the requirements in § 721.17, the records described in proposed § 721.557(b)(1) be maintained for 5 years after the date of their creation by persons who manufacture, import, or process P-86-1322.

These recordkeeping requirements would apply to all manufacturers, importers, and processors, including small manufacturers, importers, and processors, because the small business exemption of section 8(a) of TSCA is not applicable when the chemical substance which is the subject of the rule also is the subject of a section 5(e) order.

EPA considered omitting these specific recordkeeping requirements, but believes compliance monitoring for this proposed SNUR would be made more difficult without them. The basis for EPA's recordkeeping requirements has been set forth in the preambles to previously proposed SNURs. Persons interested in a complete discussion of this issue should read the proposed SNUR for P-83-370 published in the Federal Register of January 13, 1984 (49 FR 1753).

#### VII. Exemptions to Reporting Requirements

EPA has codified, in § 721.19, general exemption provisions covering SNUR reporting. On a case-by-case basis EPA may modify these provisions. However,

in this case, EPA is proposing that § 721.19 apply in its entirety.

Section 721.19(g) of the general SNUR provisions exempts persons from SNUR reporting when they manufacture (under section 3(7) of TSCA, the term manufacture includes import) or process the substance solely for export and label the substance in accordance with section 12(a)(1)(B) of TSCA. While EPA is concerned about worker exposure during manufacture and processing of the substance for export, section 12(a) of TSCA prohibits EPA from requiring reporting of such manufacture or processing for a significant new use outside the United States. However, such persons would be required to notify EPA of such export under section 12(b) of TSCA (see § 721.7 of the general SNUR provisions). Such notification will allow EPA to monitor manufacturing and processing activities which are not subject to significant new use reporting.

The term "manufacture solely for export" is defined in § 720.3(s) of the PMN rule; an amendment clarifying this definition was issued on April 22, 1986 (51 FR 15906). The term "process solely for export" is defined in § 721.3 of the general SNUR provisions in a similar fashion. Thus, persons would be exempt from reporting under this SNUR if they manufacture, import, or process the substance solely for export from the United States under the following restrictions: (1) There is no use of the substance in the United States except in small quantities solely for research and development; (2) processing is restricted to sites under the control of the manufacturer, importer, or processor, respectively; and (3) distribution in commerce is limited to purposes of export. If a person manufactured, imported, or processed the substance both for export and for use in the United States, the manufacturing, importing, or processing activity would not be "solely for export."

#### VIII. Applicability of Proposal to Uses Occurring Before Promulgation of Final Rule

When determining that a use is a significant "new" use, EPA intends that the use not be currently ongoing. In this case, P-86-1322 has just undergone premanufacture review. The notice submitter has sent EPA a Notice of Commencement of Manufacture and the substance was added to the Inventory on June 22, 1987. The section 5(e) order prohibits the notice submitter from undertaking the activities which EPA is proposing be designated as significant new uses. Therefore, EPA concluded



that these uses are not presently ongoing. However, since the chemical substance identified in this proposed SNUR has been added to the Inventory, it may be manufactured, imported, or processed by other persons for a significant new use as defined in this proposal before promulgation of the rule.

EPA believes that the intent of section 5(e)(1)(B) is best served by designating a use as a significant new use if it is not ongoing as of the proposal date of the SNUR rather than as of the promulgation of the final rule. If uses begun during the proposal period of a SNUR were considered ongoing, any person could defeat the SNUR by initiating a proposed significant new use before the rule became final. This would make it extremely difficult for EPA to establish SNUR notice requirements.

Thus, persons who begin commercial manufacture, import, or processing of P-88-1322 for a significant new use between proposal and promulgation of this proposed rule would have to cease that activity before the effective date of the rule. To resume their activities, these persons would have to comply with all applicable SNUR notice requirements and wait until the notice review period, including all extensions, expired.

EPA recognizes that this interpretation of TSCA may disrupt commercial activities of persons who begin manufacture, import, or processing of the substance for a significant new use during the proposal period. However, this proposal constitutes notice of that potential disruption.

EPA, not wishing to unnecessarily disrupt the commercial activities of persons who manufacture, import, or process for a proposed significant new use prior to promulgation of a final SNUR, promulgated a new § 721.45(h) on July 27, 1988 (53 FR 28354), to allow for advance SNUR compliance (i.e., compliance prior to the date of promulgation).

#### IX. Determining When Use Is Designated in this Rule

EPA is proposing a significant new use at production volumes which are confidential. The Agency is also proposing that these production volumes would remain confidential in the final rule. EPA believes it is appropriate to keep this information confidential to protect the interest of the original notice submitter. EPA specifically requests comments on this issue.

Therefore, EPA is proposing to reveal the production volumes described in paragraph (a)(2)(iv) of proposed § 721.557 only to a manufacturer or importer who has shown a *bona fide*

intent to manufacture or import the substance. To establish a *bona fide* intent, the person must submit the information required under proposed § 721.6(b) (1) through (3). EPA will make a determination as to whether the person has established a *bona fide* intent to manufacture or import the substance. If the person has established a *bona fide* intent, EPA will inform the person of the production volumes which would constitute a significant new use.

#### X. Test Data and Other Information

EPA recognizes that, under TSCA section 5, persons are not required to develop any particular test data before submitting a significant new use notice. Rather, persons are only required to submit test data in their possession or control and to describe any other data known to or reasonably ascertainable by them. However, in view of the potential health risks that may be posed by a significant new use of this substance, EPA suggests potential SNUR notice submitters consider conducting tests that would permit a reasoned evaluation of the potential risks posed by this substance when utilized for an intended use. The Agency believes that the results of a 2-year rodent bioassay and 90-day subchronic study would adequately characterize possible cancer and chronic health effects, respectively, of the substance. These studies may not be the only means of addressing the potential risks. SNUR notices submitted for significant new uses without such test data may increase the likelihood that EPA will take action under section 5(e).

EPA encourages persons to consult with the Agency before selecting a protocol for testing the substance. As part of this prenotice consultation, EPA will discuss the test data it believes necessary to evaluate a significant new use of the substance. Test data should be developed according to TSCA good laboratory practice standards at 40 CFR Part 792. Failure to do so may lead the Agency to find such data to be insufficient to evaluate reasonably the health effects of the substances.

EPA urges SNUR notice submitters to provide detailed information on human exposure that will result from the significant new uses. In addition, EPA encourages persons to submit information on potential benefits of the substance and information on risks posed by the substance compared to risks posed by substitutes.

Under the consent order, the PMN submitter is required to submit each study at least 12 weeks before it reaches a specified production volume limit. The order contains detailed procedures for

dealing with situations where the resulting data are invalid or equivocal, or show that the substance will present an unreasonable risk of injury under the exposure limitations in the order. This proposed SNUR uses the same production volume limits as the consent order; those production volume limits are defined as a significant new use.

EPA believes it is likely that the PMN submitter will conduct the 2-year rodent bioassay and 90-day subchronic study before reaching the production volume limits and before any other persons who would be subject to this SNUR would reach the limits in the SNUR. Accordingly, before beginning to conduct either study a person subject to this SNUR should contact EPA to determine whether the required study has already been produced.

EPA is also considering a more detailed description of the significant new use that would incorporate some or all of the procedures reflected in the consent order for dealing with invalid or equivocal data. EPA solicits comments on such an approach.

#### XI. Economic Analysis

EPA has evaluated the potential costs of establishing significant new use notice requirements for manufacture, import, distribution in commerce, use, processing, and/or disposal of this chemical substance. EPA's complete economic analysis is available in the public record.

#### XII. Confidential Business Information

Any person who submits comments which the person claims as CBI must mark the comments as "confidential," "trade secret," or other appropriate designation. Comments not claimed as confidential at the time of submission will be placed in the public file. Any comments marked as confidential will be treated in accordance with the procedures in 40 CFR Part 2. EPA requests that any person submitting confidential comments prepare and submit a sanitized version of the comments which EPA can place in the public record.

#### XIII. Rulemaking Record

EPA has established a record for this rulemaking (docket control number OPTS-50569). The record includes basic information considered by EPA in developing this proposed rule. EPA will supplement the record with additional information as it is received. The record now includes the following:

1. The premanufacture notice.
2. The Federal Register notice of receipt of the PMN.

3. The section 5(e) consent order.
4. The economic analysis of the proposed rule.

5. The toxicology support document.
  6. The engineering support document.
  7. The exposure support document.
- EPA will accept additional materials for inclusion in the record at any time between this proposal and designation of the complete record.

EPA will identify the complete rulemaking record by the date of promulgation. A public version of this record containing sanitized copies from which CBI has been deleted is available to the public in the OTS Public Docket Office from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays. The OTS Public Docket Office is located in Rm. NE-G004, 401 M St., SW., Washington, DC.

#### XIV. Regulatory Assessment Requirements

##### A. Executive Order 12291

Under Executive Order 12291, EPA must judge whether a rule is "major" and therefore, requires a Regulatory Impact Analysis. EPA has determined that this proposed rule is not a "major rule" because it would not have an effect on the economy of \$100 million or more and it would not have a significant effect on competition, costs, or prices. While there is no precise way to calculate the total annual cost of compliance with this proposed rule, EPA believes that the cost would be low. EPA believes that, because of the nature of the proposed rule and the substance involved, there would be few significant new use notices submitted. Furthermore, while the expense of a notice and the uncertainty of possible EPA regulation may discourage certain innovation, that impact would be limited because such factors are unlikely to discourage an innovation that has high potential value.

This proposed rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291.

##### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 605(b), EPA has determined that this proposed rule would not have a significant impact on a substantial number of small businesses. EPA cannot determine whether parties affected by this proposed rule are likely to be small businesses. However, EPA expects to receive few SNUR notices for the substance. Therefore, EPA believes that the number of small businesses affected by this proposed rule would not be substantial even if all the SNUR notice submitters were small firms.

##### C. Paperwork Reduction Act

OMB has approved the information collection requirements contained in this proposed rule under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2070-0012 to this proposed rule. Public reporting burden for this collection of information is estimated to average 8 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

##### List of Subjects in 40 CFR Part 721

Chemicals, Environmental protection, Hazardous substances, Significant new uses.

Dated: December 16, 1988.

Victor J. Kimm,

Acting Assistant Administrator, for Pesticides and Toxic Substances.

#### PART 721—[AMENDED]

Therefore, it is proposed that 40 CFR Part 721 be amended as follows:

1. The authority citation for Part 721 would continue to read as follows:

Authority: 15 U.S.C. 2604 and 2607.

2. By adding a new § 721.557 to read as follows:

§ 721.557 Mixture of 1,3-benzenediamine, 2(or 4)-methyl-4,6(or 2,6)-bis(methylthio)-.

(a) *Chemical substance and significant new uses subject to reporting.* (1) The following chemical substance, referred to by its PMN number and chemical name, is subject to reporting under this section for the significant new uses described in paragraph (a)(2) of this section: P-88-1322, Mixture of 1,3-benzenediamine, 2(or 4)-methyl-4,6(or 2,6)-bis(methylthio)-.

- (2) The significant new uses are:
  - (i) Use other than for industrial uses.
  - (ii) Any method of disposal of the uncured substance other than by incineration.

(iii) Any manner or method of manufacturing, importing, or processing without establishing a program whereby:

(A) Any person who may be exposed dermally to the substance wears:

(1) Gloves which have been determined to be impervious to the substance under the conditions of exposure, including the duration of exposure. This determination is made either by testing the gloves under the conditions of exposure or by evaluating the specifications provided by the manufacturer of the gloves. Testing or evaluation of specifications includes consideration of permeability, penetration, and potential chemical and mechanical degradation by the substance and associated chemical substances.

(2) Clothing which covers any other exposed areas of the arms, legs, and torso.

(3) Chemical safety goggles or equivalent eye protection.

(B) Any person who may be exposed to the substance through inhalation, in addition to the dermal protective equipment described in paragraph (a)(2)(iii)(A) of this section, wears at a minimum a National Institute for Occupational Safety and Health approved category 19C air-supplied respirator. Use of the respirator is according to 29 CFR 1910.134 and 30 CFR Part 11 Subpart J. If a full-face type respirator is selected and worn, the chemical safety goggles requirement in paragraph (a)(2)(iii)(A)(3) of this section is waived.

(C) All persons who may be exposed to the substance are informed, in writing, and by presenting the information as part of a training program in safety meetings at which attendance is recorded, by means of the following statement:

**Warning:** Avoid all contact. Chemicals similar in structure to [insert appropriate name] have been found to cause chronic organ and systemic effects and cancer in laboratory animals. To protect yourself, you must wear chemical safety goggles or equivalent eye protection, impervious gloves, and protective clothing while handling this material. In addition, you must wear a respirator if there is potential inhalation exposure.

(D) All persons that receive the PMN substance are notified, in advance of such receipt, by means of a Material Safety Data Sheet (MSDS) which includes, at a minimum, the language specified in paragraph (a)(2)(iii)(C) of this section, and specifies the requirements for protective equipment in

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paragraphs (a)(2)(iii) (A) and (B) of this section.

(E) Each container of the substance, or of a formulation containing the substance, distributed in commerce has affixed to it a label which includes a Warning Statement which consists, at a minimum, of the language specified in paragraph (a)(2)(iii)(C) of this section. The first word of the Warning Statement is capitalized, and the type size for the first word is no smaller than 6-point type for a label 5 square inches or less in area, 10-point type for a label above 5 but no greater than 10 square inches in area, 12-point type for a label above 10 but no greater than 15 square inches in area, 14-point type for a label above 15 but no greater than 30 square inches in area, or 18-point type for all labels over 30 square inches in area. The type size of the remainder of the Warning Statement is no smaller than 6-point type. All required label text is of sufficient prominence and is placed with such conspicuousness relative to other label text and graphic material to ensure that the Warning Statement is read and understood by the ordinary individual under customary conditions of purchase and use.

(iv) Manufacturing and importing the substance, for industrial uses, at greater than the aggregate volumes allowed under the consent order issued for Premanufacture Notice P-86-1322, effective on May 23, 1987, without performing the toxicity testing required under that order.

(b) *Specific requirements.* The provisions of Subpart A of this Part apply to this section, except as modified by this paragraph.

(1) *Determining whether a use is a significant new use.* (i) A person who intends to manufacture or import the substance identified in paragraph (a)(1) of this section may submit to EPA the information required under § 721.6(b).

(ii) EPA will review this information to determine whether the person has a *bona fide* intent to manufacture or import the substance. If EPA determines that the person has a *bona fide* intent to manufacture or import the substance, EPA will tell the person the specific production volume which would constitute a significant new use under paragraph (a)(2)(iv) of this section.

(iii) A disclosure to a person with a *bona fide* intent to manufacture or import the substance of specific production volume which would constitute a significant new use under paragraph (a)(2)(iv) of this section will not be considered public disclosure of confidential business information under section 14 of the Act.

(2) *Recordkeeping.* In addition to the requirements of § 721.17, manufacturers, importers, and processors must maintain the following records for 5 years after the date they are created:

(i) Any determination that gloves are impervious to the substance.

(ii) Names of persons who have attended safety meetings in accordance with paragraph (a)(2)(iii)(C) of this section, the dates of such meetings, and copies of any written information provided in accordance with paragraph (a)(2)(iii)(C) of this section.

(iii) Copies of any MSDSs used.

(iv) Names and addresses of all persons to whom the PMN substance is sold or transferred, including shipment destination address if different, the date of each sale or transfer, and the quantity of substance sold or transferred on such date.

(v) Copies of any labels used.

(vi) Any names used for the substance and the corresponding dates of use.

(vii) Quantities of the substance manufactured or imported, with the corresponding dates of manufacture or import.

(viii) Quantities of the substance purchased in the United States by processors of the substance, names and addresses of suppliers, and corresponding dates of purchase.

(ix) Information on disposal of the substance, including dates waste material is disposed of, location of disposal sites, volume of disposed solid material, estimated volume of any disposed liquid wastes containing the substance, and method of disposal.

(Approved by the Office of Management and Budget under OMB control number 2070-0012)

[FR Doc. 88-29775 Filed 12-27-88; 8:45 am]

BILLING CODE 5560-50-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### 42 CFR Part 1001

#### Medicare and Medicaid Programs; Fraud and Abuse OIG Anti-Kickback Provisions

**AGENCY:** Office of the Secretary, Office of Inspector General (OIG), HHS.

**ACTION:** Withdrawal of proposed rulemaking.

**SUMMARY:** On December 23, 1988, the Secretary published a notice of proposed rulemaking designed to implement section 14 of Pub. L. 100-93, the Medicare and Medicaid Patient

Protection Act of 1988. (See 53 FR 51856, December 23, 1988.) Upon further consideration, the Secretary has decided to withdraw the proposed rule in order to consider this matter further.

**DATE:** This notice of withdrawal is effective today.

**ADDRESS:** For further information, contact: Office of Inspector General, Department of Health and Human Services, Attention: Joel Schaefer (202) 472-5270, Room 5550, 330 Independence Avenue SW., Washington, DC 20201.

Dated: December 23, 1988.

Otis R. Bowen,  
Secretary.

[FR Doc. 88-30007 Filed 12-23-88; 3:33 p.m.]

BILLING CODE 4150-04-M

## FEDERAL MARITIME COMMISSION

### 46 CFR Part 572

[Docket No. 88-26]

#### Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984

**AGENCY:** Federal Maritime Commission.  
**ACTION:** Availability of finding of no significant impact.

**SUMMARY:** The Commission has completed an environmental assessment of a proposed rule in Docket No. 88-26 (53 FR 49210, December 16, 1988) and found that its resolution of this proceeding will not have a significant impact on the quality of the human environment.

**DATE:** Petitions for review are due 10 days after publication in the Federal Register.

**ADDRESS:** Petitions for review (original and 15 copies) to: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573-0001.

**FOR FURTHER INFORMATION CONTACT:** Edward R. Meyer, Office of Special Studies, 1100 L Street, NW., Washington, DC 20573-0001.

**SUPPLEMENTARY INFORMATION:** Upon completion of an environmental assessment, the Federal Maritime Commission's Office of Special Studies has determined that Docket No. 88-26 will not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and that preparation of an environmental impact statement is not required.

In Docket No. 88-26, the Commission proposes to amend the definitions of "Conference agreement" and "Joint service/consortium agreement" in its rules governing the filing of agreements. These amendments are intended to state more clearly the class of agreements that are subject to the mandatory provisions requirements of section 5 of the Shipping Act of 1984. The amendments would codify current Commission policy which is not to require mandatory provisions in the case of strictly voluntary arrangements.

This Finding of No Significant Impact ("FONSI") will become final within 10 days of publication of this notice in the Federal Register unless a petition for review is filed pursuant to 46 CFR 504.6 (b).

The FONSI and related environmental assessment are available for inspection on request from the Office of the Secretary, Room 11101, Federal Maritime Commission, Washington, DC 20573-0001, telephone (202) 523-5725.

By the Commission.

Joseph C. Polking,  
Secretary.

[FR Doc. 88-29613 Filed 12-27-88; 8:45 am]

BILLING CODE 4730-01-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 2 and 90

[General Docket No. 88-566; FCC 88-402]

#### Amendment of Parts 2 and 90 of the Commission's Rules To Provide for Stolen Vehicle Recovery Systems

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The FCC proposes to amend Part 2 and Part 90, Subpart B, of its rules to provide for stolen vehicle recovery systems. Specifically § 2.106, Table of Frequency Allocations, is proposed to be amended by adding footnote US312 to allocate the frequency 173.075 MHz for government and non-government use for stolen vehicles recovery systems. Section 90.19 is proposed to be amended to provide the necessary service rules for such systems. The objective of this action is to provide a nationwide allocation and service rules for stolen vehicle recovery systems.

**DATES:** Comments must be submitted on or before February 10, 1989, and reply comments on or before February 27, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** Fred Thomas, Office of Engineering and Technology, Frequency Allocation Branch, Washington, DC 20554. (202) 653-8112.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Proposed Rule in General Docket 88-566, FCC 88-402, Adopted December 12, 1988, and Released December 21, 1989.

The full text of the Commission's proposal is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this proposal may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

### Summary of Final Rule

1. By this action the Commission proposes to modify § 2.106 of its rules, the Table of Frequency Allocations, by adding footnote US312. Footnote US312 would allocate the frequency 173.075 MHz for stolen vehicle recovery systems. Further, the Commission is proposing to modify § 90.19 of its rules to provide service rules for these systems.

2. The Commission believes the development of stolen vehicle recovery systems will be of great benefit to law enforcement agencies and to the public. Therefore, we believe that it is in the public interest to propose an allocation and service rules to accommodate such operations. We wish to make it clear however, that we are proposing to allocate spectrum for a specific type of service and not for a particular manufacturer's system or technology.

3. This proceeding suggests a proposal which may have an impact on small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, public comment is requested on the initial regulatory flexibility analysis set out in the Commission's complete decision.

4. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

5. This is a non-restricted notice and comment rule making proceeding. See § 1.1231 of the Commission's Rules, 47 CFR 1.1231, for rules governing permissible *ex parte* contacts.

6. This action is taken pursuant to 47 U.S.C. 154(i), 303(c), 303(f), 303(g), and 303(r).

### List of Subjects

47 CFR Part 2

Table of frequency allocations.

47 CFR Part 90

Police radio service.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 88-29709 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

### 47 CFR Part 73

[MM Docket No. 88-541, RM-6472]

#### Radio Broadcasting Services; Grinnell, IA

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Blair Broadcasting Corporation proposing the substitution of Channel 294C2 for Channel 294A at Grinnell, Iowa, and the modification of its construction permit for Station KICL-FM to specify operation on the higher powered channel. Channel 294C2 can be allotted to Grinnell in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.3 kilometers northwest to avoid a short-spacing to Station KJJC, Channel 295C2, Osceola, Iowa, and to accommodate petitioner's desired transmitter site. The coordinates for this allotment are North Latitude 41-50-15 and West Longitude 92-43-50. In accordance with 1.420(g) of the Commission's Rules, competing expressions of interest in use Channel 294C2 at Grinnell will not be accepted and we will not require the petitioner to demonstrate the availability of an additional equivalent channel for use by any such interested parties.

**DATES:** Comments must be filed on or before February 2, 1989, and reply comments on or before February 17, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Lauren A. Colby, Esq., Debra M. Vaughn-Carrington, Esq., 10 E. Fourth Street, P.O. Box 113, Frederick, Maryland 21701 (Counsel to petitioner).



**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-541, adopted November 10, 1988, and released December 13, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-29714 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 88-545, RM-6458]

#### Radio Broadcasting Services; Elko, NV

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Elko Broadcasting, Inc., proposing the substitution of Channel 229C2 for Channel 228A at Elko, Nevada, and the modification of its license for Station KLKO to specify the higher powered channel. Channel 229C2 can be allotted to Elko in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KLKO's license. The coordinates

for this allotment are North Latitude 40-50-37 and West Longitude 115-44-58. In accordance with § 1.420(g) of the Rules, we shall not accept competing expressions of interest in use of Channel 229C2 at Elko or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

**DATES:** Comments must be filed on or before February 2, 1989 and reply comments on or before February 17, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: D. Ray Gardner, President, Elko Broadcasting, Inc., 1800 Idaho Street, Elko, Nevada 89801 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-545, adopted November 10, 1988, and released December 13, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-29712 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 88-543, RM-6457]

#### Radio Broadcasting Services; Essex, NY

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Russell P. Kinsley proposing the allotment of Channel 267A to Essex, New York, as its first local FM service. Petitioner is requested to provide information concerning Essex so that the Commission may determine that it is a community for allotment purposes since it is not listed in the 1980 U.S. Census and we are informed that it is incorporated. Channel 267A can be allotted to Essex in compliance with the Commission's minimum distance separation requirements without a site restriction. The coordinates for this allotment are North Latitude 44-18-30 and West Longitude 73-21-24. Canadian concurrence is required since Essex is located within 320 kilometer (200 miles) of the U.S.-Canadian border.

**DATES:** Comments must be filed on or before February 2, 1989, and reply comments on or before February 17, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Russel P. Kinsley, P.O. Box 301, Winooski, Vermont 05404 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-543, adopted November 10, 1988, and released December 13, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed

Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-29710 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 88-544, RM-6487]

#### Radio Broadcasting Services; Shadyside, OH

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Arthur V. Belendiuk, d/b/a Shadyside Wireless, seeking the substitution of Channel 239B1 for Channel 239A at Shadyside, Ohio, and the modification of its construction permit to specify the higher powered channel. Channel 239B1 can be allocated to Shadyside in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.0 kilometers (4.4 miles) north to accommodate petitioner's desired transmitter site. The coordinates for this allotment are North Latitude 40-02-00 and West Longitude 80-45-45. Canadian concurrence is required since Shadyside is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 239B1 at Shadyside or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties.

**DATES:** Comments must be filed on or before February 2, 1989, and reply comments on or before February 17, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant,

as follows: Arthur V. Belendiuk, Smithwick & Belendiuk, P.C., 2033 M Street, NW., Suite 207, Washington, DC 20036 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-544, adopted November 10, 1988, and released December 13, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

#### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-29711 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

#### 47 CFR Part 73

[MM Docket No. 88-542, RM-6462]

#### Radio Broadcasting Services; Lebanon, OR

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Spotlight Media Corporation proposing the substitution of Channel 279C for Channel 279C1 at Lebanon, Oregon, and the modification of its license for Station KIQY to specify the higher powered channel. Channel 279C can be allotted

to Lebanon in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) southwest to accommodate petitioner's desired transmitter site. The coordinates for this allotment are North Latitude 44-30-17 and West Longitude 122-57-30. In accordance with section 1.420(g) of the Commission's Rules, the license of Station KIQY can be modified without accepting competing expressions of interest in use of Channel 279C at Lebanon and without requiring the petitioner to demonstrate the availability of an additional equivalent channel for use by such other interested parties.

**DATES:** Comments must be filed on or before February 2, 1989, and reply comments on or before February 17, 1989.

**ADDRESSES:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Barry D. Wood, Esq., Ronald D. Maines, Esq., Jones, Waldo, Holbrook & McDonough, P.C., 1001 22nd Street, NW., Suite 350, Washington, DC 20037 (Counsel to petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-542, adopted November 10, 1988, and released December 13, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.



**List of Subjects in 47 CFR Part 73**

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 88-29713 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17****Endangered and Threatened Wildlife and Plants; Notice of Finding on Petition To Reclassify Chimpanzee****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of petition finding.**SUMMARY:** The Service announces a 12-month finding on a petition to reclassify the chimpanzee from threatened to endangered. The requested action has been found to be warranted.**DATES:** The finding announced herein was made on November 23, 1988.**ADDRESSES:** Comments, information, and questions should be submitted to the Chief, Office of Scientific Authority, Mail Stop: 527, Matomic Building, U.S. Fish and Wildlife Service, Washington, DC 20240. The petition, finding, supporting data, and comments will be available for public inspection, by appointment, from 8:00 a.m. to 4:00 p.m., Monday through Friday, in Room 537, 1717 H Street, NW., Washington, DC.**FOR FURTHER INFORMATION CONTACT:** Dr. Charles W. Dane at the above address (202-653-5948 or FTS 653-5948).**SUPPLEMENTARY INFORMATION:** Section 4(b)(3) of the Endangered Species Act, as amended in 1982, requires that, within 12 months of receipt of a petition to add a species to, or remove a species from, the Lists of Endangered and Threatened Wildlife and Plants, a finding be made as to whether the requested action is warranted, notwarranted, or warranted but precluded by other listing activity. If the finding is that the action is warranted, section 4(b)(3) also requires prompt publication in the *Federal Register* of a proposed regulation to implement such action. The Service now announces a 12-month finding on a November 4, 1987 petition.The petition was submitted jointly by the Humane Society of the United States, the World Wildlife Fund, and the Jane Goodall Institute. It is dated November 4, 1987, and was received by the Fish and Wildlife Service (Service) on that same date. It requests that the classification of the chimpanzee (*Pan troglodytes*) on the List of Endangered and Threatened Wildlife be changed from threatened to endangered. On February 4, 1988, the Service made finding that the petition had presented substantial information indicating that the requested action may be warranted. On March 23, 1988 (58 FR 9460), the Service published this finding and announced a status review of the chimpanzee. The comment period for the review ended on July 21, 1988.

The petition was accompanied by a detailed report from the Committee for the Conservation and Care of Chimpanzees. The petition and report, along with other data available to the Service, and information provided by many substantive comments received during the review period, indicate that chimpanzee numbers have declined drastically in the wild. Problems include massive habitat destruction, excessive hunting and capture by people, and lack of effective national and international controls. Furthermore, the Committee for Conservation and Care of Chimpanzees states that fragmentation of the populations and associated vulnerability to disease may pose the greatest of all threats. The chimpanzee has been extirpated in 5 of the 25 countries where it formerly occurred, reduced to fewer than 1,000 individuals in 10 others and to fewer than 5,000 in 6 others, and has populations exceeding 10,000 in 2 countries. It has been considered most secure in Gabon, but a serious decline

has recently been projected in that nation.

The petition and subsequent supporting comments dealt primarily with status in the wild and not with viability of captive populations. Pursuant to the current threatened classification, there is a special regulation exempting captive chimpanzees in the United States from the general prohibitions of the Endangered Species Act. This exemption may encourage propagation. There is a National Chimpanzee Management Plan for the purpose of optimizing breeding and maintaining these breeding populations and it is currently reported to be working well. To the extent that self-sustaining captive populations provide surplus animals, these populations may reduce the incentive to remove animals from the wild.

The Service has reviewed the petition, other available data, and all comments received, and finds that the requested action is warranted with respect to chimpanzees in the wild. A proposed rule to implement this measure will be published promptly.

**Authors**

Drs. Charles W. Dane and Ronald M. Nowak, Office of Scientific Authority, U.S. Fish and Wildlife Service, Washington, DC 20240 (202-653-5948 or FTS 653-5948).

**Authority:** Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.; Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 98 Stat. 1411); Pub. L. 99-625, 100 Stat. 3500 (1986), unless otherwise noted.**List of Subjects in 50 CFR Part 17**

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: December 19, 1988.

Becky Norton Dunlop,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88-29749 Filed 12-27-88; 8:45 am]

BILLING CODE 4310-55-M

**Notices**

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

**DEPARTMENT OF AGRICULTURE****Forest Service****Intent To Prepare an Environmental Impact Statement (EIS) Pertaining to Oil and Gas Leasing and the Federal Onshore Oil and Gas Leasing Reform Act of 1987; Pike and San Isabel National Forests, Comanche and Cimarron National Grasslands; CO and KS****ACTION:** Notice of intent to prepare an environmental impact statement.

The Forest Service, Department of Agriculture, will prepare an Environmental Impact Statement to analyze and disclose the expected environmental impacts, including possible cumulative effects, when consenting or not consenting to issuance of oil and gas leases on the Pike and San Isabel National Forests and Comanche and Cimarron National Grasslands.

The scope of the environmental analysis will: Identify areas where the Forest Service will consent or deny consent to issuance of oil and gas leases on National Forest System lands within the Pike and San Isabel National Forests (Colorado), the Comanche National Grassland (Colorado) and the Cimarron National Grassland (Kansas); determine site-specific and cumulative effects resulting from leasing decisions; determine stipulations necessary to protect surface resources; and, satisfy requirements of the Federal Onshore Oil and Gas Leasing Reform Act of 1987.

A range of alternatives, including no action, will be examined to deal with the significant issues developed during the scoping process.

The agency invites written comments and suggestions on this action. In addition, the agency will seek public involvement and will inform interested and affected parties of how they may participate and contribute to the final decision by commenting on the Draft

Environmental Impact Statement (DEIS). The DEIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by July 31, 1989. At that time EPA will publish a notice of availability of the DEIS in the *Federal Register*. The comment period on the DEIS will be 45 days from when the EPA notice of availability appears in the *Federal Register*.**ADDRESS:** Submit written comments and suggestions on the scope of the analysis to Jack Weissling, Forest Supervisor, Pike and San Isabel National Forests, 1920 Valley Drive, Pueblo, CO 81006.**FOR FURTHER INFORMATION CONTACT:** Direct comments on the proposed action and the environmental impact statement should be made to Dan Bishop, Forest Engineer and Minerals Staff Officer, Pike and San Isabel National Forests, 1920 Valley Drive, Pueblo, CO 81006 ((719) 545-8737).

The Forest Supervisor, Pike and San Isabel National Forests, Comanche and Cimarron National Grasslands, is the responsible official.

Charles A. Knight,

Acting Forest Supervisor.

[FR Doc. 88-29730 Filed 12-27-88; 8:45 am]

BILLING CODE 3410-11-M

**DEPARTMENT OF COMMERCE****Agency Form Under Review by the Office of Management and Budget (OMB)**

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Agency:** International Trade Administration.**Title:** Request for Duty-Free Entry of Scientific Instrument or Apparatus.**Form Numbers:** Agency—ITA-338P; OMB—0625-0037.**Type of Request:** Revision of a currently approved collection.**Burden:** 150 respondents; 600 reporting hours.**Average Hours Per Response:** 2 hours.**Needs and Uses:** Commerce and Treasury are required to determine whether institutions importing scientific instruments are entitled to duty-free treatment under the Florence Agreement, which is the case if the**Federal Register**

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applicant is a nonprofit institution established for scientific or educational purposes; the instrument is a scientific instrument in one of the tariff categories listed by the law (Public Law 89-651); and there is not an equivalent instrument being manufactured in the United States. The information on Form ITA-338P enables (1) Treasury to determine whether the statutory eligibility requirements for the institution and the instrument are fulfilled, and (2) Commerce to make a comparison and finding as to the scientific equivalency of comparable instruments being manufactured in the United States.

**Affected Public:** State or local governments; Federal agencies or employees; non-profit institutions.**Frequency:** On occasion.**Respondent's Obligation:** Required to obtain or retain a benefit.**OMB Desk Officer:** Francine Picoult, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room 6022, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503. Dated: December 21, 1988.

Edward Michals,

Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 88-29724 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-CW-M

**Agency Form Under Review by the Office of Management and Budget (OMB)**

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Agency:** International Trade Administration.**Title:** Application for President's "E" and "E Star," Awards for Export Expansion.**Form Numbers:** Agency—ITA-725P; OMB—0625-0065.



**Type of Request:** Extension of the expiration date of a currently approved collection.

**Burden:** 75 respondents; 1,500 reporting hours.

**Average Hours Per Response:** 20 hours.

**Needs and Uses:** The President's "E" Award was created to afford suitable recognition to persons, firms, or organizations which contribute significantly in the effort to increase United States exports. The President's "E Star" Award affords continuing recognition of noteworthy export promotion efforts. The application form is the vehicle designed to determine eligibility for the award within established criteria.

**Affected Public:** State or local governments; farms; businesses or other for-profit organizations; non-profit institutions; small businesses or organizations.

**Frequency:** On occasion.

**Respondent's Obligation:** Required to obtain or retain a benefit.

**OMB Desk Officer:** Francine Picoult, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208 New Executive Office Building, Washington, DC 20503.

Dated: December 21, 1988.

Edward Michals,  
Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 88-29725 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-CW-M

#### Agency Information Collection Under Review by the Office of Management and Budget (OMB)

DOC submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Agency:** Bureau of Export Administration.

**Title:** Consumption (Usage) of Industrial Diamond Stones in 1987.

**Form Numbers:** Agency—BXA 992; OMB—N/A.

**Type of Request:** New Collection.

**Burden:** 370 respondents; 248/ reporting/recordkeeping hours. Average hour's per respondent is 1 hour.

**Needs and Uses:** Under its Defense Production Act authority, DOC conducts on a triennial basis a survey on Industrial Diamond Stones. This information is needed to support the acquisition and disposal programs of the National Defense Stockpile of Strategic Materials. If the information were not collected, the Stockpile might dispose of diamonds which are still used for national defense applications.

**Affected Public:** Businesses or other for-profit institutions; small businesses or organizations.

**Frequency:** Triennially.

**Respondent's Obligation:** Mandatory.

**OMB Desk Officer:** Francine Picoult, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: December 21, 1988.

Edward Michals,  
Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 88-29726 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-CW-M

#### Agency Information Collection Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Agency:** International Trade Administration.

**Title:** Format for Petition Requesting Relief Under U.S. Countervailing Duty Law.

**Form Numbers:** Agency—ITA-366P; OMB—0625-0148.

**Type of Request:** Extension of the expiration date of a currently approved collection.

**Burden:** 44 respondents; 1,760 reporting hours.

**Average Hours Per Response:** 40 hours.

**Needs and Uses:** The International Trade Administration (ITA) is required to conduct countervailing duty (CVD) investigations when acceptable petitions are received from an interested party. The purpose of a CVD investigation is to determine whether a foreign government

is providing subsidies to a particular industry under investigation which provide the company(ies) producing and exporting that item to the United States an unfair advantage over U.S. producers for sales in the U.S. market. The petition provides information about the imported product which is allegedly subsidized, a description of the alleged subsidies on the imported merchandise, and the extent to which the domestic industry is being injured by the imported product.

**Affected Public:** Businesses or other for non-profit institutions; small businesses or organizations.

**Frequency:** On occasion.

**Respondent's Obligation:** Required to obtain or retain a benefit.

**OMB Desk Officer:** Francine Picoult, 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-3271, Department of Commerce, Room 6622, 14th and Constitution Avenue, NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Francine Picoult, OMB Desk Officer, Room 3208, New Executive Office Building, Washington, DC 20503.

Dated: December 21, 1988.

Edward Michals,  
Departmental Clearance Officer, Office of Management and Organization.

[FR Doc. 88-29727 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-CW-M

#### Foreign-Trade Zones Board

##### [Order No. 393]

#### Resolution and Order Approving the Application of the Indiana Port Commission for a Foreign-Trade Zone in Burns Harbor, IN, and a Subzone for Caterpillar in Lafayette, IN

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

##### Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Indiana Port Commission, an Indiana public corporation, filed with the Foreign-Trade Zones Board (the Board) on October 17, 1988, requesting a grant of authority for establishing, operating, and maintaining a

general-purpose foreign-trade zone in Burns Harbor, Indiana, adjacent to the Chicago Customs port of entry, and a special-purpose subzone for the engine manufacturing plant of Caterpillar Tractor Company in Lafayette, Indiana, the Board finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

As the proposal involves open space on which buildings may be constructed by parties other than the grantee, this approval includes authority to the grantee to permit the erection of such buildings, pursuant to Section 400.815 of the Board's regulations, as are necessary to carry out the zone proposal, providing that prior to its granting such permission it shall have the concurrences of the local District Director of Customs, the U.S. Army District Engineer, when appropriate, and the Board's Executive Secretary. Further, the grantee shall notify the Board for approval prior to the commencement of any manufacturing operation within the zone. The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

#### Grant to Establish, Operate, and Maintain a Foreign-Trade Zone and Subzone in Burns Harbor and Lafayette, IN

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Indiana Port Commission (the Grantee), has made application (filed October 17, 1988, FTZ Docket 32-86, 51 FR 39772) in due and proper form to the Board, requesting the establishment, operation, and maintenance of a foreign-trade zone in Burns Harbor, Indiana, adjacent to the Chicago Customs port of entry, and a special-purpose subzone for the engine manufacturing plant of Caterpillar Tractor Company in Lafayette, Indiana;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and,

Whereas, the Board has found that the requirements of the Act and the Board's regulations (15 CFR Part 400) are

satisfied and that the proposal is in the public interest;

Now, therefore, the Board hereby grants to the Grantee the privilege of establishing, operating, and maintaining a foreign-trade zone and subzone, designated on the records of the Board as Zone No. 152 and Subzone No. 152A, at the locations mentioned above and more particularly described on the maps and drawings accompanying the application in Exhibits IX and X, subject to the provisions, conditions, and restrictions of the Act and the regulations issued thereunder, to the same extent as though the same were fully set forth herein, and also to the following express conditions and limitations:

Operation of the foreign-trade zone and subzone shall be commenced by the Grantee within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from federal, state, and municipal authorities.

The Grantee shall allow officers and employees of the United States free and unrestricted access to and throughout the foreign-trade zone and subzone sites in the performance of their official duties.

The grant does not include authority for manufacturing within the general-purpose zone, and the Grantee shall notify the Board for approval prior to the commencement of any manufacturing operations within the general-purpose zone, and any new manufacturing within the subzone.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said zone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer at Washington, DC, this 9th day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

C. William Verity,

Chairman and Executive Officer.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

FR Doc. 88-29812 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-DS-M

##### [Order No. 406]

#### Resolution and Order Approving the Application of the Lake Charles Harbor and Terminal District for a Subzone at the Conoco, Inc., Refinery in Calcasieu Parish, LA

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

##### Resolution and Order

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of Lake Charles Harbor & Terminal District, grantee of FTZ 87, filed with the Foreign-Trade Zones Board (the Board) on June 17, 1986, requesting special-purpose subzone status for the crude oil refinery of Conoco, Inc., located in Calcasieu Parish, Louisiana, adjacent to the Lake Charles Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest if approval is subject to certain conditions, approves the application subject to the following conditions:

1. Foreign crude oil used as fuel for the refinery shall be dutiable.
2. Conoco shall elect privileged foreign status on foreign crude oil and other foreign merchandise admitted to the subzone.
3. The U.S. Customs Service shall inform the Foreign-Trade Zones Board on or before July 1, 1991, that a satisfactory control system has been implemented so that the revenue can be fully protected; otherwise, the authority under this grant shall expire on that date.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

#### Grant of Authority To Establish a Foreign-Trade Subzone at the Conoco, Inc., Refinery in Calcasieu Parish, LA

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the



United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Lake Charles Harbor and Terminal District, grantee of Foreign-Trade Zone No. 87, has made application (filed June 17, 1988, FTZ Docket 21-88, 51 FR 24188) in due and proper form to the Board for authority to establish a special-purpose subzone at the crude oil refinery at Conoco, Inc. (Conoco), located in Calcasieu Parish, Louisiana;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard;

Whereas, the Board has found that the requirements of the Act and the Board's regulations would be satisfied and that the proposal would be in the public interest if approval is given subject to the conditions in the resolution accompanying this action;

Now, therefore, in accordance with the application filed June 17, 1988, the Board hereby authorizes the establishment of a subzone at the Conoco refinery, designated on the records of the Board as Foreign-Trade Subzone No. 87A, at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and regulations, and those stated in the resolution accompanying this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to an throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or

property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer at Washington, DC, this 16th day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan W. Mares,

*Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.*

Attest:

John J. De Ponte, Jr.,  
*Executive Secretary.*

[FR Doc. 88-29813 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-05-M

#### [Order No. 401]

#### **Resolution and Order Approving the Application of the County of Monroe, NY, for a Special-Purpose Subzone for Kodak in the Rochester, NY, Area**

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

#### **Resolution and Order**

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the County of Monroe, New York, grantee of FTZ 141, filed with the Foreign-Trade Zones Board (the Board) on October 19, 1987, requesting special-purpose subzone status for the manufacturing and distribution facilities (8 sites) of the Eastman Kodak Company in the Rochester, New York, area, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest if approval is subject to the condition that Kodak shall provide the FTZ Board and the District Director of Customs annually with a list of merchandise admitted to the zone in non-privileged status for manufacturing, and the resulting products, which merchandise had not been specifically

mentioned in the application, approves the application, subject to the foregoing condition.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

#### **Grant of Authority To Establish a Foreign-Trade Subzone at the Kodak Plant in the Rochester, NY, Area**

Whereas, by an act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the County of Monroe, New York, grantee of Foreign-Trade Zone No. 141, has made application (filed October 19, 1987, FTZ Docket 23-87, 52 FR 41600, and amended on May 9, 1988), in due and proper form to the Board for authority to establish a special-purpose subzone at the manufacturing and distribution facilities of the Eastman Kodak Company in the Rochester, New York, area (Monroe, Ontario, and Wayne Counties);

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard;

Whereas, the Board has found that the requirements of the Act and the Board's regulations would be satisfied provided that approval is subject to the condition in the accompanying resolution;

Now, therefore, in accordance with the application filed October 19, 1987, and amended on May 9, 1988, the Board hereby authorizes the establishment of a subzone at the Rochester, New York, area facilities of Eastman Kodak Company, designated on the records of the Board as Foreign-Trade Subzone No. 141A at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and regulations, and to the condition in the resolution

accompanying this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from federal, state, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer at Washington, DC, this 16th day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan W. Mares,

*Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.*

Attest:

John J. De Ponte, Jr.,  
*Executive Secretary.*

[FR Doc. 88-29814 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-05-M

#### [Order No. 407]

#### **Resolution and Order Approving the Application of the Port of Corpus Christi Authority for a Subzone at the Champlin Refining Co. Refinery in Nueces County, TX**

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

#### **Resolution and Order**

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Port of Corpus Christi Authority, Grantee of FTZ 122, filed with the Foreign-Trade Zones Board (the Board) on August 18, 1986, requesting special-purpose subzone status for the crude oil refinery of Champlin Petroleum Company, now by change of name Champlin Refining Company, located in Nueces County, Texas, adjacent to the Corpus Christi Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest if approval is subject to certain conditions, approves the application subject to the following conditions:

1. Foreign crude oil used as fuel for the refinery shall be dutiable.
2. Champlin shall elect privileged foreign status on foreign crude oil and other foreign merchandise admitted to the subzone.
3. The U.S. Customs Service shall inform the Foreign-Trade Zones Board on or before July 1, 1991, that a satisfactory control system has been implemented so that the revenue can be fully protected; otherwise, the authority under this grant shall expire on that date.

The Secretary of Commerce, as Chairman and Executive Officer of the Board is hereby authorized to issue a grant of authority and appropriate Board Order.

#### **Grant of Authority To Establish a Foreign-Trade Subzone at the Champlin Refining Company Refinery in Nueces County, Texas**

Whereas, by an act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance for foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes," as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Port of Corpus Christi Authority, grantee of Foreign-Trade Zone No. 122, has made application (filed August 18, 1986, FTZ Docket 28-86, 51 FR 30684) in due and proper form to the Board for authority to establish a special-purpose subzone at the crude oil refinery of Champlin Refining Company

(Champlin), located in Nueces County, Texas;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard;

Whereas, the Board has found that the requirements of the Act and the Board's regulations would be satisfied and that the proposal would be in the public interest if approval is given subject to the conditions in the resolution accompanying this action;

Now, therefore, in accordance with the application filed August 18, 1986, the Board hereby authorizes the establishment of a subzone at the Champlin refinery, designated on the records of the Board as Foreign-Trade Subzone No. 122L, at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and regulations, and those stated in the resolution accompany this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto the Grantee shall obtain all necessary permits from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve the Grantee from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and the Army District Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed thereto by its Chairman and Executive Officer at Washington, DC, this 16th day of December, 1988, pursuant to Order of the Board.



## Foreign-Trade Zones Board.

Jan W. Mares,  
Assistant Secretary of Commerce for Import  
Administration, Chairman, Committee of  
Alternates.

## Attest:

John J. Da Ponte, Jr.,  
Executive Secretary.  
[FR Doc. 88-29815 Filed 12-27-88; 8:45 am]  
BILLING CODE 3510-DS-M

## International Trade Administration

Caribbean Basin Business Promotion  
Council; Renewal

In accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, and the General Services Administration (GSA) rule on the Federal Advisory Committee Management, 41 CFR Part 101-6, and after consultation with GSA, the Secretary of Commerce has determined that the renewal of the Caribbean Basin Business Promotion Council is in the public interest in connection with the performance of duties imposed on the Department by law.

The Council was first established by the Secretary of Commerce on November 20, 1986 and is charged with advising the Secretary of Commerce on all matters pertinent to the implementation of the Caribbean Basin Initiative. The Council's advice is also forwarded to the interagency CBI Task Force. Specifically, the Council suggests means to promote private sector investment and trade as well as recommend policy changes to provide incentives to business expansion in the CBI region.

The Council will consist of 30 private sector members and ten senior U.S. Government officials to be appointed by the Secretary to assure a balance of representation among a variety of businesses involved with manufacturing and trade interests in the Caribbean region, and the major U.S. Government agencies which play a key role in implementing the Caribbean Basin Initiative.

The Council will function solely as an advisory body, and in compliance with provisions of the Federal Advisory Committee Act. Copies of the revised charter will be filed with the appropriate committees of the Congress and with the Library of Congress.

Inquiries or comments may be directed to Paul Bucher, Deputy Director, Caribbean Basin Business Information Center, Room 3203, U.S. Department of Commerce, Washington, DC 20230. Telephone: (202) 377-0703.

Date: December 19, 1988.

Lew W. Cramer,  
Director General, U.S. and Foreign  
Commercial Service.

[FR Doc. 88-29723 Filed 12-27-88; 8:45 am]  
BILLING CODE 3510-PP-M

National Oceanic and Atmospheric  
AdministrationEndangered Species; Application for  
Permit; St. George's School (P437)

Notice is hereby given that the Applicant has applied in due form for a Permit to take endangered species as authorized by the Endangered Species Act of 1973 (16 U.S.C. 1531-1543) and the National Marine Fisheries Service regulations governing endangered fish and wildlife permits (50 CFR Part 217-222).

1. *Applicant:* St. George's School, Newport, Rhode Island 02840.

2. *Type of Permit:* Scientific research.

3. *Name and Number of Species:* Green sea turtle (*Chelonia mydas*) unspecified; Hawksbill sea turtle (*Eretmochelys imbricata*) unspecified; Kemp's Ridley sea turtle (*Lepidochelys kempi*) unspecified; Leatherback sea turtle (*Dermochelys coriacea*) unspecified; Loggerhead sea turtle (*Caretta caretta*) unspecified; Olive Ridley sea turtle (*Lepidochelys olivacea*) unspecified.

4. *Type of Take:* The applicant proposes to capture, tag and release, recapture and release, sea turtles to determine population structure and distribution in the study area.

5. *Location and Duration of Activity:* Eastern United States, Bahamas, Bermuda, the Azores and the eastern Atlantic over a 5-year period.

Concurrent with the publication of this notice in the *Federal Register*, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S. Department of Commerce, 1335 East West Hwy., Room 7324, Silver Spring, Maryland 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of

those of the Applicant and do not necessarily reflect the views of the National Marine Fisheries Service.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

Office of Protected Resources,  
National Marine Fisheries Service, 1335 East West Hwy., Room 7324, Silver Spring, Maryland 20910;

Director, Northeast Region, National Marine Fisheries Service, Federal Bldg., 14 Elm Street, Gloucester, Massachusetts 01930; and  
Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, Florida 33702.

Date: December 20, 1988.

Nancy Foster,

Director, Office of Protected Resources and  
Habitat Programs.

[FR Doc. 88-29856 Filed 12-27-88; 8:45 am]  
BILLING CODE 3510-22-M

Marine Mammals; Application for  
Permit, Gulfarium, Gulf Exhibition  
Corporation (P90E)

Notice is hereby given that the Applicant has applied in due form for a Permit to take marine mammals as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216).

1. *Applicant:* Gulfarium, Gulf Exhibition Corporation, Highway 98, Fort Walton Beach, FL 32548.

2. *Type of Permit:* Public display.

3. *Name and Number of Marine Mammals:* Pacific false killer whales (*Pseudorca Crassidens*).

4. *Type of Take:* Import for captive maintenance.

5. *Location and Duration of Activity:* Japan over a 2-year period.

The arrangements and facilities for transporting and maintaining the marine mammals requested in the above described application have been inspected by a licensed veterinarian, who has certified that such arrangements and facilities are adequate to provide for the well-being of the marine mammals involved.

Concurrent with the publication of this notice in the *Federal Register*, the Secretary of Commerce is forwarding copies of this application to the Marine Mammal Commission and the Committee of Scientific Advisors.

Written data or views, or requests for a public hearing on this application should be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, U.S.

Department of Commerce, 1335 East West Hwy., Room 7324, Silver Spring, Maryland 20910, within 30 days of the publication of this notice. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular application would be appropriate. The holding of such hearing is at the discretion of the Assistant Administrator for Fisheries. All statements and opinions contained in this application are summaries of those of the Applicant and do not necessarily reflect the views of the National Marine Fisheries Service.

Documents submitted in connection with the above application are available for review by interested persons in the following offices:

Office of Protected Resources,  
National Marine Fisheries Service, 1335 East West Hwy., Room 7324, Silver Spring, Maryland 20910; and

Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Blvd., St. Petersburg, Florida 33702.

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731-7415.

Date: December 22, 1988.

Nancy Foster,

Director, Office of Protected Resources and  
Habitat Programs, National Marine Fisheries  
Service.

[FR Doc. 88-29853 Filed 12-27-88; 8:45 am]  
BILLING CODE 3510-22-M

## (Modification No. 4 to Permit No. 493)

Marine Mammals; Permit Modification:  
West Coast Whale Research  
Foundation (P349)

Notice is hereby given that pursuant to the provisions of § 216.33(d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216) and § 220.24 of the regulations on endangered species (50 CFR Parts 217-222), Scientific Research Permit No. 493 issued to the West Coast Whale Research Foundation, c/o Elizabeth A. Mathews, Applied Sciences 273, Center for Marine Studies, on February 28, 1985 (50 FR 9481) as modified on October 4, 1985 (50 FR 41550), March 6, 1987 (52 FR 7007), and July 31, 1987 (52 FR 29406) is further modified as follows:

Section B.8 is changed to read

"This Permit is valid with respect to the taking authorized herein until December 31, 1989."

This modification becomes effective on December 22, 1988.

Documents pertaining to the Permit and all modifications are available for review in the following Offices:

Office of Protected Resources,  
National Marine Fisheries Service, 1335 East West Hwy., Room 7324, Silver Spring, Maryland 20910.

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731-7415.

Date: December 22, 1988.

Nancy Foster,

Director, Office of Protected Resources and  
Habitat Programs, National Marine Fisheries  
Service.

[FR Doc. 88-29854 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-22-M

Marine Mammals; Request for  
Modification: Brent Stewart (P278C)

Notice is hereby given that pursuant to the provisions of § 216.33(d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216), Scientific Research Permit No. 579 issued to Mr. Brent S. Stewart, Hubbs Marine Research Center, 1700 South Shores Road, San Diego, California 92109, on January 10, 1987 (52 FR 3037), and modified on February 23, 1988 (53 FR 6683), is further modified in the following manner:

Section A.1.d. is deleted and replaced by:

"d. Up to 40 of the tagged females and up to 40 of the tagged males may be chemically immobilized for attachment of time-depth recorders.

(i) Blood samples may be taken while these animals are chemically immobilized for attachment of TDR's.

(ii) These 40 males may be given intramuscular injections of Decapeptyl-CR (16 mg per injection) during breeding season."

This modification becomes effective upon signature.

Documents submitted in connection with the above application are available for review in the following offices:

Office of Protected Resources,  
National Marine Fisheries Service, 1335 East West Hwy., Suite 7324, Silver Spring, Maryland 20910; and

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731.

Date: December 20, 1988.

Nancy Foster,

Director, Office of Protected Resources and  
Habitat Programs, National Marine Fisheries  
Service.

[FR Doc. 88-29855 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-22-M

COMMITTEE FOR THE  
IMPLEMENTATION OF TEXTILE  
AGREEMENTSAdjustment of Import Limits for  
Certain Cotton and Man-Made Fiber  
Textile Products Produced or  
Manufactured in the People's Republic  
of Bangladesh

December 21, 1988.

AGENCY: Committee for the  
Implementation of Textile Agreements  
(CITA).

ACTION: Issuing a directive to the  
Commissioner of Customs adjusting  
limits.

EFFECTIVE DATE: December 29, 1988.

FOR FURTHER INFORMATION CONTACT:  
Anne Novak, International Trade  
Specialist, Office of Textiles and  
Apparel, U.S. Department of Commerce,  
(202) 377-4212. For information on the  
quota status of these limits, refer to the  
Quota Status Reports posted on the  
bulletin boards of each Customs port.  
For information on embargoes and quota  
re-openings, call (202) 377-3715.

## SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the  
Agricultural Act of 1956, as amended (7  
U.S.C. 1854)

The current limits for Categories 334 and 638/639 are being increased, respectively, for swing and special shift. The limits for Categories 335 and 338/339 are being reduced, respectively, for the swing and special shift being applied.

A description of the textile and apparel categories in terms of T.S.U.S.A. numbers is available in the

CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see *Federal Register* notice 52 FR 47745, published on December 16, 1987). A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see *Federal Register* notice 53 FR 44937, published on November 7, 1988). Also see FR 752, published on January 12, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist



only in the implementation of certain of its provisions.

James H. Babb,  
Chairman, Committee for the Implementation of Textile Agreements.

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

December 21, 1988

Commissioner of Customs,  
Department of the Treasury,  
Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on January 7, 1988 by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton and man-made fiber textile products, produced or manufactured in Bangladesh and exported during the period which began on February 1, 1988 and extends through January 31, 1989.

Effective on December 29, 1988, the directive of January 7, 1988 is amended further to adjust the limits for cotton and man-made fiber textile products in the following categories, as provided under the terms of the current bilateral agreement between the Governments of the United States and Bangladesh:

Category	Adjusted twelve-month limit <sup>1</sup>
334.....	79,944 dozen.
335.....	132,079 dozen.
338/339.....	507,002 dozen.
638/639.....	963,209 dozen.

<sup>1</sup> The limits have not been adjusted to account for any imports exported after January 31, 1988.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

James H. Babb,  
Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-29773 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-DR-M

#### Adjustment of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in the People's Republic of China

December 22, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 22, 1988.

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade

Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566-8828. For information on embargoes and quota re-openings, call (202) 377-3715.

#### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854)

The current limits for Group III and Category 611 are being increased, respectively by application of swing and carryforward. The limits for Categories 313, 314, 317/328, 607, 614 and 615 are being reduced to account for the swing being applied.

A description of the textile and apparel categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States (see Federal Register notice 52 FR 47745, published on December 16, 1987). Also see 53 FR 55, published on January 4, 1988.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 22, 1988.

Commissioner of Customs,  
Department of the Treasury, Washington,  
D.C. 20229

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 30, 1987, as amended, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports into the United States of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in China and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on December 22, 1988, the directive of December 30, 1987 is amended further to adjust the limits for cotton, wool and man-made fiber textile products in the following categories, as provided under the provisions of the current bilateral agreement between the Governments of the United States and the People's Republic of China:

Category	Adjusted twelve-month limit <sup>1</sup>
313.....	40,432,610 square yards.
314.....	44,688,520 square yards.
317/328.....	18,253,536 square yards.
607.....	2,500,000 pounds.
611.....	5,610,000 square yards.
614.....	9,000,000 square yards.
615.....	17,900,000 square yards.

#### Group III

201, 220, 222-225, 227, 229, 362, 369-0,<sup>2</sup> 400, 414, 484-489, 600, 603, 604-0,<sup>3</sup> 606, 618-622, 624-627, 628, 629, 665, 666, 669-0<sup>4</sup> and 670, as a group.

345,459,450 square yards equivalent.

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1987.

<sup>2</sup> In Category 369-0, all TSUSA numbers except 365,6615, 366,1720, 366,1740, 366,2020, 366,2040, 366,2420, 366,2440 and 366,2680 in Category 369-0; 708,3640 and 708,4108 in Category 369-H; 706,3210, 706,3650 and 706,4111 in Category 369-L; and 366,2840 in Category 369-S.

<sup>3</sup> In Category 604-0, all TSUSA numbers except 310,5049 and 310,6045.

<sup>4</sup> In Category 669-0, all TSUSA numbers except 385,5300 in Category 669-P

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

Acting Chairman, Committee of the Implementation of Textile Agreements.

[FR Doc. 88-29768 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-DR-M

#### Adjustment of Import Limits for Certain Wool Textile Products Produced or Manufactured in the Socialist Federal Republic of Yugoslavia

December 22, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 23, 1988.

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port. For information on embargoes and quota re-openings, call (202) 377-3715.

#### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854)

The current limit for Category 434 is being increased for swing and carryforward, and the limit for Categories 447/448 is being reduced for the swing applied.

A description of the textile and apparel categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated [See Federal Register notice 52 FR 47745, published on December 16, 1987]. Also see 52 FR 49064, published on December 29, 1987.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 22, 1988.

Commissioner of Customs,  
Department of the Treasury, Washington,  
D.C. 20229

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 21, 1987, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in the Socialist Federal Republic of Yugoslavia and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on December 23, 1988, the directive of December 21, 1987 is being amended to adjust the limits for wool textile products in the following categories, as provided under the terms of the current bilateral textile agreement between the Governments of the United States and the Socialist Federal Republic of Yugoslavia:

Category	Adjusted twelve-month limit <sup>1</sup>
434.....	10,159 dozen.
447/448.....	47,110 dozen.

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1987.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-29768 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-DR-M

#### Announcement of Import Limits for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in the United Mexican States

December 22, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits for the new agreement year.

EFFECTIVE DATE: January 1, 1989.

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854)

FOR FURTHER INFORMATION CONTACT: Diana Solkoff, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 535-9481. For information on embargoes and quota re-openings, call (202) 377-3715.

SUPPLEMENTARY INFORMATION: The Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of February 13, 1988 between the Governments of the United States and the United Mexican States establishes import limits for certain cotton, wool and man-made fiber textile products for 1989. Sublevels of these limits are established for products which are not subject to the terms of the Special Regime. The limits for Categories 334, 338/636, 341/641, 342/642, 347/348/647/648, 359-C/659-C and 669-B have been adjusted to account for carryforward used in 1988.

A copy of the current bilateral textile agreement between the Governments of the United States and the United Mexican States is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647-1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States Annotated [see Federal Register notice 53 FR 44937, published on November 7, 1988].

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 22, 1988.

Commissioner of Customs,  
Department of the Treasury, Washington, DC  
20229

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as further extended on July 31, 1986; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of February 13, 1988 between the Governments of the United States and the United Mexican States; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 1, 1989, entry into the United States for consumption, and withdrawal from warehouse for consumption, of cotton, wool and man-made fiber textile products in the following categories, produced or manufactured in Mexico and exported during the twelve-month period beginning on January 1, 1989 and extending through December 31, 1989, in excess of the following levels and sublevels of restraint:

Category	Twelve-month limit
218-220, 225-227, 313-326, 611-617 and 625-629, as a group.	38,996,980 square meters equivalent.

#### Sublevels within the Group

219.....	9,749,245 square meters.
313.....	19,498,490 square meters.
317.....	9,749,245 square meters.

#### Individual Limits not in the Group

201pt./669pt. <sup>1</sup>	1,202,020 kilograms.
222.....	406,233 kilograms.
223pt. <sup>2</sup>	635,029 kilograms.
229-F <sup>3</sup>	680,388 kilograms.
229-0 <sup>4</sup>	771,107 kilograms.
237.....	80,000 dozen.
239.....	233,600 kilograms.
300/301/607pt. <sup>5</sup>	6,429,672 kilograms of which not more than 3,572,040 kilograms shall be in Category 300.
334.....	70,000 dozen.
335.....	127,200 dozen.
338/636.....	180,000 dozen.
338/339/638/639.....	1,166,000 dozen.
340/640.....	381,600 dozen.



Category	Twelve-month limit
341/641.....	744,000 dozen of which not more than 288,800 dozen shall be in blouses with two or more colors in the warp and/or filling in Categories 341-Y/641-Y.*
342/642.....	290,000 dozen.
345.....	19,022 dozen.
347/348/647/648.....	3,846,000 dozen.
349/649.....	2,650,000 dozen.
350.....	13,725 dozen.
351/651.....	307,400 dozen.
352/652.....	2,650,000 dozen.
359-C/659-C <sup>1</sup> .....	1,543,121 kilograms.
359-D <sup>2</sup> .....	136,078 kilograms.
363.....	5,500,000 numbers.
369-B <sup>3</sup> .....	202,020 kilograms.
369-D <sup>10</sup> .....	181,437 kilograms.
369-D <sup>11</sup> .....	1,610,706 kilograms.
369-D <sup>12</sup> .....	181,437 kilograms.
410.....	397,160 square meters.
433.....	11,000 dozen.
435.....	10,100 dozen.
442.....	5,556 dozen.
443.....	84,000 numbers.
447.....	12,000 dozen.
459.....	22,880 kilograms.
604-A <sup>13</sup> .....	613,257 kilograms.
604-O/607-O <sup>14</sup> .....	1,923,231 kilograms.
621.....	90,718 kilograms.
632.....	750,000 dozen pairs.
633.....	90,100 dozen.
634.....	66,900 dozen.
635.....	121,900 dozen.
645/646.....	45,000 dozen.
650.....	13,725 dozen.
659-H <sup>15</sup> .....	158,757 kilograms.
659-S <sup>16</sup> .....	240,404 kilograms.
659-O <sup>17</sup> .....	680,389 kilograms.
666.....	3,461,817 kilograms.
669-B <sup>18</sup> .....	589,670 kilograms.
669-O <sup>19</sup> .....	294,895 kilograms.
670.....	2,494,758 kilograms.

Non-Special Regime Category Sublimits	
335.....	31,800 dozen.
338/339/638/639.....	583,000 dozen.
340/640.....	95,400 dozen.
342/642.....	61,480 dozen.
347/348/647/648.....	477,265 dozen.
349/649.....	530,000 dozen.
351/651.....	46,110 dozen.
352/652.....	1,192,500 dozen.
359-C/659-C (coveralls and overalls).....	158,667 kilograms.
369-B (handbags and luggage).....	180,303 kilograms.
369-U (shoe uppers).....	241,606 kilograms.
663.....	9,010 dozen.
634.....	10,335 dozen.
659-S (swimwear).....	4,040 kilograms.
666.....	1,730,909 kilograms.

<sup>1</sup> In Category 201pt., only tariff numbers 5607.41.30.00, 5607.49.15.00, 5607.49.25.00, 5607.50.20.00 and 5607.90.20.00; in Category 669pt. only tariff numbers 5607.49.30.00 and 5607.50.40.00.

<sup>2</sup> In Category 223pt., all tariff numbers except 5601.21.00.10.

<sup>3</sup> In Category 229-F, only tariff numbers 5608.11.00.00, 5608.109.10.10 and 5608.19.10.20.

<sup>4</sup> In Category 229-O, all tariff numbers in Category 229 except 5608.11.00.00, 5608.19.10.10 and 5608.19.10.20.

<sup>5</sup> In Categories 300 and 301 and in 607pt., only tariff numbers 5509.53.00.30 and 5509.53.00.60.

<sup>6</sup> In Category 341-Y, only tariff numbers 6204.22.30.60, 6206.30.30.10 and 6206.30.30.30; and in Category 641-Y only 6204.23.00.50, 6204.29.20.30, 6206.40.30.10, and 6206.40.30.25.

<sup>7</sup> In Categories 359-C/659-C, only tariff numbers 6103.42.20.25, 6103.49.30.34, 6104.62.10.20, 6104.69.30.10, 6114.20.00.48, 6114.20.00.52, 6203.42.20.10, 6203.42.20.90, 6204.62.20.10, 6211.32.00.10, 6211.32.00.25 and 6211.42.00.10 in Category 359-C and 6103.23.00.55, 6103.49.20.20, 6103.49.20.00, 6103.49.30.38, 6104.63.10.20, 6104.69.10.00, 6104.69.30.14, 6114.30.30.40, 6114.30.30.50, 6203.43.20.10, 6203.43.20.90, 6203.49.10.10, 6203.49.10.90, 6204.63.15.10, 6204.69.10.10, 6211.33.00.10, 6211.33.00.17 and 6211.43.00.10 in Category 659-C.

<sup>8</sup> In Category 359-O, all tariff numbers except 6103.42.20.20, 6103.49.30.34, 6104.62.10.20, 6104.69.30.10, 6114.20.00.48, 6114.20.00.52, 6203.42.20.10, 6204.62.20.10, 6211.32.00.10 and 6211.42.00.10 in Category 359-C.

<sup>9</sup> In Category 369-B, only tariff numbers 4202.12.40.00, 4202.12.80.20, 4202.12.80.60, 4202.22.40.20, 4202.22.45.00, 4202.22.80.30, 4202.92.15.00, 4202.92.30.15 and 4202.92.60.00.

<sup>10</sup> In Category 369-D, only tariff numbers 6302.80.00.10 and 6302.91.00.20.

<sup>11</sup> In Category 369-U, only tariff numbers 6406.10.75.60.

<sup>12</sup> In Category 369-O, all tariff numbers except 4202.12.40.00, 4202.12.80.20, 4202.12.80.60, 4202.22.40.20, 4202.22.45.00, 4202.22.80.30, 4202.92.15.00 and 4202.92.30.15 in Category 369-B; 6302.80.00.10 and 6302.91.00.20 in Category 369-D; and 6406.10.75.00 in Category 369-U.

<sup>13</sup> In Category 604-A, only tariff numbers 5509.32.00.00.

<sup>14</sup> In Category 604-O, all tariff numbers except 5509.32.00.00; and in Category 607-O, all tariff numbers except 5509.53.00.30 and 5509.53.00.60.

<sup>15</sup> In Category 659-H, only tariff numbers 6502.00.90.30, 6504.00.90.15, 6504.00.90.60, 6505.90.50.80, 6505.90.80.60, 6505.90.70.60 and 6505.90.80.75.

<sup>16</sup> In Category 659-S, only tariff numbers 6112.31.00.10, 6112.31.00.20, 6112.41.00.10, 6112.41.00.20, 6112.41.00.30, 6112.41.00.40, 6111.11.10.10, 6112.11.10.20, 6111.12.10.10 and 6111.12.10.20.

<sup>17</sup> In Category 659-O, all tariff numbers except 6103.23.00.55, 6103.43.20.20, 6103.49.20.00, 6103.49.30.38, 6104.63.10.20, 6104.69.10.00, 6104.69.30.14, 6114.30.30.40, 6114.30.30.50, 6203.43.20.10, 6203.49.10.10, 6204.63.15.10, 6204.69.10.10, 6211.33.00.10, and 6211.43.00.10 in Category 659-C; 6502.00.90.30, 6504.00.90.15, 6504.00.90.60, 6505.90.50.80, 6505.90.80.60, 6505.90.70.60, 6505.90.80.75 in Category 659-H; and 6112.31.00.10, 6112.31.00.20, 6112.41.00.10, 6112.41.00.20, 6112.41.00.30, 6112.41.00.40, 6111.11.10.10, 6112.11.10.20, 6211.12.10.10 and 6211.12.10.20 in Category 659-S.

<sup>18</sup> In Category 669-B, only tariff numbers 6305.31.00.20 and 6305.39.00.00.

<sup>19</sup> In Category 669-O, all tariff numbers except 5607.49.30.00 and 5607.50.40.00 in Category 669pt.; 6305.31.00.20 and 6305.39.00.00 in Category 669-B; and 6305.31.00.10 which covers polyethylene or polypropylene packing bags weighing one kilogram or more.

Imports charged to these category limits for the period January 1, 1988 through December 31, 1988 shall be charged against the levels of restraint to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such goods shall be subject to the limits set forth in this directive.

The bilateral agreement establishes separate treatment for products in certain categories. Those products which are made of U.S. formed and cut fabric are subject to the Special Regime and to the category limits listed in this directive. These products which are exported from Mexico to the United States under provisions of the Special Regime, HTS item number 9802.00.80.10, on and after January 1, 1989 must be accompanied by a properly certified Form ITA-370P.

Any shipment for entry under tariff number 9802.00.80.10 which is not accompanied by a valid and correct certification and Shippers Export Declaration (Form ITA-370P) in

accordance with the provisions of the certification requirements established in the directive of August 22, 1988, as amended, shall be denied entry under the Special Regime. Any shipment which is declared as tariff number 9802.00.80.10 but found not to qualify for the Special Regime shall be denied entry into the United States. Invoices visaed for Special Regime shall include only products that are subject to the Special Regime or entry will be denied.

Shipments of products, in categories covered by the Special Regime, but that are not subject to the Special Regime are subject to the applicable limits and sublimits listed in this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-29770 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-DR-M

#### Extending Coverage of the Export Visa Arrangement for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in the Republic of Turkey

December 22, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner for Customs extending coverage of the export visa arrangement.

**EFFECTIVE DATE:** January 1, 1989.

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

**FOR FURTHER INFORMATION CONTACT:** Janet Heinzen, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

**SUPPLEMENTARY INFORMATION:** Under the terms of the current Bilateral Cotton and Man-Made Fiber Textile Agreement between the Governments of the United States and the Republic of Turkey, and current visa arrangement is being amended to include coverage of cotton and man-made fiber textile products in Categories 237, 314, 315, 38, 342/642, 617 and 625-628.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States Annotated (see Federal Register notice 52 FR 44937, published on November 7, 1987). Also see 52 FR 6859, published in the Federal Register on March 5, 1987.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 22, 1988.

Commissioner of Customs,  
Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on March 2, 1987, by the Chairman, Committee for the Implementation of Textile Agreements, that directed you to prohibit entry of certain cotton and man-made fiber textile products, produced or manufactured in Turkey which were not properly visaed by the Government of the Republic of Turkey.

Effective on January 1, 1989, shipments of cotton and man-made fiber textile products in Categories 237, 314, 315, 338, 342/642, 617 and 625-628, produced or manufactured in Turkey and exported on or after January 1, 1989 from Turkey shall require a visa for entry into the United States.

A current list of whole, merged and part categories subject to the visa arrangement with Turkey is as follows:

#### Categories

200  
219  
237  
300/301  
313  
314  
315  
317  
326  
335  
338/339 (other than 338-S/339-S) 338-S/339-S<sup>1</sup>  
340/640 (other than 340-Y/640-Y) 340-Y/640-Y<sup>2</sup>

<sup>1</sup> In Categories 338-S/339-S, only tariff numbers 6103.22.00.50, 6105.10.00.10, 6105.10.00.30, 6105.90.30.10, 6109.10.00.35, 6110.20.10.25, 6110.20.20.40, 6110.20.20.65, 6110.90.00.68, 6112.11.00.30 and 6114.20.00.05 in Category 338-S; and 6104.22.00.60, 6104.29.20.46, 6106.10.00.10, 6106.10.00.30, 6106.90.20.10, 6106.90.30.10, 6109.10.00.70, 6110.20.10.30, 6110.20.20.45, 6110.20.20.75, 6110.90.00.70, 6112.11.00.40, 6114.20.00.10 and 6117.90.00.22 in Category 339-S.

<sup>2</sup> In Categories 340-Y/640-Y, only tariff numbers 6205.20.20.15, 6205.20.20.20, 6205.20.20.46, 6205.20.20.60 and 6205.20.20.80 in Category 340-Y; and 6205.30.20.10, 6205.30.20.20, 6205.30.20.50 and 6205.30.20.60 in Category 640-Y.

341 (other than 341-Y)  
341-Y<sup>3</sup>  
342/642  
347/348 (other than 347-T/348-T)  
347-T/348-T<sup>4</sup>

350

361

369-S<sup>5</sup>

604

617

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Further, should additional categories, merged categories or part categories be added to the bilateral agreement or become subject to import quotas, the entire category or categories shall be automatically included in the coverage of the visa arrangement. Merchandise exported on or after the date the category is added to the agreement or becomes subject to import quotas shall require a visa. Notification will be provided when additions or changes are made.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-29771 Filed 12-27-88; 8:45 am]

BILLING CODE 3510-01-M

#### Establishment of a New Export Visa Arrangement for Certain Textiles and Textile Products Produced or Manufactured in the United Arab Emirates

December 22, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs establishing a new export visa arrangement.

**EFFECTIVE DATE:** January 15, 1989.

**FOR FURTHER INFORMATION CONTACT:** Jerome Turtola, International Trade

<sup>3</sup> In Category 341-Y, only tariff numbers 6204.22.30.60, 6206.30.30.10 and 6206.30.30.30.

<sup>4</sup> In Category 347-T/348-T, only tariff numbers 6103.19.20.15, 6103.19.40.20, 6103.22.00.30, 6103.42.10.20, 6103.42.10.40, 6103.49.30.10, 6112.11.00.50, 6113.00.00.35, 6203.19.10.20, 6203.19.40.20, 6203.22.30.20, 6203.42.40.05, 6203.42.40.10, 6203.42.40.15, 6203.42.40.25, 6203.42.40.35, 6203.42.40.45, 6203.48.30.20, 6210.40.20.30, 6211.20.15.20, 6211.20.30.10, and 6211.32.00.40 in Category 347-T; and 6104.12.00.30, 6104.19.20.30, 6104.22.00.40, 6104.29.20.34, 6104.62.20.10, 6104.62.20.25, 6104.69.30.22, 6112.11.00.60, 6113.00.00.40, 6117.90.00.42, 6204.12.00.30, 6204.19.30.30, 6204.22.30.40, 6204.29.40.34, 6204.62.30.00, 6204.62.40.05, 6204.62.40.10, 6204.62.40.20, 6204.62.40.30, 6204.62.40.40, 6204.62.40.50, 6204.69.30.10, 6204.69.30.10, 6210.50.20.30, 6211.20.15.50, 6211.20.60.10, 6211.42.00.30 and 6217.90.00.50 in Category 348-T.

<sup>5</sup> In Category 369-S, only tariff number 6307.10.20.05.

Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

#### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

During recent negotiations, the Governments of the United States and the United Arab Emirates agreed to establish a new export visa arrangement.

A copy of the visa arrangement is available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647-1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see Federal Register notice 53 FR 44937, published on November 7, 1988).

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 22, 1988.

Commissioner of Customs,  
Department of the Treasury,  
Washington, D.C. 20229.

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to prohibit, effective on January 15, 1989, entry into the Customs territory of the United States (i.e., the 50 States, the District of Columbia and the Commonwealth of Puerto Rico) for consumption and withdrawal from warehouse for consumption of textiles and textile articles of cotton, wool, man-made fibers, silk blends and other vegetable fibers in Categories 200-239, 300-369, 400-469, 600-670 and 800-899, including part and merged categories, produced or manufactured in the United Arab Emirates and exported on and after January 15, 1989 from the United Arab Emirates for which the Government of the United Arab Emirates has not issued an appropriate visa fully described below.

A visa must accompany each commercial shipment of the aforementioned textiles and textile articles. A circular stamped marking in blue ink will appear on the front of the original commercial invoice. The original visa shall not be stamped on duplicate copies of the invoice. The original invoice with the original visa stamp will be required to enter the shipment into the United States. Duplicates of the invoice and/or visa may not be used for this purpose.

Each visa stamp shall include the following information:



1. The visa number. The visa number shall be in the standard nine digit letter format, beginning with one numerical digit for the last digit of the calendar year of export, followed by the two character alpha country code specified by the International Organization for Standardization (ISO), and a six digit numerical serial number identifying the shipment; e.g. 9AE123456).

2. The date of issuance. The date of issuance shall be the day, month and year on which the visa was issued.

3. The signature of the issuing official.

4. The correct category(s), merged category(s), part category(s), quantity(s) and unit(s) of quantity provide for in the U.S. Department of Commerce CORRELATION and in the Harmonized Tariff Schedule of the United States (e.g., "Cat. 340-510 DZ").

Quantities must be stated in whole numbers. Decimals or fractions will not be accepted. Merged category quota merchandise may be accompanied by either the appropriate merged category visa or the correct category visa corresponding to the actual shipment (e.g., quota Categories 347/348 may be visaed as 347/348, or if the shipment consists solely of Category 347 merchandise, the shipment may be visaed as "Cat. 347," but not as "Cat. 348").

U.S. Customs shall not permit entry if the shipment does not have a visa, or if the visa number, date of issuance, signature, category, quantity or units of quantity are missing, incorrect or illegible, or have been crossed out or altered in any way. If the quantity indicated on the visa is less than that of the shipment, with the exception of rounding down to the closest whole number, entry shall not be permitted. If the quantity indicated on the visa is more than that of the shipment, entry shall be permitted and only the amount entered shall be charged to any applicable quota.

If the visa is not acceptable to the U.S. Customs Service, a new visa must be obtained from the Government of the United Arab Emirates or a visa waiver issued by the Embassy of the United Arab Emirates through the U.S. Department of Commerce and presented to the U.S. Customs Service before any portion of the shipment will be released. The waiver, if used, only waives the requirement to present a visa which the shipment. It does not waive any applicable quota requirements.

If the visaed invoice is deficient, the U.S. Customs Service will not return the original document after entry, but will provide a certified copy of that visaed invoice for use in obtaining a new correct original visaed invoice, or visa waiver.

If import quotas are in force, U.S. Customs Service shall charge only the actual quantity in the shipment to the correct category limit. If a shipment from the United Arab Emirates has been allowed entry into the commerce of the United States with either an incorrect visa or no visa, and redelivery is requested but cannot be made, U.S. Customs shall charge the shipment to the correct category limit whether or not a replacement visa or visa waiver is provided.

Any shipment which requires a visa but which is not accompanied by a valid and correct visa in accordance with the foregoing

provisions shall be denied entry by U.S. Customs Service unless the Government of the United Arab Emirates authorizes the entry and any charges to the import levels through the visa waiver process.

Merchandise imported for the personal use of the importer and not for resale, regardless of value, and properly marked commercial sample shipments valued at U.S. \$250 or less, do not require a visa for entry.

A facsimile of the visa stamp and a list of authorizing officials are enclosed with this letter.

The actions taken with respect to the Government of the United Arab Emirates and with respect to the imports of textiles and textile articles of cotton, wool, man-made fibers, silk blends and other vegetable fibers have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1). This letter will be published in the Federal Register.

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.



List of officials Authorized to Sign Visas for Textile Exports from the United Arab Emirates

Mohd Jasim Al Mozaki  
Saif Khalfan Bin Sabt  
Humaid Hassan Humaid  
Saif Humaid Zayed  
Mohd Rashid Al Sharhan  
Abdullah Ahmed Al Hussain  
Saeed Bin Khadem  
Walid Ali Mohd Al Falah  
Hashem Saeed Al Taghi  
Abdullah Ali Al Hoseni  
Abdullah Salem Samhan  
Noor Hussain Abu Al Qasem  
Ali Ahmed Al Bahri  
Abdul Rahman Mohd Ali Wahabi  
Abdul Rahim Mohd Ali Al Sharif

Hussain Mohd Saleh  
[FR Doc. 88-29772 Filed 12-27-88; 8:45 am]  
BILLING CODE 3510-DR-M

### Changes in Visa Arrangements To Coincide with Implementation of the Harmonized Tariff Schedule

December 22, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs amending existing visa arrangements.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Brian Fennessy, Commodity Industry Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-3400.

#### SUPPLEMENTARY INFORMATION:

**Authority:** Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

On January 1, 1989 the United States Government will implement the Harmonized Tariff Schedule (HTS). Pursuant to its authority under section 204 of the Agricultural Act of 1956, as amended, CITA is amending the visa requirements for imports into the United States of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products exported on and after January 1, 1989.

These amendments substitute HTS numbers for TSUSA numbers except in the cases listed under the "Country Specific Section." These part-categories will occur due to unilateral or bilateral actions.

The attached directive contains some HTS numbers which will be published in the third supplement to the Harmonized Tariff Schedule.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Schedule of the United States Annotated (see Federal Register notice 53 FR 44937, published on November 7, 1988).

Interested person are advised to take all necessary steps to ensure that textiles and textile products that are entered into the United States for consumption, and withdrawn from warehouse for consumption, will meet the requirements set forth in the letter

published below to the Commissioner of Customs.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

December 22, 1988

Commissioner of Customs,  
Department of the Treasury,  
Washington, D.C. 20229.

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended, you are directed to make the changes shown below in the current visa requirements with all countries with which visa arrangements are in place, effective for goods exported to the United States on and after January 1, 1989. Merchandise exported to the United States prior to January 1, 1989 shall continue to be subject to the current visa requirements.

#### GENERAL SECTION

For all countries, substitute the Harmonized Tariff Schedule (HTS) numbers listed in the enclosure for those countries with part-categories included in their visa arrangement with the United States. The HTS numbers shall cover goods exported from these countries on and after January 1, 1989 which are entered into the Customs territory of the United States (i.e., the 50 states, the District of Columbia and the Commonwealth of Puerto Rico) for consumption, and withdrawn from warehouse for consumption, on and after January 1, 1989.

Also effective on January 1, 1989, Category 237 shall replace Category 337 and/or Category 637 in all visa arrangements for goods exported on and after January 1, 1989.

#### COUNTRY SPECIFIC SECTION

The following are new requirements in 1989 for goods exported on and after January 1, 1989.

**China:**  
The following part-categories will be required:

340 (will be valid for all products in Category 340, except those in Category 340-Z)  
340-Z

Part-category 359-D will be invalid.

**Hong Kong:**  
The description for Categories 338/339(1) has been changed to tops, including tank tops.

**Korea:**  
The following part-categories will be required:

<sup>1</sup> In Category 340-Z, only HTS numbers 6205.20.2015, 6205.20.2020, 6205.20.2050 and 6205.20.2060.

<sup>2</sup> In Categories 338/339(1), only HTS numbers 6109.10.0025, 6109.10.0030, 6109.10.0060, 6109.10.0065, 6114.20.0005 and 6114.20.0010.

<sup>3</sup> In Category 669-P, only HTS numbers 6305.31.0000, 6305.31.0020 and 6305.39.0000.

340-Y<sup>4</sup>  
340-O<sup>5</sup>

**Mexico:**

Part-category 669-P, which will be invalid, is being replaced by 669-B<sup>6</sup>, excluding bags weighing over one kilograms.

**Pakistan:**

Part-category 631-W will be invalid.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Customs territory of the United States (i.e., the 50 states, the District of Columbia, and the Commonwealth of Puerto Rico).

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

**Note:**—Please note that the descriptions with each part category are for quick reference only and are not binding in any way.

#### Bangladesh

The following is a list of HTS numbers for floor coverings requiring an exempt certificate:

369  
5702.99.10.10  
465  
5701.10.16.00  
5702.51.20.10  
5702.51.20.00  
5702.91.30.00  
665  
5702.92.00.10

#### China

##### Part Categories

338-S/339-S—Only the following HTS numbers from the respective categories:

338-S:  
6103.22.00.50  
6105.10.00.10  
6105.10.00.30  
6105.90.30.10  
6109.10.00.35  
6110.20.10.25  
6110.20.20.40  
6110.20.20.65  
6110.90.00.68  
6112.11.00.30  
6114.20.00.05  
339-S:  
6104.22.00.60

<sup>4</sup> In Category 340-Y, only HTS numbers 6205.20.2015, 6205.20.2020, 6205.20.2046, 6205.20.2050 and 6205.20.2060.

<sup>5</sup> In Category 340-O, only HTS numbers 6203.22.3050, 6205.20.1000, 6205.20.2025, 6205.20.2030, 6205.20.2035, 6205.20.2045, 6205.20.2065, 6205.20.2075, 6205.90.2010, 6205.90.4010 and 6211.32.0060.

<sup>6</sup> In Category 669-B, only HTS numbers 6305.31.0020 and 6305.39.0000.

6104.29.20.46  
6106.10.00.10  
6106.10.00.30  
6106.90.20.10  
6106.90.30.10  
6109.10.00.70  
6110.20.10.30  
6110.20.20.45  
6110.20.20.75  
6110.90.00.70  
6112.11.00.40  
6114.20.00.10  
6117.90.00.22

338—All remaining HTS numbers in category 338.

339—All remaining HTS numbers in category 339.

340-Z—With Two or More Colors in the Warp and/or Filling, excluding Napped shirts, in HTS numbers:

6205.20.20.15  
6205.20.20.20  
6205.20.20.50  
6205.20.20.60

340—All remaining HTS numbers in category 340.

341-Y—With Two or More Colors in the Warp and/or Filling in HTS numbers:

6204.22.30.60  
6206.30.30.10  
6206.30.30.30

341—All remaining HTS numbers in category 341.

359-C—Coveralls and Overalls in HTS numbers:

6103.42.20.25  
6103.49.30.34  
6104.62.10.20  
6104.69.30.10  
6114.20.00.48  
6114.20.00.52  
6203.42.20.10  
6203.42.20.90  
6204.62.20.10  
6211.32.00.10  
6211.32.00.25  
6211.42.00.10

359-V—Vests in HTS numbers:

6103.19.20.30  
6103.19.40.30  
6104.12.00.40  
6104.19.20.40  
6110.20.10.22  
6110.20.10.24  
6110.20.20.30  
6110.20.20.35  
6110.90.00.44  
6110.90.00.46  
6201.92.20.10  
6202.92.20.20  
6203.19.10.30  
6203.19.40.30  
6204.12.00.40  
6204.19.30.40  
6211.32.00.70  
6211.42.00.70







640—OO—Shirts, Other Than Dress, Other Than Two or More Colors in the Warp and/or Filling in HTS numbers:	6306.12.00.00 6306.19.00.10 6306.22.90.00	6104.69.20.20 6104.69.30.26 6112.12.00.60 6112.19.10.60 6112.20.10.70 6113.00.00.50 6117.90.00.46
6203.23.00.80 6203.29.20.50 6205.30.10.00 6205.30.20.70 6205.30.20.80 6211.33.00.40	669—O—All remaining HTS numbers in category 669. 670—L—Luggage in HTS numbers: 4202.12.80.30 4202.12.80.70 4202.92.30.20 4202.92.30.30 4202.92.90.20	648—All remaining HTS numbers in category 648.
641—Y—Blouses With Two or More Colors in the Warp and/or Filling in HTS numbers: 6204.23.00.50 6204.29.20.30 6206.40.30.10 6206.40.30.25	670—O—All remaining HTS numbers in category 670.	Mexico
641—O—All remaining HTS numbers in 641.	Malaysia	Part Categories
659—O—Coveralls and Overalls in HTS numbers: 6103.23.00.55 6103.43.20.20 6103.49.20.00 6103.49.30.38 6103.63.10.20 6104.69.10.00 6104.69.30.14 6114.30.30.40 6114.30.30.50 6203.43.20.10 6203.43.20.90 6203.49.10.10 6203.49.10.90 6204.63.15.10 6204.69.10.10 6211.33.00.10 6211.33.00.17 6211.43.00.10	369—S—Shop Towels in HTS number: 6307.10.20.05 369—O—All remaining HTS numbers in category 369. 438—W—Womens and Girls in HTS numbers: 6104.21.00.60 6104.23.00.20 6104.29.20.48 6106.20.10.10 6106.20.10.20 6106.90.10.10 6106.90.10.20 6106.90.20.20 6106.90.30.20 6109.90.15.40 6110.10.10.60 6110.10.20.80 6110.30.15.60 6110.90.00.74 6114.10.00.40	201—C—Cordage in HTS numbers: 5607.41.30.00 5607.49.15.00 5607.49.25.00 5607.50.20.00 5607.90.20.00 201—O—All remaining HTS numbers in category 201. 229—F—Fishnets in HTS numbers: 5608.11.00.00 5608.19.10.10 5608.19.10.20 229—O—All remaining HTS numbers in 229. 359—C—Coveralls and Overalls in HTS numbers: 6103.42.20.25 6103.49.30.34 6104.62.10.20 6104.69.30.10 6114.20.00.48 6114.20.00.52 6203.42.20.10 6203.42.20.90 6204.62.20.10 6211.32.00.10 6211.32.00.25 6211.42.00.10
659—H—Hats in HTS numbers: 6502.00.90.30 6504.00.90.15 6504.00.90.80 6505.90.50.60 6505.90.60.60 6505.90.70.60 6505.90.80.75	438—O—All remaining HTS numbers in category 438. 647—K—Knit in HTS numbers: 6103.23.00.40 6103.29.10.20 6103.43.15.20 6103.43.15.40 6103.49.10.20 6103.49.30.14 6112.12.00.50 6112.19.10.50 6112.20.10.60 6113.00.00.45 6103.23.00.45 6103.29.10.30 6103.43.15.50 6103.43.15.70 6103.49.10.60	359—O—All remaining HTS numbers in category 359. 369—D—Dish Towels in HTS numbers: 6302.60.00.10 6302.91.00.20 369—B—Handbags and Luggage in HTS numbers: 4202.12.40.00 4202.12.80.20 4202.12.80.60 4202.22.40.20 4202.22.45.00 4202.22.80.30 4202.92.15.00 4202.92.30.15 4202.92.60.00
659—S—Swimwear in HTS numbers: 6112.31.00.10 6112.31.00.20 6112.41.00.10 6112.41.00.20 6112.41.00.30 6112.41.00.40 6211.11.10.10 6211.11.10.20 6211.12.10.10 6211.12.10.20	647—All remaining HTS numbers in category 647. 648—K—Knit in HTS numbers: 6104.23.00.32 6104.23.00.34 6104.29.10.30 6104.29.10.40 6104.29.20.38 6104.63.20.10 6104.63.20.25 6104.63.20.30 6104.63.20.60 6104.69.20.10	369—U—Shoe Uppers in HTS numbers: 6406.10.75.60 369—O—All remaining HTS numbers in category 369 Excluding 5601.10.00.00 and 5601.21.00.90. 341—Y/641—Y—Only the following HTS numbers in the respective categories: 341—Y: 6204.22.30.60 6206.30.30.10
659—O—All remaining HTS numbers in category 659. 669—C—Braided/Plated Cords, Twines and Ropes in HTS numbers: 5607.49.30.00 5607.50.40.00		
669—P—Polypropylene Bags in HTS numbers: 6305.31.00.10 6305.31.00.20 6305.39.00.00		
669—T—Tents and Tarpaulins in HTS numbers:		

6206.30.30.30 641—Y: 6204.23.00.50 6204.29.20.30 6206.40.30.10 6206.40.30.25	6305.39.00.00 669—O—All remaining HTS numbers in category 669.  Pakistan  Part Categories 369—D—Dishtowels in HTS numbers: 6302.60.00.10 6302.91.00.20 369—R—Bar Mops in HTS number: 6307.10.20.20 369—S—Shop Towels in HTS number: 6307.10.20.05 369—O—All remaining HTS numbers in category 369.	640—Y: 6205.30.20.10 6205.30.20.20 6205.30.20.50 6205.30.20.60 340—O/640—O—All remaining HTS numbers in category 340/640 659—H—Hats in HTS numbers: 6502.00.90.30 6504.00.90.15 6504.00.90.60 6505.90.50.60 6505.90.60.60 6505.90.70.60 6505.90.80.75 659—O—All remaining HTS numbers in category 659.
341/641—All remaining HTS numbers in categories 341/641. 465—** Wool rugs in HTS numbers 5702.51.20.00 and 5702.91.30.00 are exempt from visa requirements ** 604—A—Acrylic Staple Fiber Yarn in HTS number: 5509.32.00.00 604—O—All remaining HTS numbers in category 604. 607—Y—Polyester/Cotton Yarn in HTS numbers: 5509.53.00.30 5509.53.00.60 607—O—All remaining HTS numbers in category 607. 659—C—Coveralls and Overalls in HTS numbers: 6103.23.00.55 6103.43.20.20 6103.49.20.00 6103.49.30.38 6104.63.10.20 6104.69.10.00 6104.69.30.14 6114.30.30.40 6114.30.30.50 6203.43.20.10 6203.43.20.90 6203.49.10.10 6203.49.10.90 6204.63.15.10 6204.69.10.10 6211.33.00.10 6211.33.00.17 6211.43.00.10	Peru  Part Categories 338—S—Other than Tee Shirts and Tank Tops in HTS numbers: 6103.22.00.50 6105.10.00.10 6105.10.00.30 6105.90.30.10 6109.10.00.35 6110.20.10.25 6110.20.20.40 6110.20.20.65 6110.90.00.68 6112.11.00.30 6114.20.00.05 338—All remaining HTS numbers in category 338. 339—S—Other than Tee Shirts and Tank Tops in HTS numbers: 6104.22.00.60 6104.29.20.46 6106.10.00.10 6106.10.00.30 6106.90.20.10 6106.90.30.10 6109.10.00.70 6110.20.10.30 6110.20.20.45 6110.20.20.75 6110.90.00.70 6112.11.00.40 6114.20.00.10 6117.90.00.22 339—All remaining HTS numbers in category 339.	Singapore  Part Categories 659—S—Swimwear in HTS numbers: 6112.31.00.30 6112.31.00.20 6112.41.00.10 6112.41.00.20 6112.41.00.30 6112.41.00.40 6111.11.10.10 6111.11.10.20 6111.12.10.10 6111.12.10.20 659—V—Vests in HTS numbers: 6110.30.10.30 6110.30.10.40 6110.30.20.30 6110.30.20.40 6110.30.30.30 6110.30.30.35 6110.90.00.52 6110.90.00.54 6201.93.20.20 6202.93.20.20 6211.33.00.50 6211.43.00.80 659—O—All remaining HTS numbers in category 659.
659—H—Hats in HTS numbers: 6502.00.90.30 6504.00.90.15 6504.00.90.80 6505.90.50.60 6505.90.60.60 6505.90.70.60 6505.90.80.75 659—S—Swimwear in HTS numbers: 6112.31.00.10 6112.31.00.20 6112.41.00.10 6112.41.00.20 6112.41.00.30 6112.41.00.40 6211.11.10.10 6211.11.10.20 6211.12.10.10 6211.12.10.20 659—O—All remaining HTS numbers in category 659. 669—C—Braided/Plated Cords, Twines and Ropes in HTS numbers: 5607.49.30.00 5607.50.40.00 669—B—Poly Bags in HTS numbers: 6305.31.00.20	Philippines  Part Categories 369—S—Shop Towels in HTS number: 6307.10.20.05 369—O—All remaining HTS numbers in category 369. 340—Y/640—Y—Only the following HTS numbers in the respective categories: 340—Y: 6205.20.20.15 6205.20.20.20 6205.20.20.46 6205.20.20.50 6205.20.20.60	Sri Lanka  Part Categories 338—S—Other than Tee Shirts and Tank Tops in HTS numbers: 6103.22.00.50 6105.10.00.10 6105.10.00.30 6105.90.30.10 6109.10.00.35 6110.20.10.25 6110.20.20.40 6110.20.20.65 6110.90.00.68 6112.11.00.30 6114.20.00.05 338—O—All remaining HTS numbers in category 338. 339—S—Other than Tee Shirts and Tank Tops in HTS numbers: 6104.22.00.60



6104.29.20.46  
6106.10.00.10  
6106.10.00.30  
6106.90.20.10  
6106.90.30.10  
6109.10.00.70  
6110.20.10.30  
6110.20.20.45  
6110.20.20.75  
6110.90.00.70  
6112.11.00.40  
6114.20.00.10  
6117.90.00.22  
339-O—All remaining HTS numbers in category 339.  
340-Y—With Two or More Colors in the Warp and/or Filling in HTS numbers:  
6205.20.20.15  
6205.20.20.20  
6205.20.20.46  
6205.20.20.50  
340-O—All remaining HTS numbers in category 340  
341-Y—With Two or More Colors in the Warp and/or Filling in HTS numbers:  
6204.22.30.60  
6206.30.30.10  
6206.30.30.30  
341-O—All remaining HTS numbers in category 341  
359-C—Coveralls and Overalls in HTS numbers:  
6103.42.20.25  
6103.49.30.34  
6104.62.10.20  
6104.69.30.10  
6114.20.00.48  
6114.20.00.52  
6203.42.20.10  
6203.42.20.90  
6204.62.20.10  
6211.32.00.10  
6211.32.00.25  
6211.42.00.10  
359-O—All remaining HTS numbers in category 359.  
369-D—Dish Towels in HTS numbers:  
6302.60.00.10  
6302.91.00.20  
369-S—Shop Towels in HTS number:  
6307.10.20.05  
369-O—All remaining HTS numbers in category 369.  
659-C—Coveralls and Overalls in HTS numbers:  
6103.23.00.55  
6103.43.20.20  
6103.49.20.00  
6103.49.30.36  
6104.63.10.20  
6104.69.10.00  
6104.69.30.14  
6114.30.30.40  
6114.30.30.50  
6203.43.20.10  
6203.43.20.90  
6203.49.10.10  
6203.49.10.90  
6204.63.15.10  
6204.69.10.10  
6211.33.00.10  
6211.33.00.17  
6211.43.00.10  
659-H—Hats in HTS numbers:  
6502.00.90.30  
6504.00.90.15  
6504.00.90.60  
6505.90.50.60  
6505.90.60.60  
6505.90.70.60  
6505.90.80.75  
659-S—Swinwear in HTS numbers:  
6112.31.00.10  
6112.30.00.20  
6112.41.00.10  
6112.41.00.20  
6112.41.00.30  
6112.41.00.40  
6211.11.10.10  
6211.11.10.20  
6211.12.10.10  
6211.12.10.20  
659-O—All remaining HTS numbers in category 659.  
669-P—Poly Bags in HTS number:  
6305.31.00.10  
6305.31.00.20  
6305.39.00.00  
669-T—Tents and Tarpaulins in HTS numbers:  
6306.12.00.00  
6306.19.00.10  
6306.22.90.00

6203.49.10.90  
6204.63.15.10  
6204.69.10.10  
6211.33.00.10  
6211.33.00.17  
6211.43.00.10  
659-O—All remaining HTS numbers in category 659.  
Taiwan  
Part Categories:  
229-R—Fishnets in HTS numbers:  
5608.11.00.00  
5608.19.10.10  
5608.19.10.20  
229-O—All remaining HTS numbers in category 229.  
359-H—Headwear in HTS numbers:  
6505.90.15.30  
6505.90.20.60  
359-C—Coveralls and Overalls in HTS numbers:  
6103.42.20.25  
6103.49.30.34  
6104.62.10.20  
6104.69.30.10  
6114.20.00.48  
6114.20.00.52  
6203.42.20.10  
6203.42.20.90  
6204.62.20.10  
6211.32.00.10  
6211.32.00.25  
6211.42.00.10  
359-V—Vests in HTS numbers:  
6103.19.20.30  
6103.19.40.30  
6104.12.00.40  
6104.19.20.40  
6110.20.10.22  
6110.20.10.24  
6110.20.20.30  
6110.20.20.35  
6110.90.00.44  
6110.90.00.46  
6201.92.20.10  
6202.92.20.20  
6203.19.10.30  
6203.19.40.30  
6204.12.00.40  
6204.19.30.40  
6211.32.00.70  
6211.42.00.70  
359-O—All remaining HTS numbers in category 359.  
369-L—Luggage in HTS numbers:  
4202.12.40.00  
4204.12.80.20  
4202.12.80.60  
4202.92.15.00  
4202.92.30.15  
4202.92.30.15  
4202.92.30.15  
4202.92.30.15  
369-O—All remaining HTS numbers in category 369.  
640-Y—With Two or More Colors in the Warp and/or Filling in HTS numbers:  
6205.30.20.10

6205.30.20.20  
6205.30.20.50  
6205.30.20.60  
640-O—All remaining HTS numbers in category 640.  
641-Y—With Two or More Colors in the Warp and/or Filling in HTS numbers:  
6204.23.00.50  
6204.29.20.30  
6206.40.30.10  
6206.40.30.25  
641-O—All remaining HTS numbers in category 641.  
659-B—Bodysuits in HTS numbers:  
6114.30.20.10  
6114.30.20.20  
659-C—Coveralls and Overalls in HTS numbers:  
6103.23.00.55  
6103.43.20.20  
6103.49.20.00  
6103.49.30.36  
6104.63.10.20  
6104.69.10.00  
6104.69.30.14  
6114.30.30.40  
6114.30.30.50  
6203.43.20.10  
6203.43.20.90  
6203.49.10.10  
6203.49.10.90  
6204.63.15.10  
6204.69.10.10  
6211.33.00.10  
6211.33.00.17  
6211.43.00.10  
659-H—Hats in HTS numbers:  
6502.00.90.30  
6504.00.90.15  
6504.00.90.60  
6505.90.50.60  
6505.90.60.60  
6505.90.70.60  
6505.90.80.75  
659-S—Swinwear in HTS numbers:  
6112.31.00.10  
6112.30.00.20  
6112.41.00.10  
6112.41.00.20  
6112.41.00.30  
6112.41.00.40  
6211.11.10.10  
6211.11.10.20  
6211.12.10.10  
6211.12.10.20  
659-O—All remaining HTS numbers in category 659.  
669-P—Poly Bags in HTS number:  
6305.31.00.10  
6305.31.00.20  
6305.39.00.00  
669-T—Tents and Tarpaulins in HTS numbers:  
6306.12.00.00  
6306.19.00.10  
6306.22.90.00

669-O—All remaining HTS numbers in category 669.  
670-F—Flatgoods in HTS number:  
4202.32.95.50

670-H—Handbags in HTS numbers:  
4202.22.40.30  
4202.22.80.50  
670-L—Luggage in HTS numbers:  
4202.12.80.30  
4202.12.80.70  
4202.92.30.20  
4202.92.30.30  
4202.92.90.20

#### Thailand

##### Part Categories

301-P—Less Than 85% Cotton in HTS numbers:

5206.21.000.000  
5206.22.000.000  
5206.23.000.000  
5206.24.000.000  
5206.25.000.000  
5206.41.000.000  
5206.42.000.000  
5206.43.000.000  
5206.44.000.000  
5206.45.000.000

301-O—85% or More Cotton in HTS numbers:

5205.21.000.000  
5205.22.000.000  
5205.23.000.000  
5205.24.000.000  
5205.25.000.000  
5205.41.000.000  
5205.42.000.000  
5205.43.000.000  
5205.44.000.000  
5205.45.000.000

369-L—Luggage in HTS numbers:

4202.12.40.00  
4202.12.80.20  
4202.12.80.60  
4202.92.15.00  
4202.92.30.15  
4202.92.30.15  
4202.92.30.15

369-O—All remaining HTS numbers in category 369.

604-A—Acrylic Staple Fiber Yarn in HTS number:  
5509.32.00.00

604—All remaining HTS numbers in category 604.

669-P—Poly Bags in HTS number:

6305.31.00.10  
6305.31.00.20  
6305.39.00.00

669—All remaining HTS numbers in category 669.

#### Yugoslavia

##### Part Categories

604-A—Acrylic Staple Fiber Yarn in HTS number:  
5509.32.00.00

[FR Doc. 88-29774 12-27-88; 8:45 am]

BILLING CODE 3510-DR-M

#### DEPARTMENT OF DEFENSE

##### Department of the Army

##### Army Science Board; Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463) announcement is made of the the following Committee Meeting:  
Name of the Committee: Army Science Board (ASB).

Dates of Meeting: 23-27 January 1989.  
Time: 0800-1700 hours daily.

Place: Federal Republic of Germany.

Agenda: The Army Science Board Ad Hoc Subgroup on Army Families will be hosted by the Commanding General of U.S. Army V Corps, Frankfurt, Germany. The subgroup will receive briefings on those programs being utilized in V Corps that address soldier and family issues impacting on Quality of Life in Germany. In addition, the subgroup will be afforded the opportunity to visit with soliders and families at select installations and hear first-hand of soldiers' concerns. This meeting is open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039/7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 88-29702 Filed 12-27-88; 8:45 am]

BILLING CODE 3710-08-M

#### DEPARTMENT OF EDUCATION

##### Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before January 27, 1989.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Jim Houser, Desk Officer, Department of Education, Office of Management and Budget, 725 Jackson Place, NW., Room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should

be addressed to Margaret B. Webster, Department of Education, 400 Maryland Avenue, SW., Room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Margaret B. Webster (202) 732-3915.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) title; (3) frequency of collection; (4) the affected public; (5) reporting burden; and/or (6) recordkeeping burden; and (7) abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Margaret Webster at the address specified above.

Dated: December 22, 1988.

Carlos U. Rice,

Director for Office of Information Resources Management.

##### Office of Educational Research and Improvement

Type of Review: reinstatement.

Title: Continuation Application-LEAD

(Leadership in Educational Administration Development).

Frequency: Annually

Affected Public: State or Local

Governments; Non-profit institutions.

Reporting Burden:

Responses: 57; Burden Hours: 228.

Recordkeeping:

Recordkeepers: 0; Burden Hours: 0.

Abstract: This form will be used by State agencies to apply for funding under the Leadership in Educational Administration Development program. The Department uses the information to make grant awards.



**Office of Special Education and Rehabilitation Services**

**Type of Review:** Extension.  
**Title:** Recordkeeping for Children Transferring to Local Agency Programs.

**Frequency:** Recordkeeping.

**Affected Public:** State or local governments.

**Reporting Burden:**

**Responses:** 0; **Burden Hours:** 0.

**Recordkeeping:**

**Recordkeepers:** 10,000; **Burden Hours:** 10,000.

**Abstract:** The State educational agency must maintain data each year on the number of children who leave institutions and return to local school systems.

[FR Doc. 88-29852 Filed 12-27-88; 8:45 am]  
BILLING CODE 4000-01-M

[CFDA No. 84.087]

**Inviting Applications for New Awards Under the Indian Education Act of 1988, Subpart 2 (Formerly Part B)—Fellowships for Indian Students for Fiscal Year 1989**

**Purpose:** Enables Indian students to pursue courses of study leading to: (a) Postbaccalaureate degrees in medicine, psychology, law, education, clinical psychology and related fields, or (b) undergraduate or graduate degrees in business administration, engineering, natural resources, and related fields.

**Deadline for Transmittal of Applications:** February 16, 1989.

**Deadline for Intergovernmental Review Comments:** April 17, 1989.

**Applications Available:** January 6, 1989.

**Available Funds:** The Congress has appropriated \$1,600,000 for this program for fiscal year 1989. Approximately \$600,000 will be available for new awards.

**Estimated Range of Awards:** \$797-\$29,860.

**Estimated Average Size of Awards:** \$12,661.

**Estimated Number of Awards:** 47.

**Project Period:** 12 months.

**Applicable Regulations:** The Indian Fellowship Program Regulations, 34 CFR Part 263, as proposed to be amended (53 FR 39876-39878).

It is the policy of the Department of Education not to solicit applications before the publication of final regulations. However, in this case it is essential to solicit applications on the basis of the notice of proposed rulemaking (NPRM) for this program, as published in the *Federal Register* on October 12, 1988 (53 FR 39876-39878)

because of the requirement in 25 U.S.C. 2623(d)(2) to make awards no later than 45 days before the commencement of an academic term. The Secretary received very few comments on the NPRM. He has carefully reviewed them and does not anticipate making any changes in the final regulations. However, if any changes are made, applicants will be given an opportunity to revise or resubmit their applications.

**For Applications or Information**

**Contact:** Dorothea Perkins, U.S. Department of Education, 400 Maryland Avenue, SW., Room 2164, Washington, DC 20202. Telephone: (202) 732-1909.

**Program Authority:** 25 U.S.C. 2623.

**Dated:** December 22, 1988.

**Beryl Dorsett,**

*Assistant Secretary for Elementary and Secondary Education.*

[FR Doc. 88-29851 Filed 12-27-88; 8:45 am]

BILLING CODE 4000-01-M

**Fund for the Improvement and Reform of Schools and Teaching Board; Meeting**

**AGENCY:** Department of Education Fund for the Improvement and Reform of Schools and Teaching Board.

**ACTION:** Notice of Meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Fund for the Improvement and Reform of Schools and Teaching Board. This notice also describes the functions of the Board. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend.

**DATE:** January 13, 1989—9:00 a.m.—Conclusion of Business.

**ADDRESS:** The Holiday Inn Hotel, 550 C Street, SW, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Daniel Schecter, Acting Director, Fund for the Improvement and Reform of Schools and Teaching, U.S. Department of Education, 555 New Jersey Avenue, NW., Room 522, Washington, DC 20208-5524, (202) 357-6496.

**SUPPLEMENTARY INFORMATION:** The Fund for the Improvement and Reform of Schools and Teaching is established under Section 3231 of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988 Act (Pub. L. 100-297). The Board is established to advise the Secretary concerning developments in education that merit his attention; identify promising initiatives to be supported under the authorizing legislation; advise

the Secretary and the Director of the Fund on the selection of projects under consideration for support, and on planning documents, guidelines and procedures for grant competitions carried out by the Fund; and advise the Secretary and the Congress of the priorities of the Board for the improvement of education and the implications of the priorities for the Fund.

The meeting of the Board is open to the public. The agenda includes: discussion of FIRST Program legislation and plans for the 1989 competitions, 1990 competition priorities, the duties and responsibilities of Board members and other general Board business.

Records will be kept of all Board proceedings and will be available for public inspection at the Office of the Fund for the Improvement and Reform of Schools and Teaching, U.S. Department of Education, 555 New Jersey Avenue, NW., Room 522, Washington, DC 20208-5524 from the hours of 8:30 a.m. to 5:00 p.m.

**Dated:** December 21, 1988.

**Patricia Hines,**

*Acting Assistant Secretary for Educational Research and Improvement.*

[FR Doc. 88-29846 Filed 12-27-88; 8:45 am]

BILLING CODE 4000-01-M

**National Council on Vocational Education; Public Meeting**

**AGENCY:** National Council on Vocational Education.

**ACTION:** Notice of public meeting of the council.

**SUMMARY:** This notice sets forth the proposed agenda of a forthcoming meeting of the National Council on Vocational Education. It also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act, and is intended to notify the general public of its opportunity to attend.

**DATES:** January 22, 1989—6:00 p.m. to 8:00 p.m. National Association of State Directors, of Vocational Education, 1420 16th St. NW., Washington, DC 20036, (202) 328-0216.

January 23, 1989—9:30 a.m. to 4:00 p.m. **ADDRESS:** The Jefferson Hotel Sixteenth & M Streets, NW., Washington, DC 20036-3295. Location: Jefferson Suite, (202) 331-7982.

**SUPPLEMENTARY INFORMATION:** The National Council on Vocational Education is established under section

104 of the Vocational Education Amendments of 1968, Pub. L. 90-576.

The Council is established to:

(A) Advise the President, the Congress, and the Secretary of Education concerning the administration of, preparation of general regulations for, and operation of, vocational education programs supported with assistance under this title;

(B) Review the administration and operation of vocational education programs under this title, including the effectiveness of such programs in meeting the purposes for which they are established and operated, make recommendations with respect thereto, and make annual reports of its findings and recommendations (including recommendations for change in the provisions of this title) to the Secretary for transmittal to Congress' and

(C) Conduct independent evaluations of programs carried out under this title and publish and distribute the results thereof.

**Agenda**

The proposed agenda will include: Discussions of the Council's initiatives including: National Awareness Campaign, Occupational Competencies Report and Phase II, Council Annual Report and Reauthorization Statement, Current and Future Council Business.

**FOR FURTHER INFORMATION CONTACT:** Dr. Joyce Winterton, Executive Director, 330 C Street, SW., MES-Suite 4080, Washington, DC 20202-7580, (202) 732-1884.

Records are kept of all Council proceedings, and are available for public inspection at the above address from the hours of 9:00 a.m. to 4:30 p.m.

Signed at Washington, DC, December 19, 1988.

**Joyce Winterton,**

*Executive Director.*

[FR Doc. 88-29684 Filed 12-27-88; 8:45 am]

BILLING CODE 4000-01-M

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket Nos. ER89-116-000 et al.]

**Idaho Power Co. et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings**

Take notice that the following filings have been made with the Commission:

December 23, 1988.

**1. Idaho Power Company**

[Docket No. ER89-116-000]

Take notice that on December 14, 1988, Idaho Power Company (IPC) tendered for filing, pursuant to Section 205 of the Federal Power Act, an Interim Agreement executed on October 31, 1988, providing for a seasonal energy exchange with the City of Seattle, City Light Department. The Interim Agreement is to run from December 1, 1988, and shall terminate on September 15, 1989, or upon the execution of an Energy Exchange Agreement, whichever occurs earlier.

IPC has requested waiver of the notice provisions of the Commission's regulations in order to permit the agreement to become effective on December 1, 1988, in accordance with its terms.

**Comment date:** January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

**2. Tampa Electric Company**

[Docket No. ER89-116-000]

Take notice that on December 14, 1988, Tampa Electric Company (Tampa Electric) tendered for filing Service Schedules A, B, and D providing for emergency, scheduled, and long-term interchange service, respectively, between Tampa Electric and the Utilities Commission, City of New Smyrna Beach, Florida (New Smyrna Beach). The service schedules are submitted as supplements under the existing agreement for interchange service between Tampa Electric and New Smyrna Beach, designated as Tampa Electric's Rate Schedule FERC No. 13.

Tampa Electric also tendered for filing, as a supplement to the Service Schedule D under its rate schedule, a Letter of Commitment providing for the sale by Tampa Electric to New Smyrna Beach of capacity and energy from coal-fired resources, at a maximum hourly delivery rate of five megawatts. The term of the commitment is from January 1, 1989 through December 31, 1989, unless extended upon mutual agreement of the parties.

Tampa Electric proposes an effective date of January 1, 1989 for Service Schedules A, B, and D and the Letter of Commitment, and therefore requests waiver of the Commission's notice requirements.

Copies of the filing have been served on New Smyrna Beach and the Florida Public Service Commission.

**Comment date:** January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

**3. Canal Electric Company**

[Docket No. ER89-125-000]

Take notice that on December 16, 1988, Canal Electric Company (Canal) tendered for filing a Power Contract (the "Power Contract") between itself, Cambridge Electric Light Company and Commonwealth Electric Company and an NU Units Capacity Acquisition Commitment (the Commitment). The Power Contract implements the terms of the Capacity Acquisition Agreement (FERC Rate Schedule No. 21) and the Commitment. Such Power Contract recognizes the purchase demand and energy by Canal from Connecticut Light and Power Company and Western Massachusetts Electric Company, subsidiaries of Northeast Utilities, over the time period November 1, 1988 to April 30, 1993 and the sale of such power to Cambridge Electric Light Company and Commonwealth Electric Company. Canal has requested that the Commission's notice requirements with respect to the Power Contract and the Commitment be waived pursuant to Section 35.11 of the Commission's regulations in order to allow the tendered rate change to become effective as of November 1, 1988.

**Comment date:** January 9, 1988, in accordance with Standard Paragraph E at the end of this notice.

**4. New England Power Company**

[Docket No. ER89-123-000]

Take notice that on December 15, 1988, New England Power Company (NEP) tendered for filing as an initial rate schedule a Letter Agreement between NEP and Public Service Company of New Hampshire (PSNH) that provides for the sale by NEP of thirty megawatts of capacity and related energy from NEP's sixty megawatt purchase from New Brunswick Power for the period November 1, 1988 through November 30, 1988.

A proposed effective date of November 1 is requested with a waiver of the Commission's prior notice provision also requested.

**Comment date:** January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

**5. Pacific Power & Light Company, an assumed business name of PacifiCorp.**

[Docket No. ER89-121-000]

Take notice that Pacific Power & Light Company (Pacific), an assumed business name of PacifiCorp, on December 15, 1988, tendered for filing, in accordance with Section 35.30 of the Commission's Regulations, Pacific's Revised Appendix 1 for the state of Washington and



Bonneville Power Administration's (Bonneville) Determination of Average System Cost (ASC) for the state of Washington (Bonneville's Docket No. 5-A2-8802). The Revised Appendix 1 calculates the ASC for the state of Washington applicable to the exchange of power between Bonneville and Pacific.

Pacific requests waiver of the Commission's notice requirements to permit this rate schedule to become effective March 1, 1988, which it claims is the date of commencement of service.

Copies of the filing were supplied to Bonneville, the Washington Utilities and Transportation Commission and Bonneville's Direct Service Industrial Customers.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

#### 6. Florida Power & Light Company

[Docket No. ER89-120-000]

Take notice that on December 15, 1988, Florida Power & Light Company (FPL) tendered for filing a document entitled Amendment Number Twenty-One to Agreement to Provide Specified Transmission Service Between Florida Power & Light Company and Utilities Commission, City of New Smyrna Beach, Florida (Rate Schedule FERC No. 59).

FPL states that under Amendment Number Twenty-One, FPL will transmit power and energy for Utilities Commission, City of New Smyrna Beach, Florida as is required in the implementation of certain interchange arrangements with Tampa Electric Company.

FPL requests that waiver of the Commission's Regulations be granted and that the proposed Amendment made effective on January 1, 1989. FPL states that copies of the filing were served on Utilities Commission, City of New Smyrna Beach, Florida.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

#### 7. Public Service Electric and Gas Company

[Docket No. ER89-115-000]

Take notice that on December 14, 1988, Public Service Electric and Gas Company (PSE&G) of Newark, New Jersey tendered for filing an agreement for the sale of limited term power to Boston Edison Company (Edison). Pursuant to the agreement PSE&G commences selling on November 1, 1988 and will sell to Edison capacity and

system power from time to time as scheduled by Edison.

PSE&G requests the Commission to waive its notice requirements to permit the Sale of Limited Term Power Agreement to become effective as of the commencement of the transaction, November 1, 1988. Copies of the filing have been served upon Edison.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

#### 8. Niagara Mohawk Power Corporation

[Docket No. ER89-117-000]

Take notice that Niagara Mohawk Power Corporation (Niagara Mohawk) on December 14, 1988, tendered for filing an agreement between Niagara Mohawk and UNITIL Power dated October 26, 1988 providing for certain transmission services to UNITIL Power. This agreement provides for the transmission and delivery by Niagara Mohawk of 40 MW of firm power purchased by UNITIL Power from New York State Electric and Gas (NYSEG). The term of the agreement is from November 1, 1988 until April 30, 1989.

An effective date of November 1, 1988 is proposed. Niagara Mohawk states that waiver of the notice requirements is warranted because UNITIL Power, the only customer under this rate schedule, has consented to the effective date, and the service provided by this agreement commenced on November 1, 1988.

Copies of this filing were served upon UNITIL Power and the New York State Public Service Commission.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

#### 9. Carolina Power & Light Company

[Docket No. ER89-124-000]

Take notice that on December 16, 1988, Carolina Power & Light Company (CP&L) tendered for filing an Amendment dated December 13, 1988, which amends the Interchange Agreement between South Carolina Electric & Gas Company dated July 9, 1970 and subsequent Amendments dated January 1, 1974, April 1, 1979, and August 10, 1980. The Interchange Agreement and the Amendments are filed with the Federal Energy Regulatory Commission (Commission) and designated South Carolina Electric & Gas Company FPC Rate Schedule No. 29 and Carolina Power & Light Company FPC Rate Schedule No. 97.

The proposed Amendment to the Interchange Agreement provides that the demand rates and transmission use rates for limited term, short term,

spinning reserve, and other energy will be calculated by both parties on an annual basis as set forth in the appendices and exhibits to the Amendment. The primary purpose of the proposed Amendment is to update the rates for transactions under the Interchange Agreement to reflect current costs. In addition, the proposed Amendment establishes a mechanism for "ceiling rates" under which the parties may do business with greater flexibility. The rates calculated under the appendices will be "ceiling rates"; and although the parties may agree on a rate below a "ceiling rate" for a particular transaction, the rate for any such transaction will not exceed the "ceiling rate". The parties to the Amendment mutually agree to recalculate the "ceiling rates" each year to determine if the costs have changed sufficiently to warrant a change in the "ceiling rates". The Amendment further provides that for deliveries from a third-party system, the delivering party will charge the receiving party the demand rate equal to the demand rate charged by the third party.

It is proposed that the Commission waive its 60-day notice requirement and allow the Amendment submitted herewith to become effective on January 1, 1989.

Copies of this filing were served on South Carolina Electric & Gas Company, the North Carolina Utilities Commission, and the South Carolina Public Service Commission.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

#### 10. Northern States Power Company (Minnesota); Northern States Power Company (Wisconsin)

[Docket No. ER89-122-000]

Take notice that on December 15, 1988, Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) jointly tendered for filing revised exhibits VII, VIII and IX to the Agreement to Coordinate Planning and Operations and Interchange Power and Energy Between Northern States Power Company (Minnesota) and Northern States Power Company (Wisconsin).

Exhibit VII sets forth the specification of the rate of return on common equity to determine the overall cost of capital. The return on common equity for calendar year 1989 is the FERC generic rate of return effective November 1, 1988. A Statement of the impact of the

return on common equity on each Company has been filed.

Exhibit VIII sets forth the specification of average monthly coincident peak demands for calendar year 1989 for each of the Companies. A statement of the impacts of these coincident peak demands on each Company has been filed. These coincident peak demands were determined based upon three year data. The three year data consist of 18 months actual and 18 months projected.

The change from the use of the average of the 12 monthly peak demand allocation method to the use of 36 months was approved in Docket No. ER87-279-000.

Exhibit IX sets forth a specification of depreciation rates certified by the Minnesota Public Utilities Commission and the Wisconsin Public Service Commission for NSP (Minnesota) and NSP (Wisconsin). A statement of the impact of the depreciation rates of each company has been filed.

The NSP Companies request an effective date of January 1, 1989, for this filing. Copies of the filing letter and revised Exhibits VII, VIII and XI have been served upon the wholesale and wheeling customers of the Companies. Copies of the filing have been mailed to the state Commissions of Michigan, Minnesota, North Dakota, South Dakota and Wisconsin.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

#### Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commissions Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29841 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-410-000, et al.]

#### Texas Gas Transmission Corp., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission: December 21, 1988

#### 1. Texas Gas Transmission Corporation [Docket No. CP89-410-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation, (Texas Gas) 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-410-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas under its blanket authorization issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Texas Gas proposes to transport natural gas on an interruptible basis for Ford Motor Company—Maumee Stamping Plant (Ford Motor). Texas Gas explains that the service commenced November 1, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1090. Texas Gas proposes to transport on a peak day up to 1,100 MMBtu; on an average day up to 1,100 MMBtu; and on an annual basis 401,500 MMBtu. Texas Gas proposes to receive the subject gas from various existing and proposed points of receipt on its system and transport and redeliver such volumes to Ford Motor at an existing point of delivery in Ohio. The proposed rate to be charged is contained in Texas Gas' currently effective T rate schedule.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 2. Algonquin Gas Transmission Company

Docket No. CP89-400-000]

Take notice that on December 13, 1988, the Algonquin Gas Transmission Company (Algonquin), 1284 Soldiers Field Road, Boston, Massachusetts 02135, filed a request pursuant to §§ 157.205 and 157.212 of the Commission's Regulations for authorization to establish two new delivery points for the Bay State Gas Company (Bay State) under Algonquin's blanket certificate issued in Docket No. CP87-317x-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Algonquin proposes to establish new delivery points to Bay State for deliveries of up to 20,000 MMBtu per day for service under Algonquin's existing Rate Schedules F-1, F-4, and WS-1 on an interruptible basis at Algonquin's existing facilities at Mahwah, New Jersey and Mendon, Massachusetts which are existing interconnection points with the facilities of Tennessee Gas Pipeline Company. Algonquin indicates that the proposed addition of delivery points would not require any facility construction and that the total volumes to be delivered to Bay State after this request would not exceed the total volumes authorized prior to the request.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 3. Texas Gas Transmission Corporation [Docket No. DP90-411-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation, (Texas Gas) 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-411-000 a request to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas under its blanket authorization issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Texas Gas proposes to transport natural gas on an interruptible basis for Kimball Resources, Inc. (Kimball). Texas Gas explains that the service commenced November 1, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1093. Texas Gas proposes to transport on a peak day up to 35,000 MMBtu; on an average day up to 20,000 MMBtu; and on an annual basis up to 12,775,000 MMBtu. Texas Gas proposes to receive the subject gas from various existing and proposed points of receipt on its system and transport and redeliver such volumes to Kimball at existing points of delivery in Ohio. The proposed rate to be charged is contained in Texas Gas' currently effective T rate schedule.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 4. Texas Gas Transmission Corporation [Docket No. CP89-417-000]

Take notice that on December 15, 1988, Texas Gas Transmission Corporation, (Texas Gas) 3800 Frederica



Street, Owensboro, Kentucky 42301, filed in Docket No. CP89-417-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas under its blanket authorization issued in Docket No. CP88-886-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Texas Gas proposes to transport natural gas on an interruptible basis for Coastal Gas Marketing Company (Coastal). Texas Gas explains that the service commenced November 1, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1091. Texas Gas proposes to transport on a peak day up to 300,000 MMBtu; on an average day up to 100,000 MMBtu; and on an annual basis up to 109,500,000 MMBtu. Texas Gas proposes to receive the subject gas from various existing and proposed points of receipt on its system and transport and redeliver such volumes to Coastal at existing points of delivery in Ohio and Indiana. The proposed rate to be charged is contained in Texas Gas' currently effective T rate schedule.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 5. Texas Gas Transmission Corporation [Docket No. CP89-420-000]

Take notice that on December 15, 1988, Trunkline Gas Company (Trunkline) P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-420-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas on behalf of APX Corporation (APX), under the authorization issued in Docket No. CP88-586-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Trunkline would perform the proposed interruptible transportation service for APX, a producer of natural gas, pursuant to a transportation agreement rate schedule PT dated September 9, 1988 (contract no. T-PTL-1217). The term of the transportation agreement is for a primary term of one month from the initial date for service, and shall continue in effect month-to-month thereafter unless terminated upon 30 days prior written notice by one party to the other party. Trunkline proposes to transport on a peak day up to 100,000

dekatherm; on an average day up to 100,000 dekatherm; and on an annual basis 36,500,000 dekatherm of natural gas for APX. Trunkline proposes to receive the subject gas from various receipt points in offshore Louisiana, Texas, Louisiana, Illinois, and Tennessee. Trunkline would then transport and redeliver the subject gas, less fuel and unaccounted for line loss, to Panhandle Eastern Pipe Line Company in Douglas County, Illinois. The ultimate delivery of the transportation volumes would be to various LDC's and end users. It is alleged that APX would pay Trunkline the effective rate contained in Trunkline's rate schedule PT, which is currently 10.41 cents, which includes the ACA and GRI surcharge. Trunkline avers that construction of facilities would not be required to provide the proposed service.

It is explained that the proposed service is currently being performed pursuant to the 120-day self implementing provision of § 284.223(a)(1) of the Commission's Regulations. Trunkline commenced such self-implementing service on December 14, 1988, as reported in Docket No. ST89-1286-000.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 6. United Gas Pipe Line Company [Docket No. CP89-433-000]

Take notice that on December 15, 1988, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP89-433-000 a request pursuant to §§ 157.205 and 284.223(2)(b) of the Commission's Regulations under the Natural Gas Act for authorization to provide transportation for Catamount Natural Gas Company (Catamount) under United's blanket certificate issued in Docket No. CP88-6-000, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

United requests authorization to transport, on an interruptible basis, up to a maximum of 49,711 MMBtu of natural gas per day for Catamount from a receipt point and to various delivery points on United's pipeline system in Louisiana. The receipt and delivery points are listed in Exhibits A and B of the October 17, 1988 transportation agreement which provides for this service. United states that it anticipates transporting 49,711 MMBtu on an average day and 18,144,515 MMBtu on an annual basis.

United states that the transportation of natural gas for Catamount commenced on November 16, 1988, as reported in Docket No. ST89-966-000, for a 120-day period pursuant to § 284.223(a)(1) of the Commission's Regulations and the blanket certificate issued to United in Docket No. CP88-6-000. United proposes to continue this service in accordance with §§ 284.221 and 284.223 of the Commission's Regulations. United further states that it will be using existing facilities to provide this transportation service.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 7. Algonquin Gas Transmission Company [Docket No. CP88-192-001]

Take notice that on December 6, 1988, Algonquin Gas Transmission Company (Algonquin), 1284 Soldiers Field Road, Boston, Massachusetts 02135, filed in Docket No. CP88-192-001 an amendment to its application in Docket No. CP88-192-000, so as to delete any services and facilities related to the PennEast CDS project, all as more fully set forth in the amendment which is on file with the Commission and open to public inspection.

Algonquin states that it filed its original application in Docket No. CP88-192-000 (Original Application) on January 15, 1988, in response to the Commission's "Notice Inviting Applications to Provide New Gas Service to the Northeast U.S." (Open Season Proceeding), issued on July 24, 1987, and amended on September 25, 1987, in Docket No. CP87-451-000. It is stated that the Original Application was submitted as a comprehensive proposal integrating several projects designed to meet the present and future needs of the Northeast's traditional and emerging markets. Included among the various authorizations sought was a proposal to provide a service to various customers in conjunction with the PennEast CDS project. It is stated that, in the course of the Open Season Proceeding, however, the Commission determined that the PennEast CDS proposal constituted a discrete project which should be served from the mutually exclusive, competitive applications consolidated for comparative consideration. Accordingly, by its "Order Ruling On Discreteness of Additional Northeast Project," issued November 21, 1988, at Docket Nos. CP87-451-015, et al., the Commission ordered Algonquin to file this revision to its application at Docket No. CP88-192-000 to delete any services and facilities related to the PennEast CDS project.

Therefore, in compliance with that order, Algonquin has submitted for filing a revised abbreviated application which, after deleting any services or facilities related to the PennEast CDS project, requests the authorizations needed to implement the following activities:

(1) Algonquin seeks authority to render a firm transportation service of up to 452,000 MMBtu per day for the Iroquois shippers and the New England Power Company under proposed Rate Schedule AFTN. Algonquin proposes to render this service through portions of its existing pipeline system as well as through three proposed extensions of its existing system. The proposed extensions, as described more fully in its original application, will run (a) from Mendon, Massachusetts to Deerfield, Massachusetts (b) from Southbury, Connecticut to South Commack, Long Island, New York, and (c) from Algonquin's existing G-system to Brayton Point in Somerset, Massachusetts;

(2) Algonquin seeks authority to render a firm transportation service to Northeast Energy Associates, a limited partnership acting through its managing general partner, InterContinental Energy Corporation, of up to 59,777 MMBtu per day under proposed Rate Schedule X-35 from Lambertville, New Jersey to Bellingham, Massachusetts;

(3) Algonquin seeks authority to render a firm transportation service of up to 45,593 MMBtu per day for Mid-Hudson Cogeneration Limited Partnership and Oxford Cogeneration, Associates Limited Partnership, acting through their general partner, Tellus Cogeneration Company, Inc., under proposed Rate Schedules X-36 and X-37 from Lambertville, New Jersey to Somers, New York and Mendon, Massachusetts, respectively; and

(4) Algonquin seeks authority to construct and operate the facilities required to render the services described in items (1), (2), and (3) above.

Algonquin states that it contemplates commencement of the firm transportation service for which authorization is requested on or about November 1, 1990.

Algonquin requests authorization to construct and operate certain facilities to render such service, including: 81 miles of 30-inch pipeline from a new point of interconnection between Algonquin and a new pipeline to be constructed by Greater Northeast Pipeline Corporation located at or near Deerfield, Massachusetts, to existing facilities at the beginning of Algonquin's G-System located near Mendon, Massachusetts; 60.3 miles of 24-inch

pipeline from Algonquin's mainline located near Southbury, Connecticut, to a terminus point near South Commack, New York; 11.0 miles of 20-inch pipeline from Dighton, Massachusetts to Somerset, Massachusetts; and a 5,500 horsepower compressor to be installed at the existing Hanover, New Jersey compressor station. Algonquin's proposal would also include construction of several meter stations and appurtenant facilities, all as more fully described in the application. The estimated cost of such facilities is \$274,751,000. Algonquin proposes that its construction costs and working capital be financed with bank financing equal to 75 percent and equity contributions equal to 25 percent of the total of such costs. Algonquin states that the bank financing would be in the form of a credit agreement among Algonquin, Texas Eastern Transmission Corporation, and a group of banks who would make funds available during construction.

*Comment date:* January 11, 1989, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

#### 8. Northwest Pipeline Corporation [Docket No. CP89-416-000]

Take notice that on December 14, 1988, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84108, filed in Docket No. CP89-416-000, a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 284.223) for authorization to provide a transportation service for PPG Industries, Inc. (PPG), an end user of natural gas, under Northwest's blanket certificate issued in Docket No. CP88-578-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Northwest states that, pursuant to a transportation agreement dated September 23, 1988, under Rate Schedule TI-1, it proposes to transport natural gas for PPG from various existing receipt points on Northwest's system in Colorado, Wyoming, New Mexico, Utah and Washington to the Chehalis delivery meter to Washington Natural Gas Company located in Lewis County, Washington. Northwest also states that no construction of new facilities will be required to provide this transportation service. Northwest states further that the maximum day transportation quantities would be up to 3,000 MMBtu equivalent of natural gas, average day

350 MMBtu equivalent of natural gas, and annual quantities would be 125,000 MMBtu equivalent of natural gas. Northwest states its understanding that PPG Industries has entered into a service agreement with Washington Natural Gas Company, a local distribution company. Northwest advises that service under § 284.223(a) commenced November 6, 1988, as reported in Docket No. ST89-965-000 (filed November 30, 1988).

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 9. Tennessee Gas Pipeline Company [Docket No. CP89-406-000]

Take notice that on December 14, 1988, Tennessee Gas Pipeline Company (Applicant), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP89-406-000 a request, pursuant to §§ 157.205 and 284.223 of the Commission's Regulations, for authorization to provide a transportation service for Carless Resources, Inc., a producer, acting as agent for Lighthouse Gas Marketing Company, under Applicant's blanket certificate issued in Docket No. CP87-115-000 on June 18, 1987, pursuant to section 7(c) of the Natural Gas Act, all as more fully set out in the request on file with the Commission and open to public inspection.

Applicant further states that pursuant to a transportation agreement dated October 25, 1988, it proposes to transport natural gas for Carless Resources, Inc., a producer, acting as agent for Lighthouse Gas Marketing Company, from points of receipt located in the states of Alabama and Texas. The points of delivery are located in the states of West Virginia, Kentucky, Pennsylvania, and Ohio. The location of the ultimate delivery point of the gas is the state of Ohio.

The Applicant further states that the maximum daily quantity is 20,000 dekatherms under the contract. Service under § 284.223(a) commenced November 3, 1988, as reported in Docket No. ST89-871.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 10. Northern Natural Gas Company, Division of Enron Corporation [Docket No. CP89-366-000]

Take notice that on December 9, 1988, Northern Natural Gas Company, Division of Enron Corporation (Northern), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188 filed in Docket No. CP89-366-000 a request



pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP86-435-000 pursuant to section 7 of the Natural Gas Act for Union Exploration Partners, Ltd. (Union), all as more fully set forth in the request of file with the Commission and open to public inspection.

Northern proposes to transport natural gas for Union, a producer, on an interruptible basis, pursuant to a transportation agreement dated November 8, 1988. Northwest explains that service commenced November 8, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-893. Northwest further explains that the peak day quantity would be 10,000 MMBtu, the average daily quantity would be 7,500 MMBtu, and that the annual quantity would be 3,650,000 MMBtu. Northwest explains that it would receive natural gas for Union's account from various sources in Texas and offshore Texas and Louisiana and would redeliver the gas for Union's account at various points of delivery in Texas and offshore Louisiana and Texas.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of his notice.

#### 11. Panhandle Eastern Pipe Line Company

[Docket No. CP89-422-000]

Take notice that on December 15, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642 filed in Docket No. CP89-422-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP86-585-000 pursuant to section 7 of the Natural Gas Act for Amoco Production Company (Amoco), all as more fully set forth in the request on file with the Commission and open to public inspection.

Panhandle proposes to transport natural gas for Amoco, a producer, pursuant to a transportation agreement dated October 31, 1988. Panhandle explains that service commenced October 31, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1260. Panhandle further explains that the peak day quantity would be 100,000 dekatherms, the average daily quantity would be 50,000 dekatherms, and that the annual quantity would be 18,250,000

dekatherms. Panhandle explains that it would receive natural gas for Amoco's account at 1547 points of receipt in Illinois, Oklahoma, Colorado, Texas, Kansas and Wyoming. Panhandle states that it would redeliver natural gas for Amoco's account at an existing interconnection with Colorado Interstate Gas Company located in Adams County, Colorado.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 12. Natural Gas Pipeline Company of America

[Docket No. CP89-414-000]

Take notice that on December 14, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-414-000 a request pursuant to the notice procedure in §§ 157.205 and 284.223(b) of the Commission's Regulations for authorization to transport, on an interruptible basis, up to a maximum of 30,000 MMBtu (plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS) for Tejas Power Corporation (Tejas), a marketer of natural gas, under Natural's blanket certificate issued in Docket No. CP86-582-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Natural states it commenced the transportation of natural gas for Tejas on November 1, 1988 at Docket No. ST89-1269-000 for a 120 day period ending March 1, 1989, pursuant to § 284.223(a)(1) of the Commission's Regulations. Natural proposes to continue this service in accordance with §§ 284.221 and 284.223(b).

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 13. Texas Gas Transmission Corporation

[Docket No. CP89-407-000]

Take notice that on December 14, 1988, Texas Gas Transmission Corporation, (Texas Gas) 3800 Frederica Street, Owensboro, Kentucky, 42301, filed in Docket No. CP89-407-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas under its blanket authorization issued in Docket No. CP88-686-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Texas Gas proposes to transport natural gas on an interruptible basis for Pentex Petroleum, Inc. (Pentex). Texas Gas explains that the service commenced November 4, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1088. Texas Gas proposes to transport on a peak day up to 30,000 MMBtu; on an average day up to 10,000 MMBtu; and on an annual basis up to 10,950,000 MMBtu. Texas Gas proposes to receive the subject gas from various existing and proposed points of receipt on its system and transport and redeliver such volumes to Pentex at existing points of delivery in Ohio. The proposed rate to be charged is contained in Texas Gas' currently effective T rate schedule.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 14. Colorado Interstate Gas Company

[Docket No. CP89-353-000]

Take notice that on December 7, 1988, Colorado Interstate Gas Company (CIG), Post Office Box 1087, Colorado Springs, Colorado 80944, filed in Docket No. CP89-353-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to establish a new delivery point for Peoples Natural Gas Company (Peoples) an existing customer of CIG, under CIG's blanket certificate issued in Docket No. CP83-21-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

CIG states that it proposes to construct and operate a new tap on its Limon Lateral to provide another point of delivery to Peoples to be known as the Horner Meter Station. It is further stated that this delivery point, to be located in Elbert County, Colorado, would be utilized by Peoples to serve two residential customers. CIG indicates that the volume of gas to be delivered, which is to be less than 24 Mcf per day, by CIG to Peoples at the proposed delivery point would be within the volumes that CIG is currently authorized to sell and deliver to Peoples. CIG states that no change in Peoples' total daily or annual entitlement is proposed by the request. CIG further states that it believes that it would experience no significant impact on its peak day or annual sales resulting from the addition of the proposed delivery point and the anticipated deliveries resulting from the proposal would be accommodated by CIG's existing transmission system

without detriment or disadvantage to CIG's other customers.

*Comment date:* February 6, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 15. Tennessee Gas Pipeline Company

[Docket No. CP89-333-000]

Take notice that on December 5, 1988, Tennessee Gas Pipeline Company, (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP89-333-000, an application for a certificate of public convenience and necessity pursuant to section 7(c) of the Natural Gas Act. Tennessee seeks authorization to: (1) increase its firm natural gas sales service to 18 existing customers in Kentucky, Louisiana, Mississippi, Tennessee and Texas by an aggregate maximum annual quantity of 2,665,526 Dt; (2) provide firm natural gas sales service for two new customers in Mississippi and Tennessee for an aggregate maximum daily quantity of 1,082 Dt and for an aggregate maximum annual quantity of 103,108 Dt; and (3) construct and operate the facilities necessary to deliver these quantities, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

See Appendix A for a detailed listing of the service changes/additions. Tennessee estimates the total project cost to be \$700,000. Tennessee initially proposes to finance this project with funds on hand, funds generated internally, borrowings under revolving credit agreements or short term financing which would be rolled into permanent financing.

*Comment date:* January 11, 1989, in accordance with Standard Paragraph K at the end of the notice.

#### Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

#### Standard Paragraphs

K. Any person desiring to be heard or to protest the subject filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceedings. Any person wishing to become a party must file a motion with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29842 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. QF89-98-000]

#### Department of the Army; Application for Commission Certification of Qualifying Status of a Cogeneration Facility

December 21, 1988.

On December 8, 1988, Department of the Army (Applicant), of USATC and Fort Dix, Fort Dix, New Jersey 08640-5519, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to § 292.207 of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The topping-cycle cogeneration facility will be located in Fort Dix, New Jersey. The facility will consist of a reciprocating engine driving an induction generator. Thermal energy recovered from the facility will be used to produce hot water for laundry use, to produce raw steam for laundry presses and space heating. The net electric power production capacity of the facility will be 30 KW. The primary energy source will be natural gas. Installation will begin in February 1989.

Any person desiring to be heard or objecting to the granting of qualifying status should file a petition to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NW., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such petitions or protests must be filed within 30 days after the date of publication of this notice and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29839 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM89-2-20-001, TM89-3-20-001, TM89-5-20-000]

#### Algonquin Gas Transmission Co.; Proposed Changes in FERC Gas Tariff

December 22, 1988.

Take notice that Algonquin Gas Transmission Company ("Algonquin") on December 16, 1988, tendered for filing



to its FERC Gas Tariff, Second Revised Volume No. 1 the following tariff sheets:

**Proposed to be effective November 1, 1988**

Revised Thirteenth Revised Sheet No. 214

**Proposed to be effective November 15, 1988**

Nineteenth Revised Sheet No. 211

**Proposed to be effective January 1, 1989**

Substitute Twenty-third Revised Sheet No. 204

Twentieth Revised Sheet No. 211

Fourteenth Revised Sheet No. 214

Algonquin states that Nineteenth Revised Sheet No. 211, Twentieth Revised Sheet No. 211 and Fourteenth Revised Sheet No. 214 are being filed pursuant to Section 10 of Rate Schedule STB and Section 9 of Rate Schedule SS-III, to reflect changes in the underlying service by its pipeline supplier, Texas Eastern Transmission Corporation ("Texas Eastern").

Algonquin further states that, the changes made by Texas Eastern in the service underlying Rate Schedule STB represent an increase of 19.3 cents per MMBtu in the Firm Demand rate to be effective November 15, 1988 and additional increases, to be effective January 1, 1989, of 47.0 cents per MMBtu in the Demand rate, 0.53 per MMBtu cents in the Space charge, 3.74 cents per MMBtu in the Injection charge and 3.75 cents per MMBtu in the Withdrawal charge.

Algonquin states that, the changes made by Texas Eastern in the service underlying Rate Schedule SS-III represent increases of 47.0 cents per MMBtu in the Demand rate, 0.53 per MMBtu cents in the Space charge, 3.74 cents per MMBtu in the Injection charge, 3.76 cents per MMBtu in the FDDQ Withdrawal charge and 3.75 cents per MMBtu in the Non-FDDQ Withdrawal charge, all to be effective January 1, 1989.

Algonquin states that pursuant to section 7 of Rate Schedule F-3, it is filing Substitute Twenty-third Revised Sheet No. 204 to track rate updates made by its supplier, National Fuel Gas Supply Corporation ("National") in the underlying service as shown in National's filing dated December 1, 1988 in Docket No. TA89-1-16 *et al.* National's update rates represent increases of 34 cents per MMBtu in the demand component and 14.72 cents per MMBtu in the commodity component, to be effective January 1, 1989.

Algonquin also states that it is filing Revised Thirteenth Revised Sheet No. 214, effective November 1, 1988, for the

sole purpose of correcting a typographical error in the Firm Demand rate in Thirteenth Revised Sheet No. 214 under Algonquin's Rate Schedule SS-III. The correct Firm Demand rate is \$8.209 per MMBtu.

Algonquin notes that copies of this filing were served upon each affected party and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29838 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. TA82-1-21-029]**

**Columbia Gas Transmission Corp.; Proposed Changes in FERC Gas Tariff**

December 21, 1988.

Take notice that Columbia Gas Transmission Corporation (Columbia) on November 30, 1988, tendered for filing, in accordance with the procedures established in Article II and Appendix B of the April 4, 1985 Stipulation and Agreement (Stipulation), a report setting forth (i) its commodity gas costs on a unit of sales basis for twelve months ended March 31, 1987, with adjustment through October 31, 1988; (ii) the calculation of the Decrease in Gas Costs applicable to such period; and (iii) the credits to be made to its Account No. 191.

Columbia states the report contained in this filing reflects that its revised commodity gas cost per unit of sales for the twelve months ended March 31, 1987, is \$2.7152, which is \$5594 lower than the benchmark rate for the subject period. This translates to an indicated rate reduction of \$127,739,703, plus interest of \$10,257,409 (for a total of \$137,997,112), to be returned to the customers. As of October 31, 1988, Columbia states it has returned to the customers a total of \$118,885,820 through

the commodity rate reduction. Therefore, in accordance with the procedures set forth in Appendix B, Columbia shall credit \$19,111,292 (\$137,997,112 minus \$118,885,820) to Account No. 191.

Columbia proposes that 50 percent of any relevant adjustments applicable to the twelve months ended March 31, 1987, which occur subsequent to October 31, 1988, shall be applied to increase or reduce the unrecovered costs reflected in Appendix G, and the remaining 50 percent shall be returned or charged to its customers by including the aforesaid adjustments in Account No. 191 and treating such costs as past period billing adjustments pursuant to the methodology described in FERC Order 483, *et al.*

Copies of the filing were served upon Columbia's jurisdictional customers and interested state commissions and to each person designated on the official service list compiled by the Commission's Secretary in Docket No. TA82-1-21-001, *et al.*

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, Union Center Plaza Building, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of Columbia's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29840 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. TM89-2-70-000]**

**Columbia Gulf Transmission Co.; Proposed Changes in FERC Gas Tariff**

December 22, 1988.

Take notice that Columbia Gulf Transmission Company (Columbia Gulf) on December 18, 1988, tendered for filing the following revised tariff sheet to its FERC Gas Tariff, Original Volume No. 1, with the proposed effective date of January 1, 1989:

**Sixth Revised Sheet No. 5A**

Columbia Gulf states that this tariff sheets reflects the Gas Research Institute (GRI) funding unit of 1.51¢ per Mcf as authorized by Opinion No. 320 issued by the Federal Energy Regulatory Commission (Commission) on November 30, 1988 in Docket No. RP88-182-000. Ordering Paragraph (B) of the Commission's Opinion approves the GRI funding requirement for the year 1989 and provides that members of GRI shall collect from their applicable customers a general R&D funding unit of 1.51¢ per Mcf during 1989 for payment to GRI. This GRI funding unit of 1.51¢ per Mcf converts to 1.47¢ per Dekatherm as shown on Schedule No. 1 attached hereto.

Copies of this filing were served upon the Company's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, Union Center Plaza Building, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of Columbia Gulf's filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29848 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. TQ89-2-51-001]**

**Great Lakes Gas Transmission Co.; Proposed Changes in FERC Gas Tariff Purchased Gas Adjustment Clause Provisions**

December 22, 1988.

Take notice that Great Lakes Gas Transmission Company ("Great Lakes") on December 19, 1988, tendered for filing Corrected Seventeenth Revised Sheet Nos. 57(i) and 57(ii) and Corrected Fifth Revised Sheet No. 57(v) to Great Lakes Gas Transmission Company's ("Great Lakes") FERC Gas Tariff, First Revised Volume No. 1.

Great Lakes states that it filed with the Federal Energy Regulatory Commission ("Commission") six copies

of Seventeenth Revised Sheet Nos. 57(i) and 57(ii), Second Revised Sheet No. 57(iii) and Fifth Revised Sheet No. 57(v) to Great Lakes FERC Gas Tariff, First Revised Volume No. 1. With the exception of Second Revised Sheet No. 57(iii), these tariff sheets were filed as an Out of Cycle PGA to revise the current PGA rates for the months of December, 1988 and January, 1989 to reflect the latest estimated gas costs as provided to Great Lakes by its sole supplier of natural gas, TransCanada PipeLines Limited ("TransCanada").

Great Lakes states that it has since been informed by TransCanada and Natural Gas Pipeline Company of America ("Natural") that the actual gas prices related to the sale of gas to Natural, as determined by an indexing mechanism, for the month of December, 1988 results in prices significantly higher than those included in the December 12, 1988 filing.

Great Lakes states that in order to implement the correct gas prices for gas sales to Natural and to reflect the latest information available for ANR Pipeline and Great Lakes company use gas, Great Lakes is filing herewith Corrected Seventeenth Revised Sheet Nos. 57(i) and 57(ii) and Corrected Fifth Revised Sheet No. 57(v) to Great Lakes FERC Gas Tariff, First Revised Volume No. 1.

Great Lakes requested waiver of the 30 day notice requirement as provided in § 154.51 of the Commission's Regulations and any other necessary waivers so as to permit the aforementioned tariff sheets to become effective on December 1, 1988.

Any person desiring to be heard or to protest said filing should file a Motion to Intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29816 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Project No. 2360 Minnesota]**

**Minnesota Power & Light Co.; Intent To File an Application for a New License**

December 21, 1988.

Take notice that on December 7, 1988, Minnesota Power & Light Company, the existing licensee for the St. Louis River Hydroelectric Project No. 2360, filed a notice of intent to file an application for a new license, pursuant to section 15(b)(1) of the Federal Power Act (Act), 16 U.S.C. 808, as amended by section 4 of the Electric Consumers Protection Act of 1986, Public Law 99-495. The original license for Project No. 2360 was issued effective January 1, 1950, and expires December 31, 1993.

The project is located on the St. Louis, Cloquet, Whiteface, Skunk, Beaver, and Otter Rivers in Carlton and St. Louis Counties, Minnesota. The principal works of the St. Louis River Project include the Fond du Lac, Thompson, Scanlon, and Knife Falls developments; the Fish Lake, Rice Lake, Island Lake, Boulder Lake, and Whiteface dams and reservoirs; four powerhouses with a combined installed capacity of 87,600 kW; transmission line connections; and appurtenant facilities.

Pursuant to section 5(b)(2) of the Act, the licensee is required to make available certain information described in Docket No. RM87-7-000, Order No. 496 (Final Rule issued April 28, 1988). A copy of this Docket can be obtained from the Commission's Public Reference Branch, Room 1000, 825 North Capitol Street, NE., Washington, DC 20426. The above information as described in this rule is now available from the licensee at 30 W. Superior Street, Duluth, Minnesota 55802.

Pursuant to section 15(c)(1) of the Act, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by December 30, 1991.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29825 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Project No. 2361 Minnesota]**

**Minnesota Power & Light Co.; Intent To File an Application for a New License**

December 21, 1988.

Take notice that on December 7, 1988, Minnesota Power & Light Company, the



existing licensee for the Prairie River Hydroelectric Project No. 2381, filed a notice of intent to file an application for a new license, pursuant to section 15(b)(1) of the Federal Power Act (Act), 16 U.S.C. 808, as amended by section 4 of the Electric Consumers Protection Act of 1986, Public Law 99-495. The original license for Project No. 2381 was issued effective April 1, 1962, and expires December 31, 1993.

The project is located on the Prairie River in Itasca County, Minnesota. The principal works of the Prairie River Project include a 17-foot-high, 946-foot-long concrete gravity dam; a reinforced concrete pipe, 10 feet in diameter and 450 feet long, and a surge tank; a powerhouse with an installed capacity of 1,084 kW; a 2.3/23-kV transformer bank; and appurtenant facilities.

Pursuant to section 15(b)(2) of the Act, the licensee is required to make available certain information described in Docket No. RM87-7-000, Order No. 496 (Final Rule issued April 28, 1988). A copy of this Docket can be obtained from the Commission's Public Reference Branch, Room 1000, 825 North Capitol Street, NE., Washington, DC 20426. The above information as described in the rule is now available from the licensee at 30 W. Superior Street, Duluth, Minnesota 55802.

Pursuant to section 15(c)(1) of the Act, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by December 30, 1991.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29828 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Project No. 2454 Minnesota]**

**Minnesota Power & Light Co.; Intent To File an Application for a New License**

December 21, 1988.

Take notice that on December 7, 1988, Minnesota Power & Light Company, the existing licensee for the Sylvan Hydroelectric Project No. 2454, filed a notice of intent to file an application for a new license, pursuant to section 15(b)(1) of the Federal Power Act (Act), 16 U.S.C. 808, as amended by section 4 of the Electric Consumers Protection Act of 1986, Pub. L. 99-495. The original license for Project No. 2454 was issued effective April 12, 1962, and expires December 31, 1993.

The project is located on the Crow Wing and Gull Rivers in Cass. Crow

Wing and Morrison Counties, Minnesota. The principal works of the Sylvan Project include a dam composed of an 888-foot-long earth section and a 249-foot-long concrete spillway and powerhouse section; a reservoir of 1,220 acres at normal pool elevation of 1,170 feet m.s.l.; a powerhouse with an installed capacity of 1,800 kW; a transmission line connection; and appurtenant facilities.

Pursuant to section 15(b)(2) of the Act, the licensee is required to make available certain information described in Docket No. RM87-7-000, Order No. 496 (Final Rule issued April 28, 1988). A copy of this Docket can be obtained from the Commission's Public Reference Branch, Room 1000, 825 North Capitol Street, NE., Washington, DC 20426. The above information as described in the rule is now available from the licensee at 30 W. Superior Street, Duluth, Minnesota 55802.

Pursuant to section 15(c)(1) of the Act, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by December 30, 1991.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29827 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Project No. 2532, Minnesota]**

**Minnesota Power & Light Co.; Intent To File an Application for a New License**

December 21, 1988.

Take notice that on December 7, 1988, Minnesota Power & Light Company, the existing licensee for the Little Falls Hydroelectric Project No. 2532, filed a notice of intent to file an application for a new license, pursuant to section 15(b)(1) of the Federal Power Act (Act), 16 U.S.C. 808, as amended by section 4 of the Electric Consumers Protection Act of 1986, Pub. L. 99-495. The original license for Project No. 2532 was issued effective April 1, 1962, and expires December 31, 1993.

The project is located on the Mississippi River in Morrison County, Minnesota. The principal works of the Little Falls Project include a concrete dam in two sections, east and west of a mid-river island, having a total length of 900 feet and a height of 30 feet; a reservoir with a small amount of pondage at normal water surface elevation 1,107 feet m.s.l.; two powerhouses with a combined installed

capacity of 4,720 kW; a transmission line connection; and appurtenant facilities.

Pursuant to section 15(b)(2) of the Act, the licensee is required to make available certain information described in Docket No. RM87-7-000, Order No. 496 (Final Rule issued April 28, 1988). A copy of this Docket can be obtained from the Commission's Public Reference Branch, Room 1000, 825 North Capitol Street, NE., Washington, DC 20426. The above information as described in the rule is now available from the licensee at 30 W. Superior Street, Duluth, Minnesota 55802.

Pursuant to section 15(c)(1) of the Act, each application for a new license and any competing license applications must be filed with the Commission at least 24 months prior to the expiration of the existing license. All applications for license for this project must be filed by December 30, 1991.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29828 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP89-13-002]**

**Mississippi River Transmission Corp.; Tariff Filing**

December 22, 1988.

Take notice that on December 19, 1988, Mississippi River Transmission Corporation ("MRT") tendered for filing Substitute Tenth Revised Sheet No. 4A to its FERC Gas Tariff, Second Revised Volume No. 1.

MRT states that its filing is being submitted to comply with the Commission's November 25, 1988 order in Docket No. RP89-13 to track any changes ordered in the level of United Gas Pipe Line Company's (United) fixed take-or-pay charges in Docket Nos. RP88-27 and RP88-264.

MRT states that on November 30, 1988 United filed revised tariff sheets in Docket Nos. RP88-27 and RP88-264 reflecting substantially lower fixed take-or-pay charges applicable to MRT.

MRT states that the impact of the Additional Monthly Fixed Take-or-Pay charges reflected in its filing is a decrease of approximately \$3.3 million annually to its jurisdictional customers when compared to its previous filing dated October 28, 1988.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211

and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29817 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. MT88-11-002]**

**Northwest Pipeline Corp.; Proposed Changes in FERC Gas Tariff Pursuant to Order No. 497**

December 22, 1988.

Take notice that on December 19, 1988, Northwest Pipeline Corporation submitted for filing First Revised Sheet No. 423 and Original Sheet No. 423-A, to be part of its FERC Gas Tariff, Original Volume No. 1-A. The revised tariff sheets are quarterly updates pursuant to § 250.18(d)(2).

Any person desiring to be heard or to protest the subject filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211. All such motions or protests must be filed by December 29, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29818 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP88-154-005]**

**Northwest Pipeline Corp.; Compliance Filing**

December 22, 1988.

Take notice that on December 19, 1988, Northwest Pipeline Corporation ("Northwest") filed the tariff sheets listed below in compliance with a Federal Energy Regulatory Commission

("Commission") letter order issued December 1, 1988 in the above-captioned dockets.

First Revised Volume No. 1  
Eighth Revised Sheet No. 126-A  
Twelfth Revised Sheet No. 127  
Tenth Revised Sheet No. 127-A  
Eighth Revised Sheet No. 129

Northwest states that the tariff sheets mentioned above are filed to establish a surcharge mechanism that will apply to the demand deferral subaccount as well as the commodity deferral subaccount of Account No. 191. Northwest requests an effective date of June 1, 1988 for each of the respective tariff sheets.

A copy of this filing has been served on Northwest's jurisdictional sales customers and affected state commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29819 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP89-46-000]**

**Northwest Pipeline Corp.; Proposed Change in FERC Gas Tariff**

December 22, 1988.

Take notice that on December 15, 1988, Northwest Pipeline Corporation ("Northwest") tendered for filing and acceptance, to be a part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets:

Twenty-Fifth Revised Sheet No. 10-A  
Fourth Revised Sheet No. 71  
Second Revised Sheet Nos. 72 through 74  
First Revised Sheet No. 75

Northwest states that it and Pacific Interstate Transmission Company (PITCO) are parties to a Service Agreement dated March 10, 1981 for service under Northwest's T-1 Rate Schedule, which service was originally

certificated in Docket Nos. CP79-56-001, 002 and CP78-123, *et al.* Northwest states that on January 18, 1988 the parties agreed to amend the Agreement to extend the life for depreciation purposes through October 31, 2012. Such changes are reflected on Sheet Nos. 71 through 75.

Also tendered for filing, pursuant to Sections 13 and 14 of Rate Schedule T-1 of its FERC Gas Tariff, First Revised Volume No. 1, is Northwest's revised Facility Charge and supporting cost-of-service study concurrent with its Amortizing Adjustment and report. Such revised rates are reflected on Twenty-Fifth Revised Sheet No. 10-A.

Northwest has requested waiver to permit an October 1, 1988 effective date for Sheet Nos. 71 through 75 and has requested an effective date of February 1, 1989 for Sheet No. 10-A.

A copy of this filing is being served on PITCO and all jurisdictional customers and affected state commissions.

Any person desiring to be heard or protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29829 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

**[Docket No. RP88-227-007]**

**Paiute Pipeline Co.; Compliance Filing**

December 22, 1988.

Take notice that on December 16, 1988, Paiute Pipeline Company (Paiute) filed Substitute First Revised Sheet No. 69 to its FERC Gas Tariff, Original Volume No. 1-A, in compliance with the Commission's order of October 28, 1988.

Paiute states that it previously filed First Revised Sheet No. 69 on November 25, 1988 and discovered that it advertently failed to fully comply with the Commission's October 28, 1988 order. Accordingly, Paiute requests that



Substitute First Revised Sheet No. 69 be accepted in substitution for its counterpart on file with the Commission to become effective November 1, 1988.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1988)). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29820 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP88-227-005]**

**Paiute Pipeline Co.; Change in FERC Gas Tariff**

December 22, 1988.

Take notice that Paiute Pipeline Company (Paiute) on December 16, 1988, in compliance with the order issued by the Federal Energy Regulatory Commission ("Commission") on August 31, 1988, in Docket Nos. RP88-227-000, RP88-227-001 and CP87-309-000, submitted the following tariff sheets to be a part of its FERC Gas Tariff.

Original Volume No. 1

Fourth Revised Sheet No. 10

Original Sheet No. 77

Second Revised Sheet No. 99

Original Volume No. 1-A

Second Revised Sheet No. 10

Original Sheet No. 71

Paiute states the purpose of this filing is to revise the above listed tariff sheets to comply with the Commission's order to reflect customer nominations of D-2 service levels. The Original Volume No. 1 tariff sheets are proposed to be effective February 1, 1989, the date the suspended Volume No. 1 tariff sheets became effective, subject to refund and conditions, in this proceeding. The Original Volume No. 1-A tariff sheets are proposed to be effective November 14, 1988, the date Paiute commenced transportation services.

Any person desiring to be heard or to protest said filing should file a motion to

intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). All such motions or protests should be filed on or before December 30, 1988.

Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29830 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP89-10-002]**

**Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff**

December 22, 1988.

Take notice that on December 19, 1988, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

First Substitute Original Sheet No. 3-C.13

First Substitute Original Sheet No. 3-C.14

First Substitute Original Sheet No. 3-C.15

The proposed effective date of these revised tariff sheets is November 28, 1988.

Panhandle states that on October 28, 1988 Panhandle filed tariff sheets to recover additional take-or-pay settlement and contract reformation cost fixed surcharges which its pipeline supplier, Trunkline Gas Company (Trunkline) billed to Panhandle in accordance with the provisions of order No. 500. That filing included additional take-or-pay settlement costs not recovered in Docket No. RP88-240.

Panhandle further states that on November 25, 1988 the Commission issued an order accepting the tariff sheets subject to refund and conditions. The Commission's November 25 Order directed Panhandle, pursuant to Ordering Paragraphs (D) and (E) to: 1) track any changes required in the rates of Trunkline in Docket No. RP89-11-000, *et al.*; and 2) remove carrying costs which predate the effective date of the tariff sheets. Panhandle states that it is submitting these revised tariff sheets in compliance with Ordering Paragraphs (D) and (E) of the Commission's Order dated November 25, 1988.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR §§ 385.211 and 385.214). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29821 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP88-203-002]**

**Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff**

December 22, 1988.

Take notice that on December 16, 1988, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

First Substitute Nineteenth Sheet No. 3-C.1

First Substitute Nineteenth Sheet No. 3-C.2

First Substitute Nineteenth Sheet No. 3-C.3

The proposed effective date of these tariff sheets is August 1, 1988.

Panhandle states that the proposed tariff sheets are being filed in compliance with the Commission's Letter Order dated December 1, 1988. The Commission's December 1, 1988 Letter Order directed Panhandle to file revised tariff sheets which reflect 60 days of accrued interest on Order No. 473 producer supplier costs paid by Panhandle on January 20, 1988.

Panhandle states that copies of the filing were sent to all of Panhandle's jurisdictional sales customers, interested state commissions and intervenors in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in

determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29831 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP88-163-002]**

**South Georgia Natural Gas Co.; Proposed Changes to FERC Gas Tariff**

December 22, 1988.

Take notice that on December 16, 1988, South Georgia Natural Gas Company ("South Georgia") tendered for filing Eighth Revised Sheet No. 32 and Second Revised Sheet No. 32A to its FERC Gas Tariff, First Revised Volume No. 1.

South Georgia states that the purpose of this filing is to revise certain provisions of South Georgia's PGA clause as required by the Commission's Order of November 25, 1988, in this proceeding. Specifically, South Georgia is revising sections 14.3(3)(g) and 14.3(4) (a), (b) and (c) of its FERC Gas Tariff to make consistent its definition of the term "current adjustments" with that set forth in § 154.302(o) of the Commission's Regulations. Since the proposed tariff sheets are being submitted in compliance with the Commission's November 25 Order, South Georgia requests that the sheets be accepted effective June 1, 1988, the date on which South Georgia's restated PGA clause originally became effective.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (§§ 385.214, 385.211). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion or intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29832 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP88-221-003]**

**Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff**

December 22, 1988.

Take notice that Texas Eastern Transmission Corporation (Texas Eastern) on December 16, 1988 tendered for filing in compliance with the Commission's October 31, 1988 Order in Docket Nos. RP88-221-001 *et al.*, (October 31 Order) and the Commission's December 15, 1988 Order in Docket No. RP88-221-002 (December 15 Order) as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, six copies of the following tariff sheets:

Second Revised Sheet No. 104

Second Revised Sheet No. 112

Second Revised Sheet No. 119

Second Revised Sheet No. 126

Second Revised Sheet No. 130

Fourth Revised Sheet No. 133

Second Revised Sheet No. 138

Fifth Revised Sheet No. 489

Substitute First Revised Sheet No. 489a

Texas Eastern states that the purpose of this filing is to file tariff sheets in order (1) to provide for an authorized overrun rate as required by Ordering Paragraph (B) of the October 31 Order and (2) to specify the circumstances under which Texas Eastern would authorize a customer to exceed its annual D-2 nomination as required by the Commission's December 15 Order in Docket No. RP88-221-002. For such authorized overrun quantities Texas Eastern would charge the authorized overrun rate. Overrun quantities delivered without the authorization of Texas Eastern will be charged to the customer at the unauthorized overrun rate.

Texas Eastern states that in compliance with the October 31 Order and the December 15 Order, it has included in the above-listed tariff sheets an authorized D-2 overrun provision in its sales Rate Schedules DCQ, GS, CD-1, CD-2, SCS, ACQ and WS which specifies the situations under which Texas Eastern will authorize a customer to exceed its annual D-2 nomination.

The proposed effective date of the above listed tariff sheets is December 1, 1988.

Texas Eastern states that it is also filing tariff sheets to correct supersession problems. Third Revised Sheet Nos. 133 and 137 are being filed to replace Revised First Revised Sheet Nos. 133 and 137 which were approved to be effective September 1, 1988 by the Commission on August 31, 1988 in Docket Nos. RP88-221-000 *et al.* Third Revised Sheet Nos. 133 and 137 supersede Second Revised Sheet Nos.

133 and 137 which were approved to be effective July 1, 1988 by the Commission on August 29, 1988 in Docket Nos. RP85-177-055 *et al.*, and are proposed to be effective September 1, 1988.

Copies of the filing were served on Texas Eastern's jurisdictional customers and interested state commissions. In addition, copies have also been mailed to all parties of record in Docket Nos. RP88-67, RP88-81 and RP88-221.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure. All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29833 Filed 12-27-88; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RP89-9-002]**

**Panhandle Eastern Pipe Line Co.; Proposed Changes in FERC Gas Tariff**

December 22, 1988.

Take notice that on December 19, 1988, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing the following tariff sheets to its FERC Gas Tariff, Original Volume No. 1:

First Substitute Original Sheet No. 3-C.10

First Substitute Original Sheet No. 3-C.11

First Substitute Original Sheet No. 3-C.12

Second Revised Sheet No. 43-12

First Revised Sheet No. 43-13

The proposed effective date of these revised tariff sheets is November 28, 1988.

Panhandle states that on October 28, 1988, Panhandle filed tariff sheets to establish charges to recover 50% of its take-or-pay buyout and buydown costs in accordance with the provisions of Order No. 500. That filing included additional take-or-pay settlement costs not recovered in Docket No. RP88-241.

Panhandle further states that on November 25, 1988, the Commission issued an order accepting the tariff sheets subject to refund and conditions. The Commission's November 25 Order



directed Panhandle, pursuant to Ordering Paragraphs (B) and (C) to: (1) remove carrying costs which predate the effective date on the proposed tariff sheets and to remove carrying costs on funds not actually disbursed as of the effective date of the proposed tariff sheets; and (2) file revised tariff sheet language that reflects the Commission's interest regulations at 18 CFR 154.67(c) to customer funds collected but not disbursed, and the crediting or refunding of such accrued interest, as appropriate. Panhandle also states that the revised tariff sheets and materials submitted herein satisfy the requirements of the Commission's Order dated November 25, 1988.

Panhandle states that copies of the filing were sent to all of Panhandle's jurisdictional customers and interested state commissions, as well as the parties of the above-captioned proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lola D. Cashell,  
Secretary.  
[FR Doc. 88-29822 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

[Docket Nos. RP88-263-003 and RP88-92-007]

#### United Gas Pipe Line Co.; Filing

December 22, 1988.

Take notice that on December 19, 1988, United Gas Pipe Line Company (United) filed Second Substitute Original Sheet No. 74-X1 to its FERC Gas Tariff, First Revised Volume No. 1, to be effective October 1, 1988.

United states that the purpose of this filing is to correct an error identified in 25(c) of Substitute Original Sheet No. 74-X1. United states that the phrase "times their respective days of the month" has been deleted.

United states that copies of this filing have been mailed to all parties on the service list.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 214 and 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.214, 385.211 (1987)). All such motions or protests should be filed on or before December 30, 1988. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lola D. Cashell,  
Secretary.  
[FR Doc. 88-29823 Filed 12-27-88; 8:45 am]  
BILLING CODE 6717-01-M

#### FEDERAL COMMUNICATIONS COMMISSION

##### Agency Information Collection Activities Under OMB Review

December 20, 1988.

The following information collection requirements have been approved by the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, (44 U.S.C. 3507). For further information contact Judy Boley, Federal Communications Commission, (202) 632-7513.

OMB No.: 3060-0068.

Title: Application for Consent to Assignment of Radio Station Construction Permit or License—For Services Other Than Broadcast.  
Form No.: FCC 702.

The approval on FCC 702 has been extended through 9/30/91. The January 1986 edition with the previous expiration date of 9/30/88 will remain in use until updated forms are available.

OMB No.: 3060-0099.

Title: Annual Report Form M.

Form No. FCC Form M.

A revised annual report form M has been approved for use through 8/31/91. The edition with the previous expiration date of 3/31/90 will remain in use until revised forms are available.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 88-29708 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

[DA 88-1547]

#### Depreciation Rate Prescriptions Proposed for American Telephone and Telegraph Company's Twenty-Two Operating Companies; Pleading Cycle Established

Released: October 7, 1988.

The Commission invites comments on proposed revised depreciation rates and amortizations for American Telephone and Telegraph Company's (AT&T) twenty-two subsidiary operating companies. The Commission has evaluated depreciation rates for these companies in accordance with the triennial review schedule. The expenses and composite rates reflecting the proposed rates are listed in the Attachment. These expenses and rates include a four-year amortization of the January 1, 1988 depreciation reserve imbalance and special net book amortization of Central Office Equipment (COE)-Crossbar investment in five jurisdictions and Analog Electronic investment in three jurisdictions to correct substantial reserve problems. The Attachment also lists the twenty-two companies by jurisdiction, the current expenses and composite rates (develop using the currently prescribed depreciation rates and amortizations) and the proposed change in expenses (proposed vs. current) for each jurisdiction.

On May 10, 1988, AT&T filed studies with this Commission in support of its proposed depreciation rates. The Common Carrier Bureau reviewed these studies and obtained additional information regarding the studies from AT&T before arriving at its preliminary recommendations. On September 2, 1988, the Bureau sent letters to the state public utility commissions describing the Bureau's preliminary recommendations and requesting their comments on the life, salvage and curve shape parameters to be used for the prescription of the operating companies' depreciation rates. In addition, the Bureau discussed AT&T's study as well as the Bureau's preliminary recommendations with representatives of several state commissions who replied to the September 2, 1988 letters. After considering all of this information, the Bureau is recommending the depreciation parameters which underlie the rates shown on the Attachment. AT&T requests a January 1, 1988 effective date for the rates and amortizations.

Copies of the operating companies' initial 1988 depreciation rate study filings, replies to the September 2, 1988

letters and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street NW., Washington, DC. Copying facilities are available in Suite 812, 2000 L Street.

Parties wishing to file comments on the proposals as summarized herein

may do so by October 27, 1988. Replies may be filed by November 8, 1988. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch (202) 632-7500.

Federal Communications Commission.  
Donna R. Searcy,  
Secretary.

#### SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Company—Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed change	
		Rate	Expense	Rate	Expense	Expense	Percent
	(\$)	(%)	(\$000)	(%)	(\$000)	(\$000)	(%)
AT&T of California	1358732367	8.0	109339	10.0	136347	27008	24.7
AT&T of Delaware	7770684	27.8	2184	3.8	276	1888	-87.2
AT&T of Illinois	340181334	8.9	23539	7.8	25767	2228	9.5
AT&T of Indiana	158417729	9.0	14380	7.5	11880	-2400	-18.7
AT&T of Maryland	6663557	8.5	5670	9.4	6235	565	10.0
AT&T of Michigan	244900358	9.1	22184	10.4	25361	3177	14.3
AT&T of Nevada	70702115	6.4	4512	9.1	6413	1901	42.1
AT&T of New England							
Maine	31402408	11.0	3469	18.4	5148	1679	48.4
Massachusetts	158019042	10.2	16111	13.5	21293	5182	32.2
New Hampshire	35990948	7.5	2697	9.9	3581	884	32.8
Rhode Island	27485646	10.1	2767	12.7	3495	728	26.3
Vermont	17784861	12.1	2151	12.3	2185	34	1.6
AT&T of New Jersey	173187650	9.9	17134	10.7	18463	1329	7.8
AT&T of New York	978452957	7.5	73111	9.3	91401	18290	25.0
AT&T of Ohio	237891196	9.2	21974	11.0	26096	4124	18.8
AT&T of Pennsylvania	292828805	8.5	24967	11.8	34678	9689	38.8
AT&T of the Midwest:							
Iowa	118375140	7.7	9121	11.0	12985	3864	42.4
Minnesota	124470680	9.2	11412	9.1	11271	-141	-1.2
Nebraska	53551755	7.1	3781	8.9	4791	1010	26.7
North Dakota	43100206	10.6	4577	11.0	4746	169	3.7
South Dakota	32927154	10.5	3471	14.0	4607	1136	32.7
AT&T of the Mountain States:							
Arizona	76291488	9.4	7170	18.0	13702	6532	91.1
Colorado	184466371	6.9	12788	8.2	15132	2344	18.3
Idaho	14602174	6.7	882	11.8	1716	734	74.7
Montana	49963267	9.3	4624	13.2	6599	1975	42.7
New Mexico	46816893	7.3	3498	8.7	4080	642	18.7
Utah	49790128	8.8	4362	11.1	5540	1178	27.0
Wyoming	24788735	7.5	1851	10.5	2606	757	40.9
AT&T of the Pacific Northwest:							
Oregon	149283334	10.8	15877	9.0	13407	-2470	-15.6
Washington	177091875	7.9	14076	9.9	17487	3411	24.2
AT&T of the S. Central States:							
Alabama	180558469	7.8	14033	9.6	17333	3300	23.5
Kentucky	86361194	6.9	5923	9.7	8376	2453	41.4
Louisiana	173272025	8.2	14211	10.0	17252	3041	21.4
Mississippi	69121492	10.0	8930	9.7	6717	-213	-3.1
Tennessee	126998173	7.0	8930	9.7	12322	3392	38.0
AT&T of the Southern States:							
Florida	411597019	9.4	38662	11.2	46132	7470	19.3
Georgia	317054416	7.8	24775	9.2	29107	4332	17.5
North Carolina	208194037	8.1	16762	11.9	24755	7993	47.7
South Carolina	148155571	7.6	11305	10.5	15580	4255	37.6
AT&T of the Southwest:							
Arkansas	63018699	9.5	8005	12.9	8155	2150	35.8
Kansas	57475084	12.0	8888	17.5	10050	3162	46.9
Missouri	218367339	8.1	17580	10.7	23136	5546	31.5
Oklahoma	104573372	8.9	9352	10.2	10640	1288	13.8
Texas	743736770	7.8	57695	10.7	79278	21583	37.4
AT&T of Virginia	192821188	8.0	15382	10.3	19815	4433	28.8
AT&T of Washington, D.C.	46104363	8.1	3722	10.7	4920	1198	32.2
AT&T of West Virginia	52069848	7.3	3820	9.2	4775	955	25.0
AT&T of Wisconsin	93628961	8.7	8162	11.0	10269	2107	25.8
Composite Total	8639160838	8.3	713846	10.3	885982	172116	24.1

[FR Doc. 88-29374 Filed 12-27-88; 8:45 am]

BILLING CODE 6712-01-M

BEST COPY AVAILABLE



## FEDERAL MARITIME COMMISSION

## Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the *Federal Register* in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 212-010286-017.

Title: South Europe/U.S.A. Pool Agreement.

## Parties:

Compania Transatlantica Espanola, S.A.  
Evergreen Marine Corporation  
Costa Line (Costa Container Lines, S.p.A., Genoa)  
Farrell Lines, Inc.  
Italia Di Navigazione, S.p.A.  
Lykes Lines (Lykes Bros. Steamship Co., Inc.)  
Nedlloyd Lines (Nedlloyd Lijnen B.V.)  
P&O Containers (TFL) Ltd.  
Jugolinija  
A.P. Moller-Maersk Line  
Sea-Land Service, Inc.  
Zim Israel Navigation

**Synopsis:** The proposed modification would extend the current pool period to January 31, 1989; establish four subsequent pool periods beginning February 1, 1989; and provide for new service obligations. In addition, various other administrative changes are made.

By Order of the Federal Maritime Commission.

Tony P. Kominoto,  
Assistant Secretary.

Dated: December 22, 1988.

[FR Doc. 88-29698 Filed 12-27-88; 8:45 am]  
BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

## Federal Open Market Committee; Rules of Organization; Start of Terms of Office of Reserve Bank Representatives

The Federal Open Market Committee has amended its Rules of Organization in order to advance the start of the terms of office of the Federal Reserve Bank presidents who serve one-year terms as Committee or alternate members from March 1 to January 1 of each year.

Effective January 1, 1990, sections 2(b), 3, and 4(a) of the Committee's Rules of Organization are amended by replacing "March" with "January" wherever it appears.

By order of the Federal Open Market Committee, November 11, 1988.

Normand R.V. Bernard,  
Assistant Secretary.

[FR Doc. 88-29690 Filed 12-27-88; 8:45 am]  
BILLING CODE 6210-01-M

## Banamex International; Corporation To Do Business Under Section 25(a) of the Federal Reserve Act

An application has been submitted for the Board's approval of the organization of a corporation to do business under section 25(a) of the Federal Reserve Act ("Edge Corporation"). The Edge Corporation would operate as a subsidiary of the applicant. The factors that are to be considered in acting on the application are set forth in § 211.4(a) of the Board's Regulation K (12 CFR 211.4(a)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank listed for that notice. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identify specifically any questions of fact that are in dispute, and summarize the evidence that would be presented at a hearing. Any person wishing to comment on the application should submit views in writing to be received not later than January 10, 1989.

**A. Board of Governors of the Federal Reserve System** (William W. Wiles, Secretary), Washington, DC 20551:

1. *Banco Nacional de Mexico*, Mexico City, Mexico: to establish a corporation to be known as Banamex International in Houston, Texas, with branch offices in Chicago, Illinois, Los Angeles, California, and New York, New York. This application may be inspected at the Federal Reserve Bank of San Francisco.

Board of Governors of the Federal Reserve System, December 21, 1988.

James McAfee,  
Associate Secretary of the Board.  
[FR Doc. 88-29691 Filed 12-27-88; 8:45 am]  
BILLING CODE 6210-01-M

## Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 9, 1989.

**A. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Alfred L. Belt*, Thomas Ford, Clyde Helms, Jr., Ove Nielsen, Paul E. Nielsen, and Henry Southway, Jr., all of Alamosa, Colorado; to each acquire 16.7 percent of the voting shares of Alamosa Bancorporation, Inc., Alamosa, Colorado, and thereby indirectly acquire Alamosa National Bank, Alamosa, Colorado.

2. *Malcolm Deisenroth, Jr.*, to acquire an additional 10.7 percent of the voting shares of TulBancorp, Inc., Tulsa, Oklahoma, and thereby indirectly acquire Bank of Tulsa, Tulsa, Oklahoma.

**B. Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *George Borba*, Chino, California; to acquire 7.19 percent of the voting shares of CVB Financial Corp., Chino, California, and thereby indirectly acquire Chino Valley Bank, Chino, California.

Board of Governors of the Federal Reserve System, December 20, 1988.

James McAfee,  
Associate Secretary of the Board.  
[FR Doc. 88-29695 Filed 12-27-88; 8:45 am]  
BILLING CODE 6210-01-M

## Exchange Bancorp, Inc.; Acquisition of Company Engaged in Permissible Nonbanking Activities

The organization listed in this notice has applied under § 225.23(a)(2) or (f) of the Board's Regulation Y (12 CFR 225.23(a)(2) or (f)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to acquire or control voting securities or assets of a company engaged in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

The application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Comments regarding the application must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 6, 1989.

**A. Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Exchange Bancorp, Inc.*, Chicago, Illinois; to acquire Exchange Securities Corporation, Hallandale, Florida, and thereby engage in underwriting and dealing in government obligations and money market instruments pursuant to § 225.25(b)(18) of the Board's Regulation Y.

Board of Governors of the Federal Reserve System, December 20, 1988.

James McAfee,  
Associate Secretary of the Board.  
[FR Doc. 88-29694 Filed 12-27-88; 8:45 am]  
BILLING CODE 6210-01-M

## First Community Bank Corp., et al., Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 13, 1989.

**A. Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *First Community Bank Corporation*, Inverness, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of First Community Bank, Inverness, Florida, a *de novo* bank.

**B. Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Scott Bancshares, Inc.*, Bethany, Illinois; to acquire 100 percent of the voting shares of The Hight State Bank, Dalton City, Illinois.

**C. Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Gold Bancshares, Inc.*, Marysville, Kansas; to merge with Commanche

Bancshares, Inc., Marysville, Kansas, and thereby indirectly acquire The Peoples State Bank, Coldwater, Kansas, and Oketo Bancshares, Inc., Marysville, Kansas, and thereby indirectly acquire Blue Valley National Bank, Marysville, Kansas, which engages in selling general insurance in Marysville, a town with a population of less than 5,000.

Board of Governors of the Federal Reserve System, December 20, 1988.

James McAfee,  
Associate Secretary of the Board.  
[FR Doc. 88-29693 Filed 12-27-88; 8:45 am]  
BILLING CODE 6210-01-M

## National Bank of Washington; Corporation To Do Business Under Section 25(a) of the Federal Reserve Act

An application has been submitted for the Board's approval of the organization of a corporation to do business under section 25(a) of the Federal Reserve Act ("Edge Corporation"). The Edge Corporation would operate as a subsidiary of the applicant. The factors that are to be considered in acting on the application are set forth in § 211.4(a) of the Board's Regulation K (12 CFR 211.4(a)).

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank listed for that notice. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identify specifically any questions of fact that are in dispute, and summarize the evidence that would be presented at a hearing. Any person wishing to comment on the application should submit views in writing to be received not later than January 18, 1989.

**A. Board of Governors of the Federal Reserve System** (William W. Wiles, Secretary) Washington, DC 20551:

1. *National Bank of Washington*, Washington, DC: to establish a corporation in Miami, Florida to be known as NBW International Banking Corporation. This application may be inspected at the Federal Reserve Bank of Richmond.

Board of Governors of the Federal Reserve System, December 21, 1988.

James McAfee,  
Associate Secretary of the Board.  
[FR Doc. 88-29692 Filed 12-27-88; 8:45 am]  
BILLING CODE 6210-01-M



# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Office of Human Development Services

### Head Start Program

**AGENCY:** Administration for Children, Youth and Families (ACYF), Office of Human Development Services (OHDS), Department of Health and Human Services (DHHS).

**ACTION:** Notice and request for public comment.

**SUMMARY:** The Administration for Children, Youth and Families (ACYF) announces proposed revisions to grant application instructions and requirements to be followed by Head Start grantees. ACYF proposes revisions to the Standard Form (SF) 424, Application for Federal Assistance; to the SF 424A, Budget Information—Non-Construction Programs; to the SF 424B, Assurances—Non-Construction Programs; and to the Program Narrative Statement.

The general purpose of these revisions is to improve the management of Head Start by collecting uniform data from 1290 local grantees and 620 delegate agencies for monitoring the effectiveness and efficiency with which Head Start programs use Federal funds. This data will identify certain types of program and management problems or anomalies and guide initiatives to assist programs to improve their operations and the services being provided to children and families.

**DATE:** In order to be considered, comments on the proposed revisions must be received on or before February 27, 1989.

**ADDRESS:** Please address comments to: Elizabeth Strong Ussery, Associate Commissioner, Head Start Bureau, Administration for Children, Youth and Families, P.O. Box 1182, Washington, DC 20013.

Beginning 14 days after close of the comment period, comments will be available for public inspection in Room 5755, 400 6th Street, SW., Washington, DC 20021, Monday through Friday between the hours of 9:00 a.m. and 4:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Terry R. Lewis, 202-755-0590.

### SUPPLEMENTARY INFORMATION:

#### I. Program Purpose

Head Start is a national program providing comprehensive developmental services primarily to low-income preschool children, age three to the age of compulsory school attendance, and

their families. In FY 1987, Head Start served 446,523 children.

To help enrolled children achieve their full potential, Head Start programs provide comprehensive health, nutritional, educational, social and other services. In addition, Head Start programs are required to provide for the direct participation of parents of enrolled children in the development, conduct, and direction of local programs.

#### II. Development of the Proposed Revisions

The current Head Start application forms and process utilize the OMB approved Standard Form 424 and instructions for a Program Narrative Statement approved for use by Head Start. The need to revise the current system derives from the need to be able to look at Head Start budgets in more detail than allowed by the eight Budget Categories included in the OMB SF 424, Part B., the need to update narrative information requested from the grantee and the need to solicit information in a uniform manner across all grantees. The Administration for Children, Youth and Families is publishing these proposed revisions to the grant application forms and process as required by section 644(d) of the Head Start Act.

The data we propose to collect through the revised application forms were selected as a result of an extensive review of the cost analysis instrument and the data collected to date. The process leading to the proposed revisions has been one in which many interested and involved parties have been periodically consulted. Federal staff, including a user's task force, were instrumental in identifying concerns, problems and needs that led to improvements in the data instrument and the system. This group is still in existence and continues to provide creative ideas for improvements. Head Start grantee and delegate agency staff, training and technical assistance providers and the National Head Start Association Board of Directors and members (a national organization representing Head Start directors, parents, staff and friends) have also provided input.

These proposed revisions to the grant application include the program design and cost data previously contained in the Head Start cost analysis system. Combining the cost analysis system with the grant application process provided the opportunity to:

1. Update the program narrative instructions to include a concentrated planning, review and analysis system needed to make sure that programs were

delivering effective, efficient and necessary services to children and their families.

2. Implement a three year grant cycle that generates the data needed and reduces the local grantees' paperwork burden, and

3. Have grantee staff directly provide uniform, correct and complete program design and cost information.

#### III. Implementation of the Proposed Revisions

All grantees will be phased into a three year grant application cycle. For the first year of funding in this cycle, grantees will be required to provide the comprehensive data requested in the revised instructions as a part of their application. For the second and third year grant applications, assuming no major program or budget changes, reporting is greatly reduced to only the basic SF 424 forms and reports on progress, identification of problems, concerns and issues and proposed methods for improvement.

When measured over the entire three year grant cycle, the expectation is that there will be no increased reporting burden over the grant application forms and program narrative statement instructions presently in use. Instead, we believe there will be a decrease in burden.

In addition, the current requirement for a quarterly programmatic progress report on the delivery of services is deleted from the Instructions, further decreasing the burden on grantees and delegate agencies. Although there has been no standard format for quarterly reports, there has been a long standing practice that various types of information be submitted. We believe that quarterly reports should be required only on an individual grantee basis for limited periods of time when needed to track specific compliance or performance problems. Requirements for submitting quarterly financial reports remain unchanged.

#### IV. Description of the Revised Instructions and Requirements

The following documents are included in the revised instructions.

*General Instructions For Completion of a Head Start Grant Application (SF 424, 424A, 424B and Program Narrative Statement)*

These general instructions include an explanation of the grant application cycle, including the timing for submission of applications. They indicate the forms and information that must be submitted as a part of the

application, including the SF 424, the SF 424A, Budget Information—Non-Construction Programs and Appendix, the SF 424B, Assurances, including Policy Council Approval and a Program Narrative Statement.

#### Instructions for the Completion of the Program Narrative Statement for a Head Start Grant Application

These instructions describe information that must be submitted in response to the Program Narrative Statement for the first year of funding, for the second and third year of funding, and for an application for supplemental funds or a grant amendment.

The instructions require information in the following areas:

1. Need for Assistance and Geographic Area
2. Objectives and Results or Benefits Expected
3. Approach
4. Staffing and Management
5. Budget Appropriateness and Reasonableness

#### Program Narrative: Head Start Program Design Form and Instructions

This form, a part of the approach section of the Program Narrative Statement, requires the submission of information on type and duration of services being provided to children and families, funded enrollment and staff employment. It is to be filled out for the first year of a three year grant cycle.

#### Appendix to SF 424A: Head Start Line Item Budget and Instructions

This form requires the submission of detailed budget information on ACYF funds, non-Federal cash, the value of non-Federal in-kind contributions, other resources being used by the program and administrative costs. It includes information on staffing, functional costs and allocation of costs across options. It is to be filled out for the first year of a three year grant cycle. It is to be filled out for the second or third year of funding only if major changes are being proposed by the program.

#### V. Impact Analysis

##### Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980, Pub. L. 96-511, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval of any reporting or recordkeeping requirement affecting ten or more persons. This proposed revision does contain information collection requirements, but over a three year period, decreases the Federal paperwork burden on Head Start grantees. OMB has conditionally approved this

proposed revision under OMB No. 0980-0202 which expires on September 30, 1989.

#### Index of Terms

Head Start, Grant application.

(Catalog of Federal Domestic Assistance Program Number 13.600, Project Head Start.) Dated: November 29, 1988.

**Dodie Truman Borup,**

*Commissioner, Administration for Children, Youth and Families.*

**Sydney Olson,**

*Assistant Secretary for Human Development Services.*

#### General Instructions for Completion of a Head Start Grant Application

(SF 424, 424A, 424B and Program Narrative Statement)

##### Grant Application Cycle

ACYF will make annual grant awards for twelve month periods to Head Start grantees on a three year grant application cycle. Applicants will be required to submit a full application for the first year of operation in each three year grant cycle and an abbreviated application for the subsequent two years. Instructions that follow indicate the submissions required of applicants for the first year of funding in the three year grant cycle, those submissions required for the second and third year of funding, and submissions required for supplemental funding and grant amendments.

##### Submission of Application

Applications for the first year of the grant application cycle must be submitted no later than 150 days prior to funding. Applications for the second or third years of funding must be submitted no later than 90 days prior to funding. An original application and two copies should be submitted to the responsible grants management office.

##### Content of Application

Head Start applicants should adhere to the instructions for both the SF 424, Application for Federal Assistance and for the 424A, Budget Information—Non-Construction Programs. Programs must also certify their compliance with the 424B, Assurances—Non-Construction Programs and submit a Program Narrative Statement. The following additional information is provided to Head Start applicants to facilitate the completion of their application:

**SF 424:** This form is to be completed for all funding requests.

Compliance with E.O. 12372, "Intergovernmental Review of Federal Programs", is required of all Head Start applicants prior to grant funding, except

those noted below. The appropriate information should be included in Block 16 and, if applicable, Block 3. Alaska, Idaho, Kansas, Minnesota, Nebraska, American Samoa and Palau have elected not to participate in the Executive Order process. In addition, applicants for projects administered by Federally-recognized Indian tribes are exempt from these requirements. Applicants from these areas need take no action regarding E.O. 12372.

All applicants must attach documentation of Policy Council approval of the application to the SF 424. Policy Council minutes indicating approval of the application along with the signature of the Policy Council Chairperson may be considered satisfactory documentation.

**SF 424A, Budget Information—Non-Construction Programs:** The SF 424A must be submitted for all funding requests.

In Section B—Budget Categories, grantees should enter all program activities, including the various program options, Parent/Child Centers and handicapped services in Column 1. Training and Technical Assistance funds must be displayed in Column 2. When the grantee delegates part or all of its program, a separate 424A must be submitted for each delegate agency.

The placement of proposed program costs in the object class categories in Section B should be determined based on the following instructions:

**Personnel—Line 6a.** Enter the total costs of salaries and wages of applicant/grantee staff. Do not include costs of consultants or personnel costs of delegate agencies.

**Fringe Benefits—Line 6b.** Enter the total costs of fringe benefits unless included as a part of an approved indirect cost rate.

**Travel—Line 6c.** Enter the total costs of out-of-town travel for employees of the project and fully explain and justify them. Do not include costs for consultant travel or local transportation.

**Equipment—Line 6d.** Enter the total costs of all equipment to be acquired by the project. Provide a list of all equipment and estimated cost of each item. Need for equipment must be explained and justified and the need for the equipment must be supported by the program narrative. For governmental grantees, including Federally-recognized Indian tribes, "equipment" means an article of tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5000 or more per unit. For all other Head Start grantees, "equipment" means an article of tangible, non-



expendable, personal property having a useful life of more than two years and an acquisition cost of \$500 or more per unit.

**Supplies—Line 6e.** Enter the total costs of all tangible personal property (supplies) other than those included in Line 6d.

**Contractual—Line 6f.** Enter the total costs of all contracts including (1) procurement contracts (except those which belong in other categories such as equipment, supplies, etc.), (2) contracts/agreements with delegate agencies, and (3) contracts with organizations for the provision of training or technical assistance. Fully explain and justify any contracts not explained and justified in previous applications. Do not include payments to individuals in this line.

**Construction—Line 6g.** Enter the total costs of alterations or renovations. New construction is unallowable.

**Other—Line 6h.** Enter the total of all other direct costs not identified in other categories. Explain and justify these costs.

**Indirect Costs—Line 6j.** Enter the total amount of indirect costs. Attach a copy of any rate agreement approved within the past year. If no indirect costs are requested, enter "none".

In Section C—Non-Federal Resources, enter the amounts of non-Federal resources, including in-kind contributions, that will be used to support the project. Provide a brief explanation of the types of volunteers and the rates at which their services are valued; a valuation of donated space (use only) including the number of square feet and value assigned per square foot; and a determination of depreciation or use allowance for grantee-owned space based on the property's market value at the time it was donated. When a grantee or delegate agency owns or has a substantial interest in real property, charges to the Head Start grant may not exceed the cost of ownership. Thus, depreciation or use allowances are charged to compensate a grantee or delegate agency for the use of a building which they own. In these instances, rental costs may not be charged.

**Appendix to SF 424A:** All applicants must also fill out the Head Start line item budget found in the Appendix to SF 424A as a part of their grant application for the first year of the three year grant application cycle. A separate line item budget must be submitted for the grantee, for each delegate agency, and for each Parent/Child Center with the total request being combined and recorded in SF 424A, Section B. The Appendix to SF 424A explains into

which object class category in Section B each line item is to be placed.

Explanations and justifications required in response to the SF 424A are specified above and must be provided to the extent that they are not provided as a part of the Appendix.

The Appendix is not to be completed for second or third year funding if there are no major budget changes in the basic grant application. If major program changes result in major budget changes, the line-item budget contained in the Appendix must be completed for second or third year funding. Major program changes include an increase or decrease in the number of children being served, changes in the program options being implemented, changes in staffing patterns, the communities being served, the delegates being funded or a change in administrative costs. The Appendix also does not have to be filled out for one time or permanent supplemental funding requests or for grant amendments if they do not result in any major changes.

**SF 424B—Assurances:** A written assurance must also be included annually which states that the costs of development and administration will not exceed 15 percent of the total cost of the program including non-Federal share.

**Program Narrative Statement:** Each applicant must submit a Program Narrative Statement. The instructions for completion of the Narrative detail the information to be provided for each year of the three year grant application cycle. They also specify the information required for permanent and one-time supplemental funding and for grant amendments.

#### Instructions for Completion of the Program Narrative Statement for a Head Start Grant Application

Applicants must submit a program narrative statement based on the following instructions:

##### A: Application for The First Year of Funding

Applicants entering the first year of their three year grant application cycle are required to complete Sections 1-5 below.

##### 1. Need for Assistance and Geographic Area

a. Applicants are required to conduct community needs assessments. They must submit a summary of the most recent community needs assessment which describes the following information about the Head Start service area:

1) The demographic make-up of Head Start eligible children and families,

including the number, geographic location and racial and ethnic composition;

2) The number of Head Start eligible handicapped children, including types of handicaps and relevant services and resources provided to these children by community agencies;

3) Data regarding the education, health, nutrition and social service needs of Head Start eligible children and their families;

4) The education, health, nutrition and social service needs of children and their families as defined by families of Head Start eligible children and by institutions in the community which serve young children;

5) Other child development and child care programs that the serving Head Start eligible children, including publicly funded State and local preschool programs, and the approximate number of Head Start eligible children served by each; and

6) Resources in the community that could be used to enhance the operation of the Head Start program.

Applicants must also summarize the process that was used to conduct the community needs assessment, including the date it was completed, a description of the involvement of parents staff and the grantee board and data sources for statistical information.

b. Based on the findings of the community needs assessment, applicants must identify and prioritize key issues or problems facing children and their families that need to be addressed by the Head Start program.

Applicants must also identify service and recruitment areas. They must explain, where their recruitment area or areas are smaller than their service area and why those recruitment areas were chosen.

Applicants must also identify and changes in the community that indicate a need for change in the location, design or method of service delivery.

c. Applicants must submit a map or maps showing:

1) The proposed service area. The service area is the geographic area within which a grantee and, if applicable, each delegate agency may provide Head Start services.

2) The recruitment area or areas for the grantee and, if applicable, each delegate agency. Recruitment areas are the geographic areas within which the grantee and delegate agency recruit Head Start children and families to participate in the program. The recruitment areas can be the same as the service area or they can be smaller areas within the service area.

3) The location of the grantee's and, if applicable, each delegate agency's offices and centers, including facilities for home-based programs and the geographic areas served by each. Counties in which services are provided must be identified.

4) The location of other child care facilities in the area that serve Head Start eligible children.

The maps must provide sufficient detail to clearly identify the service and recruitment area or areas. Where these areas constitute only a part of a county, the names of standard recognized county subdivisions, such as townships, cities, villages or unincorporated places, must be used to show the areas to be served. If only a portion of a standard county subdivision is to be served, the maps must clearly delineate such areas.

##### 2. Objectives and Results or Benefits Expected

a. Grantees must provide information on the program's long range objectives to be accomplished in the three year period. These objectives should directly relate to meeting the needs and addressing the problems of the program participants and the community. These needs should have been identified in the community needs assessment and might, for example, include working with high risk children or families, adult literacy, transition to public schools, special emphasis or nutrition or other efforts. (These objectives should be in addition to the Head Start goals required under 45 CFR 1304.1-3, and the Head Start Program Performance Standard objectives specified under 1304.2-4. See 3.b. below)

b. Grantees must provide information on the major activities that will be undertaken to achieve these long range objectives. These activities should be delineated for each year of the three year funding period. Information should be provided regarding timelines and methods for measuring progress and accomplishments (results and benefits).

c. Grantees must also submit a description of the planning process used to arrive at these long range objectives. The description must include who was involved in the process, when it took place and how it was accomplished.

d. Applicants must provide information or progress made in meeting long range objectives and in implementing major activities established for the previous year.

##### 3. Approach

a. Program Design: Applicants must fill out the Head Start Program Design form attached to these instructions, including information on type and

duration of services being provided to children and families, funded enrollment and staff employment.

Applicants should also provide a short explanation of the options being implemented, relating them to the identified needs of the program participants and the community as identified in the community needs assessment. Any special features of the options or any special options being implemented should be described.

b. Program Components: Applicants must provide information on how they intend to meet or exceed the goals set forth in the Head Start Program Performance Standards (45 CFR 1304.1-3) and how they intend to comply with the Head Start Program Performance Standard objectives specified under 45 CFR 1304.2-4. These Standards require that grantees have a service plan for each component.

(Education, Health Services (Medical, Dental, Nutrition and Mental Health), Social Services, Parent Involvement). While it is not necessary to submit these plans with the grant application, it is necessary to submit the significant activities for each component that will serve to illustrate the timing and resources that will be used to ensure compliance with the Performance Standards.

Applicants must also provide information on the significant activities that will be implemented to provide services to handicapped children.

c. Applicants must provide information on progress made in meeting program requirements, on causes of program deficiencies, on the identification of program issues and on plans for improving the management and delivery of services. Mention should be made of specific needs for improvement identified through such documents as audits, monitoring reports, self-assessments, cost analyses, Program Information Report data, fiscal reports and correspondence from regional offices.

##### 4. Staffing and Management

a. Program Staff: By completing the Appendix to SF 424A of the grant application, applicants will have listed also proposed program staff. In addition, applicants must provide information regarding:

(1) Education and experience required for key staff positions;

(2) Plans for staff pre-service and in-service training and technical assistance opportunities;

(3) Volunteer participation in the program, including volunteer supervision and training opportunities; and

(4) Staff supervision, including an organizational chart.

b. Program Management: Applicants must provide a short summary of the systems it has in place that ensure effective program administration and management. The summary should include the areas of personnel, record keeping and financial and property management, and procurement.

The applicant must also describe its system for effectively monitoring the provision of quality services to Head Start children and families throughout the operational year. Grantee's plans for self-assessment should be provided.

c. The applicant must show how programmatic coordination will be managed in instances where the applicant delivers services in cooperation with the child development and child care programs such as State or Title XX funded preschool and childcare.

##### 5. Budget Appropriateness and Reasonableness

a. Applicant must relate the proposed budget to the level of effort indicated in the proposal. Information must be provided regarding the source and amounts of the non-Head Start resources (e.g., Medicaid, Department of Agriculture nutrition programs, volunteers, services to handicapped children) that will be mobilized in addition to the Federal funds requested.

b. The applicant must show how coordination will be managed from a budget perspective in instances where the Head Start program delivers services in cooperation with other child development and child care programs such as State of Title XX funded preschool and childcare.

##### B: Application for The Second or Third Year of Funding

Grantees entering the second or third year of their three year grant application cycle are required to complete Sections 1-5 below.

##### 1. Need for Assistance and Geographic Area

Applicant must update the application information previously submitted under A.1.a-c for funding in the first year of the three year grant application cycle. Significant changes must be explained, especially those that have resulted in proposed revisions in the objectives, design or implementation of the program.

If no changes have occurred, the application should so state. No additional response to this criterion for review is required.



**2. Objectives and Results or Benefits Expected**

Applicant must provide information regarding changes to long range objectives and major activities submitted in response to A.2.a-c in the application for funding in the first year of the three year grant application cycle. If no changes have occurred, the application should so state.

Applicant must respond to A.2.d.

**3. Approach**

If major changes from the previous year's program are being proposed, applicant must submit information required under A.3.a-b that is needed to explain the changes. Major changes include an increase or decrease in the number of children being served, changes in the program options being implemented, changes in staffing patterns, the communities being served, the delegates being funded or a change in administrative costs. If no major changes have occurred, no information need be submitted.

Applicant must respond to A.3.c.

**4. Staffing and Management**

Applicant must update the application information previously submitted under A.4.a-c for funding in the first year of the three year grant application cycle.

If no changes have occurred, the application should so state. No additional response to this criterion for review is required.

**5. Budget Appropriateness And Reasonableness**

If major changes from the previous year's program are being proposed, submit the information required in A.5 that is needed to explain the changes.

If no changes have occurred, the application should so state. No additional response to this criterion for review is required.

**C: Application For Supplemental Funds**

For supplemental assistance requests, applicant must explain the reason for the request and justify the need for additional funding. Applicants must indicate whether the request is for a permanent funding increase or if the request is for one-time funds. An SF 424 and 424A, including evidence of Policy Council approval, must also be submitted.

**D: Application For Grant Amendment**

Grantees wanting to make a major program change within the course of a grant year (with no increase or decrease of the budget) must submit a request for a grant amendment and secure approval from the regional office prior to making the change. At a minimum, grant amendments must be requested when the grantee intends to increase or decrease the number of children being served, change the program options being implemented, change staffing patterns, the communities being served, the delegates being funded or change administrative costs.

Grantees must explain the reason for the request and submit a SF 424 and 424A, including evidence of Policy Council approval.

**Program Narrative: Instructions for the Head Start Program Design Form**

The purpose of this form is to provide information on the type and duration of services being provided to children and families, on planned enrollment and on staff employment. Each grantee and delegate agency must fill out a separate form.

Separate sections 1. (Program Schedule) and 2. (Staff Employment) should be filled out for each group of children served for different hours of service each year. The hours of service are calculated by using the number of hours per day, days per week and days per year of classroom operations or socialization experiences, plus the number and duration of home visit.

Section 3. (Summary of Program Design Information) should be filled out and submitted only once for each grantee and delegate agency.

The following instructions refer only to those items on the form which need additional clarification.

**Grantee/delegate identification:** Enter the official grant number and, if appropriate, the official delegate identification number.

**Program schedule number:** Give each schedule an identifying number beginning with number 1.

**Program option identification:** Identify the program option of each program schedule as center-based (CB), home-based (HB), combination program (CO) or other (OT). Double and split session classes are to be considered center-based. Double session classes have the same teacher working with one group of children in the morning and another

group of children in the afternoon. Split sessions have the same teacher working with different groups of children on different days of the week.

Programs other than center- and home-based, such as combination programs (CO) or other (OT) programs, should be identified, and the items on the form that most appropriately describe the services provided by these programs should be filled out.

**3. Number of hours of center-based class per child per day.** Record the number of hours that a child will spend in the center each day. Do not count transportation time or home visits.

**5. Number of days of center-based class per child per year.** Record the number of planned days that class will be held during the year. Use an exact figure for number of days of operation that excludes planned vacation time and days when the center will not be open to the children.

**9. Number of home visits per child per year.** Record the planned number of home visits for each child to be made during the year by the teacher or the home visitor.

**10. Number of hours per home visit.** Record the number of hours that teachers or home visitors will spend with children and families on each home visit. Do not count staff members' travel time.

**20. Employment.** Provide information on the average annual length of employment for the positions indicated. In cases where individuals will perform more than one role in the program, the following rules should be followed for information related to this question:

Head Start directors with additional responsibilities should always be reported in the director category. For example, a director/teacher should always be reported as a director in this section of the form.

Component coordinators with dual roles should be reported under the role that consumes the most amount of time or that is mentioned first in the job title. For example, a social services/parent involvement position that will require that 70% of the employee's time be devoted to parent involvement should always be reported as a parent involvement position. A social services/parent involvement position that requires half of the employee's time be devoted to each component should be reported as a social services coordinator.

BILLING CODE 4130-01-M

**HEAD START PROGRAM DESIGN FORM**

Grantee/Delegate # \_\_\_\_\_

**1. Program Schedule**

Program Schedule Number: \_\_\_\_\_

Program Option Identification: (CB/HB/CO/OT) \_\_\_\_\_

1. Funded enrollment \_\_\_\_\_

2. Number of CB/CO/OT classes, or number of HB home visitors \_\_\_\_\_

If this is a double session program, enter (D)  
If this is a split session program, enter (S)  
If neither, enter (N) \_\_\_\_\_

3. Number of hours of CB/CO/OT class per child per day \_\_\_\_\_

4. Number of days of CB/CO/OT class per child per week \_\_\_\_\_

5. Number of days of CB/CO/OT class per child per year \_\_\_\_\_

6. Number of CB/CO/OT parent/teacher conferences per child per year \_\_\_\_\_

7. Number of hours per HB socialization experience \_\_\_\_\_

8. Number of HB socialization experiences per child per year \_\_\_\_\_

9. Number of CB/HB/CO/OT home visits per child per year \_\_\_\_\_

10. Number of hours per CB/HB/CO/OT home visit \_\_\_\_\_

**2. Paid Staff Employment**

11. Number of hours of employment of teachers or home visitors per week \_\_\_\_\_

12. Number of days of employment of teachers or home visitors per week \_\_\_\_\_

13. Number of days of employment of teachers or home visitors per year \_\_\_\_\_



Grantee/Delegate # \_\_\_\_\_

14. Number of hours of employment of aides per week \_\_\_\_\_
15. Number of days of employment of aides per week \_\_\_\_\_
16. Number of days of employment of aides per year \_\_\_\_\_

## 3. Summary of Program Design Information

## 17. Funded enrollment by program option:

Center-based enrollment \_\_\_\_\_

Home-based enrollment \_\_\_\_\_

Combination program enrollment \_\_\_\_\_

Other enrollment \_\_\_\_\_

Total enrollment \_\_\_\_\_

## Enrollment by county:

County	Number of Children Served
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

18. Handicapped enrollment: \_\_\_\_\_
19. Number of centers to be operated: \_\_\_\_\_
20. Employment. Indicate the average annual length of employment for the following positions:

Position	Hours per Week of Employment	Days per Week of Employment	Days per Year of Employment
Director	_____	_____	_____
Coordinators	_____	_____	_____
Education	_____	_____	_____
Health	_____	_____	_____
Social Serv.	_____	_____	_____
Parent Invol.	_____	_____	_____
Handicapped	_____	_____	_____

BILLING CODE 4130-01-C

-PD2-

## Appendix to SF 424A: Head Start Line-Item Budget Instructions

Each grantee, delegate and Parent Child Center must complete a separate form, filling out all columns of the line-item budget and answering the questions that follow.

The line-items are organized into 12 budget categories: Personnel, Fringe Benefits, Occupancy, Child Travel, Staff Travel, Nutrition and Food, Furniture and Equipment, Supplies, Other Child Services, Other Parent Services, Other and Indirect Costs. The line-items in the budget are neither all inclusive nor necessarily relevant to each program, but are examples of appropriate budget items. Please attempt to use the standard line-item even though the title or item may be somewhat different from the one in your program (e.g.: use teacher aide for teacher assistant or associate teacher). If your budget includes titles or items that are not listed, include them in the last line in the appropriate budget category.

**Funds for handicapped services:** Funds for serving handicapped children should generally be entered in the following line-items: 1.b.7 and 1.j.3, 2, 4.5, 8.6, 9.6, 9.7, 11.11, 11.12 and 12. In cases where handicapped costs are a part of other line-items, they should be identified under question 15. below as a part of the handicapped function.

**Funds for Training and Technical Assistance (T&TA):** Funds for providing training and technical assistance must be entered in line-items 11.8 and 11.9.

**Column A:** All grantees and delegates must enter budgeted ACYF costs plus planned non-Federal cash expenditures in the appropriate budget categories in Column A. All Federal and non-Federal cash should be accounted for in this column, including all cash donations.

**Column B:** All grantees and delegates must next enter the value of all budgeted non-Federal in-kind contributions in the appropriate line-items in Column B.

**Column C:** All grantees and delegates must identify every proposed ACYF and non-Federal administrative cost included in all line-items identified under Columns A and B. These proposed administrative costs must be entered in Column C. If there is no line under Column C, there is no possible administrative cost for that item. Costs entered in line-items 1.a and 11.1-5 are considered 100% administrative and the total of Column A and Column B for these line-items must be entered in Column C. Line-items marked with a percentage sign (%) indicate that the amount of administrative costs can vary and is to be determined by the grantee

or delegate agency. Both the percentage of these line-items and the amount of dollars attributed to administrative costs must be indicated in Column C.

**Column D:** All grantees and delegates must identify the number of staff proposed for each personnel category, and indicate the number that are full time (more than 32 hours per week and at least 34 weeks per year) and part time (less than full time) for each category. Be sure not to count any staff person more than once.

REFERENCES IN PARENTHESES NEXT TO BUDGET CATEGORIES OR LINE-ITEMS REFER TO THE OBJECT CLASS CATEGORY INTO WHICH THE COST MUST BE PLACED IN SF 424A, SECTION B OF THE APPLICATION FORM. THE SUM OF ALL GRANTEE AND DELEGATE AGENCY ACYF COSTS AND NON-FEDERAL SHARE REPORTED IN THIS APPENDIX MUST EQUAL THE AMOUNTS SPECIFIED IN SF 424A OF THE APPLICATION FORM.

The following instructions refer only to those items which need additional clarification:

## Head Start Line-Item Budget

1. **Personnel.** For each position, total all staff salaries and enter the sum on the appropriate line. In deciding where to place each title, follow the category definitions given below. Consultants and substitutes paid as staff with fringe benefits, rather than through contract, should be listed in this section of the budget.

a. **Administration.** Enter positions that have executive responsibilities and/or responsibilities related to planning, advertising, legal, accounting and bookkeeping, personnel, purchasing and general central office services.

b. **Component coordinators.** Enter all positions involved in coordinating component services, including coordinators who also have other functions in the program (e.g., Nutrition Coordinator/Cook or Head Start Director/Education Coordinator). Do not enter salaries or count number of staff more than once.

c. **Education.** Enter educational staff such as Teachers, Teacher Aides, Home Visitors and substitutes who are staff members eligible for fringe benefits.

d. **Health.** Enter staff devoted to the provision of health services such as Health Aides, etc.

e. **Nutrition.** Enter Head Start nutrition component staff such as Cooks and Cook Aides. Do not include nutrition staff costs that will be reimbursed by USDA.

f. **Social services.** Enter social service staff such as Social Service Aides.

g. **Parent involvement.** Enter positions devoted to parent involvement in Head Start such as Parent Involvement Aides.

h. **Maintenance.** Enter positions devoted to maintaining the premises of the grantee's program, such as Janitors, Housekeepers, etc.

i. **Transportation.** Enter transportation staff such as Bus or Van Drivers, Bus Aides, etc.

j. **Dual roles.** Enter positions (except Coordinators) that are split between two or more of the above categories such as Director/Teacher, Social Services/Parent Involvement Aide, Teachers/Van Aides, Cook/Secretary, etc. Also enter other handicapped staff not already entered.

**Total personnel.** Sum should be the same as that given on SF 424A, Section B, Object Class Category 6a of the Application Form.

2. **Fringe benefits.** Enter the amounts for each proposed fringe benefit unless these costs are part of an approved indirect cost rate. Social Security is the same as FICA payments and both State and Federal (FUTA) unemployment should be entered on the Unemployment line. Total administrative costs for this budget category should be calculated based on the percentage of salaries assigned to administration. **Total Fringe** should be the same as that given on SF 424A, Section B, Object Class Category 6b of the Application Form.

3. **Occupancy.** Enter proposed occupancy expenses. Rent may be charged only when the applicant does not own or have substantial interest in the real property. Depreciation/use allowances should be charged when the building is owned by or has been donated to the applicant or there is a less-than-arms-length lease agreement.

4. **Child travel.** List proposed costs associated with transporting children to and from the center, doctors, on field trips, etc. Enter costs for transportation of handicapped children separately, if possible. Include all the costs of maintaining and repairing vehicles that transport children and the cost of contracts with transportation firms. (Vehicle purchase should be entered in budget category 7 below).

5. **Staff travel.** Enter travel costs, including per diem expenses.

6. **Nutrition and food.** Enter proposed ACYF nutrition costs. Do not include nutrition costs that will be reimbursed by USDA.

7. **Furniture & equipment.** Enter proposed costs of furniture, equipment, and equipment leases. Repair costs and maintenance contracts of any amount should also be entered with the exception of vehicle maintenance and



repair, which is to be entered in budget category 4 above. The fair rental rate of loaned equipment should be entered in Column B.

8. *Supplies.* List the proposed budgeted amounts for consumable supplies and equipment. Enter costs of supplies for handicapped children separately, if possible.

9. *Other child services.* List other proposed costs for direct services to children such as medical, dental, and mental health services and other consultant services. If substitutes or consultants who provide direct services to children are to be paid through contract rather than as staff, they should be listed in this category. Enter in-kind value of volunteers (parents or others) who participate in education component activities. Enter costs for handicapped children separately, if possible.

10. *Other parent services.* List the proposed costs for parent activities and parent travel (local and out-of-town).

11. *Other.* List the proposed costs for expenses not captured elsewhere. Enter in-kind value of volunteers (parents or others) who participate in activities not related to the education component. Note the line-items for proposed costs for handicapped and training and technical assistance services.

12. *Indirect costs.* Enter the appropriate amount of indirect costs being charged to the grant. Note that

items included in the grantee's indirect cost rate should not also be included above as direct cost line-items.

13. *Totals:*

*All budget categories.* Add the amounts from each of the budget category totals for columns A. and B., Federal and non-Federal costs, and C., Administrative Costs.

*Total budget.* Add Totals of Columns A. and B., ACYF cash, non-Federal cash and the value of non-Federal in-kind contributions. This total (planned total Federal and non-Federal cost of the proposed program) must equal the amount of Federal and non-Federal funds indicated in SF 424A of the grant application.

*Total ACYF budget.* Indicate the amount of ACYF funds being requested in the categories indicated, including funds for implementing the program options, handicapped services funds and training and technical assistance funds. This amount should equal the amount of Federal funds requested in SF 424A of the grant application.

*Total non-Federal budget.* Indicate the amount of non-Federal cash and the value of non-Federal in-kind contributions being provided on separate lines. This amount should equal the amount of non-Federal share indicated in SF 424A of the grant application.

14. *Other funds.* Record amounts of State and other Federal funds the program will use to provide Head Start services. State funds that are counted as a part of the non-Federal share should be separated from State funds not counted as part of the non-Federal share. If any of these State funds are used to provide services to additional Head Start eligible children, indicate the number of children served.

15. *Functional allocation of costs.* The information in the line-item budget will be used by ACYF to allocate all ACYF and non-Federal costs to specific program components or functional areas: Education (E), Health (H), Nutrition (N), Social Services (S), Parent Involvement (P), Handicapped Services (HS), Occupancy (Occ) Transportation (T) and Other (Oth).

Review question 15. below to determine if the manner in which these funds will be allocated across functions is satisfactory.

16. *Programs options.* The information in the line-item budget will be used by ACYF to allocate all ACYF and non-Federal costs among specific program schedules and options. Grantees and delegate agencies which operate more than one option should respond to this question.

BILLING CODE 4130-01-M

Grantee/Delegate Number \_\_\_\_\_

HEAD START LINE-ITEM BUDGET

	A. Total Cash: ACYF and Non-Federal	B. Non- Federal In-kind	C. Admin. Costs	D. Number of Persons FT PT	
1. <u>Personnel</u> (object class category 6.a)					
a. Administration					
1) Executive Director	_____	_____	_____	_____	_____
2) Fiscal Off./Accountant	_____	_____	_____	_____	_____
3) Head Start/Del. Dir.	_____	_____	_____	_____	_____
4) Bookkeeper	_____	_____	_____	_____	_____
5) Secretary	_____	_____	_____	_____	_____
6) Center Director	_____	_____	_____	_____	_____
A) _____	_____	_____	_____	_____	_____
B) _____	_____	_____	_____	_____	_____
b. Component Coordinators					
1) Education Coordinator	_____	_____	_____	_____	_____
2) Head Start Director/ Education Coordinator	_____	_____	§ _____	_____	_____
3) Health Coordinator	_____	_____	_____	_____	_____
4) Social Services Coordinator	_____	_____	_____	_____	_____
5) Parent Involvement Coordinator	_____	_____	_____	_____	_____
6) Social Serv./Parent Invol. Coordinator	_____	_____	_____	_____	_____
7) Handicapped Services Coordinator	_____	_____	_____	_____	_____
A) _____	_____	_____	§ _____	_____	_____
B) _____	_____	_____	§ _____	_____	_____



	A. Total Cash: ACYF and Non-Federal	B. Non- Federal In-kind	C. Admin. Costs	D. Number of Persons FT PT	
c. Education					
1) Teacher	_____	_____		_____	_____
2) Teacher Aide	_____	_____		_____	_____
3) Home Visitor	_____	_____		_____	_____
4) Substitutes	_____	_____			
5) Other	_____	_____		_____	_____
d. Health					
1) Health Aide	_____	_____		_____	_____
2) Other Health Staff	_____	_____		_____	_____
e. Nutrition					
1) Cook	_____	_____		_____	_____
2) Cook Aide	_____	_____		_____	_____
3) Other Nutrition Staff	_____	_____		_____	_____
f. Social Services					
1) Social Service Aide	_____	_____		_____	_____
2) Other Soc. Serv. Staff	_____	_____		_____	_____
g. Parent Involvement					
1) Parent Invol. Aide	_____	_____		_____	_____
2) Other P.I. Staff	_____	_____		_____	_____
h. Maintenance					
1) Housekeeper/Custodian	_____	_____	% _____	_____	_____
2) Other Maint. Staff	_____	_____	% _____	_____	_____
i. Transportation					
1) Bus Driver	_____	_____		_____	_____
2) Bus Aide	_____	_____		_____	_____
3) Other Trans. Staff	_____	_____	% _____	_____	_____

	A. Total Cash: ACYF and Non-Federal	B. Non- Federal In-kind	C. Admin. Costs	D. Number of Persons	
				FT	PT
j. Dual Roles					
1) Family Worker (SS/PI)	_____	_____		_____	_____
2) Teacher Aide/Bus Driver/Bus Rider	_____	_____		_____	_____
3) Other Handicapped Services Staff	_____	_____		_____	_____
A) _____	_____	_____	% _____	_____	_____
B) _____	_____	_____	% _____	_____	_____
C) _____	_____	_____	% _____	_____	_____
TOTAL PERSONNEL					
	_____	_____	_____	_____	_____
2. <u>Fringe Benefits</u> (Object class category 6.b)					
1) Social Security	_____	_____			
2) State Disability	_____	_____			
3) Unemployment	_____	_____			
4) Worker's Compensation	_____	_____			
5) Health/Dent./Life Ins.	_____	_____			
6) Retirement	_____	_____			
7) Other Fringe	_____	_____			
TOTAL FRINGE					
	_____	_____	_____		
3. <u>Occupancy</u> (Object class category 6.h)*					
1) Rent	_____	_____	% _____		
2) Depreciation/Use All.	_____	_____	% _____		
3) Utilities	_____	_____	% _____		
4) Telephone	_____	_____	% _____		
5) Building Insurance	_____	_____	% _____		
6) Child Accident Ins.	_____	_____			
7) Maintenance/Repair	_____	_____	% _____		
8) Renovation/Alteration	_____	_____	% _____		
9) Other Occupancy Costs	_____	_____	% _____		
TOTAL OCCUPANCY					
	_____	_____	_____		



	A. Total Cash: ACYF and Non-Federal	B. Non- Federal In-kind	C. Admin. Costs
4. <u>Child Travel</u> (Object class category 6.h)			
1) Vehicle Contract/Rental			
2) Vehicle Maint./Repair			
3) Vehicle Insurance			
4) Field Trips			
5) Handicapped Child Travel			
6) Other Child Travel			
TOTAL CHILD TRAVEL			
5. <u>Staff Travel</u>			
1) Out-of-Town (6.c)			\$
2) Local (6.h)			\$
TOTAL STAFF TRAVEL			
6. <u>Nutrition and Food</u> (Object class category 6.h)			
1) Children's Food			
2) Adult's Food			
3) Other Nutrition Costs			
TOTAL FOOD			
7. <u>Furniture &amp; Equipment</u> (Object class category 6.d)			
1) Vehicle Purchase			\$
2) Office			\$
3) Classroom/Playground			
4) Kitchen			
5) Equip. Maint./Repair*			\$
6) Other Furn. & Equip.			\$
TOTAL FURNITURE & EQUIPMENT			

	A. Total Cash: ACYF and Non-Federal	B. Non- Federal In-kind	C. Admin. Costs
8. <u>Supplies</u> (Object class category 6.e)			
1) Office/Copying/Postage			\$
2) Cleaning			\$
3) Classroom/Home-based			
4) Medical/Dental			
5) Kitchen			
6) Handicapped Supplies			
7) Other Supplies			\$
TOTAL SUPPLIES			
9. <u>Other Child Services</u> (Object class category 6.h) *			
1) Education Consultant			
2) Substitutes			
3) Volunteers in Educ.			
4) Medical & Dental Exam/Screening/Care			
5) Mental Health Assessment/Care			
6) Nutrition Consultants			
7) Speech Therapy			
8) Handicapped Services			
9) Other Services			
TOTAL OTHER CHILD SERVICES			
10. <u>Other Parent Services</u>			
1) Parent Activities(6.h) Parent Travel			
2) a) Out-of-Town (6.c)			
3) b) Local (6.h)			
4) Other Activities(6.h)			
TOTAL OTHER PARENT SERVICES			



	A. Total Cash: ACYF and Non-Federal	B. Non- Federal In-kind	C. Admin. Costs
11. Other (Object class category 6.h)*			
1) Audit (6.h)*	_____	_____	_____
2) Legal (6.h)*	_____	_____	_____
3) Theft Bond	_____	_____	_____
4) General Liability Ins.	_____	_____	_____
5) Payroll/Accounting	_____	_____	_____
6) Publications/Subscript.	_____	_____	§ _____
7) Printing/Advertising	_____	_____	§ _____
8) T&TA: CDA	_____	_____	_____
9) Other T&TA	_____	_____	§ _____
10) Other Training	_____	_____	§ _____
11) Handicapped Training	_____	_____	_____
12) Other Handicapped Costs	_____	_____	_____
13) Volunteers (non-Educ.)	_____	_____	§ _____
14) Other	_____	_____	§ _____
TOTAL OTHER	_____	_____	_____
12. Indirect Costs	_____	_____	§ _____
13. TOTALS:			
ALL BUDGET CATEGORIES	\$ _____	\$ _____	\$ _____
TOTAL BUDGET (A+B)		\$ _____	
TOTAL ACYF BUDGET: (a+b+c below)		\$ _____	
a. Program Funds		\$ _____	
b. Handicapped Services Funds		\$ _____	
c. T&TA Funds		\$ _____	
TOTAL NON-FEDERAL BUDGET		Cash: \$ _____ In Kind: \$ _____	

\* If these services are provided by an individual who is not an employee, enter these costs in the object class category 6.h. of SF 424A, Section B. If these services are provided through a contract, enter these costs on line 6.f. of SF 424A, Section B.

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14. Other Funds. Indicate State or other Federal funds being used by the program. If the state funds are used to provide services to additional Head Start eligible children, indicate the number of children served.

	Funds	Children
USDA	_____	_____
State: Counted as NFS	_____	_____
State: Not counted as NFS	_____	_____
Other	_____	_____

15. Functional Allocation of Costs. ACYF will automatically allocate line-item costs among program component functions. For example, all education staff, services and supplies will be allocated to the education component and all health staff, services and supplies will be allocated to the health component. The automatic allocations are as follows:

Staff and Coordinators. 100% to the appropriate component function or split evenly between functions except for the position of Head Start Director/Education Coordinator which is allocated 75% to Administration and 25% to Education.

Maintenance. 95% Occupancy and 5% Administration.

Dual Roles. Split equally between the appropriate component roles except for the position of Teacher Aide/ Bus Driver/Rider which is allocated 80% to Education and 20% to Transportation.

Occupancy. Rent, Depreciation/Use Allowance, Utilities, Building Insurance, Maintenance/Repair and Renovation is 95% Occupancy and 5% Administration; Telephone is 75% Occupancy and 25% Administration; and Children's Accident Insurance is 100% Occupancy.

Staff Travel. Local travel is 95% Transportation and 5% Administration. Out-of-town travel is 50% Transportation and 50% Administration.

Furniture & Equipment. Office and Equipment Maintenance and Repair are 100% Administration, Vehicle purchase is 100% Transportation, Classroom/Playground is 100% Education and Kitchen is 100% Nutrition.

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Supplies. Office/Copying/Postage is 100% Administration. Cleaning supplies are 95% Occupancy and 5% Administration.

Other. 100% Administration. Training line-items are 100% Other.

Indirect Costs. 100% Administration.

If the above allocations are inappropriate or incorrect for a particular program, specify the line-item and the correct functional allocation [Education (E), Health (H), Nutrition (N), Social Services (S), Parent Involvement (P), Occupancy (Occ) Transportation (T), Handicapped Services (HS) and Other (Oth)] and the percentage of total budgeted costs (e.g., SS/PI Aide: S 70% and P 30%):

Line-Item	Functional Allocation (percent)

16. Program Options. ACYF will automatically allocate line-item costs among program options and schedules. For example, all teacher and aide salaries and fringe benefits will be allocated to the center-based program and all home visitor salaries and fringe benefits will be allocated to the home-based program. Additional automatic allocations are as follows:

Personnel. Nutrition and maintenance staff salaries will be allocated based on the hours children in each option or schedule spend in the center. All other staff salaries and fringe benefits will be prorated based on the number of children enrolled in each option or schedule.

Non-personnel. Planned expenditures for occupancy, food, child travel classroom equipment, maintenance and kitchen supplies will be allocated based on the hours children in each option and schedule use the program's center facilities or transportation systems.

If any of these automatic allocations are inappropriate for your program, indicate below only those line-items that are exceptions.

- A. Personnel: If the automatic allocations indicated above are inappropriate to your program, provide the appropriate percentage allocation of personnel line-items for each option:

Personnel Position	Percentage Allocation			
	CB	HB	CO	OT

- B. Non-personnel. If the automatic allocations indicated above are inappropriate to your program, provide the appropriate percentage allocation of non-personnel line-items for each option:

- a. Occupancy: Indicate the line-item and percentage of occupancy costs for each option.

Occupancy Line-Items	Percentage Allocation			
	CB	HB	CO	OT

- b. Child travel: Indicate the line-item and percentage of child travel costs for each option.

Child Travel Line-Items	Percentage Allocation			
	CB	HB	CO	OT



c. **Staff travel:** Indicate the line-item and percentage of staff travel costs for each option.

Staff Travel Line-Items	Percentage Allocation			
	CB	HB	CO	OT

d. **Food:** Indicate the line-item and percentage of food costs for each option.

Food Line-Items	Percentage Allocation			
	CB	HB	CO	OT

e. **Supplies:** Indicate the line-item and percentage of supply costs for each option.

Supply Line-Items	Percentage Allocation			
	CB	HB	CO	OT

f. **All Other Non-Personnel Costs:** Indicate below percentage of other non-personnel line items for each option.

Other Non-Personnel Line-Items	Percentage Allocation			
	CB	HB	CO	OT

**DEPARTMENT OF HOUSING AND  
URBAN DEVELOPMENT**

**Office of Administration**

[Docket No. N-88-1910]

**Submission of Proposed Information  
Collection to OMB**

**AGENCY:** Office of Administration, HUD.  
**ACTION:** Notice.

**SUMMARY:** The proposed information collection required described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**ADDRESS:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** David S. Cristy, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

**SUPPLEMENTARY INFORMATION:** This Notice informs the public that the Department of Housing and Urban Development has submitted to OMB, for emergency processing, an information collection package with respect to the

Supportive Housing Demonstration Program.

The information collection requirements in this package are the result of amendments to the Supportive Housing program contained in the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. 100-628 (approved November 7, 1988). Under section 485 of the 1988 McKinney Act, the Department has 60 days from the date of statutory enactment (i.e., by January 6, 1989) to publish a notice implementing the new provisions. In order to meet this statutory deadline, the Department has requested OMB to complete its paperwork review of the Supportive Housing notice by December 28, 1988. Any control number issued by OMB to cover this emergency situation would be valid for no more than 90 days.

To ensure that the public has an adequate opportunity to comment on these information collection requirements, HUD also intends to submit the Supportive Housing notice to OMB for regular paperwork review. The public will then have an additional 60-day period in which to comment on the paperwork requirements.

The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members

of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and (9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

**Authority:** Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Date: December 16, 1988.

John T. Murphy,  
Director, Information Policy and Management Division.

**Proposal:** Supportive Housing Demonstration Program (FR-2585).

**Office:** Housing.

**Description of the Need for the Information and Its Proposed Use:** This program is necessary to allow HUD to determine the eligibility of private nonprofit organizations or governmental entities to receive funding under the demonstration program. It is needed to assess the relative capability of these organizations to operate housing and supportive services for the homeless population.

**Form Number:** None.

**Respondents:** State or Local Governments and Non-Profit Institutions.

**Frequency of Submission:** On Occasion.

**Reporting Burden:**

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Permanent Housing	100		1		44		4,400
Environmental Assessment	100		1		14		1,400
Transitional Housing	300		1		44		13,200
Recordkeeping	400		1		1		400

**Total Estimated Burden Hours:** 19,400.  
**Status:** Revision.

**Contact:** Morris Bourne, HUD, (202) 755-9075; John Allison, OMB, (202) 395-6880.

Dated: December 16, 1988.

[FR Doc. 88-29736 Filed 12-27-88; 8:45 am]

BILLING CODE 4210-01-M

[Docket No. N-88-1909]

**Submission of Proposed Information  
Collection to OMB**

**AGENCY:** Office of Administration, HUD.  
**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork

Reduction Act. The Department is soliciting public comments on the subject proposal.

**ADDRESS:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: John Allison, OMB Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** David S. Cristy, Reports Managements



Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 755-6050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Cristy.

**SUPPLEMENTARY INFORMATION:** This Notice informs the public that the Department of Housing and Urban Development has submitted to OMB for emergency processing, an information collection package with respect to the Supplemental Assistance for Facilities to Assist the Homeless (SAFAH) program under Subtitle D of Title IV of the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100-77, approved July 22, 1987).

The information collection requirements in this package are the result of amendments to the SAFAH program contained in the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. 100-628 (approved November 7, 1988). Under statutory enactment (i.e., by January 8, 1989) in which to publish a Notice implementing the new provisions. In order to meet this statutory deadline, the Department has requested OMB to complete its paperwork review of the SAFAH Notice by December 28, 1988. Any control number issued by OMB to

cover this emergency situation would be valid for no more than 90 days.

To ensure that the public has an adequate opportunity to comment on these information collection requirements, HUD also intends to submit the SAFAH Notice to OMB for regular paperwork review. The public will then have an additional 60 day period in which to comment on the paperwork requirements.

The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the description of the need for the information and its proposed use; (4) the agency form number, if applicable; (5) what members of the public will be affected by the proposal; (6) how frequently information submissions will be required; (7) an estimate of the total numbers of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (8) whether the proposal is new or an extension, reinstatement, or revision of an information collection requirement; and

(9) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

**Authority:** Section 3507 of the Paperwork Reduction Act, 44 U.S.C. 3507; section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: December 16, 1988.

**John T. Murphy,**  
Director, Information Policy and Management Division.

**Proposal:** Supplemental Assistance for Facilities to Assist the Homeless.

**Office:** Policy Development and Research.

**Description of the Need for the Information and Its Proposed Use:** This program, created by the Stewart B. McKinney Homeless Assistance Act, provides grants and interest-free advances to stimulate community-wide innovative efforts to assist homeless families and individuals. Proposals by state or local governments, urban counties, and non-profit organizations for participation in the Supplemental Assistance for Facilities to Assist the Homeless will be solicited.

**Form Number:** None.

**Respondents:** State or Local Governments and Non-Profit Institutions.

**Frequency of Submission:** Single-time.  
**Reporting Burden:**

	Number of respondents	x	Frequency of response	x	Hours per response	=	Burden hours
Application Requirements:							
Comprehensive Assistance	250		1		100		25,000
Supplemental Assistance	30		1		100		1,560

**Total Estimated Burden Hours:** 26,560.  
**Status:** Reinstatement.

**Contact:** Sarajane R. Karadhill, HUD, (202) 755-5537; John Allison, OMB, (202) 395-6880.

Dated: December 16, 1988.

[FR Doc. 88-29737 Filed 12-27-88; 8:45 am]

**BILLING CODE 4210-01-M**

[Docket No. D-88-891]

**Acting Regional Administrator, Region IV (Atlanta); Designation**

**AGENCY:** Department of Housing and Urban Development.

**ACTION:** Designation.

**SUMMARY:** Updates the designation of officials who may serve as Acting Regional Administrator for Region IV.

**EFFECTIVE DATE:** November 3, 1988.

**FOR FURTHER INFORMATION CONTACT:** Henry E. Rollins, Director, Management Systems Division, Office of Administration, Atlanta Regional Office, Department of Housing and Urban Development, Room 634, Richard B. Russell Federal Building, 75 Spring Street, SW., Atlanta, Georgia 30303-3388, 404-331-5199.

**Designation of Acting Regional Administrator for Region IV**

Each of the officials appointed to the following positions is designated to serve as Acting Regional Administrator during the absence of, or vacancy in the position of, the Regional Administrator, with all the powers, functions, and duties redelegated or assigned to the Regional Administrator: Provided, That no official is authorized to serve as Acting Regional Administrator unless all other employees whose names or titles

precede his/hers in this designation are unable to serve by reason of absence:

1. Director Regional Administrator
2. Director, Office of Housing
3. Director, Office of Administration
4. Director, Office of Public Housing
5. Director, Office of Community Planning and Development
6. Regional Counsel
7. Georgia Program Coordinator
8. Director, Office of Fair Housing and Equal Opportunity
9. Director, Program Planning and Evaluation
10. Director, Operational Support Divisions

This designation supersedes the designation effective October 19, 1987, (52 FR 45871, December 2, 1987).

(Delegation of Authority by the Secretary effective May 4, 1962, (27 FR 4319, May 4, 1962); Dept. Interim Order II (31 FR 815, January 21, 1966).

This designation shall be effective as of November 3, 1988.

**Raymond A. Harris,**  
Regional Administrator-Regional Housing Commissioner, Region IV (Atlanta).  
[FR Doc. 88-29735 Filed 12-27-88 8:45 am]  
**BILLING CODE 4210-01-M**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[OR-010-09-4322-02:GP9-076]

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of a meeting of the Lakeview District Grazing Advisory Board.

**SUMMARY:** A meeting of the Lakeview District Grazing Advisory Board has been scheduled for Wednesday, February 8, 1989 at 10:00 a.m. in the conference room of the Lakeview District Office. The public is invited to attend.

The purpose of the meeting is to discuss forage allocations, range improvement projects scheduled for 1989 and an update on the status of the Warner Lakes Plan Amendment for Wetlands and Associated Uplands.

**DATE:** Wednesday, February 8, 1989.

**FOR FURTHER INFORMATION CONTACT:** Renee Snyder, Public Affairs Officer, (503) 947-6110.

**Judy Nelson,**

District Manager.

[FR Doc. 88-29710 Filed 12-27-88; 8:45 am]

**BILLING CODE 4310-33-M**

## National Park Service

### National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before December 17, 1988. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013-7127. Written comments should be submitted by January 12, 1989.

**Carol D. Shull,**

Chief of Registration, National Register.

## ARIZONA

### Yavapai County

**Fawke's Fort Below Aztec Pass (AR-03-09-06-23)** (Prehistoric Walled Hilltop Sites of Prescott National Forest and Adjacent

**Regions MPS), Address Restricted, Prescott vicinity, 88003186**  
**Indian Peak Ruin (AR-03-09-06-116)** (Prehistoric Walled Hilltop Sites of Prescott National Forest and Adjacent Regions MPS), Address Restricted, Prescott vicinity, 88003185

## IOWA

### Adams County

**Corning Opera House (Iowa Opera Halls and Opera Houses MPS), 800 Davis Ave., Corning, 88003144**

### Clayton County

**Volga Opera House (Iowa Opera Halls and Opera Houses MPS), Washington St., Volga, 88003148**

### Crawford County

**Deutsche Opernhaus (Iowa Opera Halls and Opera Houses MPS), 1303 Broadway, Denison, 88003145**

### Henry County

**Steele's Opera House (Iowa Opera Halls and Opera Houses MPS), Main St., Bedford, 88003148**

**Union Hall, (Iowa Opera Halls and Opera Houses MPS), 108 W. Monroe, Mount Pleasant, 88003147**

### Lyon County

**Big Sioux Prehistoric Prairie Procurement System Archaeological District (Prehistoric Hunters and Gatherers on the Northwest Iowa Plains, c. 10,000-200 B.P.), address Restricted, Klondike vicinity, 88003184**

## KENTUCKY

### Johnson County

**Akers, Thomas, House (Johnson County MRA), 374 Fifth, Paintsville, 88003151**

**Archer House (Johnson County MRA), 170 Euclid St., Paintsville, 88003162**

**Band, Jeff, House (Johnson County MRA), Rt. 172, Red Bush, 88003174**

**Davis, John, House (Johnson County MRA), Off Davis Branch Rd., Oil Springs vicinity, 88003176**

**First Baptist Church (Johnson County MRA), College St., Paintsville, 88003165**

**First Methodist Church (Johnson County MRA), Main and Church Sts., Paintsville, 88003155**

**First National Bank Building (Johnson County MRA), Main and College Sts., Paintsville, 88003154**

**Flat Gap School (Johnson County MRA), KY 689 near jct. with KY 1092, Flat Gap, 88003187**

**Foster Hardware (Johnson County MRA), Main and Court Sts., Paintsville, 88003156**

**Lemaster, John J. and Ellen, House (Johnson County MRA), 6 mi. NE of Low Gap on Low Gap Fork, Low Gap vicinity, 88003177**

**Mayo Methodist Church (Johnson County MRA), Third St., Paintsville, 88003152**

**Mayo, Thomas, House (Johnson County MRA), 228 Second St., Paintsville, 88003168**

**Meade Memorial Gymnasium (Johnson County MRA), Jct. KY 2040 and KY 40, Williamsport, 88003170**

**Mine No. 5 Store (Johnson County MRA), KY 302, Van Lear, 88003172**

**Mollett, Ben, Cabin (Johnson County MRA), Off KY 40 at Pigeon Roost Fork of Greasy Creek, Williamsport vicinity, 88003171**

**Mott, Lloyd Hamilton, House (Johnson County MRA), Rt. 172, Red Bush, 88003175**

**Oil Springs High School Gymnasium (Johnson County MRA), KY 580 off US 40, Oil Springs, 88003178**

**Oil Springs Methodist Church (Johnson County MRA), Jct. KY 580 and US 40, Oil Springs, 88003179**

**Paintsville City Hall (Johnson County MRA), Main St. and spur of KY 40, Paintsville, 88003158**

**Paintsville Country Club (Johnson County MRA), KY 1107 at Davis Branch, Paintsville, 88003168**

**Paintsville High School (Johnson County MRA), Second St., Paintsville, 88003163**

**Paintsville Public Library (Johnson County MRA), Second St., Paintsville, 88003164**

**Patterson House (Johnson County MRA), West and Second, Paintsville, 88003167**

**Rice, H.B., Insurance Building (Johnson County MRA), Court and Main Sts., Paintsville, 88003157**

**Rice, Wiley, House (Johnson County MRA), KY 825 at Asa Creek, Asa, 88003180**

**Salyer House (Johnson County MRA), Off KY 825 at Asa Creek, Asa, 88003181**

**Salyer, Addison, House (Johnson County MRA), Off KY 825 at Middle, Fork of Jenny's Creek, Paintsville vicinity, 88003169**

**Stambaugh Church of Christ (Johnson County MRA), KY 1559 at Frog Omery Branch, Stambaugh, 88003182**

**Stambaugh House (Johnson County MRA), KY 1559 at Van Hoose Branch, Stambaugh, 88003183**

**Turner, Judge Jim, House (Johnson County MRA), 315 Third St., Paintsville, 88003153**

**Webb House (Johnson County MRA), 139 Main St., Paintsville, 88003160**

**Webb, Byrd and Leona, House (Johnson County MRA), 137 Main, Paintsville, 88003159**

**Wiley, Tobe, House (Johnson County MRA), 141 Euclid St., Paintsville, 88003161**

**Williams House (Johnson County MRA), Rt. 689/Elna Rd., Red Bus, 88003173**

**Shelby County**

**Hornsby, John A., House (Boundary Increase) (Shelby County MRA), Clore-Jackson Rd., Eminence vicinity, 88003195**

**LOUISIANA**

**De Soto Parish**

**Liberty Lodge No. 123, F & A M, LA 5 and 172, Keachi, 88003138**

**Roseneath, LA 5, Gloster vicinity, 88003137**

**Orleans Parish**

**Flint—Goodridge Hospital of Dillard University, Louisiana Ave. and LaSalle St., New Orleans, 88003139**

**St. John The Baptist Parish**

**Emilie Planation House, LA 44, Garyville, 88003135**

**MINNESOTA**

**Wabasha County**

**Stout, James C. and Agnes M., House, 310 S. Oak St., Lake City, 88003138**



**MONTANA****Cascade County**

*Northern Montana State Fairground Historic District*, 3rd St., NW, Great Falls, 88003143

**Deer Lodge County**

*California Creek Quarry*, Address Restricted, Anaconda vicinity, 88003140

**Ravalli County**

*Popham Ranch*, 460 M.E. Popham Ln., Corvallis vicinity, 88003141

**Silver Bow County**

*Butte, Anaconda and Pacific Railway Historic District (Boundary Increase)*, Confluence of German Gulch and Silver Bow Creeks at E end of Silver Bow Canyon, Durant, 88003149

**Sweet Grass County**

*Brannan Ranch*, W of Melville on Sweet Grass Creek, Melville vicinity, 88003142

**OHIO****Cuyahoga County**

*Union Steel Screw Office Building*, 1875—7 E. 40th St., Cleveland, 88003193

**Fayette County**

*Light, Jacob, House*, 234 W. Circle Ave., Washington Court House, 88003191

**Montgomery County**

*West Third Street Historic District*, Roughly W. Third St. between Broadway and Shannon St., Dayton, 88003194

**Wayne County**

*Gasche, Charles, House*, 340 Bever St., Wooster, 88003192

**VIRGINIA****Chesapeake Independent City**

*South Norfolk Historic District*, Roughly bounded by Hull St., Poindexter, D St., 18th St., B St., Seaboard Ave., Richmond Ave., and Byrd Ave., Chesapeake, 88003133

The following property is also being considered for listing in the National Register:

**CONNECTICUT****Hartford County**

*Carter, John, House*, Colonial Houses of Southington TR 1096 West St. Southington, 88003189

[FR Doc. 88-29844 Filed 12-27-88; 8:45 am]

BILLING CODE 4310-70-M

**INTERNATIONAL TRADE COMMISSION**

[Investigation No. 731-TA-411 (Final)]

**Calcined Bauxite Proppants From Australia**

**AGENCY:** United States International Trade Commission.

**ACTION:** Institution of a final antidumping investigation and

scheduling of a hearing to be held in connection with the investigation.

**SUMMARY:** The Commission hereby gives notice of the institution of final antidumping investigation No. 731-TA-411 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Australia of calcined bauxite proppants, provided for in item 521.17 of the Tariff Schedules of the United States (subheading 2806.00.00 of the Harmonized Tariff Schedule of the United States), that have been found by the Department of Commerce, in a preliminary determination, to be sold in the United States at less than fair value (LTFV). Unless the investigation is extended, Commerce will make its final LTFV determination on or before February 6, 1989, and the Commission will make its final injury determination by March 28, 1989 (see sections 735(a) and 735(b) of the act (19 U.S.C. 1673d(a) and 1673d(b))).

For further information concerning the conduct of this investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and C (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201).

**EFFECTIVE DATE:** November 29, 1988.

**FOR FURTHER INFORMATION CONTACT:** Valerie Newkirk (202-252-1190), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

**SUPPLEMENTARY INFORMATION:****Background**

This investigation is being instituted as a result of an affirmative preliminary determination by the Department of Commerce that imports of calcined bauxite proppants from Australia are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the act (19 U.S.C. 1673). The investigation was requested in a petition filed on June 14, 1988, by counsel on behalf of Carbo-

Ceramics, Inc., Irving, TX. In response to that petition the Commission conducted a preliminary antidumping investigation and, on the basis of information developed during the course of that investigation, determined that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of imports of the subject merchandise (53 FR 29295, August 4, 1988).

**Participation in the Investigation**

Persons wishing to participate in this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the *Federal Register*. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

**Service List**

Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

**Limited Disclosure of Business Proprietary Information Under a Protective Order**

Pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a) as amended 53 FR 33039 (Aug. 29, 1988)), the Secretary will make available business proprietary information gathered in this final investigation to authorized applicants under a protective order, provided that the application be made not later than twenty-one (21) days after the publication of this notice in the *Federal Register*. A separate service list will be maintained by the Secretary for those parties authorized to receive business proprietary information under a protective order. The Secretary will not accept any submission by parties containing business proprietary

information without a certificate of service indicating that it has been served on all the parties that are authorized to receive such information under a protective order.

**Staff report**

The prehearing staff report in this investigation will be placed in the nonpublic record on February 2, 1989, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

**Hearing**

The Commission will hold a hearing in connection with this investigation beginning at 9:30 a.m. on February 22, 1989, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on February 10, 1989. All persons desiring to appear at the hearing and make oral presentations should file prehearing briefs and attend a prehearing conference to be held at 9:30 a.m. on February 14, 1989, at the U.S. International Trade Commission Building. The deadline for filing prehearing briefs is February 14, 1989.

Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonbusiness proprietary summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any business proprietary materials must be submitted at least three (3) working days prior to the hearing (see § 201.6(b)(2) of the Commission's Rule (19 CFR 201.6(b)(2))).

**Written Submissions**

All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with § 207.22 of the Commission's rules (19 CFR 207.22). Posthearing briefs must conform with the provisions of § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on February 27, 1989. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before February 27, 1989.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for business proprietary data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any information for which business proprietary treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Business Proprietary Information." Business proprietary submissions and requests for business proprietary treatment must conform with the requirements of §§ 201.8 and 207.7 of the Commission's rules (19 CFR 201.8 and 207.7).

Parties which obtain disclosure of business proprietary information pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a)) may comment on such information in their prehearing and posthearing briefs, and may also file additional written comments on such information no later than March 3, 1989. Such additional comments must be limited to comments on business proprietary information received in or after the posthearing briefs.

**Authority:** This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

Issued: December 21, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-29809 Filed 12-27-88; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 731-TA-234 (Final—Court Remand)]

**Carbon Steel Structural Shapes From Norway (Court Remand)**

**AGENCY:** United States International Trade Commission.

**ACTION:** Remand proceedings.

**SUMMARY:** The Commission hereby gives notice of its remand proceedings ordered by the United States Court of International Trade (CIT) with respect to the Commission's final negative determination in investigation No. 731-TA-234 (Final), Carbon Steel Structural Shapes from Norway. These remand proceedings will be conducted under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act) to request,

gather, examine, and consider data on carbon steel structural shapes, and determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Norway of carbon steel angles, shapes, and sections, having a maximum cross-sectional dimension of 3 inches or more, provided for in item 609.80 of the Tariff Schedules of the United States (subheadings 7216.31.00 through 7216.50.00, inclusive, of the Harmonized Tariff Schedule of the United States) that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV). The Commission has been ordered to notify the CIT of its remand determination by February 13, 1989.

For further information concerning the conduct of these proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and C (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201).

**EFFECTIVE DATE:** November 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Debra Baker (202-252-1180), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

**SUPPLEMENTARY INFORMATION:****Background**

On September 28, 1988, the CIT remanded the Commission's negative final determination in *Carbon Steel Structural Shapes from Norway*, Inv. No. 731-TA-234 (Final), USITC Pub. 1785 (November 1985) and ordered the Commission to cumulate imports from Poland, Spain, and South Africa with the imports from Norway in determining whether a domestic industry is injured or threatened with injury by reason of the subject Norwegian imports.<sup>1</sup>

The CIT directed the Commission to report the results of its remand determination within 45 days of the date of the remand order, or by November 14, 1988. Subsequently, the Commission

<sup>1</sup> *Chaparral Steel Company v. United States*, Slip. Op. 88-129 (September 28, 1988).



sought a stay of the remand determination period until the CIT decided the Commission's request for certification to the Federal Circuit, and absent certification, for an extension of the remand period to 75 days from the denial of the stay. On November 30, 1988, the CIT granted the extension of the remand period.

#### Participation in these Proceedings

Persons wishing to participate in this remand investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

#### Service List

Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

#### Written Submissions

All legal arguments, economic analyses, and factual materials relevant to the remand investigation should be included in briefs in accordance with § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on January 18, 1989. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before January 18, 1989.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for business proprietary data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in

the Office of the Secretary to the Commission.

Any information for which business confidential treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Business Confidential Information." Business confidential submissions and requests for business confidential treatment must conform with the requirements of §§ 201.8 and 207.7 of the Commission's rules (19 CFR 201.8 and 207.7).

**Authority:** This investigation is being conducted under authority of the Tariff Act of 1930, Title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

Issued: December 20, 1988.

Kenneth R. Mason,  
Secretary.

[FR Doc. 88-29805 Filed 12-27-88; 8:45 am]  
BILLING CODE 7020-02-M

#### [Investigation No. 731-TA-207 (Final—Court Remand)]

#### Cellular Mobile Telephones and Subassemblies Thereof From Japan (Court Remand)

**AGENCY:** United States International Trade Commission.

**ACTION:** Remand proceedings.

**SUMMARY:** The Commission hereby gives notice of its remand proceedings ordered by the United States Court of International Trade (CIT) with respect to the Commission's final antidumping investigation No. 731-TA-207 (Final), Cellular Mobile Telephones and Subassemblies thereof from Japan. These Remand proceedings will be conducted under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act) to request, gather, examine, and consider data on subassemblies of cellular mobile telephones, and determine whether industries in the United States are materially injured, or are threatened with material injury, or the establishment of industries in the United States are materially retarded, by reason of imports from Japan of cellular mobile telephone subassemblies, provided for in items 685-28 and 685.32 of the Tariff Schedules of the United States (subheadings 8525.20.80, 8529.10.80, 8517.40.00, 8518.30.20, 8525.10.80, 8527.90.80, 8529.90.50, 8542.20.20, and 8542.80.00 of the Harmonized Tariff Schedule of the United States) that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

The Commission has been ordered to notify the CIT of its remand determination by February 16, 1989.

For further information concerning the conduct of these proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and C (19 CFR Part 207), and Part 201, Subparts A through E (19 CFR Part 201).

**EFFECTIVE DATE:** December 3, 1988.

**FOR FURTHER INFORMATION CONTACT:** Tedford Briggs (202-252-1181), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

#### SUPPLEMENTARY INFORMATION:

##### Background

On October 31, 1988, the CIT remanded investigation No. 731-TA-207 (Final), Cellular Mobile Telephones and Subassemblies Thereof from Japan, to the Commission for additional proceedings. Specifically, the CIT noted that the Commission found seven categories of subassemblies of cellular mobile telephones to be separate "like" products from complete cellular mobile telephones. The CIT ruled (Slip OP. 88-152) that the Commission precluded itself from receiving available data permitting separate identification of production of subassemblies, and that the Commission chose not to seek this information from domestic producers as it concerned subassemblies sold to related purchasers. Further, the CIT noted that the Commission assumed such information, even if it were available, was irrelevant and unreliable and did not merit an attempt to obtain and consider.

The CIT directed the Commission to request, gather, examine, and consider subassembly-specific information and data that is available to permit the separate identification of production in terms of such criteria as the production process or the producer's profits pursuant to 19 U.S.C. 1677(4)(D); take such other administrative action the Commission deems appropriate (not inconsistent with the CIT opinion issued simultaneously with the remand); and report the results of such remand determination to the CIT within 45 days of the date of the remand order, October

31, 1988. Subsequently, the Commission requested, and was granted on December 3, 1988, a 75-day extension to comply with the CIT's order.

#### Participation in these proceedings

Persons wishing to participate in this remand investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

#### Service list

Pursuant to § 201.11(d) of the Commission's rules (19 CFR § 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

#### Written submissions

All legal arguments, economic analyses, and factual materials relevant to the remand investigation should be included in briefs in accordance with § 207.24 (19 CFR § 207.24) and must be submitted not later than the close of business on January 23, 1989. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before January 23, 1989.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for business confidential data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any information for which business confidential treatment is desired must be submitted separately. The envelope

and all pages of such submissions must be clearly labeled "Business Confidential Information." Business confidential submissions and requests for business confidential treatment must conform with the requirements of §§ 201.8 and 207.7 of the Commission's rules (19 CFR 201.8 and 207.7).

**Authority:** This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

Issued: December 19, 1988.

Kenneth R. Mason,  
Secretary.

[FR Doc. 88-29805 Filed 12-27-88; 8:45 am]  
BILLING CODE 7020-02-M

#### [Investigation No. 337-TA-289]

#### Certain Concealed Cabinet Hinges and Mounting Plates; Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Institution of investigation pursuant to 19 U.S.C. 1337.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 23, 1988, under section 337 of the Tariff Act of 1930, as amended, (19 U.S.C. 1337), on behalf of Julius Blum, Inc., Blum Industrial Park, Highway 16, Lowesville, Stanley, North Carolina 28184. The complaint was supplemented on December 13, 1988. The complaint, as supplemented, alleges violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain concealed cabinet hinges and mounting plates by reason of alleged direct, contributory, and induced infringement of: (1) Claims 1-4, 6-7, and 9-12 of U.S. Letters Patent 4,045,841; (2) claims 1-6 of U.S. Letters Patent 4,075,735; and (3) claims 1-4 of U.S. Letters Patent 4,367,566; and that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and permanent cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room

112, Washington, DC 20436, telephone 202-252-1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

#### FOR FURTHER INFORMATION CONTACT:

Cheri Taylor, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202-252-1588).

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.12 of the Commission's Interim Rules of Practice and Procedure, 53 FR 33034, 33057 (Aug. 29, 1988).

#### Scope of Investigation

Having considered the complaint, the U.S. International Trade Commission, on December 22, 1988, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, and/or consignee of certain concealed cabinet hinges and mounting plates by reason of alleged direct, contributory, and induced infringement of: (1) Claims 1-4, 6-7 or 9-12 of U.S. Letters Patent 4,045,841; (2) claims 1-6 of U.S. Letters Patent 4,075,735; or (3) claims 1-4 of U.S. Letters Patent 4,367,566; and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

Julius Blum, Inc.,  
Blum Industrial Park, Highway 16,  
Lowesville, Stanley, North Carolina 28184

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Advanced Affiliates Inc., 96-12 43rd Avenue,  
Corona, New York 11368  
U.S. Industrial Products Corp., 96-12 43rd  
Avenue, Corona, New York 11368  
Harris Hardware Sales Corp., 4 Harbor Park  
Drive, Port Washington, New York 10050  
Euro-Tech, 3160 Bordentown Avenue, Old  
Bridge, New Jersey 08857  
A & M Supply Inc., 6701 90th Avenue, North  
Pinellas Park, Florida 33658  
L & L Saw & Supply Co., P.O. Box 584 Clyde,  
North Carolina 28721  
Trend Distributors, 230 N.W. 4th Avenue,  
Hallandale, Florida 33009



Metropolitan Millwork Supply Inc., 800-B Ronda, Canton, Michigan 48187  
 Woojin Industrial Co., 587-1 Sindang-dong, Jung-Ku, Seoul, Korea  
 Sunkyoung, Ltd., 5-3 Namdaemunno 2ga, C.P.O. Box 1780, Chung-ku, Seoul, Korea  
 Hu Lin Industrial Co., Ltd., Add. No. 73, Ta Hu Tsun, Hu Nei Shiang, P.O. Box 30 Lu Chu, Kaohsiung, Taiwan  
 Liberty Hardware Mfg. Corp., 928 Alton Place, High Point, North Carolina 27263-2197  
 A. Ferrari & Co., S.r.l., Corso C. Alberto 124/A, I-22053 Lecco, Italy  
 USA Manufacturing Corp., 209 Redneck Avenue, P.O. Box 531, Little Ferry, New Jersey 07643

(c) Cheri Taylor, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401J, Washington, DC 20436, shall be the Commission Investigative attorney, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding administrative law judge.

Responses to this complaint and the notice of investigation must be submitted by the named respondents in accordance with § 210.21 of the Commission's Interim Rules of Practice and Procedure, 53 FR 33034, 33057 (Aug. 23, 1988). Pursuant to §§ 201.16(d) and 210.21(a) of the Commission's rules (19 CFR 201.16(d) and 53 FR 33034, 33057 (Aug. 23, 1988)), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

By order of the Commission.

Kenneth R. Mason,  
 Secretary.

Issued: December 22, 1988.

[FR Doc. 88-29803 Filed 12-27-88; 8:45 am]  
 BILLING CODE 7020-02-M

[Investigations Nos. 731-TA-406 and 408 (Final)]

#### Electrolytic Manganese Dioxide from Greece and Japan

AGENCY: United States International Trade Commission.

ACTION: Institution of final antidumping investigations and scheduling of a hearing to be held in connection with the investigations.

SUMMARY: The Commission hereby gives notice of the institution of final antidumping investigations Nos. 731-TA-406 and 408 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. 1673d(b)) (the act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Greece and Japan of electrolytic manganese dioxide (EMD), provided for in item 419.44 of the Tariff Schedules of the United States (subheading 2820.10.00 of the Harmonized Tariff Schedule of the United States), that have been found by the Department of Commerce, in preliminary determinations, to be sold in the United States at less than fair value (LTFV). Commerce is scheduled to make its final LTFV determinations on or before February 22, 1989 and the Commission is scheduled to make its final injury determinations by April 10, 1989 (see sections 735(a) and 735(b) of the act (19 U.S.C. 1673d(a) and 1673d(b)).

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 207, subparts A and C (19 CFR part 207), as amended, 53 FR 33034, August 28, 1988, and part 201, subparts A through E (19 CFR part 201).

EFFECTIVE DATE: November 14, 1988.

FOR FURTHER INFORMATION CONTACT: Bruce Cates (202-252-1187), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

SUPPLEMENTARY INFORMATION:

#### Background

These investigations are being instituted as a result of affirmative preliminary determinations by the Department of Commerce that imports of EMD from Greece and Japan are being sold in the United States at less than fair value within the meaning of section 731 of the act (19 U.S.C. 1673). The investigations were requested in petitions filed on May 13, 1988, by Chemetals, Inc., Baltimore, MD and Kerr-McGee Chemicals Corp., Oklahoma City, OK. In response to those petitions the Commission conducted preliminary antidumping investigations and, on the basis of information developed during the course of those investigations, determined that there was a reasonable indication that an industry in the United States was materially injured by reason of imports of the subject merchandise (53 FR 28276, July 27, 1988).

#### Participation in the Investigations

Persons wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the Federal Register. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

#### Service List

Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance. In accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

#### Limited Disclosure of Business Proprietary Information Under a Protective Order

Pursuant to section 207.7(a) of the Commission's rules (19 CFR 207.7(a) as amended 53 FR 33034, 33041) the Secretary will make available business proprietary information gathered in

these final investigations to authorized applicants under a protective order, provided that the application be made not later than twenty-one (21) days after the publication of this notice in the Federal Register. A separate service list will be maintained by the Secretary for those parties authorized to receive business proprietary information under a protective order. The Secretary will not accept any submission by parties containing business proprietary information without a certificate of service indicating that it has been served on all the parties that are authorized to receive such information under a protective order.

#### Staff Report

The prehearing staff report in these investigations will be placed in the nonpublic record on February 24, 1989, and a public version will be issued thereafter, pursuant to § 207.21 of the Commission's rules (19 CFR 207.21).

#### Hearing

The Commission will hold a hearing in connection with these investigations beginning at 9:30 a.m. on March 9, 1989, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m.) on February 23, 1989. All persons desiring to appear at the hearing and make oral presentations should file prehearing briefs and attend a prehearing conference to be held at 9:30 a.m. on February 28, 1989, at the U.S. International Trade Commission Building. The deadline for filing prehearing briefs is March 6, 1989.

Testimony at the public hearing is governed by § 207.23 of the Commission's rules (19 CFR 207.23). This rule requires that testimony be limited to a nonbusiness proprietary summary and analysis of material contained in prehearing briefs and to information not available at the time the prehearing brief was submitted. Any written materials submitted at the hearing must be filed in accordance with the procedures described below and any business proprietary materials must be submitted at least three (3) working days prior to the hearing (see § 201.6(b)(2) of the Commission's rules (19 CFR 201.6(b)(2))).

#### Written Submissions

All legal arguments, economic analyses, and factual materials relevant to the public hearing should be included in prehearing briefs in accordance with § 207.22 of the Commission's rules (19

CFR 207.22). Posthearing briefs must conform with the provisions of § 207.24 (19 CFR 207.24) and must be submitted not later than the close of business on March 15, 1989. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before March 15, 1989.

A signed original and fourteen (14) copies of each submission must be filed with the Secretary to the Commission in accordance with § 201.8 of the Commission's rules (19 CFR 201.8). All written submissions except for business proprietary data will be available for public inspection during regular business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary to the Commission.

Any information for which business proprietary treatment is desired must be submitted separately. The envelope and all pages of such submissions must be clearly labeled "Business Proprietary Information." Business proprietary submissions and requests for business proprietary treatment must conform with the requirements of §§ 201.8 and 207.7 of the Commission's rules (19 CFR 201.8 and 207.7).

Parties which obtain disclosure of business proprietary information pursuant to § 207.7(a) of the Commission's rules (19 CFR 207.7(a)) may comment on such information in their prehearing and posthearing briefs, and may also file additional written comments on such information no later than March 20, 1989. Such additional comments must be limited to comments on business proprietary information received in or after the posthearing briefs.

Authority: These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

Issued: December 21, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-29810 Filed 12-27-88; 8:45 am]

BILLING CODE 7020-02-M

[Investigations Nos. 701-TA-293 and 295 (Final)]

#### Industrial Belts From Israel and South Korea

AGENCY: United States International Trade Commission.

ACTION: Institution of final countervailing duty investigations.

SUMMARY: The Commission hereby gives notice of the institution of final countervailing duty investigations Nos. 701-TA-293 and 295 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the act) to determine whether an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Israel (Inv. No. 701-TA-293 (Final)) and South Korea (Inv. No. 701-TA-295 (Final)) of industrial belts<sup>1</sup> and components and parts thereof, whether cured or uncured, provided for in items 358.02, 358.06, 358.08, 358.09, 358.11, 358.14, 358.16, 657.25, and 773.35 of the Tariff Schedules of the United States (subheadings 4010.10.10, 4010.10.50, 5910.00.10, and 5910.00.90 of the Harmonized Tariff Schedule of the United States), that have been found by the Department of Commerce, in preliminary determinations, to be subsidized by the Governments of Israel and South Korea.

Pursuant to a request from petitioner under section 705(a)(1) of the Act (19 U.S.C. 1671d(a)(1)), Commerce is expected to extend the date for its final determinations in these investigations to coincide with the date of its final determinations in ongoing antidumping investigations on industrial belts and components and parts thereof from Israel, Italy, Japan, Singapore, South Korea, Taiwan, the United Kingdom, and West Germany. Accordingly, the Commission will not establish a schedule for the conduct of these countervailing duty investigations until Commerce makes preliminary determinations in the antidumping investigations (currently scheduled for January 28, 1989).

For further information concerning the conduct of these investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, Part 207, Subparts A and C (19 CFR Part 207), and Part 201, subparts A through E (19 CFR Part 201).

<sup>1</sup> For the purposes of these investigations, the term "industrial belts" includes belting and belts for machinery, in part or wholly of rubber or plastics. Specifically excluded from the scope of these investigations are imports of conveyor belts and imports of automotive belts. (Automotive belts include belts for such motor vehicles as cars, buses, on-the-road trucks, etc., and also the front-end engine drive belts for industrial vehicles such as road graders and cranes; automotive belts do not include any belts for agricultural equipment).



**EFFECTIVE DATE:** December 2, 1988.

**FOR FURTHER INFORMATION CONTACT:** Robert Eninger (202-252-1194), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-252-1000.

**SUPPLEMENTARY INFORMATION:**

**Background**

These investigations are being instituted as a result of affirmative preliminary determinations by the Department of Commerce that certain benefits which constitute subsidies within the meaning of section 701 of the act (19 U.S.C. 1671) are being provided to manufacturers, producers, or exporters in Israel and South Korea of industrial belts and parts and components thereof. The investigations were requested in a petition filed on June 30, 1988, by The Gates Rubber Co., Denver, CO. In response to that petition the Commission conducted preliminary countervailing duty investigations and, on the basis of information developed during the course of those investigations, determined that there was a reasonable indication that an industry in the United States was materially injured or threatened with material injury by reason of imports of the subject merchandise (53 FR 32478, August 25, 1988).

**Participation in the Investigations**

Persons wishing to participate in these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules (19 CFR 201.11), not later than twenty-one (21) days after the publication of this notice in the *Federal Register*. Any entry of appearance filed after this date will be referred to the Chairman, who will determine whether to accept the late entry for good cause shown by the person desiring to file the entry.

**Service List**

Pursuant to § 201.11(d) of the Commission's rules (19 CFR 201.11(d)), the Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance. In

accordance with §§ 201.16(c) and 207.3 of the rules (19 CFR 201.16(c) and 207.3), each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by the service list), and a certificate of service must accompany the document. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** These investigations are being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules (19 CFR 207.20).

By order of the Commission.

Kenneth R. Mason,  
Secretary.

Issued: December 21, 1988.

[FR Doc. 88-29808 Filed 12-27-88; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 731-TA-200  
(Preliminary)]

**Radial Ply Tires for Passenger Cars  
From the Republic of Korea**

**Determination**

The United States International Trade Commission (ITC or Commission) is publishing this notice in keeping with the June 8, 1988, mandate of the United States Court of Appeals for the Federal Circuit in *The Armstrong Rubber Company, et al. v. The United States, et al.*, Nos. 88-1380 & 88-1381, which vacated the Court of International Trade (CIT) judgment in 84-10-01444, as embodied in Slip Op. 88-33 (March 17, 1988). The Court of Appeals has vacated the CIT decision which reversed and remanded the ITC's negative preliminary determination in *Radial Ply Tires for Passenger Cars from the Republic of Korea*, USITC Inv. No. 731-TA-200 (Preliminary), 49 FR 36712 (Sept. 29, 1984); the Court of Appeals has also remanded the case to the CIT for dismissal of the complaint with prejudice. Accordingly, the litigation of this case and of the underlying administrative proceedings has terminated, and the Commission's original negative preliminary determination remains in effect.

**Background**

On July 29, 1984, a petition was filed with the ITC and the U.S. Department of Commerce by counsel on behalf of The Armstrong Rubber Co., Cooper Tire & Rubber Co., The Firestone Tire & Rubber Co., The B.F. Goodrich Co., and The Goodyear Tire & Rubber Co., alleging that imports of the subject merchandise are being sold in the United States at less than fair value. Effective July 20,

1984, the Commission instituted a preliminary antidumping investigation under section 733(a) of the Tariff Act of 1930 to determine whether there is a reasonable indication that an industry in the United States is materially injured, or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of such merchandise.

Notice of the institution of the Commission's investigation and of a public conference to be held in connection with it was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* on July 31, 1984. All persons who requested the opportunity were permitted to appear in person or by counsel.

On September 4, 1984, the Commission issued a negative preliminary determination in the investigation. 49 FR 36712 (September 19, 1984). The negative preliminary determination, accompanied by the views of the Commission and the public version of its report, was subsequently published in *Radial Ply Tires for Passenger Cars from the Republic of Korea*, Investigation No. 731-TA-200 (Preliminary), USITC Pub. 1572 (1984).

On February 4, 1985, the petitioners sought judicial review of the Commission's determination by commencing a civil action in the CIT under 28 U.S.C. 1581(c). On August 8, 1985, the CIT entered a judgment in *Armstrong Rubber Co. v. United States*, 614 F. Supp. 1252 (*Armstrong I*), reversing and remanding the Commission's determination on the ground that it was inconsistent with the "possibility of injury standard" set out in *Republic Steel Corp. v. United States*, 591 F. Supp. 640 (CIT 1984). The CIT ordered the Commission to make a new determination consistent with the CIT's opinion. 614 F. Supp. 1254.

Reasoning that "the CIT's opinion makes clear that only an affirmative preliminary determination would be consistent with its analysis," the Commission responded to *Armstrong I* by issuing an affirmative preliminary determination. 50 FR 52869-70 (Dec. 28, 1985). The Commission also appealed *Armstrong I* to the Federal Circuit. While that appeal was pending, the Federal Circuit issued its decision in a related case, *American Lamb Company v. United States*, 785 F.2d 894 (Fed. Cir. 1986). In *American Lamb*, the Federal Circuit specifically rejected the CIT's "possibility of injury" standard articulated in *Republic Steel*.

Subsequently, the Federal Circuit granted the Commission's motion to vacate and remand the judgment in *Armstrong I* for reconsideration in light of *American Lamb*.

On remand, the CIT again reversed and remanded the Commission's negative preliminary determination. Slip Op. 88-33 (March 17, 1988) ("*Armstrong II*"). The Commission as well as interested Korean producers appealed the CIT decision. Shortly thereafter, all the parties to the litigation jointly moved the Federal Circuit to vacate the CIT judgment and to remand the case to the CIT with instructions to dismiss the complaint with prejudice. The Federal Circuit granted this motion on June 8, 1988, and issued a mandate to this effect. Accordingly, this case and the underlying investigation have been terminated in all respects. The CIT judgment has been vacated, and the Federal Circuit has ordered dismissal of the complaint with prejudice. The Commission's original negative preliminary determination (49 FR 36712) remains in effect and constitutes the ultimate determination of the Commission with respect to USITC Investigation No. 731-TA-200 (Preliminary).

By order of the Commission.

Kenneth R. Mason,  
Secretary.

Issued: December 20, 1988.

[FR Doc. 88-29804 Filed 12-27-88; 8:45 am]

BILLING CODE 7020-02-M

[Investigation No. 337-TA-288]

**Certain Straight Knife Cloth Cutting  
Machines; Investigation**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Institution of investigation pursuant to 19 U.S.C. 1337.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 23, 1988, under section 337 of the Tariff Act of 1930, as amended, (19 U.S.C. 1337), on behalf of Eastman Machine Company, 779 Washington Street, Buffalo, New York 14203. The complaint was supplemented on December 13, 1988. The complaint, as supplemented, alleges violations of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain straight knife cloth cutting machines by reason of (1) infringement of claims 1-8 of U.S. Letters Patent 3,714,743; (2) infringement of claims 1-4

of U.S. Letters Patent 3,775,913; and (3) infringement of claims 1-7 of U.S. Letters Patent 3,960,244; and that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after a full investigation, issue a permanent exclusion order and cease and desist orders.

**ADDRESSES:** The complaint, as supplemented, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone 202-252-1802. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

**FOR FURTHER INFORMATION CONTACT:** William M. Nugent, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202-252-1581.

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in § 210.12 of the Commission's Interim Rules of Practice and Procedure, 53 FR 33034, 33057 (Aug. 29, 1988).

**Scope of Investigation**

Having considered the complaint, as supplemented, the U.S. International Trade Commission, on December 22, 1988, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain straight knife cloth cutting machines by reason of alleged (1) infringement of claims 1, 2, 3, 4, 5, 6, 7 or 8 of U.S. Letters Patent 3,714,742, (2) infringement of claims 1, 2, 3, or 4 of U.S. Letters Patent 3,775,913, or (3) infringement of claims 1, 2, 3, 4, 5, 6 or 7 of U.S. Letters Patent 3,960,244 and whether there exists an industry in the United States as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—Eastman Machine Company, 779 Washington Street, Buffalo, New York 14203.

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint, as supplemented, is to be served:

Chuan Neng Enterprise Co., Ltd., No. 5, Lane 251, Min-Chu Road, San-Ye Village, Ru-Ju Hsian Kaohsiung Hsien, Taiwan

The Fox Company, 2902 Interstate Street, Charlotte, North Carolina 28208

New and Used Equipment Company, 1202 East Mountain Street, Kennerlyville, North Carolina 27284.

(c) William M. Nugent, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401 L, Washington, DC 20436, shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, Janet D. Saxon, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding administrative law judge.

Responses to the complaint, as supplemented, and the notice of investigation must be submitted by the named respondents in accordance with § 210.21 of the Commission's Interim Rules of Practice and Procedure, 53 FR 33034, 33057 (Aug. 29, 1988). Pursuant to §§ 201.16(d) and 210.21(a) of the Commission's Rules (19 CFR 210.16(d) and 53 FR 33034, 33057 (Aug. 29, 1988)), such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint, as supplemented. Extensions of time for submitting responses to the complaint, as supplemented, will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint, as supplemented, and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint, as supplemented, and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint, as supplemented, and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.



By order of the Commission.  
Kenneth R. Mason,  
Secretary.

Issued: December 22, 1988.  
[FR Doc. 88-29802 Filed 12-27-88; 8:45 am]  
BILLING CODE 7020-02-M

## INTERSTATE COMMERCE COMMISSION

[Docket No. AB-55 (Sub-No. 263X)]

**CSX Transportation Inc.; Abandonment Exemption; Between Typo and Harveyton, in Perry County, KY**

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of exemption.

**SUMMARY:** The Interstate Commerce Commission exempts from the prior approval requirements of 49 U.S.C. 10903, *et seq.*, the abandonment by CSX Transportation, Inc., of 5.44 miles of rail line in Perry County, KY, subject to standard labor protective conditions.

**DATES:** Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on February 1, 1989. Petitions to stay must be filed by January 17, 1989. Petitions for reconsideration must be filed by January 27, 1989. Formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2) must be filed by January 9, 1989. Requests for a public use condition must be filed by January 9, 1989.

**ADDRESSES:** Send pleadings, referring to Docket No. AB-55 (Sub-No. 263X), to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

(2) Petitioner's representative: Lawrence H. Richmond, 100 North Charles Street, Baltimore, MD 21201.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 275-7245. (TDD for hearing impaired: (202) 275-1721).

### SUPPLEMENTARY INFORMATION:

Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone: (202) 289-4357/4359.

<sup>1</sup> See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1967), and final rules published in the Federal Register December 22, 1987 (52 FR 48440-48446).

(Assistance for the hearing impaired is available through TDD services (202) 275-1721.)

Decided: December 19, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

Noreta R. McGee,  
Secretary.

[FR Doc. 88-29752 Filed 12-27-88; 8:45 am]  
BILLING CODE 7035-01-M

[Docket No. AB-3 (Sub-No. 57)]

**Missouri Pacific Railroad Co.; Abandonment; in Osage County, KS; Findings**

The Commission has found that the public convenience and necessity permit Missouri Pacific Railroad Company to abandon its 13.5-mile line of railroad between milepost 368.3 near Lomax and milepost 381.8 near Overbrook in Osage County, KS.

A certificate will be issued authorizing abandonment unless within 15 days after this publication the Commission also finds that: (1) A financially responsible person has offered financial assistance (through subsidy or purchase) to enable rail service to be continued; and (2) it is likely that the assistance would fully compensate the railroad.

Any financial assistance offer must be filed with the Commission and the applicant no later than 10 days from publication of this Notice. The following notation shall be typed in bold face on the lower left-hand corner of the envelope containing the offer: "Rail Section, AB-OFA." Any offer previously made must be remade within this 10-day period.

Information and procedures regarding financial assistance for continued rail service are contained in 49 U.S.C. 10905 and 49 CFR 1152.

Decided: December 16, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips. Commissioner Phillips concurred with a separate expression. Commissioner Lamboley dissented with a separate expression.

Noreta R. McGee,  
Secretary.

[FR Doc. 88-29671 Filed 12-27-88; 8:45 am]  
BILLING CODE 7035-01-M

## DEPARTMENT OF JUSTICE

[Order No. 1308-88]

**Repatriation Review of Mariel Cubans**

**AGENCY:** Department of Justice.

### ACTION: Notice.

**SUMMARY:** Notice is hereby given that the Attorney General, pursuant to his prosecutorial discretionary authority, has revised the Repatriation Review Program for Cubans who arrived in the United States during the 1980 Mariel Cuban boatlift. The purpose of this Program is to determine which of those Mariel Cubans found to be excludable from the United States are to be returned to Cuba. This notice is being published in order to give the public information on the Department's continuing activities respecting the deportation of excludable Cuban boatlift participants.

**EFFECTIVE DATE:** The revised procedures described in this Notice are effective immediately.

**FOR FURTHER INFORMATION CONTACT:** George W. Calhoun, Director, Mariel Cuban Parole and Repatriation Program, Office of the Associate Attorney General, Telephone (202) 633-4374.

**SUPPLEMENTARY INFORMATION:** On December 28, 1987, a notice was published in the Federal Register (52 FR 48884) which described the program established by Attorney General Edwin Meese III for the review of the cases of detained, excludable Mariel Cubans to determine which of these aliens are to be repatriated to Cuba. Attorney General Meese directed that this Repatriation Review Program, as well as a separate Departmental Parole Review Program, be supervised by the Associate Attorney General. Experience, gained in the day-to-day administration of the programs, indicates that with only minor modifications to the repatriation review process the Department can save considerable resources and simultaneously eliminate potentially substantial delays in the release of certain detainees. By giving immigration parole powers directly to the Associate Attorney General and the repatriation panels, it is possible to approve the release on parole of certain repatriation candidates without their having to undergo a separate and lengthy parole review process. This is obviously a tangible benefit to those detainees, as it speeds their release, while it also conserves Departmental resources.

Accordingly, I have determined to confer parole authority on the Associate Attorney General and the repatriation panels, as well as to allow the panels to refer a repatriation candidate directly into the more elaborate parole review program, if the panels are unable to determine from their review that either repatriation or prompt release on parole is appropriate.

No change, however, is being made in the process under the regulations respecting the revocation of parole for detainees who are granted parole by the Associate Attorney General or by a repatriation panel.

Finally, minor related changes are being made to that aspect of the repatriation review program which deals with the resubmission of cases by the Service for reconsideration by panels. The Associate Attorney General will have the power to withdraw release approval with respect to any detainee granted parole, such as those whose conduct while awaiting sponsorship indicates that parole would no longer be appropriate, as well as to determine the extent of the procedures that will apply during any such reconsideration. Previously, a reconsideration would have required a complete repetition of all the procedures outlined in the repatriation program. Experience has indicated, however, that there would be no need to repeat a number of the steps, such as those involved in preliminary file reviews, which would needlessly prolong the alien's detention in the United States.

In keeping with the original Notice issued by Attorney General Meese, I have concluded that this revised Mariel Cuban Repatriation Review Program should be effective immediately and that it is not subject to notice and comment rulemaking under the Administrative Procedure Act because the program: (1) Is exempt as a "foreign affairs function of the United States," 5 U.S.C. 553(a)(1); (2) reflects a "general statement of policy," 5 U.S.C. 553(b)(A); (3) constitutes "rules of agency organization, procedure, or practice," 5 U.S.C. 553(b)(A); and (4) there is "good cause" why notice and comment would be "impracticable, unnecessary, or contrary to the public interest," 5 U.S.C. 553(b)(B).

The following is the procedural outline for the Mariel Cuban Repatriation Review Program.

### 1. Selection of Cases for Repatriation

A. Only those cases will be considered where the alien: (1) Has received an administratively final order of exclusion; or (2) volunteers to return to Cuba.

B. The Enforcement Branch of the Immigration and Naturalization Service will select cases from among those on the repatriation list based principally on criminal activity. The focus at the outset will be on those cases where the alien is ineligible for relief or where the alien is volunteering to return to Cuba.

### 2. Review of Case Selection

A. The alien will be sent notification by the Service that the Government intends to repatriate him to Cuba. This notification will also include a questionnaire for the alien to return to the Service within 30 days, and to set forth any reasons why he believes he should not be repatriated. Notification to the alien will also include a statement that he may seek the assistance of counsel, at no expenses to the Government, in the preparation of his response.

B. Upon receipt of the alien's submission, or his failure to return the questionnaire within 30 days, attorneys with the Service and the Civil Division will review the case and determine whether to proceed with repatriation efforts.

C. The alien will be notified if it should be decided that repatriation efforts will not be pursued at this time.

D. If it should be decided that repatriation efforts will proceed, attorneys for the Service and the Civil Division will prepare a memorandum summarizing the facts of the case. The alien will then receive from the Government (1) a notice of intent to deport the alien, (2) a translated copy of the Government's memorandum summarizing the facts of the case, and (3) a form provided for the alien to respond to the Government's memorandum, included in which will be notification to the alien that he may seek the assistance of counsel, at no expense to the Government, in the preparation of his response. The alien will be instructed in the materials that any response must be forwarded directly to a Repatriation Review Panel within the time prescribed by the Panel.

E. The memorandum prepared by the Service and the Civil Division attorneys will be forwarded to a Panel along with a copy of relevant file material.

### 3. Repatriation Review Panels for Excludable Mariel Cubans

A. The Associate Attorney General shall establish one or more Repatriation Review Panels and their procedures and shall supervise the review by the Panels of the cases of excludable Mariel Cubans selected for repatriation to Cuba. Each Panel shall be composed of three members, and shall consist of: (1) The Associate Attorney General, or his designee; (2) the Assistant Attorney General for Civil Rights, or his designee; and (3) the Director of the Community Relations Service, or his designee. A unanimous decision is required in each case. If one is not reached, the case will

be referred to a new panel for a final (majority allowed) decision.

B. A Panel possesses the power to approve the repatriation of an excludable Mariel Cuban to Cuba. In any case in which the Panel does not approve prompt repatriation, the Panel or the Associate Attorney General may grant parole for emergent reasons or for reasons deemed strictly in the public interest, or may refer a case for a special parole review under the procedures outlined in 8 CFR 212.13. No detainee shall be released on such a grant of parole until suitable sponsorship or placement has been found for the detainee. Pursuant to established regulations in 8 CFR Part 212, the Immigration and Naturalization Service will specify the conditions for parole and will retain the authority to revoke parole granted by a repatriation panel or the Associate Attorney General, as provided in §§ 212.12 and 212.13.

C. Decisions will be rendered based on a record review. Oral presentations will not be permitted, unless requested by a Panel in its sole discretion.

D. A Panel will consider only those cases that are presented for repatriation by the Service.

E. The Panel will independently evaluate the detainee's case in making its decision on whether to approve repatriation.

F. If a Panel refers a case for a special parole review under paragraph B above, the case may be presented by the Service at a later date for reconsideration of repatriation. In the event that the detainee has been granted parole by the Associate Attorney General or a repatriation panel, any such reconsideration of repatriation shall be preceded by either a withdrawal of parole approval by the Associate Attorney General or his designee, or, if actual release has occurred, the revocation of parole.

Should the Service submit the case for reconsideration of repatriation, the Associate Attorney General shall determine which procedural steps under this review program will be repeated prior to review before the Panel.

G. If a Panel does not approve repatriation to Cuba, the decision will be issued with the understanding that the case may be presented by the Service at a later date for reconsideration. Should the Service submit the case for reconsideration, all of the procedural aspects listed above will be repeated.



H. The decision to repatriate is final and subject to no further review.

Dick Thornburgh,  
Attorney General.

Dated: December 22, 1988.  
[FR Doc. 88-29699 Filed 12-27-88; 8:45 am]  
BILLING CODE 4410-10-M

#### Federal Bureau of Prisons

#### Intent To Prepare a Draft Environmental Impact Statement (DEIS) for the Construction of a Federal Correctional Facility, Taft, CA

AGENCY: U.S. Department of Justice, Federal Bureau of Prisons.

ACTION: Notice of intent to prepare a Draft Environmental Impact Statement (DEIS).

#### Summary

1. **Proposed Action:** The U.S. Department of Justice, Federal Bureau of Prisons has determined that a new federal correctional institution with an adjacent all original tract of land approximately 5 miles east of the City of Taft, a 550 acre tract of land will be evaluated. The proposal calls for the construction of a 600 bed facility to house medium inmates and a 150 to 300 bed Camp to house minimum security inmates.

Approximately 80 of the 550 acres would be used for road access, inmates housing, administration, programs, and support facilities.

2. In the process of evaluating the tract of land, several aspects will receive a detailed examination including: Utilities, traffic patterns, noise levels, visual intrusion, threatened and endangered species, cultural resources, and socio-economic impacts.

3. **Alternatives:** In developing the DEIS, the options of no action and alternative sites for the proposed facility will be fully and thoroughly examined.

4. **Scoping Process:** During the

preparation of the DEIS there have been numerous opportunities for public involvement in order to determine the issues to be examined. A scoping meeting will be held at a location convenient to the citizens of Taft. The meeting will be well publicized and will be held at a time which will make it possible for the public and interested agencies or organizations to attend.

In addition, a number of informal meetings have already been held with interested community leaders and officials.

(It should be noted that a Scoping Meeting was originally held on October 28, 1987, regarding this project. The site being considered at that time was found to be unacceptable. The Bureau of Prisons has identified a new site described above for the proposed facility.)

5. **DEIS Preparation:** Public notice will be given concerning the availability of the DEIS for public review and comment.

6. **Address:** Questions concerning the proposed action and the DEIS can be answered by: Patricia Sledge, Site Acquisition Coordinator, U.S. Bureau of Prisons, 320 First St. NW., Washington, DC 20534, Telephone: (202) 272-6534.

Dated: December 7, 1988.

William J. Patrick,  
Chief, Facilities Development & Operations,  
Federal Bureau of Prisons, Department of Justice.

[FR Doc. 88-29849 Filed 12-27-88; 8:45 am]  
BILLING CODE 4410-02-M

#### DEPARTMENT OF LABOR

#### Employment and Training Administration

#### Investigations Regarding Certifications of Eligibility To Apply For Worker Adjustment Assistance

Petitions have been filed with the

Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 9, 1989.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 9, 1989.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, 601 D Street, NW., Washington, DC 20213.

Signed at Washington, DC, this 28th day of November 1988.

Marvin M. Fooks,  
Director, Office of Trade Adjustment Assistance.

#### APPENDIX

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
AIC/Martin (laborers)	Anchorage, AK	11/18/88	11/7/88	21,772	Oil and gas.
Adobe Resources Corp. (workers)	Pittsburgh, PA	11/18/88	11/8/88	21,773	Oil and gas.
Ahtna Construction & Primary Products Corp. (workers)	Copper Center, AK	11/18/88	11/1/88	21,774	Oil and gas.
Alaska International Construction Inc. (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,775	Oil and gas.
Aldebraran Drilling Co. (workers)	Pratt, KS	11/18/88	11/8/88	21,776	Oil and gas.
Algoma Tube Corp. (workers)	Houston, TX	11/18/88	11/15/88	21,777	Oil and gas.
Amber Refining Co. (company)	Fl. Worth, TX	11/18/88	11/7/88	21,778	Oil and gas.
American Drilling, Co. (workers)	San Antonio, TX	11/18/88	11/14/88	21,779	Oil and gas.
American Mud Logging, Inc. (company)	Odessa, TX	11/18/88	11/10/88	21,780	Oil and gas.
Anglo Alaska Construction (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,781	Oil and gas.

#### APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Aqua Environmental Field Services Corp. (company)	Bradford, PA	11/18/88	11/9/88	21,782	Oil and gas.
Arapahoe Drilling Co. (workers)	Farmington, NM	11/18/88	11/7/88	21,783	Oil and gas.
Arapaho Oil & Gas (company)	Carlsbad, NM	11/18/88	10/5/88	21,784	Oil and gas.
Arctic Slope/AK General	Seattle, WA	11/18/88	11/1/88	21,785	Oil and gas.
Arctic Slope Wright Schuchart-Gregory & Cook (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,786	Oil and gas.
Arctic Surveys Co. (workers)	Fairbanks, AK	11/18/88	11/1/88	21,787	Oil and gas.
Arkansas Oil & Gas (workers)	El Dorado, AR	11/18/88	11/14/88	21,788	Oil and gas.
B&B Oil Well Service (workers)	Heidelberg, MS	11/18/88	11/10/88	21,789	Oil and gas.
Baker Hughes, CAC Division (company)	Oklahoma City, OK	11/18/88	10/27/88	21,790	Oil and gas.
Baker & Taylor Drilling (company)	Amarillo, TX	11/18/88	10/27/88	21,791	Oil and gas.
Barnette & Sons, Inc. (workers)	El Dorado, AR	11/18/88	11/9/88	21,792	Oil and gas.
Basin Packer Co., Inc. (workers)	Odessa, TX	11/18/88	11/14/88	21,793	Oil and gas.
Beebe & Beebe, Inc. (workers)	El Dorado, AR	11/18/88	11/11/88	21,794	Oil and gas.
Beavers Well Service, Inc. (company)	Louann, AR	11/18/88	11/5/88	21,795	Oil and gas.
Bob's Casing Crews (workers)	Odessa, TX	11/18/88	10/14/88	21,796	Oil and gas.
Boco of Louisiana, Inc. (workers)	Lafayette, LA	11/18/88	11/4/88	21,797	Oil and gas.
Borden Energy Resources (workers)	Geismar, LA	11/18/88	10/4/88	21,798	Oil and gas.
Bredero Price (Laborers)	Seattle, WA	11/18/88	11/7/88	21,799	Oil and gas.
Brice Inc. (workers)	Fairbanks, AK	11/18/88	11/1/88	21,800	Oil and gas.
Britt Construction (workers)	Big Lake, TX	11/18/88	11/7/88	21,801	Oil and gas.
Broughton Offshore Limited, II (workers)	Lafayette, LA	11/18/88	11/8/88	21,802	Oil and gas.
Bunton Oil Co. (company)	Newton, IL	11/18/88	11/1/88	21,803	Oil and gas.
CO2 In Action (company)	Amarillo, TX	11/18/88	10/27/88	21,804	Oil and gas.
CRC Mallard Workover & Drilling, Inc. (workers)	Lubbock, TX	11/18/88	11/9/88	21,805	Oil and gas.
Cabot Corp. (company)	Amarillo, TX	11/18/88	11/8/88	21,806	Oil and gas.
Cactus Drilling Co. (workers)	Midland, TX	11/18/88	11/3/88	21,807	Oil and gas.
Cactus Drilling Co. (workers)	Odessa, TX	11/18/88	11/9/88	21,808	Oil and gas.
Capitan Enterprises, Inc. (workers)	Odessa, TX	11/18/88	11/14/88	21,809	Oil and gas.
Capitol Trencher Corp. (workers)	Odessa, TX	11/18/88	11/14/88	21,810	Oil and gas.
Cavenham Energy Resources (OWCER)	Winnfield, LA	11/18/88	11/10/88	21,811	Oil and gas.
Charles Bearden Drilling (workers)	Wichita Falls, TX	11/18/88	10/28/88	21,812	Oil and gas.
Chief Drilling Co. Inc. (workers)	Hoisington, KS	11/18/88	11/9/88	21,813	Oil and gas.
Classic Construction Survey (workers)	Anchorage, AK	11/18/88	11/1/88	21,814	Oil and gas.
Cliffs Drilling (workers)	Houston, TX	11/18/88	11/13/88	21,815	Oil and gas.
Coleman Oil & Gas (company)	Farmington, NM	11/18/88	11/15/88	21,816	Oil and gas.
Cone Mills Co., Edna Plant (ACTWU)	Reidsville, NC	11/18/88	11/4/88	21,817	Textile yarns.
Construction & Rigging (workers)	Anchorage, AK	11/18/88	11/1/88	21,818	Oil and gas.
Crown Exploration Co. (company)	Abilene, TX	11/18/88	11/9/88	21,819	Oil and gas.
Dale's Oilwell Cementing Co. (company)	Morgan City, LA	11/18/88	9/27/88	21,820	Oil and gas.
Damson Oil Co. (company)	Houston, TX	11/18/88	11/1/88	21,821	Oil and gas.
David Crow-Blackbird, Co. (workers)	Shreveport, LA	11/18/88	11/16/88	21,822	Oil and gas.
Don Graves Well (company)	Booker, TX	11/18/88	10/4/88	21,823	Oil and gas.
Donald B. Murphy Contractors, Inc. (laborers)	Federal Way, AK	11/18/88	11/7/88	21,824	Oil and gas.
Doyles Fuel Service (workers)	Kenai, AK	11/18/88	11/1/88	21,825	Oil and gas.
Dresser Atlas (workers)	Mt. Vernon, IL	11/18/88	11/9/88	21,826	Oil and gas.
Dyna Jet, Inc. (company)	Gillette, WY	11/18/88	11/9/88	21,827	Oil and gas.
Dyna Jet, Inc. (company)	Grand Junction, CO	11/18/88	11/9/88	21,828	Oil and gas.
Earth Movers of Fairbanks (workers)	Fairbanks, AK	11/18/88	11/1/88	21,829	Oil and gas.
El Paso Natural Gas (workers)	El Paso, TX	11/18/88	9/14/88	21,830	Oil and gas.
Engineering & Production Service, Inc. (workers)	Farmington, NM	11/18/88	11/14/88	21,831	Oil and gas.
Enron Oil & Gas (workers)	Houston, TX	11/18/88	11/10/88	21,832	Oil and gas.
Enron Oil & Gas (workers)	Denver, CO	11/18/88	11/10/88	21,833	Oil and gas.
Exeter Drilling Northern, Inc. (workers)	Denver, CO	11/18/88	10/31/88	21,834	Oil and gas.
Explo, Inc. (company)	El Dorado, AR	11/18/88	11/3/88	21,835	Oil and gas.
Exploration Co. (company)	New Orleans, LA	11/18/88	11/7/88	21,836	Oil and gas.
Exploration Co. (The) (company)	San Antonio, TX	11/18/88	11/14/88	21,837	Oil and gas.
Fairbanks Lumber Supply (workers)	Fairbanks, AK	11/18/88	11/17/88	21,838	Oil and gas.
Fargo Trading Co. (company)	Corpus Christi, TX	11/18/88	11/1/88	21,839	Oil and gas.
Fiberflex Products, LTD (workers)	Big Spring, TX	11/18/88	11/10/88	21,840	Oil and gas.
Fleetwood Petroleum Ltd. (workers)	Bellevue, WA	11/18/88	11/14/88	21,841	Oil and gas.
Four States Casing (workers)	Farmington, NM	11/18/88	11/17/88	21,842	Oil and gas.
Frontier Rock & Sand, Inc. (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,843	Oil and gas.
Fullman Co. (UJAAPPI)	Portland, OR	11/18/88	11/14/88	21,844	Oil and gas.
G&G Tong Rental Oil Co. (workers)	Denver City, TX	11/18/88	11/14/88	21,845	Oil and gas.
Galloway Drilling, Co. (workers)	Wakeney, KS	11/18/88	9/23/88	21,846	Oil and gas.
Geophysics International Corp. (workers)	Dallas, TX	11/18/88	11/17/88	21,847	Oil and gas.
Gillespie Well Service Inc. (workers)	Mangolia, AR	11/18/88	11/9/88	21,848	Oil and gas.
Gillespie Well Service Inc. (workers)	Springhill, LA	11/18/88	11/9/88	21,849	Oil and gas.
Golden Services, Inc. (workers)	Victoria, TX	11/18/88	11/18/88	21,850	Oil and gas.
Goliad Operating Co. (company)	Stafford, TX	11/18/88	11/12/88	21,851	Oil and gas.
Grand Teton Contracting Co., Inc. (workers)	Beattyville, KY	11/18/88	10/30/88	21,852	Oil and gas.
Green Construction, Co. (workers)	Anchorage, AK	11/18/88	11/1/88	21,853	Oil and gas.
Gruy Companies (The) (workers)	Irving, TX	11/18/88	11/17/88	21,854	Oil and gas.
H&B Surveyors (workers)	Anchorage, AK	11/18/88	1/1/88	21,855	Oil and gas.
HC Price Construction Co. (workers)	Anchorage, AK	11/18/88	10/25/88	21,856	Oil and gas.
HF Hatcher & Son (workers)	Smackover, AR	11/18/88	11/17/88	21,857	Oil and gas.
H&N Oil Well Cementing Co., Inc. (workers)	El Dorado, AR	11/18/88	11/15/88	21,858	Oil and gas.



## APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Haddad & Brooks, Inc. (workers)	Washington, PA	11/18/88	10/27/88	21,859	Oil and gas.
Hudson Petroleum Corp. (workers)	Oklahoma City, OK	11/18/88	11/15/88	21,860	Oil and gas.
Haskell Corp. (UJAAPPI)	Bellingham, WA	11/18/88	11/14/88	21,861	Oil and gas.
Hatch Wireline Service, Inc. (workers)	Sterling, LA	11/18/88	11/5/88	21,862	Oil and gas.
Helmerich & Payne International Drilling (workers)	Tulsa, OK	11/18/88	11/18/88	21,863	Oil and gas.
Hoffman Construction Co. of Alaska (workers)	Portland, OR	11/18/88	11/1/88	21,864	Oil and gas.
Holmes & Narver Services Inc. (workers)	Anchorage, AK	11/18/88	11/14/88	21,865	Oil and gas.
Hook Bros. Oil Co. (workers)	Stinnett, TX	11/18/88	11/15/88	21,866	Oil and gas.
Hook Well Service (workers)	Stinnett, TX	11/18/88	11/15/88	21,867	Oil and gas.
Hook Tank Truck Services (workers)	Stinnett, TX	11/18/88	11/15/88	21,868	Oil and gas.
Hook Welding & Roustabout (workers)	Stinnett, TX	11/18/88	11/15/88	21,869	Oil and gas.
Houston Contracting (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,870	Oil and gas.
Hudgeons Oil Co. (workers)	El Dorado, AR	11/18/88	11/15/88	21,871	Oil and gas.
Hustlers Inc. (workers)	Anchorage, AK	11/18/88	11/1/88	21,872	Oil and gas.
Huthnance Drilling Co. (company)	Houston, TX	11/18/88	11/14/88	21,873	Oil and gas.
Hydri Co. (company)	Houston, TX	11/18/88	11/13/88	21,874	Oil and gas.
I.C. Gas Amcans, Inc. (workers)	Tulsa, OK	11/18/88	11/15/88	21,875	Oil and gas.
Intercontinental Energy Corp. (IEC)	Three Rivers, TX	11/18/88	11/8/88	21,876	Uranium.
International Oil & Gas Corp. (workers)	Houston, TX	11/18/88	11/3/88	21,877	Oil and gas.
J.B. Mechanical (UJAAPPI)	Lynnwood, WA	11/18/88	11/14/88	21,878	Oil and gas.
J-O-B Operating Co. (workers)	Shreveport, LA	11/18/88	11/14/88	21,879	Oil and gas.
J. David Reynolds Co. (company)	Camden, AR	11/18/88	11/4/88	21,880	Oil and gas.
John Ruggles & Co. (company)	Montgomery, TX	11/18/88	11/17/88	21,881	Oil and gas.
Johnson-Brisk, Inc. (workers)	Nome, AK	11/18/88	11/1/88	21,882	Oil and gas.
Johnston Oil Production (workers)	El Dorado, AR	11/18/88	11/10/88	21,883	Oil and gas.
Kimco Inc. (workers)	Kenai, AK	11/18/88	11/1/88	21,884	Oil and gas.
Kodiak Oil Field (workers)	Anchorage, AK	11/18/88	11/1/88	21,885	Oil and gas.
Koneb Service, Inc. (workers)	Amite, LA	11/18/88	11/14/88	21,886	Oil and gas.
Kuster Co. (company)	Broussard, LA	11/18/88	11/14/88	21,887	Oil and gas.
LHD & Associates (workers)	Anchorage, AK	11/18/88	11/1/88	21,888	Oil and gas.
Litwin Corp. (The) (workers)	Kenai, AK	11/18/88	11/1/88	21,889	Oil and gas.
Loco Hills Pump Service & Supply, Inc.	Artesia, NM	11/18/88	11/5/88	21,890	Oil and gas.
Lowery Oil Co. (company)	El Dorado, AR	11/18/88	11/10/88	21,891	Oil and gas.
Lynden Transport, Inc. (workers)	Seattle, WA	11/18/88	11/1/88	21,892	Oil and gas.
MacFarlane Co. (workers)	El Dorado, AR	11/18/88	11/14/88	21,893	Oil and gas.
Magnolia Trucking Co. (workers)	Magnolia, AR	11/18/88	11/15/88	21,894	Oil and gas.
Mammoth of Alaska (workers)	Anchorage, AK	11/18/88	11/1/88	21,895	Oil and gas.
Mandarin Oil & Gas Co. (company)	Dallas, TX	11/18/88	10/22/88	21,896	Oil and gas.
Marietta Royalty Co., Inc. (company)	Stillwater, OK	11/18/88	11/10/88	21,897	Oil and gas.
Marietta Royalty Co., Inc. (workers)	Marietta, OH	11/18/88	11/10/88	21,898	Oil and gas.
Marshall Oil Corp. (workers)	Oklahoma City, OK	11/18/88	11/18/88	21,899	Oil and gas.
Maxwell Herring Drilling Corp. (workers)	Tyler, TX	11/18/88	11/14/88	21,900	Oil and gas.
McDermott Marine Construction (company)	Morgan City, LA	11/18/88	11/7/88	21,901	Oil and gas.
Midland South West Division (workers)	Midland, TX	11/18/88	11/5/88	21,902	Oil and gas.
Missouri Typewriter Exchange Inc. (workers)	Wentzville, MO	11/18/88	11/7/88	21,903	Typewriters and calculators.
Moore & Munger Energy/Chapman Energy (workers)	Smackover, AR	11/18/88	11/14/88	21,904	Oil and gas.
Morrison Knudsen (UJAAPPI)	Fairbanks, AK	11/18/88	11/14/88	21,905	Oil and gas.
Morrison Knudsen Co. (workers)	Anchorage, AK	11/18/88	11/1/88	21,906	Oil and gas.
Mukluk Freight Lines Inc. (workers)	Seattle, WA	11/18/88	11/1/88	21,907	Oil and gas.
Murphy Oil USA, Inc. (company)	El Dorado, AR	11/18/88	11/14/88	21,908	Oil and gas.
Natkin/Ahtna (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,909	Oil and gas.
Ned R. Price Oil Co. (company)	Smackover, AR	11/18/88	11/3/88	21,910	Oil and gas.
Niel F. Lampson (workers)	Kennewick, WA	11/18/88	11/1/88	21,911	Oil and gas.
Noble Drilling Corp. (workers)	New Orleans, LA	11/18/88	11/2/88	21,912	Oil and gas.
Noble Drilling Corp. (workers)	Tulsa, OK	11/18/88	11/18/88	21,913	Oil and gas.
Nobors Alaska Drilling (workers)	Anchorage, AK	11/18/88	10/22/88	21,914	Oil and gas.
Norse Well Service (company)	Havre, MT	11/18/88	11/4/88	21,915	Oil and gas.
Northland Maintenance Co. (workers)	Anchorage, AK	11/18/88	11/1/88	21,916	Oil and gas.
Nowaco Services (workers)	Farmington, NY	11/18/88	11/1/88	21,917	Oil and gas.
Ocean Drilling Co. (company)	New Orleans, LA	11/18/88	11/7/88	21,918	Oil and gas.
Oilfield Testors & Equipment	Morgan City, LA	11/18/88	11/15/88	21,919	Oil and gas.
Olympic/Shea Ventures (workers)	Denver, CO	11/18/88	11/14/88	21,920	Oil and gas.
P.M.B. Operators Inc. (workers)	Erath, LA	11/18/88	11/17/88	21,921	Oil and gas.
Pelham Marine Inc. (workers)	Houma, LA	11/18/88	11/18/88	21,922	Oil and gas.
Perry Gas Processors (workers)	Odessa, TX	11/18/88	11/14/88	21,923	Oil and gas.
Petco Fishing & Rental (workers)	Corpus Christi, TX	11/18/88	11/14/88	21,924	Oil and gas.
Petromark Resources Co. (company)	Tulsa, OK	11/18/88	11/8/88	21,925	Oil and gas.
Phillips Petroleum/Tioga Gas Plant (workers)	Tioga, ND	11/18/88	10/17/88	21,926	Oil and gas.
Pool Co. (workers)	Houston, TX	11/18/88	11/18/88	21,927	Oil and gas.
Pool Offshore (workers)	Harvey, LA	11/18/88	11/15/88	21,928	Oil and gas.
Pride & Suther (UJAAPPI)	Seattle, WA	11/18/88	11/14/88	21,929	Oil and gas.
Producers Oil Co. (company)	Tulsa, OK	11/18/88	11/17/88	21,930	Oil and gas.
Prudential Oil & Gas (workers)	Houston, TX	11/18/88	10/21/88	21,931	Oil and gas.
Quaker State Corp., Production Division (company)	Titusville, FL	11/18/88	11/8/88	21,932	Oil and gas.
Quanco Oil & Gas, Inc. (workers)	El Dorado, AR	11/18/88	11/15/88	21,933	Oil and gas.
Quarles Drilling Corp. (workers)	Tulsa, OK	11/18/88	11/17/88	21,934	Oil and gas.
Quarles Drilling Corp. (workers)	Wheatland, OK	11/18/88	11/17/88	21,935	Oil and gas.
Quarles Drilling Corp. (workers)	Belle Chasse, LA	11/18/88	11/17/88	21,936	Oil and gas.

## APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
RPI Texas, Inc. (workers)	Austin, TX	11/18/88	11/1/88	21,937	
RPI, Inc. (workers)	Boulder, CO	11/18/88	11/1/88	21,938	Oil and gas.
R.W. Brasseur & Associates (workers)	Erath, LA	11/18/88	11/17/88	21,939	Oil and gas.
Range Oil Co., Inc. (workers)	Wichita, KS	11/18/88	11/7/88	21,940	Oil and gas.
Range Drilling Co., (workers)	Wichita, KS	11/18/88	11/7/88	21,941	Oil and gas.
Red Oak Exploration, Inc. (workers)	Duncanville, TX	11/18/88	11/17/88	21,942	Oil and gas.
Reliance Well Service (workers)	Magnolia, AR	11/18/88	11/15/88	21,943	Oil and gas.
Renfro Fishing Service (workers)	Casper, WY	11/18/88	10/14/88	21,944	Oil and gas.
Relamco Operating, Inc. (workers)	San Antonio, TX	11/18/88	11/15/88	21,945	Oil and gas.
Roll'n Alaska Inc. (workers)	Anchorage, AK	11/18/88	11/8/88	21,946	Oil and gas.
Rosamond Drilling (company)	Houston, TX	11/18/88	11/1/88	21,947	Oil and gas.
S.W. Jack Drilling Co. (workers)	Indiana, PA	11/18/88	11/10/88	21,948	Oil and gas.
Santa Ana Corp. (company)	Lafayette, LA	11/18/88	11/7/88	21,949	Oil and gas.
Schlumberger Well Services (workers)	Broussard, LA	11/18/88	11/5/88	21,950	Oil and gas.
Schlumberger Well Services (workers)	Lafayette, LA	11/18/88	11/5/88	21,951	Oil and gas.
Schlumberger Well Services (workers)	Magnolia, AR	11/18/88	11/10/88	21,952	Oil and gas.
Scientific Drilling (workers)	Houston, TX	11/18/88	11/18/88	21,953	Oil and gas.
Sealand Freight Services (workers)	Anchorage, AK	11/18/88	11/1/88	21,954	Oil and gas.
Seiscom Delta United (workers)	Houston, TX	11/18/88	11/18/88	21,955	Oil and gas.
Shaughnessy Co., Inc. (workers)	Seattle, WA	11/18/88	11/1/88	21,956	Oil and gas.
Shuler Drilling Co., Inc. (company)	El Dorado, AR	11/18/88	11/4/88	21,957	Oil and gas.
Silverridge Corp. (workers)	Van Buren, AR	11/18/88	11/15/88	21,958	Oil and gas.
Silverridge Corp. (workers)	Van Buren, AR	11/18/88	11/15/88	21,959	Oil and gas.
Siana Surveys Inc. (workers)	Anchorage, AK	11/18/88	11/1/88	21,960	Oil and gas.
Sohio Construction Co. (workers)	Anchorage, AK	11/18/88	11/1/88	21,961	Oil and gas.
Sourdough Freight Lines (workers)	Fairbanks, AK	11/18/88	11/1/88	21,962	Oil and gas.
Southwest Energy Corp. (workers)	Tulsa, OK	11/18/88	10/31/88	21,963	Oil and gas.
Southwestern Energy Production Co. (workers)	Denver, CO	11/18/88	10/23/88	21,964	Oil and gas.
Southwestern Energy Production Co. (workers)	Oklahoma City, OK	11/18/88	10/23/88	21,965	Oil and gas.
Southwestern Energy Production Co. (workers)	Fayetteville, AR	11/18/88	10/23/88	21,966	Oil and gas.
Summit Equipment Co. (workers)	Anchorage, AK	11/18/88	11/1/88	21,967	Oil and gas.
Stanco Insulation Services (workers)	Roosevelt, UT	11/18/88	10/17/88	21,968	Oil and gas.
Standard Alaska Product Co. (workers)	Anchorage, AK	11/18/88	11/15/88	21,969	Oil and gas.
Stone Petroleum Corp. (workers)	Lafayette, LA	11/18/88		21,970	Oil and gas.
Spencer Steam & Well Service (workers)	Stinnett, TX	11/18/88	11/15/88	21,971	Oil and gas.
State Geophysical Corp. (workers)	Wichita Falls, KS	11/18/88	11/10/88	21,972	Oil and gas.
Stream Energy, Inc. (workers)	Oklahoma City, OK	11/18/88	11/16/88	21,973	Oil and gas.
Sun Exploration Co. (workers)	Longview, TX	11/18/88	11/14/88	21,974	Oil and gas.
Sundance Exploration (workers)	Amarillo, TX	11/18/88	10/27/88	21,975	Oil and gas.
Superior Plumbing & Heating (UJAAPPI)	Anchorage, AK	11/18/88	11/14/88	21,976	Oil and gas.
T.O.T. Drilling Corp. (workers)	Odessa, TX	11/18/88	10/13/88	21,977	Oil and gas.
Teisco Oilfield Services, Inc. (company)	Meriden, CT	11/18/88	11/15/88	21,978	Oil and gas.
Teria Resources, Inc. (workers)	Gillette, WY	11/18/88	11/15/88	21,979	Oil and gas.
Texas Eastern Corp. (workers)	Houston, TX	11/18/88	11/11/88	21,980	Oil and gas.
Texas Energies, Inc. (workers)	Wichita, KS	11/18/88	11/17/88	21,981	Oil and gas.
Texas Oil & Gas Corp. (workers)	Denver, CO	11/18/88	11/8/88	21,982	Oil and gas.
Texas Universal Petroleum Co.	Midland, TX	11/18/88	11/17/88	21,983	Oil and gas.
Tooke International (workers)	Midland, TX	11/18/88	11/17/88	21,984	Oil and gas.
Torch Operating Co. (workers)	Oklahoma City, OK	11/18/88	11/7/88	21,985	Oil and gas.
Transok, Inc. (workers)	Tulsa, OK	11/18/88	11/15/88	21,986	Oil and gas.
Tri-Service Drilling, Co. (workers)	Midland, TX	11/18/88	11/15/88	21,987	Oil and gas.
Tri State Oil Tools, Inc. (workers)	Bossier City, LA	11/18/88	11/10/88	21,988	Oil and gas.
Tri State Oil Tools, Inc. (workers)	Lafayette, LA	11/18/88	11/10/88	21,989	Oil and gas.
Underwood Oil Well Service Inc. (workers)	Monroe, LA	11/18/88	11/14/88	21,990	Oil and gas.
Valdez Surveying Inc. (workers)	Valdez, AK	11/18/88	11/1/88	21,991	Oil and gas.
Van Drill Inc. (workers)	Oklahoma City, OK	11/18/88	11/10/88	21,992	Oil and gas.
Venango Drilling (workers)	Oil City, PA	11/18/88	11/9/88	21,993	Oil and gas.
Vertex (workers)	Fairbanks, AK	11/18/88	11/1/88	21,994	Oil and gas.
Webb Bros. Well Service Inc. (workers)	El Dorado, AR	11/18/88	11/15/88	21,995	Oil and gas.
Weiser-Brown Oil Co. (workers)	Magnolia, AR	11/18/88	11/15/88	21,996	Oil and gas.
Western Drilling Co. (workers)	Williston, ND	11/18/88		21,997	Oil and gas.
Western Kansas Drilling (workers)	Hays, KS	11/18/88	10/31/88	21,998	Oil and gas.
Western Oceanic, Inc. (workers)	Houston, TX	11/18/88	11/15/88	21,999	Oil and gas.
William E. Goodwin (company)	Oil City, PA	11/18/88	11/12/88	22,000	Oil and gas.
Wintershall Oil & Gas Corp. (workers)	Englewood, CO	11/18/88	11/8/88	22,001	Oil and gas.
Wold Drilling Inc. (workers)	Casper, WY	11/18/88	10/28/88	22,002	Oil and gas.
Wolf Energy (workers)	Midland, TX	11/18/88	11/10/88	22,003	Oil and gas.
World Producers, Inc. (workers)	Dallas, TX	11/18/88	11/15/88	22,004	Oil and gas.
Wright Drilling Co. (workers)	Harriman, TN	11/18/88	11/1/88	22,005	Oil and gas.
Yates Petroleum Corp. (workers)	Artesia, NM	11/18/88	11/17/88	22,006	Oil and gas.

[FR Doc. 88-29781 Filed 12-27-88; 8:45 am]

BILLING CODE 4510-30-M



[TA-W-19,758 Houston, Texas; TA-W-19,758A Wichita, Kansas]

**BHP Petroleum (Americas), Inc. Headquarters Staff; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance**

In accordance with section 223 of the Trade Act of 1974 (19 USC 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 21, 1987 applicable to all workers of the Headquarters Staff of BHP Petroleum (Americas), Incorporated, Houston, Texas.

A petitioner claimed that the former location of the Headquarters Staff was in Wichita, Kansas. Based on new information from the company, the Headquarters Staff was moved in the fourth quarter of 1986 from Wichita to Houston, Texas—the headquarters location at the time of petition submittal. The petition was filed on behalf of 250 headquarters office workers laid off in May, 1988. The intent of the certification is to cover all headquarters staff personnel at both headquarters locations. The notice, therefore is amended by including the former headquarters location in Wichita, Kansas.

The amended notice applicable to TA-W-19,758 is hereby issued as follows:

All workers of the Headquarters Staff of BHP Petroleum (Americas), Incorporated, Wichita, Kansas and Houston, Texas who became totally or partially separated from employment on or after May 10, 1986 are eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 12th day of November, 1988.

**Stephen A. Wandner,**  
Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 88-29708 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-15,410 Bristol, TN; TA-W-15,422 Mountain City, TN]

**Burlington Industries Textured Woven Division; Negative Determinations on Remand**

Pursuant to the U.S. Court of International Trade remand dated October 28, 1988 in *Grace Smith et al., v. Secretary of Labor* (USCIT 85-06-00745) the Department is recommending that a negative determination on remand be issued.

The Court remanded the case because of the partial customer survey conducted by the Department and not

obtaining responses for the top two customers experiencing the greatest sales decline from the Textured Woven Division.

The Mountain City and Bristol plants are but two of several Burlington plants which produced polyester woven fabric in the period 1982 to 1984. The Department was of the opinion that it had conducted a fair and adequate investigation given (1) the findings that sales and production increased in 1983 compared to 1982 at both Mountain City and Bristol (2) the Department's survey of Burlington's customers showing no increased reliance on imports or polyester woven fabric and (3) other investigation findings showing that lost production will be consolidated with other corporate plants.

On reconsideration, the Department supplemented the record by disaggregating the U.S. import table on All Finished Fabric for the first three months of 1984 and considered only Polyester Woven Fabric for the first nine months of 1984 as being more germane to the production at the subject plants. This new finding showed that U.S. aggregate imports of polyester woven fabric declined in the first nine months of 1984 compared to 1983. In any event, the responses to the Department's survey, though partial, showed that none of the customers increased their reliance on polyester woven fabric during the period surveyed.

On remand the Department obtained information from the remaining customers who never responded to the Department's survey in October 1984. Although over four years have elapsed since the first survey, the Department was successful in obtaining responses from five of the seven who previously did not respond, including the two top decliners. These responses showed that none of the five imported polyester woven fabric.

**Conclusion**

After reconsideration, I reaffirm the original denial of eligibility to apply for adjustment assistance to workers at the Textured Woven Division of Burlington Industries, Bristol, Tennessee and Mountain City, Tennessee.

Signed at Washington, DC, this December 14, 1988.

**Stephen A. Wandner,**  
Deputy Director, Office of Legislation and Actuarial Services, UIS.

[FR Doc. 88-29789 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-21,429]

**Guadalupe Oil and Gas Co., Victoria, TX; Termination of Investigation**

Pursuant to section 211 of the Trade Act of 1974, an investigation was initiated on October 24, 1988 in response to a worker petition received on October 24, 1988 which was filed on behalf of workers at Guadalupe Oil and Gas Company, located at Victoria, Texas.

Layoffs at the subject firm occurred in the middle of 1986; the company terminated operations on July 31, 1986. All workers were separated from the subject firm more than one year prior to the date of the petition. Section 223 of the Act specifies that no certification may apply to any worker whose last separation occurred more than one year before the date of the petition. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 15th day of December 1988.

**Marvin M. Fooks,**  
Director, Office of Trade Adjustment Assistance.

[FR Doc. 88-29782 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-21,521]

**LTV Steel Tubular Products Co., Campbell Works, Youngstown, OH; Termination of Investigation**

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated in response to a worker petition which was received on October 31, 1988 and filed on behalf of workers at the Campbell Works of LTV Steel Tubular Products Company, Youngstown, Ohio.

All production operations at the Campbell Works were idled in mid-1986 and all production workers were released prior to the earliest possible impact date. Consequently, further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, DC, this 8th day of December 1988.

**Marvin M. Fooks,**  
Director, Office of Trade Adjustment Assistance.

[FR Doc. 88-29783 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-21,445]

**Loffland Brothers Co., New Braunfels, TX; Termination of Investigation**

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated in response to a worker petition which was filed on October 24, 1988 on behalf of workers at Loffland Brothers Company, New Braunfels, TX.

An active certification covering the petitioning group of workers is currently in effect (TA-W-21,366; TA-W-21,366A-M). Consequently, further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, DC, this 15th day of December, 1988.

**Marvin M. Fooks,**  
Director, Office of Trade Adjustment Assistance.

[FR Doc. 88-29784 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-21,315]

**TransAmerican Natural Gas Corp., Laredo, TX; Termination of Investigation**

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on October 11, 1988 in response to a worker petition received on October 11, 1988 which was filed on behalf of workers at TransAmerican Natural Gas Corporation, Laredo, TX.

The retroactive provision of section 1421(a)(1)(B) of the Omnibus Trade and Competitiveness Act of 1988 do not apply to workers who are engaged in the production of crude oil or refined petroleum products if such workers were eligible to be certified for benefits under the Trade Act prior to the implementation of the retroactive provisions.

A negative determination applicable to the petitioning group of workers was recently recommended for the same group of workers at TransAmerican Natural Gas Corporation, Laredo, TX, on November 25, 1988 (TA-W-21,241). No new information is evident which would result in a reversal of the Department's previous determination. Consequently, further investigation in this case would serve no purpose; and the investigation has been terminated.

Signed at Washington, DC, this 5th day of December 1988.

**Marvin M. Fooks,**  
Director, Office of Trade Adjustment Assistance.

[FR Doc. 88-29785 Filed 12-27-88; 8:45 am]  
BILLING CODE 4510-30-M

**NATIONAL ECONOMIC COMMISSION**

**Meetings**

**AGENCY:** National Economic Commission.

**ACTION:** Cancellation of public meetings on January 4 and 5.

**SUMMARY:** The National Economic Commission meetings scheduled for January 4 and 5, 1989 have been cancelled. The agenda topics for those meetings: Economic assumptions, review of budget options, alternative baselines and treatment of social security will be taken up at subsequent meetings, including the meetings scheduled for January 10 and 11, 1989.

**FOR FURTHER INFORMATION CONTACT:** Jim Hildreth at 703-425-6986 or 202-789-1993, National Economic Commission, 734 Jackson Place NW., Washington, DC 20503.

**SSUPPLEMENTARY INFORMATION:** See Federal Register, Volume 53, No. 80, Tuesday, April 26, 1988, Page 14871.

**Drew Lewis,**  
Co-Chairman.

**Robert S. Strauss,**  
Co-Chairman.

[FR Doc. 88-29837 Filed 12-27-88; 8:45 am]  
BILLING CODE 6820-45-M

**NATIONAL SCIENCE FOUNDATION**

**Materials Submitted for OMB Review**

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting this notice of information collection that will affect the public.

**Agency Clearance Officer:** Herman G. Fleming, (202) 357-9520.

**OMB Desk Officer:** Written comments to: Office of Information and Regulatory Affairs, ATTN: Jim Houser, Desk Officer, OMB, 722 Jackson Place, Room 3208, NEOB, Washington, DC 20503.

**Title:** Survey of Non-U.S. Citizen Scientists and Engineers.

**Affected Public:** Individuals.

**Responses/Burden Hours:** 2,477 respondents; an average of 9 minutes per response.

**Abstract:** This pilot survey will determine the feasibility of collecting data on immigrant scientists and engineers. If successful, periodic surveys may be conducted to provide ongoing data on this missing element in estimates of the total number and characteristics of scientists and engineers in the United States.

Dated: December 22, 1988.

**Herman G. Fleming,**  
NSF Clearance Officer.

[FR Doc. 88-29834 Filed 12-27-88; 8:45 am]  
BILLING CODE 7555-01-M

**Materials Submitted for OMB Review**

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting this notice of information collection that will affect the public.

**Agency Clearance Officer:** Herman G. Fleming, (202) 357-9520.

**OMB Desk Officer:** Written comments to: Office of Information and Regulatory Affairs, ATTN: Jim Houser, Desk Officer, OMB, 722 Jackson Place, Room 3208, NEOB, Washington, DC 20503.

**Title:** Baseline Data for the Young Scholars Program.

**Affected Public:** Individuals.

**Responses/Burden Hours:** 6,000 respondents; an average of 15 minutes per response.

**Abstract:** NSF needs the information to establish baseline data on its Young Scholars Program. This will allow for the assessment of program impact after enough time has elapsed to allow for observable results, including the influence of participation on career selection. The affected individuals are students in the projects.

Dated: December 22, 1988.

**Herman G. Fleming,**  
NSF Clearance Officer.

[FR Doc. 88-29835 Filed 12-27-88; 8:45 am]  
BILLING CODE 7555-01-M

**Materials Submitted for OMB Review**

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting this notice of information collection that will affect the public.

**Agency Clearance Officer:** Herman G. Fleming, (202) 357-9520.

**OMB Desk Officer:** Written comments to: Office of Information and Regulatory Affairs, ATTN: Jim Houser, Desk Officer, OMB, 722 Jackson Place, Room 3208, NEOB, Washington, DC 20503.

**Title:** Survey of Graduate Science and Engineering Students and Postdoctorates.

**Affected Public:** Non-profit institutions.

**Responses/Burden Hours:** 9,600 respondents; an average of 1 hour and 20 minutes per response.

**Abstract:** The survey is the only source of national statistics on graduate students and on student and post

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doctorate support in graduate science/engineering programs. Federal agencies, State Education Boards, institutions of higher education and others use the data to monitor S/E educational programs and to plan for future S/E personnel needs.

Dated: December 22, 1988.

Herman G. Fleming,

NSF Clearance Officer.

[FR Doc. 88-29836 Filed 12-27-88; 8:45 am]

BILLING CODE 7550-01-M

## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-293]

### Boston Edison Co.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from certain requirements of 10 CFR Part 50, Appendix E, to the Boston Edison Company (BECO/licensee) for the Pilgrim Nuclear Power Station located at the licensee's site in Plymouth County, Massachusetts.

#### Environmental Assessment

##### Identification of the Proposed Action

The proposed action would grant an extension to previously granted scheduler exemptions from certain specific requirements of Appendix E of 10 CFR Part 50.

On September 17, 1987, BECO requested an exemption from Section IV.F.3, which requires that each licensee at each site shall exercise with offsite authorities such that State and local government emergency plans for each operating reactor site are exercised biennially, with full or partial participation by States and local governments, with the plume exposure pathway Emergency Planning Zone (EPZ). On December 16, 1987, the NRC granted a scheduler exemption, stipulating that an exercise be conducted prior to June 30, 1988. The exemption was based on the licensee's statements regarding the ongoing emergency preparedness improvement efforts by the Commonwealth and local governments, with the assistance of the licensee, which precluded the conduct of a full participation exercise. By letter dated April 14, 1988, the licensee requested an extension of the June 30, 1988 exemption deadline to permit conduct of an exercise prior to the end of 1988. The licensee's request stated that the ongoing improvements in emergency preparedness, which were

continuing, still precluded conduct of a full participation exercise. On May 18, 1988, the NRC granted the requested extension to the scheduler exemption.

A further scheduler exemption has been requested by the licensee. The exemption would be responsive to the licensee's request dated December 8, 1988.

#### The Need for the Proposed Action

The proposed exemption is needed because the Commonwealth of Massachusetts, the local governments within the EPZ and the two emergency reception center communities are still in the process, with the assistance of the licensee, of implementing numerous improvements in their offsite emergency preparedness programs. The improvement effort is in response to a Federal Emergency Management Agency (FEMA) Interim Finding issued August 4, 1987. That finding stated that offsite radiological emergency planning and preparedness for Massachusetts was inadequate to protect the health and safety of the public in the event of an accident at the Pilgrim Nuclear Power Station. The effort to upgrade the Pilgrim emergency plan has been underway for well over a year. In view of the extensive efforts, the Commonwealth and local governments were not able to fully participate in an exercise during 1987 and 1988 and the Commission has previously granted exemptions from the requirement to conduct the required exercises [52 FR 47806 on December 16, 1987 and 53 FR 17804 on May 18, 1988]. These exemptions expire on December 31, 1988. Although the deficiencies identified by FEMA have been corrected and the overall emergency plan has now been substantially upgraded, the approval process has not yet been completed and the Commonwealth has indicated that it is not prepared to participate in an exercise until the planning approval process is completed.

The last exercise conducted pursuant to Section IV.F.3 of Appendix E to 10 CFR Part 50 was held in September 1985. Literal compliance with Section IV.F.3 would not be possible without Commonwealth and local government participation.

#### Environmental Impact of the Proposed Action

The proposed exemption constitutes an exemption from the requirement to conduct an offsite full participation exercise within two years of the last full participation exercise carried out in 1985.

Since the last full participation biennial exercise at Pilgrim, the Commonwealth has participated on a

limited basis with the licensee in the December 1986 exercise and the quarterly onsite drills in 1987. The March and June 1987 drills also included limited participation by several of the towns within the EPZ. The towns within the EPZ have also cooperated in the full scale siren test conducted by FEMA in September 1986. The Commonwealth has also participated in full participation exercises at the Yankee Nuclear Power Station in June 1987 and a full participation exercise at the Vermont Yankee Nuclear Generating Station in December 1987 and a partial exercise at Vermont Yankee in August 1988.

The requested exemption is a temporary one and is necessary because the approval process for the proposed emergency plans is still underway. The licensee has made a good faith effort to comply with the regulation by assisting in the ongoing improvements to the Commonwealth and local offsite emergency response programs. The extensive efforts required to upgrade the offsite plans, implement the changes and conduct training preclude the conduct of a meaningful and effective full participation exercise at the current stage of the approval process. On the other hand, as indicated in the Exemption, there has been substantial improvement in plant safety as a result of improvements in plant features and a significant improvement in plant management. Moreover, there has been substantial improvement in emergency plans for the Pilgrim facility. The exemption concludes that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at the Pilgrim facility. Accordingly, this exemption does not adversely affect either the probability or the consequences of any accident at this facility. The exemption does not affect radiological effluents from the facility or radiation levels at the facility. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed exemption.

The proposed exemption does not affect nonradiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed exemption.

#### Alternative Use of Resources

This action involves no use of resources not previously considered in the Final Environmental Statement for the Pilgrim Nuclear Power Station.

#### Agencies and Persons Contacted

On August 4, 1987, FEMA provided information on the status of emergency preparedness at Pilgrim. The Commission has received substantial information concerning emergency planning at the Pilgrim facility in connection with its consideration of plant restart. This information was considered by the NRC in the evaluation of the requested exemption.

#### Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, the staff concludes that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this proposed action, see the licensee's letter dated December 8, 1988. This letter is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the Plymouth Public Library, 11 North Street, Plymouth, Massachusetts 02360.

Dated at Rockville, Maryland, this 22nd day of December 1988.

For the Nuclear Regulatory Commission,  
Richard H. Weissman,  
Director, Project Directorate I-3, Division of  
Reactor Projects I/II, Office of Nuclear  
Reactor Regulation.

[FR Doc. 88-29936 Filed 12-27-88; 8:45 am]

BILLING CODE 7550-01-M

[Docket No. 50-346]

### Toledo Edison Co. and the Cleveland Electric Illuminating Co.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPP-3, issued to Toledo Edison Company and The Cleveland Electric Illuminating Company (the licensees), for operation of the Davis-Besse Nuclear Power Station, Unit No. 1, located in Ottawa County, Ohio.

#### Environmental Assessment

##### Identification of Proposed Action

The proposed amendment would revise the provisions in the Davis-Besse Nuclear Power Station, Unit No. 1, Technical Specifications (TS's) relating to the Reactor Protection System (RPS) High Pressure Trip Setpoint and Anticipatory Reactor Trip System

(ARTS) Threshold Power in accordance with Toledo Edison Company's application dated February 1, 1988 as supplemented by letter dated February 26, 1988.

Specifically, the proposed amendment would:

- (1) Raise the ARTS turbine trip arming setpoint from 25% to 45% of full power,
- (2) Raise the RPS high pressure trip setpoint from 2300 psig to the original value of 2355 psig,
- (3) Raise the minimum Pilot Operated Relief Valve (PORV) trip setpoint to greater than 2435 psig from the existing value of greater than 2390 psig.

#### The Need for the Proposed Action

The proposed changes would reduce the likelihood of unplanned reactor trips and reduce unnecessary challenges to safety systems.

#### Environmental Impacts of the Proposed Action

The Davis-Besse RPS is designed to initiate a reactor trip when any of its monitored parameters exceeds its setpoint value to ensure fuel cladding and the Reactor Coolant System (RCS) boundary integrity are maintained. Raising the RPS High Pressure Trip Setpoint will not impact the peak pressure postulated during a high pressure trip and will maintain the RCS pressure boundary within its pre-established safety limits.

The Davis-Besse ARTS is designed to automatically trip the reactor and thereby reduce the severity of nuclear steam supply system (NSSS) transients that can result from a Loss of Main Feedwater Pumps and/or Main Turbine trip. Raising the ARTS arming level will reduce the number of unnecessary trips due to loss of the Main Feedwater Pumps or upon Main Turbine trip when secondary plant relief capacity is capable of providing plant runback when these conditions occur.

The Davis-Besse PORV is designed to provide, in conjunction with the Pressurizer Code Safety Valves, protection from overpressurization. Raising the PORV minimum setpoint has no effect on the valve's actual setpoint but provides an adequate margin above the RPS High Pressure Trip Setpoint such that minimization of PORV actuation is maintained.

The Commission has evaluated the environmental impact of the proposed amendment and has determined that neither the probability of accidents nor the post-accident radiological releases would be greater than previously determined. The proposed amendment does not otherwise affect radiological plant effluents during normal operation.

In addition, the proposed amendment does not have any influence upon occupational radiation exposure. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with this proposed amendment.

With regard to potential nonradiological impacts, the proposed amendment does not affect nonradiological plant effluents and has no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed amendment.

The Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the Federal Register on May 3, 1988 (53 FR 15758). No request for hearing or petition for leave to intervene was filed following this notice.

#### Alternatives to the Proposed Action

Since the Commission has concluded that the environmental effects of the proposed action are not significant, any alternative with equal or greater environmental impacts need not be evaluated.

The principal alternative would be to deny the requested amendment. This would not reduce the environmental impacts attributable to this facility and would only result in retaining the present potential for unplanned reactor trips and unnecessary challenges to safety systems in accordance with present design.

#### Alternative Use Of Resources

This action does not involve the use of resources not previously considered in the Final Environmental Statement related to operation of the Davis-Besse facility.

#### Agencies and Persons Consulted

The Commission's staff reviewed the licensee's request and did not consult other agencies or persons.

#### Finding of No significant impact

The Commission has determined not to prepare an environmental impact statement for the proposed amendment.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for amendment dated February 1, 1988, and letter dated February 26, 1988, which are



available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and at the University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606.

Dated at Rockville, Maryland, this 8th day of December, 1988.

For The Nuclear Regulatory Commission.

Timothy G. Colburn,

Acting Director, Project Directorate III-3  
Division of Reactor Projects—III, IV, V and  
Special Projects Office of Nuclear Reactor  
Regulation.

[FR Doc. 88-29997 Filed 12-27-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-327 and 50-328]

#### Tennessee Valley Authority, Sequoyah Nuclear Plant, Units 1 and 2; Issuance of Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. DPR-77 and DPR-79, issued to Tennessee Valley Authority (TVA, the licensee), for operation of the Sequoyah Nuclear Plant (SQN), Units 1 and 2, located in Hamilton County, Tennessee.

#### Identification of Proposed Action

The current license terms for the Sequoyah Nuclear Plant, Units 1 and 2 end on May 27, 2010. Accounting for the time that was required for plant construction, this represents an effective operating license of approximately 29 years and four months for Unit 1 and 28 years and eight months for Unit 2. The licensee's application dated June 21, 1988 requests an extension of the expiration dates so that the fixed period of the licenses would be 40 years from the date of the operating license issuance for both the units. The Commission's staff has prepared an Environmental Assessment of the Proposed Action, "Environmental Assessment by the Office of Special Projects Relating to the Change in Expiration Dates of Facility Operating Licenses Nos. DPR-77 and DPR-79, Tennessee Valley Authority, Units 1 and 2, Docket Nos. 50-327 and 50-328," dated December 22, 1988.

#### Summary of Environmental Assessment

The Commission's staff has reviewed the potential environmental impact of the proposed change in the expiration dates of the Operating Licenses for Sequoyah Nuclear Plant, Units 1 and 2. This evaluation considered all the previous environmental studies,

including the "Final Environmental Statement (FES) Related to Operation of Sequoyah Nuclear Plant, Units 1 and 2," and the revision to the FES.

#### Radiological Impacts

In the FES, TVA has calculated the offsite population doses based on the population estimates for the year 2010. The radiological impacts to offsite individuals due to releases of radioactive liquid and gaseous waste from the plant remain well within all applicable regulatory limits. Computed gaseous offsite doses are typically less than 3 percent of the 10 CFR Part 50, Appendix I, guidelines (for a two-unit plant) of 20 millirad/year gamma and 40 millirad/year beta air dose and 30 millirem/year organ dose. Computed offsite liquid doses are typically less than 10 percent of the 10 CFR 50, Appendix I, guidelines of 6 millirem/year total body and 20 millirem/year organ dose. Radioactive effluent releases are controlled by the technical specifications specified in section 3.11. These specifications implement the release limits specified in 10 CFR Part 20 and set performance goals based on 10 CFR 50, Appendix I. The Sequoyah Final Safety Analysis Report (FSAR) Section 2.1.3 provides the population density distribution around the site. Population projections are based on county projections by Tennessee, Georgia, Alabama, and North Carolina Social Sciences Advisory Committee. The population is estimated to increase from 45,740 in the year 2010 to 52,601 in the year 2021, an increase of approximately 15 percent. Doses calculated for offsite population in the year 2021 would be less than 15 percent greater than those estimated for the 2010 population. However, population doses would remain less than 0.1 percent of the natural background dose to the offsite population. Therefore, the staff agrees with the licensee and concludes that the higher projected population for 2021 would not change the overall conclusions of the FES concerning radiological consequences following accidents.

With regard to normal plant operation, the licensee complies with Commission guidance and requirements for keeping radiation exposures "as low as is reasonably achievable" (ALARA) for occupational exposures and for radioactive effluents. The licensee would continue to comply with these requirements during any additional years of facility operation and also apply advanced technology when available and appropriate. Accordingly, radiological impacts on man, both onsite and offsite, are not significantly more

severe than previously estimated in the FES and our previous conclusions remain valid.

The environmental impacts attributable to transportation of fuel and waste to and from the Sequoyah Nuclear Plant, with respect to normal conditions of transport and possible accidents in transport, would be bounded as set forth in Summary Table S-4 of 10 CFR Part 51.52, and the values in Table S-4 would continue to represent the contribution of transportation to the environmental costs associated with the reactor.

#### Non-Radiological Impacts

The Commission has concluded that the proposed extension will not cause a significant increase in the impacts to the environment and will not change any conclusions reached previously by the Commission.

#### Finding of No Significant Impact

The Commission's staff has reviewed the proposed change to the expiration dates of the Sequoyah Nuclear Plant, Units 1 and 2, Facility Operating Licenses relative to the requirements set forth in 10 CFR Part 51. Based upon the environmental assessment, the staff concluded that there are no significant radiological or non-radiological impacts associated with the proposed action and that the proposed license amendments will not have a significant effect on the quality of the human environment. Therefore, the Commission has determined, pursuant to 10 CFR 51.31, not to prepare an environmental impact statement for the proposed amendments.

For further details with respect to this action, see (1) the application for amendments dated June 21, 1988, (2) the Final Environmental Statement Related to Sequoyah Nuclear Plant, Units 1 and 2, issued February 21, 1974 and as updated on October 30, 1978, and (3) the Environmental Assessment dated December 22, 1988. These documents are available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street, Washington, DC 20555 and at the Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Dated at Rockville, Maryland, this 22nd day of December, 1988.

For the Nuclear Regulatory Commission.

Suzanne C. Black,

Assistant Director for Projects, TVA Projects  
Division, Office of Special Projects.

[FR Doc. 88-29732 Filed 12-27-88; 8:45 am]

BILLING CODE 7590-01-M

#### Advisory Committee on Reactor Safeguards (ACRS) and Advisory Committee on Nuclear Waste (ACNW); Proposed Meetings

In order to provide advance information regarding proposed public meetings of the ACRS Subcommittees and meetings of the ACRS full Committee, and of the ACNW, the following preliminary schedule is published to reflect the current situation, taking into account additional meetings which have been scheduled and meetings which have been postponed or cancelled since the last list of proposed meetings published December 1, 1988 (53 FR 48597). Those meetings which are definitely scheduled have had, or will have, an individual notice published in the Federal Register approximately 15 days (or more) prior to the meeting. It is expected that sessions of ACRS full Committee and ACNW meetings designated by an asterisk (\*) will be open in whole or in part to the public. ACRS full Committee and ACNW meetings begin at 8:30 a.m. and ACRS Subcommittee meetings usually begin at 8:30 a.m. The time when items listed on the agenda will be discussed during ACRS full Committee and ACNW Subcommittee meetings will start will be published prior to each meeting. Information as to whether a meeting has been firmly scheduled, cancelled, or rescheduled, or whether changes have been made in the agenda for the January 1989 ACRS full Committee and the ACNW meetings can be obtained by a prepaid telephone call to the Office of the Executive Director of the Committee (telephone: 301/492-7288, ATTN: Barbara Jo White) between 7:30 a.m. and 4:15 p.m., Eastern Time.

#### ACRS Subcommittee Meetings

**Regional Programs**, January 5-6, 1989, Region IV Office, Arlington, TX. The Subcommittee will review the activities under the purview of the NRC Region IV Office.

**Improved Light Water Reactors**, January 10, 1989, Bethesda, MD. The Subcommittee will review: the proposed final version of 10 CFR Part 52, Early Site Permits, Standard Design Certification, and Combined Licenses for Nuclear Power Reactors.

**Auxiliary and Secondary Systems**, January 11, 1989, Bethesda, MD. The Subcommittee will discuss the design of air systems, problems experienced by utilities with these systems, industry activities to improve the performance of such systems, and the proposed resolution of Generic Issue 43, "Air Systems Reliability."

**Mechanical Components**, January 11, 1989, Bethesda, MD. The Subcommittee will discuss Air Operated Valve Testing and Operating Experience (including Solenoid Air Control Valves) and other related matters.

**Human Factors**, January 26, 1989, Bethesda, MD. The Subcommittee will review the Human Factors Research Program Plan.

**Auxiliary and Secondary Systems**, January 27, 1989, Bethesda, MD. The Subcommittee will review the adequacy of the proposed staff's plans to implement the recommendations resulting from the Fire Risk Scoping Study.

**Mechanical Components**, January 27, 1989, Bethesda, MD. The Subcommittee will review Generic Issues 70, "PORV Reliability," and 94, "Low Temperature Over Pressure Protection," and other related matters.

**Safety Research Program**, February 8, 1989, Bethesda, MD. The Subcommittee will discuss the ongoing and proposed NRC Safety Research program and budget.

**Improved Light Water Reactors**, February 21, 1989, Bethesda, MD. The Subcommittee will review the SER and Chapter 5 of the EPRI ALWR Requirements Document.

**Occupational and Environmental Protection Systems**, March 1-2, 1989, Bethesda, MD. The Subcommittee will discuss the general status of emergency planning for nuclear power plants.

**Materials and Metallurgy**, March 15-16, 1989, Columbus, OH. The Subcommittee will review the degraded piping program, including NDE and aging of centrifugally cast stainless steel piping material.

**Babcock & Wilcox Reactor Plants**, March 22-23, 1989, Sacramento, CA. The Subcommittee will discuss the lessons learned from the approximately 2-year shutdown of Rancho Seco that occurred following the December 16, 1985, overcooling event. Topics include monitoring the extended start-up program, as well as, plant end organizational changes as a result of the restart effort.

**Limerick 2**, March 28, 1989, Philadelphia, PA. The Subcommittee will review Limerick 2 for a low power operating license.

**Maintenance Practices and Procedures**, March 30, 1989, Bethesda, MD. The Subcommittee will review the proposed maintenance rule.

**Materials and Metallurgy**, April 27, 1989, Palo Alto, CA. The Subcommittee will discuss the status of the following matters: erosion/corrosion of pipes, hydrogen/water chemistry, zinc

addition to primary coolant loop and its effects on materials, decontamination effects on materials and other related matters.

**Decay Heat Removal Systems**, Date to be determined (January/February), Bethesda, MD. The Subcommittee will review the proposed resolution of Generic Issue 23, "RCP Seal Failures."

**Joint Core Performance/Thermal Hydraulic Phenomena**, Date to be determined (January/February), Bethesda, MD. The Subcommittee will review the implications of the core power oscillation event at LaSalle, Unit 2.

**Advanced Pressurized Water Reactors**, Date to be determined (February), Bethesda, MD. The Subcommittee will discuss the licensing review bases document being developed for Combustion Engineering's Standard Safety Analysis Report-Design Certification (CESSAR-DC).

**AC/DC Power Systems Reliability**, Date to be determined (February), Bethesda, MD. The Subcommittee will review the proposed resolution of Generic Issue 128, "Electrical Power Reliability."

**Thermal Hydraulic Phenomena**, Date to be determined (February), Bethesda, MD. The Subcommittee will discuss the application of the leak-before-break criterion.

**General Electric Reactor Plants (Peach Bottom Restart)**, Date to be determined (February/March), Bethesda, MD. The Subcommittee will review the proposed restart plan for the Peach Bottom Plant.

**Instrumentation and Control Systems**, Date to be determined (February/March), Bethesda, MD. The Subcommittee will review the proposed resolution of Generic Issue 101, "Break Plus Single Failure in BWR Water Level Instrumentation."

**Extreme External Phenomena**, Date to be determined (February/March), Bethesda, MD. The Subcommittee will review planning documents on external events.

**Instrumentation and Control Systems**, Date to be determined (March/April), Bethesda, MD. The Subcommittee will review the implementation status of the ATWS rule.

**Advanced Pressurized Water Reactors**, Date to be determined (April), Bethesda, MD. The Subcommittee will discuss the comparison of WAPWR (RESAR SP/90) design with other modern plants (in U.S. and abroad).

**Plant Operating Procedures**, Date to be determined (spring), Bethesda, MD. The Subcommittee will review the status of the NRC program on Technical



Specifications update. Also, to review anonymous letter to E. Weiss, dated September 27, 1988, on Technical Specifications inadequacies.

**Materials and Metallurgy.** Date to be determined (2nd or 4th week of May, Bethesda, MD. The Subcommittee will review low upper shelf fracture energy concerns of reactor pressure vessels.

**Decay Heat Removal Systems.** Date to be determined, Bethesda, MD. The Subcommittee will explore the issue of the use of feed and bleed for decay heat removal in PWRs.

**Thermal Hydraulic Phenomena.** Date to be determined, Bethesda, MD. The Subcommittee will discuss the status of Industry Best-Estimate ECCS Model submittals for use with the revised ECCS Rule.

**Auxiliary and Secondary Systems.** Date to be determined, Bethesda, MD. The Subcommittee will discuss the: (1) Criteria being used by utilities to design Chilled Water Systems, (2) regulatory requirements for Chilled Water Systems design, and (3) criteria being used by the NRC staff to review the Chilled Water Systems design.

#### ACRS Full Committee Meetings

January 12-14, 1989—Items are tentatively scheduled.

\*A. **Sodium Advanced Fast Reactor (SAFR) (Open)**—Complete ACRS discussion and preparation of ACRS report on the preapplication review of this standardized plant.

\*B. **Fitness for Duty (Open)**—Review and report on proposed NRC rule regarding fitness for duty of nuclear power plant operators.

\*C. **Standard Design Certification and Combined Licenses for Nuclear Power Plants (Open)**—ACRS review and report regarding proposed final version of 10 CFR Part 52 regarding Early Site Permits, Standard Design Certifications, and Combined Licenses for nuclear power plants.

\*D. **Systematic Assessment of Operating Experience (Open)**—Briefing regarding AEOD reports on systematic assessment of operating experience.

\*E. **Meeting with NRC Commissioner James E. Curtiss (Open)**—Discuss items of mutual interest regarding ACRS/NRC activities.

\*F. **Decay Heat Removal/ECCS (Open)**—ACRS report on proposed NRC Code Scaling Applicability and Uncertainty Evaluation Methodology.

\*G. **Containment Systems (Open)**—Complete ACRS discussion and preparation of report to NRC regarding proposed recommendations for BWR Mark I containment performance and improvements.

\*H. **NRC Quantitative Safety Goals (Open)**—Complete ACRS discussion and preparation of ACRS report to NRC on the proposed plan for implementation of the NRC's Safety Goal Policy.

\*I. **Generic Issue 43, "Air Systems Reliability" (Open)**—Review and comment on proposed resolution of Generic Issue 43, "Air Systems Reliability."

\*J. **Nuclear Safety Research Program (Open)**—Discuss proposed ACRS annual report to the U.S. Congress on the NRC safety research program.

\*K. **Anticipated ACRS Activities (Open)**—Discuss topics proposed for consideration by the Committee.

\*L. **Anticipated ACRS Subcommittee Activities (Open)**—Discuss anticipated ACRS subcommittee activities and hear and discuss the status of assigned subcommittee and designated members activities.

\*M. **New Members (Closed)**—Discuss the qualifications of candidates proposed for consideration as nominees for appointment to the ACRS.

\*N. **Proposed NRC Legislative Changes Regarding Nuclear Power Plant Standardization and Licensing Reform, Etc. (Open)**—Briefing and discussion regarding proposed NRC legislative proposal regarding nuclear plant standardization and licensing reform, elimination of the requirement for an annual ACRS report to the U.S. Congress, etc.

\*O. **Severe Accident Policy for Future LWRs (Open)**—Briefing regarding proposed NRC plan for implementation of NRC's Severe Accident Policy for future LWRs.

\*P. **NRC Regulatory Process (Open)**—Discuss ACRS consideration of NRC regulatory philosophy.

\*Q. **Accident Management (Open)**—Briefing regarding NRC staff development of a program plan on severe accident management.

February 9-11, 1989—Agenda to be announced.

March 9-11, 1989—Agenda to be announced.

#### 6th ACNW Full Committee Meetings

January 23-24, 1989: Items are tentatively scheduled.

A. Discussion by the Director of the Division of High-Level Waste Management, Office of Nuclear Material Safety and Safeguards of 1989 Program Plans.

B. Administrative Session, including future agenda, new members, and staffing.

C. Discussion of West Valley Vitrification process.

B. Presentations by the Department of Energy on Performance Allocation and Assessment.

7th Meeting, February 22-23, 1989—Agenda to be announced.

8th Meeting, March 22-23, 1989—Agenda to be announced.

Date: December 22, 1988.

John C. Hoyle,  
Advisory Committee Management Officer.  
[FR Doc. 88-29766 Filed 12-27-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-604]

#### All Chemical Isotope Enrichment, Inc.; Exemption

##### I

All Chemical Isotope Enrichment Inc. (the applicant) has applied for a construction permit to own and operate gas centrifuge machines for the purpose of enriching stable isotopes at a site proposed for Oliver Springs, Tennessee. In order to enrich stable isotopes, AlChemIE is purchasing centrifuge machines from the Department of Energy (DOE). The centrifuge machines were originally designed and manufactured to enrich uranium, but AlChemIE will not use them for that purpose.

Although the enriching of stable isotopes is not ordinarily within the regulatory authority of the Commission, any equipment or device capable of enriching uranium, if intended for commercial use, must be licensed by the Commission. Since the centrifuge machines AlChemIE will obtain from the Department of Energy are capable of enriching uranium, their possession and use must be licensed. The Commission rule which governs the licensing of production facilities is 10 CFR Part 50. Since all of the centrifuge machines proposed for use at Oliver Springs have been tested using uranium hexafluoride, a thin film of a contamination has been left in each machine, primarily in the rotor.

The deposited material is uranyl fluoride,  $UO_2F_2$ , a reaction product formed when small amounts of moisture remaining in the low vacuum system react with the uranium hexafluoride. The Department of Energy has determined that the uranium contamination is sufficiently fixed that it did not carry over with either product or tails in tests with stable isotopes.

The applicant has conservatively assumed the occurrence of an accident which releases a fraction of the uranium and is then inhaled by a nearby operator. The resultant dose is

inconsequential. NRC staff analysis confirms this conclusion.

##### II

Section 50.34(a)(10) requires that applicants provide a discussion of preliminary plans for coping with emergencies. Section 50.34(b)(6)(v) requires that applicants provide plans for coping with emergencies, which shall include the items specified in Appendix E to 10 CFR Part 50, "Emergency Planning and Preparedness for Production and Utilization Facilities."

##### III

By letter dated August 17, 1988, the applicant requested an exemption from the requirements of § 50.34(a)(10), 50.34(b)(6)(v), and Appendix E to 10 CFR Part 50. The basis for the request for exemption is that the nature of facility for which the applicant seeks a construction permit is such that an emergency plan related to radiological hazard is unnecessary and not consistent with the underlying purpose of the regulation.

The NRC staff has reviewed the applicant's request for exemption, considering the limited issues the Commission established for findings in its notice published in the *Federal Register* on April 28, 1988 (53 FR 15317).

In its notice the Commission states that a license issued for the purposes stated above would govern possession of the centrifuge machines, but not the enriched stable isotopes produced. Accordingly, for the purposes of licensing, the only emergency planning to be undertaken by the applicant would be related to radioactive materials. Since the only radioactive material under consideration is the uranium firmly fixed to the centrifuge machines, there is no potential radiological hazard for which emergency planning is necessary.

Based on the above discussion the NRC staff finds that the requested exemption is acceptable.

##### IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(1), the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with common defense and security. The Commission has determined that the special circumstance which is present to support an exemption is described in 10 CFR 50.12(a)(2) (ii) and (vi).

Accordingly, the Commission hereby grants a permanent exemption from the requirements of 10 CFR 50.34(a)(10) and 50.34(b)(6)(v).

Pursuant to 10 CFR 51.32 the Commission has determined that the granting of this exemption will have no significant impact on the environment (December 13, 1988, 53 FR 50138).

For further details with respect to this action, see the request for exemption dated August 17, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., DC.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 20th day of December, 1988.

For the Nuclear Regulatory Commission,  
Richard E. Cunningham,  
Director, Division of Industrial and Medical Nuclear Safety, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 88-29757 Filed 12-27-88; 8:45 am]  
BILLING CODE 7590-01-M

[Docket No. 50-603]

#### All Chemical Isotope Enrichment, Inc.; Exemption

##### I

All Chemical Isotope Enrichment Inc. (the applicant) has applied for a construction permit to own and operate gas centrifuge machines for the purpose of enriching stable isotopes at the Centrifuge Plant Demonstration Facility (CPDF) located in Oak Ridge, Tennessee. In order to enrich stable isotopes, AlChemIE is purchasing centrifuge machines from the Department of Energy (DOE). The centrifuge machines were originally designed and manufactured to enrich uranium, but AlChemIE will not use them for that purpose.

Although the enriching of stable isotopes is not ordinarily within the regulatory authority of the Commission, any equipment or device capable of enriching uranium, if intended for commercial use, must be licensed by the Commission. Since the centrifuge machines AlChemIE will obtain from the Department of Energy are capable of enriching uranium, their possession and use must be licensed. The Commission rule which governs the licensing of production facilities is 10 CFR Part 50. Since all of the centrifuge machines proposed for use at the CPDF have been tested using uranium hexafluoride, a thin film of a contamination has been left in each machine, primarily in the rotor.

The deposited material is uranyl fluoride,  $UO_2F_2$ , a reaction product formed when small amounts of moisture remaining in the low vacuum system react with the uranium hexafluoride.

The Department of Energy has determined that the uranium contamination is sufficiently fixed that it did not carry over with either product or tails in tests with stable isotopes.

The applicant has conservatively assumed the occurrence of an accident which releases a fraction of the uranium and is then inhaled by a nearby operator. The resultant dose is inconsequential. NRC staff analysis confirms this conclusion.

##### II

Section 50.34(a)(10) requires that applicants provide a discussion of preliminary plans for coping with emergencies. Section 50.34(b)(6)(v) requires that applicants provide plans for coping with emergencies, which shall include the items specified in Appendix E to 10 CFR Part 50, "Emergency Planning and Preparedness for Production and Utilization Facilities."

##### III

By letter dated August 17, 1988, the applicant requested an exemption from the requirements of § 50.34(a)(10), 50.34(b)(6)(v), and Appendix E to 10 CFR Part 50. The basis for the request for exemption is that the nature of facility for which the applicant seeks a construction permit is such that an emergency plan related to radiological hazard is unnecessary and not consistent with the underlying purpose of the regulation.

The NRC staff has reviewed the applicant's request for exemption, considering the limited issues the Commission established for findings in its notice published in the *Federal Register* on April 28, 1988 (53 FR 15317).

In its notice the Commission states that a license issued for the purposes stated above would govern possession of the centrifuge machines, but not the enriched stable isotopes produced. Accordingly, for the purposes of licensing, the only emergency planning to be undertaken by the applicant would be related to radioactive materials. Since the only radioactive material under consideration is the uranium firmly fixed to the centrifuge machines, there is no potential radiological hazard for which emergency planning is necessary.

Based on the above discussion the NRC staff finds that the requested exemption is acceptable.

##### IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12(1), the exemption is authorized by law, will not present an undue risk to



the public health and safety, and is consistent with common defense and security. The Commission has determined that the special circumstance which is present to support an exemption is described in 10 CFR 50.12(a)(2) (ii) and (vi).

Accordingly, the Commission hereby grants a permanent exemption from the requirements of 10 CFR 50.34(a)(10) and 50.34(b)(6)(v).

Pursuant to 10 CFR 51.32 the Commission has determined that the granting of this exemption will have no significant impact on the environment (December 13, 1988, 53 FR 50137).

For further details with respect to this action, see the request for exemption dated August 17, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., DC.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 20th day of December, 1988.

For the Nuclear Regulatory Commission,  
Richard E. Cunningham,

Director, Division of Industrial and Medical Nuclear Safety, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 88-29758 Filed 12-27-88; 8:45 am]  
BILLING CODE 7590-01-M

[Docket No. 030-04951; License No. 22-00057-06]

**Minnesota Mining and Manufacturing Co., 3M Center 220-2E-02; Confirmatory Order Modifying License Effective Immediately**

I

Minnesota Mining and Manufacturing Company (3M or Licensee) is the holder of byproduct material licenses issued by the Nuclear Regulatory Commission (the Commission or NRC). License No. 22-00057-06 (the 06 License) was issued on February 17, 1984, was most recently amended on May 6, 1987, and expires on May 31, 1992. This license authorizes the Licensee to use a variety of radionuclides, including polonium-210 (Po-210), and to conduct a variety of activities with these materials including the manufacture, testing, installation, and repair of radioactive sources, and the devices in which they are used, and the distribution of sources and devices to those specifically licensed to receive them.

License No. 22-00057-32G (the 32G License) was issued on July 12, 1985, most recently amended on May 5, 1987, and expires on July 31, 1990. This license authorizes the Licensee to transfer Po-210 sources for use in static elimination

devices to persons generally licensed in accordance with the provisions of 10 CFR 31.5. These licenses were modified by Orders on January 25, 1988, February 5, 1988, February 12, 1988, and February 18, 1988.

II

In the Order of January 25, 1988, NRC had determined that the use of certain models of static elimination devices had resulted in significant alpha contamination on worker clothing and in a number of facilities. The facts then known demonstrated an immediate potential for radiological hazards to persons working with those models of static eliminators and to other persons present in the area of use. Accordingly, the Commission found that the public health, safety, or interest required that the January 25, 1988 Order be made effective immediately. The Order modified the 06 and 32G Licenses and, among other things, suspended authority to distribute Model Nos. 902, 902F, 906, and 906 Po-210 static elimination devices.

In the Order of February 5, 1988, NRC stated that it subsequently learned of multiple instances of failures of Model Nos. 902, 902F, 906, and 906 devices. Many of these failures occurred at facilities where general licensees manufactured products, or packages for products, such as food, beverages, pharmaceuticals, cosmetics, medical products, and other items which are to be consumed by, or applied to, human beings. On February 5, 1988, the Licensee issued a letter to all of its customers using the above-specified models of the devices, directing such uses to remove the devices from applications related to the packaging of food, beverages, pharmaceuticals, or cosmetics and to return them to 3M. The Licensee's action was confirmed by the Order of February 5, 1988 modifying the 06 and 32G Licenses.

In the Order of February 12, 1988, NRC stated that it subsequently learned of failures of devices identified by model numbers not specified in the prior Orders. These failures included both blown air and bar-type static eliminators that are used in plants that manufacture products and packages, or package materials for products, which would constitute a direct pathway for human exposure if contaminated. The cause of these failures was not then known. In view of the wide use of these devices for products intended for human consumption or application, the increasing number of failed devices of various model numbers, the uncertainty as to the failure mechanisms, and the potential for contamination and

consequent exposure to human beings, the Commission found that the public health, safety, or interest required that the February 12, 1988 Order be made effective immediately. The Order modified the 06 and 32G Licenses to require, among other things, that 3M inform all users of all models of 3M's Po-210 static eliminators involved in the production or packaging of food, beverages, pharmaceuticals, or cosmetics that 3M had withdrawn them from service and they were to be returned to 3M by March 2, 1988.

In the Order of February 18, 1988, NRC stated that, beginning in late January 1988, it had performed an inspection at 3M, and NRC, the Agreement States, and the Food and Drug Administration had performed follow-up visits at customers' sites. During this period and through these activities, the following information came to light. 3M's static eliminators were used in a variety of industries and there were continuing reports of failures of devices in industries not affected by the January 25, 1988 Order. These failures could cause not only exposure of persons working with the devices as well as other persons in the area of use, but also contamination of products that were manufactured with the assistance of 3M's static eliminators and which were then widely distributed to members of the public. Based on this information, NRC found that the public health, safety, and interest required that Section IV of the February 18, 1988 Order modifying the 06 and 32G Licenses be made effective immediately. Among other things, Section IV of this Order suspended 3M's authority to transfer any Po-210 static elimination devices to persons generally licensed except as may be specifically authorized in writing by NRC.

Section V of the February 18, 1988 Order stated that, within 60 days of the date of the Order, 3M was to show cause, pursuant to 10 CFR 2.202(b), why the 32G License should not be revoked in its entirety and why the 06 License should not be revoked to the extent that it authorizes manufacturing of Po-210 static eliminators.

III

By letter dated April 5, 1988, 3M requested an extension from April 18, 1988 to July 18, 1988 as the date for filing the show cause response to the February 18, 1988 Order. 3M stated that the additional time would allow 3M to obtain the results of internal and contract studies and then determine whether to request authorization to resume manufacture and distribution of

some or all of its static eliminators to persons holding general or specific licenses issued by NRC or the Agreement States. The extension was granted by letter dated April 13, 1988. 3M filed its written response under oath on July 18, 1988 (Answer).

In its Answer, 3M requested the continuation of its authority under the 06 License to manufacture static elimination devices for research and development purposes to evaluate whether the devices could be modified to permit resumed commercial distribution. 3M further requested that the suspension of the 32G License be contained until research and test data confirm that resumed distribution of static elimination devices is appropriate. In that case, 3M may, in the future, seek an amendment of the 32G License to permit resumed distribution outside of 3M.

NRC agrees that continued suspension of the 32G License is appropriate in that continued suspension precludes any concern regarding public health and safety and would not foreclose to 3M a regulatory mechanism, i.e., amendment of the 32G License, to seek to again distribute static elimination devices as a commercial item to general licensees, should 3M be able to convince NRC that such distribution could be conducted safely. NRC considers, then that the Licensee has shown cause why the 32G License should not be revoked in its entirety at this time. NRC notes that this License is due to expire on July 31, 1990.

NRC also agrees that continued authority to manufacture static elimination devices containing Po-210 is appropriate under the 06 License. Such manufacturing authority is needed by the Licensee in its continuing efforts to determine whether it could develop a device which would be suitable for commercial use at some future date. Essential to NRC's finding is the commitment 3M made in its Answer not to distribute static elimination devices under the 06 License outside of 3M, a commitment which NRC has determined should be confirmed by this Order.

The NRC Order of February 18, 1988 suspended 3M's authority to transfer any Po-210 static elimination device to persons generally licensed based on the use of these devices in a variety of industries and continuing reports of failures of the devices. These failures could cause not only exposure of persons working with the devices as well as other persons in the area of use, but also contamination of products that were manufactured with the assistance of 3M's static eliminators and which were then widely distributed to members of the public. Based on this

information, the NRC found that the public health, safety, and interest required the February 18, 1988 Order to be made immediately effective. The same considerations apply to any distribution of Po-210 static elimination devices to specific licensees outside of 3M under the 06 License. Given the public health, safety, and interest concerns that would be raised by any distribution of 3M static elimination devices outside of 3M, the NRC finds that the actions specified in Section IV of this Order should be made effective immediately.

Continued manufacturing authority would not result in any current commercial distribution and use of the devices outside of 3M. Distribution to general licensees is prohibited by NRC's Order to 3M of February 18, 1988. Distribution to specific licensees other than 3M is prohibited by the terms of this Order. Distribution within 3M would be limited to use of the devices in its own commercial production facilities to assess, as a research and development matter, the acceptability of the devices for long-term use. Consequently, continued authority to manufacture static elimination devices containing Po-210 would be for research and development purposes only and would not result in distribution and use outside 3M.

NRC also concludes that the Licensee has the ability to safely manufacture and test static elimination devices containing Po-210 for research and development purposes without undue risk to its employees. This conclusion is based on the results of NRC's four inspections of 3M's various licensed activities during 1988. Although NRC identified apparent violations and areas of concern and 3M will have to describe to NRC its corrective action, NRC did not identify significant violations related to in-plant worker safety in that portion of 3M's program in which Po-210 static eliminators will be manufactured and tested for research and development purposes.

With the added restriction imposed by this Order, NRC considers that the Licensee has shown cause why the 06 License should not be revoked to the extent that it authorizes the manufacture of static elimination devices containing Po-210. NRC notes that this License is due to expire on May 31, 1992. Accordingly, in view of the foregoing and pursuant to Sections 81, 161b, and 161i of the Atomic Energy Act of 1954, as amended, and the Commission's regulations, specifically in 10 CFR 2.204 and 10 CFR Part 30, it is hereby ordered, effective immediately, that License

Number 22-00057-06 is modified as follows:

The authority to transfer any Po-210 static elimination device to a specific licensee other than 3M is suspended. Such devices used within 3M shall be for research and development purposes only.

The Director, Office of Nuclear Material Safety and Safeguards, may in writing relax or rescind any of the above conditions for good cause shown by the Licensee.

V

Pursuant to the Atomic Energy Act of 1954, as amended, any person other than the Licensee who may be adversely affected by this Order may request a hearing within 30 days of the date of this Order. Any request for a hearing shall be submitted to the Director, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, with copies to the Assistant General Counsel for Enforcement at the same address, and to the Regional Administrator, Region III, 799 Roosevelt Road, Glen Ellyn, Illinois 60137. If a person requests a hearing, that person shall set forth with particularity in accordance with 10 CFR 2.714 the manner in which the person's interest is adversely affected by this Order. A request for a hearing shall not stay the immediate effectiveness of this Order.

If a hearing is requested, the Commission shall issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such a hearing is whether this Order should be sustained.

Dated at Rockville, Maryland, this 21st day of December 1988.

For the U.S. Nuclear Regulatory Commission,

Hugh L. Thompson, Jr.,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 88-29759 Filed 12-27-88; 8:45 am]  
BILLING CODE 7590-01-M

[Docket No. 50-297]

**North Carolina State University; Consideration of Application for Renewal of Facility License**

The United States Nuclear Regulatory Commission (the Commission) is considering renewal of Facility License No. R-120, issued to North Carolina State University for operation of the PULSTAR Reactor located on the University's campus in Raleigh, North Carolina.



The renewal would extend the expiration date of Facility License No. R-120 for twenty years from date of issuance, in accordance with the licensee's timely application for renewal dated August 19, 1988.

Prior to a decision to renew the license, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

By January 27, 1989, the licensee may file a request for a hearing with respect to renewal of the subject facility license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary of the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to

intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the renewal action under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, at 2120 L Street, NW., Washington, DC by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Charles L. Miller: petitioner's name and telephone number; date petition was mailed; North Carolina State University; and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555 and to Becky R. French, General Counsel, Box 7001, A Holladay Hall, North Carolina State University, Raleigh, North Carolina 27695, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for renewal dated August 19, 1988, which is available for public inspection at the Commission's Public Document Room at

2120 L Street, NW., Washington, DC 20555.

Dated at Rockville, Maryland, this 21st day of December 1988.

For the Nuclear Regulatory Commission.

Charles L. Miller,  
Director, Standardization and Non-Power  
Reactor Project Directorate, Division of  
Reactor Projects III, IV, V and Special  
Projects, Office of Nuclear Reactor  
Regulation.

[FR Doc. 88-29760 Filed 12-27-88; 8:45 am]  
BILLING CODE 7590-01-M

#### [Docket No. 50-265]

#### Omaha Public Power District, Fort Calhoun Station, Unit 1; Exemption

##### I

Omaha Public Power District (OPPD or the licensee) is the holder of Facility Operating License No. DPR-40 which authorizes the operation of Fort Calhoun Station, Unit 1 (the facility), at a steady state power level not in excess of 1500 megawatts thermal. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (the Commission or the staff) now or hereafter in effect. The facility is a pressurized water reactor (PWR) located at the licensee's site in Washington County, Nebraska.

##### II

10 CFR 50.48, "Fire Protection", and Appendix R to 10 CFR Part 50, "Fire Protection Program for Nuclear Facilities Operating Prior to January 1, 1979" set forth certain fire protection features required to satisfy the General Design Criterion related to fire protection (Criterion 3, Appendix A to 10 CFR Part 50).

Section III.0 of Appendix R requires that facilities have a reactor coolant pump oil collection system if the containment is not inerted during normal operation. This system must be designed, engineered, and installed so that failure during normal or design basis accident conditions will not lead to fire, and that there is reasonable assurance that the system will withstand a Safe Shutdown Earthquake. Additionally, the system must drain to a vented closed container that can hold the entire lube oil system inventory.

##### III

By letter dated November 28, 1988, the licensee requested approval of an exemption from Appendix R, section III.0 to the extent that it requires the

installation of a reactor coolant pump (RCP) oil collection system sized to accommodate the entire lube oil system inventory.

#### Exemption Requested

The licensee requested an exemption from the specific requirements of section III.0 that would require the reactor coolant pump oil collection system drain tank capacity to be capable of containing the entire reactor coolant pump lube oil inventory.

The licensee stated in a letter dated November 28, 1988 that the reactor coolant pump oil collection system capacity was designed such that oil leaks from the RCP lift pumps, oil coolers, flanged or gasketed oil connections, oil sight glasses, drain and fill connection points, and oil reservoir points would be contained. The system consists of sealed pans and covers enclosing the pressurized oil containing portions of each RCP and drain piping routed to one of two 150 gallon collection tanks. One tank is associated with each pair of RCPs. The collection tank capacity was based on a maximum expected leak of 110 gallons for any single failure as opposed to a two pump inventory of 280 gallons for each tank.

##### IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, this Exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. The Commission has further determined that special circumstances, as set forth in 10 CFR 50.12(a)(2)(ii), are present justifying the Exemption, namely that the application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule. In general, the underlying purpose of the rule is to accomplish safe shutdown in the event of a single fire and maintain the plant in a safe condition. Under a worst case scenario, reactor coolant pump lube oil would overflow from the collection tanks, due to the limited storage capacity, and will be channeled to the floor drains. Since no ignition sources are present in the area, no fire is likely to occur. Therefore, the limited lube oil collection system capacity does not pose a significant hazard to safe shutdown systems. Further, the Fort Calhoun Station Fire Hazards Analysis has evaluated the effect of a lube oil fire in the reactor coolant pump cavities and has shown that sufficient undamaged equipment would remain available to support safe shutdown.

Accordingly, the Commission hereby grants the exemption from the requirements of 10 CFR 50, Appendix R, as described in section III above.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this Exemption will have no significant impact on the environment (53 FR 51174).

The Safety Evaluation concurrently issued and related to this action and the above referenced submittals by the licensee are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the local public document room located at the W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102.

This Exemption is effective upon issuance. Dated at Rockville, Maryland, this 20th day of December, 1988.

For the Nuclear Regulatory Commission.

Gary M. Holahan,

Acting Director, Division of Reactor  
Projects—III, IV, V and Special Projects,  
Office of Nuclear Reactor Regulation.

[FR Doc. 88-29761 Filed 12-27-88; 8:45 am]  
BILLING CODE 7590-01-M

#### OFFICE OF PERSONNEL MANAGEMENT

##### Excepted Service

AGENCY: Office of Personnel  
Management.

ACTION: Notice.

SUMMARY: This gives notice of positions placed or revoked under Schedules A, B, and C in the excepted service, as required by civil service rule VI, Exceptions from the Competitive Service.

FOR FURTHER INFORMATION CONTACT:  
Leesa Martin, (202) 632-0728.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management published its last monthly notice updating appointing authorities established or revoked under the Excepted Service provisions of 5 CFR Part 213 on November 28, 1988 (53 FR 228). Individual authorities established or revoked under Schedule A, B, or C between November 1, 1988, and November 30, 1988, appear in a listing below. Future notices will be published on the Fourth Tuesday of each month, or as soon as possible thereafter. A consolidated listing of all authorities will be published as of June 30 of each year.

#### Schedule A

No Schedule A authorities were established or revoked during November.

#### Schedule B

No schedule B authorities were established or revoked during November.

#### Schedule C

##### Department of Agriculture

One Staff Assistant to the Assistant Secretary for Governmental and Public Affairs. Effective November 1, 1988.

##### Department of Commerce

On Congressional Affairs Specialist to the Congressional Affairs Advisor for the Bureau of the Census. Effective November 1, 1988.

One Special Advisor to the Assistant Administrator for Ocean Services and Coastal Zone Management. Effective November 2, 1988.

One Deputy to the Director for the Office of Legislative Affairs. Effective November 4, 1988.

One Confidential Assistant to the Deputy Assistant Secretary for Africa, Near East and South Asia. Effective November 15, 1988.

One Special Assistant to the Executive Director for the National Marine Fisheries Service. Effective November 17, 1988.

One Confidential Assistant to the Deputy Assistant Secretary for Near East, and South Asia. Effective November 21, 1988.

One Confidential Assistant to the Assistant Secretary for the Oceanic and Atmospheric Administration. Effective November 23, 1988.

One Confidential Assistant to the Director for the Bureau of the Census. Effective November 30, 1988.

##### Department of Defense

One Private Secretary to the Judge, U.S. Court of Military Appeals. Effective November 17, 1988.

##### Department of Education

One Special Assistant to the Deputy Under Secretary for Planning, Budget and Evaluation. Effective November 1, 1988.

One Confidential Assistant to the Secretary's Senior Special Assistant. Effective November 2, 1988.

One Special Assistant to the Deputy Under Secretary for Management. Effective November 4, 1988.

One Confidential Assistant to the Secretary's Senior Special Assistant. Effective November 18, 1988.



One Confidential Assistant to the Secretary's Senior Special Assistant. Effective November 23, 1988.

#### Department of Energy

One Legal Advisor to a Member of the Federal Energy Regulatory Commission. Effective November 1, 1988.

One Staff Assistant to the Assistant Secretary for Conservation and Renewable Energy. Effective November 4, 1988.

One Special Assistant to the Deputy Secretary for SSC Coordination (Executive Director). Effective November 23, 1988.

One Staff Assistant to the Under Secretary. Effective November 29, 1988.

#### Department of Health and Human Services

One Special Assistant to the Director for the Office of Community Services. Effective November 17, 1988.

#### Department of Housing and Urban Development

One Special Assistant to the Deputy Assistant Secretary for Operations and Management. Effective November 7, 1988.

One Staff Assistant to the Under Secretary. Effective November 10, 1988.

One Assistant to the Deputy Assistant Secretary for the Office of Legislative and Congressional Relations. Effective November 23, 1988.

One Special Assistant to the Deputy Assistant Secretary for Operations and Management. Effective November 23, 1988.

One Special Advisor to the Assistant Secretary for Legislation and Congressional Relations. Effective November 28, 1988.

One Special Assistant to the Assistant to the Secretary and Director for the Office of Public Affairs. Effective November 1, 1988.

#### Department of the Interior

One Special Assistant to the Assistant Secretary for Policy, Budget and Administration. Effective November 1, 1988.

One Special Assistant to the Director for the Bureau of Land Management. Effective November 23, 1988.

#### Department of Justice

One Assistant to the Attorney General for Offices, Boards, and Divisions. Effective November 2, 1988.

One Assistant to the Attorney General (Staff Assistant) for Offices, Boards, and Divisions. Effective November 8, 1988.

One Confidential Assistant to the Deputy Assistant Attorney General for

Offices, Boards, and Divisions. Effective November 23, 1988.

#### Department of Labor

One Staff Assistant to the Secretary of Labor. Effective November 1, 1988.

One Staff Assistant to the Assistant Secretary for Public and Intergovernmental Affairs. Effective November 1, 1988.

One Special Assistant to the Assistant Secretary for Policy. Effective November 2, 1988.

One Special Assistant to the Deputy Assistant Secretary for Mine Safety and Health. Effective November 2, 1988.

#### Department of Transportation

One Staff Assistant to the Administrator for the Maritime Administration. Effective November 23, 1988.

#### Action

One Director of Public Affairs (Supervisory Public Affairs Specialist) to the Director. Effective November 16, 1988.

One Special Assistant to the Director. Effective November 16, 1988.

#### Environmental Protection Agency

One Staff Assistant to the Assistant Administrator for the Office of Enforcement and Compliance Monitoring. Effective November 17, 1988.

#### Farm Credit Administration

One Private Secretary to the Member. Effective November 23, 1988.

#### General Services Administration

One Personal Assistant to the Regional Administrator, Region 9. Effective November 17, 1988.

#### National Archives and Records Administration

One Assistant to the Presidential Diarist to the Archivist of the United States. Effective November 23, 1988.

#### Office of Management and Budget

One Special Assistant to the Associate Director for Human Resources. Effective November 1, 1988.

Office of Personnel Management.

Constance Horner  
Director.

Authority: 5 U.S.C. 3301, 3302; E.O. 10555, 3 CFR 1954-1958 Comp.

[FR Doc. 88-29717 Filed 12-27-88; 8:45 am]  
BILLING CODE 6325-01-M

#### OFFICE OF SCIENCE AND TECHNOLOGY POLICY

##### National Advisory Committee on Semiconductors (NACS); Meeting

The purpose of the National Advisory Committee on Semiconductors is to devise and promulgate a national semiconductor strategy, including research and development. The implementation of this strategy will assure the continued leadership of the United States in semiconductor technology. The Committee will meet on January 11, 1989 in Room 5104, New Executive Office Building, Washington, D.C., at 9:00 a.m. The proposed agenda is:

- (1) Briefing of the Committee on its organization and administration.
- (2) Briefing of the Committee by OSTP personnel and personnel of other agencies on proposed, ongoing, and completed studies regarding semiconductors.
- (3) Discussion of composition of panels to conduct studies.

A portion of the January 11 session will be closed to the public.

The briefing on some of the current activities of OSTP necessarily will involve discussion of material that is formally classified in the interest of national defense or for foreign policy reasons. This is also true for a portion of the briefing on panel studies. As well, a portion of both of these briefings will require discussion of internal personnel procedures of the Executive Office of the President and information which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requiring agency action. These portions of the meeting will be closed to the public pursuant to 5 U.S.C. 552b.(c) (1), (2), and (9)(B).

A portion of the discussion of panel composition will necessitate the disclosure of information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Accordingly, this portion of the meeting will also be closed to the public, pursuant to 5 U.S.C. 552b.(c)(6).

Because of security in the New Executive Office Building, persons wishing to attend the open portion of the meeting should contact Barbara J. Diering, at (202) 456-7740, prior to 3:00 p.m. on January 10, 1989. Mrs. Diering is also available to provide specific

information regarding time, place and agenda for the open session.

December 23, 1988.

Barbara J. Diering,

Special Assistant, Office of Science and Technology Policy.

[FR Doc. 88-30015 Filed 12-23-88; 4:02 pm]

BILLING CODE 3170-01-M

#### POSTAL RATE COMMISSION

[Order No. 813; Docket No. C89-2]

##### Complaint of the City of Eufaula, AL; Order on Filing of Complaint of the City of Eufaula, AL

Issued: December 22, 1988.

Before Commissioners: Janet D. Steiger, Chairman; Patti Birge Tyson, Vice-Chairman; John W. Crutcher; Henry R. Folsom; W.H. "Trey" LeBlanc, III.

The Postal Rate Commission has received a complaint filed under 39 U.S.C. 3682 from the Barbour County Commission and City of Eufaula, Alabama.<sup>1</sup> From the material filed with the Commission it appears that the Barbour County Commission and City of Eufaula, Alabama, are asserting that the Postal Service's plans to eliminate the current post office box numbers of the Eufaula postal patrons and require the use of new box numbers constitutes unreasonable discrimination among mail users in the provision of postal services. 39 U.S.C. 403(c). It is requested "that the Postal Rate Commission (will) hold a hearing in Eufaula, Alabama, so that interested citizens may have a meaningful opportunity to be heard, and . . . the Commission (will) direct that postal box patrons be restored to their box numbers . . ."

Under the Commission's rules of practice (39 CFR 3001.84) the Postal Service has 30 days to file an answer to a complaint. As explained below, we are invoking rule 85 (39 CFR 3001.85) with respect to informal methods of resolution. We will thus postpone the formal answer until the outcome of informal approaches is clear. The Postal Service and the parties will be notified of the date for filing an answer to the complaint.

It is Commission policy and practice "to encourage the resolution and settlement of complaints by informal procedures . . ." (39 CFR 3001.85.) Although it is requested that a hearing be held in Eufaula, Alabama, we believe

<sup>1</sup> The Commission received a letter dated December 9, 1988 from Sam Slade, Mayor of the City of Eufaula, Alabama and a letter dated December 14, 1988 and accompanying Resolution 74-1988 from Grover Berry Forte, Vice Chairman, Barbour County Commission.

that informal procedures would be the best route to take at this time. Therefore, pursuant to rule 85, the Chairman will appoint a coordinator of informal resolution efforts. The scheduling of any formal procedures such as hearing dates and due date for petitions of intervention will be postponed, until it is clear that such procedures are needed.

#### It is ordered:

(1) The Commission will employ informal procedures, pursuant to section 85 of the rules of practice, in this case.

(2) Further procedural dates, including the Postal Service's answer, will be provided for in future orders.

By the Commission.

Charles L. Clapp,

Secretary.

[FR Doc. 88-29845 Filed 12-27-88; 8:45 am]

BILLING CODE 7715-01-M

#### SECURITIES AND EXCHANGE COMMISSION

##### Forms Under Review by the Office of Management and Budget

Agency Clearance Officer: Kenneth A. Fogash, Deputy Executive Director.  
Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Consumer Affairs, 450 Fifth Street, NW., Washington, DC 20549.

#### Extension

[Rule 17a-5(c); File No. 270-199]

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission has submitted for extension of OMB approval of Rule 17a-5(c) which requires all broker-dealers who carry customer accounts to furnish certain financial statements to their customers. 1500 respondents incur an estimated average burden of one minute to comply with the rule.

The estimated average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even representative summary or study of the cost of SEC rules and forms.

Direct general comments to Gary Waxman at the address below. Direct any comments concerning the accuracy of the estimated average burden hours for compliance with SEC rules and forms to Kenneth A. Fogash, Deputy Executive Director, 450 Fifth Street, NW., Washington, DC 20549-6004, and Gary Waxman, Clearance Officer, Office of Management and Budget, Paperwork Reduction Project (3235-

0199), Room 3228, New Executive Office Building, Washington, DC 20543.

Jonathan G. Katz,

Secretary.

December 21, 1988.

[FR Doc. 88-29746 Filed 12-27-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26382; File No. SR-AMEX-88-31]

##### Self-Regulatory Organizations; American Stock Exchange, Inc.; Filing and Immediate Effectiveness of Proposed Rule Change Relating to Trading Halts

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) ("Act"), notice is hereby given that on December 15, 1988, the American Stock Exchange, Inc. ("Amex") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Amex. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

##### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

[Brackets] indicate deletions; *italics* indicate additions.<sup>1</sup>

The effectiveness of this proposed rule change is contingent upon 1) approval by the Commission and effectiveness of rules (substantively identical to the proposed rule) of the following self-regulatory organizations: Chicago Board Options Exchange, [Cincinnati Stock Exchange, Midwest Stock Exchange, National Association of Securities Dealers, and New York Stock Exchange [Pacific Stock Exchange, and Philadelphia Stock Exchange]; and 2) the following organizations having rules which halt the trading of futures contracts on stock index groups and options on such futures contracts under circumstances substantively identical to those contained in this proposed rule change: Chicago Board of Trade, Chicago Mercantile Exchange, Kansas City Board of Trade and New York Futures Exchange.

This rule change shall be effective for a one-year pilot period, ending on the last day of the month in which the first

<sup>1</sup> These changes are being made to the Amex's trading halt proposal as approved in Securities Exchange Act Release No. 26196 (October 19, 1988), 53 FR 41637.



year anniversary of its effective date falls.

#### Rules of General Applicability

##### Rule 950.

(a) The following Floor Rules shall apply to Exchange option transactions and other transactions on the Exchange in option contracts: 100, 101, 103, 104, 105, 106, 109, 110, 112, 117, 123, 129, 130, 135, 150, 151, 152, 153, 155, 157, 170, 172, 173, 174, 175, 176, 177, 180, 181, 183, 184, 185, 192 and 193. Unless the context otherwise requires, the term "stock" wherever used in the foregoing Rules shall be deemed to include option contracts. Except as otherwise provided in this Rule, all other Floor Rules (series 100 et seq.) shall not be applicable to Exchange option transactions.

#### Stock Index Options

Trading Rotations, Halts and Suspensions  
Rule 918C

(a) No change

(b) Trading on the Exchange in options on a stock index group shall be halted or suspended whenever trading has been halted or suspended in the primary market(s) for any combination of underlying stocks accounting for such minimum percentage of the current index group value as the Exchange may establish from time to time pursuant to this Rule, or whenever [the Exchange otherwise] two floor governors and a senior executive officer of the Exchange deem[s] such actions appropriate in the interest of a fair and orderly market or to protect investors. Among the factors that the Exchange may consider in exercising its discretion to halt or suspend trading in options on a stock index group are that:

(1) The current calculation of the numerical index value derived from the current market prices of the underlying stocks in such stock index group is not available;

(2) Trading is one or more of the underlying stocks comprising such stock index group has been halted in the primary market(s) under circumstances which indicate that such stock or stocks will likely re-open at a price or prices significantly different than the price or prices at which such stock or stocks last traded prior to the trading halt;

(3) Trading has been halted or suspended in the primary market(s) for any combination of underlying stocks accounting for 20% or more of the current index group value; or

(4) Other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

Trading in any class or series of stock index options that has been the subject of a halt or suspension by the Exchange may be resumed upon a determination by the Exchange that (i) the conditions which led to the halt or suspension are no longer present; (ii) underlying securities constituting 50% or more of the stock index value are not subject to halt or suspension in the primary market for the trading of such underlying securities; and (iii) two floor governors in consultation with a senior executive officer of the Exchange conclude in their best judgment [and] that the interests of a fair and orderly market are [best] served by a resumption of trading.

(c) No change.

#### Commentary

.01-.06 No change.

.07 The Exchange shall halt trading in a class of broad-based stock index options no later than ten minutes after the Exchange has determined that [trading of futures on the same stock index (or on a stock index which the Exchange has determined to be closely related) the primary Standard and Poor's 500 Index futures contract has reached a price limit due to a decline of 30] Standard & Poor's 500] Index points [or 250 Dow Jones Industrial Average points] from the closing value of the previous trading day, if during such period the Exchange has determined that there is no indication that active trading above such point is about to commence. Trading may resume in such class of index options if active trading has resumed in the futures contract for two minutes, so long as the Exchange has determined that (a) underlying securities[.]; and (b) two floor governors in consultation with a senior executive officer of the Exchange conclude in their best judgment that the interests of a fair and orderly market are served by a resumption in trading.

officer of the Exchange conclude in their best judgment that the interests of a fair and orderly market are served by a resumption in trading.

(b) Not applicable.  
(c) Not applicable.

The text of the proposed rule change is available at the Office of the Secretary, Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Initis filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any

comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

##### (1) Purpose

In conjunction with the other major Exchanges, the Amex filed a proposal (SR-AMEX 88-24) to implement trading halts during significant market declines. Although the filing has been approved by the Commission (SEC Release No. 34-26198),<sup>2</sup> the Amex seeks to clarify various technical and non-substantive rules implementing the trading halt proposals.

##### (2) Basis

The proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5) in particular in that it is designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will impose no burden on competition.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change is concerned solely with an interpretation of an existing rule, it has become effective pursuant to Section 19(b)(3) of the Act and subparagraph (e) of Rule 19b-4 under the Act. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

<sup>2</sup> October 18, 1988, 53 FR 41637.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the file number in the caption above and should be submitted by January 18, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 21, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-29740 Filed 12-27-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26381; File No. SR-AMEX-88-34; SR-CBOE-88-22; SR-PSE-88-30; and SR-PHLX-88-39]

#### Self-Regulatory Organizations; American Stock Exchange, Inc. et al.; Filing and Order Granting Temporary Accelerated Approval to Proposed Rule Change

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on December 20, 1988, December 12, 1988, December 15, 1988, and November 28, 1988, respectively, the American Exchange, Inc. ("Amex"), the Chicago Board Options Exchange, Inc. ("CBOE"), the Pacific Stock Exchange, Inc. ("PSC"), and the Philadelphia Stock Exchange, Inc. ("PHLX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organizations ("SROs").

#### I. Self-Regulatory Organizations' Statement of the Terms of Substance of the Proposed Rule Change

The SROs propose to extend the current margin requirements for short equity and index options positions through March 20, 1989. The SRO's current margin requirements were approved in Securities Exchange Act Release No. 25701 (May 17, 1988), 53 FR 20706, for a six-month period.

#### II. Self-Regulatory Organizations' Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In their filings with the Commission, the SROs included statements concerning the purpose of and basis for the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. The SROs have prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organizations' Statements of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

On May 17, 1988, the Commission approved proposals by the SROs to amend their rules to increase the customer margin requirements for short positions in equity and index options.<sup>1</sup> The proposals, which were approved for a six-month period, provided for margin requirements for broad-based index options of 100% of the options premium plus 15% of the underlying aggregate index value, less any out-of-the-money amount, with a minimum requirement of the option premium plus 10% of the underlying aggregate index value. The proposals provided for margin requirements for equity options and narrow-based index options of 100% of the options premiums plus 20% of the underlying product value, less any out-of-the-money amount, with a minimum requirement of the option premium plus 10% of the underlying product value.

The SROs note that analysis of underlying instrument percentage price changes indicates that both equity and index options may be overmarginied. The SROs propose to extend the current margin requirements until March 20, 1989, however, to permit implementation of a routine margin monitoring program expected to be instituted by the options SROs in the first quarter of 1989, and to gain more time to review the initial pilot experience.

<sup>1</sup> Securities Exchange Act Release No. 25701, 53 FR 20706.

#### (B) Self-Regulatory Organizations' Statement on Burden on Competition

The SROs do not believe that the proposed rule change will impose a burden on competition.

#### (C) Self-Regulatory Organizations' Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Comments were neither solicited nor received; however, the CBOE stated that discussions with staff of numerous member organizations reflected support for the continuation of current margin levels.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The SROs have requested accelerated effectiveness of the proposals pursuant to section 19(b)(2) of the Act to permit the uninterrupted effectiveness of the current margin levels. The Commission finds good cause for approving the proposed rule changes prior to the thirtieth day after the date of publication of the proposals in the Federal Register. The SROs' proposals extend current margin requirements that were requested for the full thirty-day period and were approved by the Commission in Securities Exchange Act Release 25701 (May 17, 1988), 53 FR 20706. In light of the absence of any comments on the SROs' original proposals, the Commission believes that a good cause finding is warranted. In addition, the proposals merely extend the margin levels that have been in place for six months, and prevent the margins from reverting back to levels that may be inconsistent with the routine margin monitoring program that is being developed.

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of section 6(b)(5),<sup>2</sup> which provides, in pertinent part, that the rules of the exchanges must be designed to protect investors and the public interest. Extending the current margin requirements until a routine margin monitoring program is implemented should assure both firms and investors reasonable financial protection even if market volatility increases during this period. Moreover, the SROs have provided data to indicate that the current margin levels are adequate for

<sup>2</sup> 15 U.S.C. 78f(b)(5) (1982).



prudential purposes. Interested persons invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing also will be available for inspection and copying at the principal office of the above-referenced self-regulatory organization. All submissions should refer to the file numbers in the caption above and should be submitted by January 18, 1989.

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>3</sup> that the proposed rule changes are approved for a period ending on March 20, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>4</sup>

Dated: December 21, 1988.

[FR Doc. 88-29741 Filed 12-27-88 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-26373, File No. SR-CBOE-88-02]

**Self-Regulatory Organizations;  
Chicago Board Options Exchange,  
Inc.; Order Approving Proposed Rule  
Change Relating to the Retail  
Automatic Execution System ("RAES")**

**I. Introduction**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") on April 8, 1988, a proposed rule change (SR-CBOE-88-02) to amend on a six month pilot basis market maker eligibility requirements for participation in the CBOE's Retail Automatic Execution

System ("RAES")<sup>3</sup> in the Standard & Poor's 500 index option ("SPX").<sup>4</sup>

**II. Description of Proposal**

The Commission approved the use of RAES for SPC options in September 1988, at the same time establishing a pilot program for market maker eligibility.<sup>5</sup> The pilot program, still in effect today, requires those CBOE market makers who wish to participate in RAES SPX to meet certain eligibility requirements. Among these are requirements that (1) a market maker log on RAES in person and remain on the system only so long as he is in the SPX trading crowd and (2) only one market maker participating in RAES through a joint account may trade in SPX through RAES at a time. The proposed amendments would alter exchange administration of these standards and provide the Exchange with additional authority to both encourage and require market maker participation in RAES.

First, the proposed rule change would authorize the CBOE Market Performance Committee ("MPC") to exempt participating market makers from the joint account participation and trading in-person restrictions described above. This provision of the rule would replace the provision currently in effect, which provides that the Exchange may take these actions under "unusual market conditions." The Exchange believes it is appropriate to vest this authority in the MPC because it is responsible for overseeing market maker performance.

Second, the proposed rule change would provide the MPC with the discretion to require that any market maker who logs onto RAES in SPX at any time during an expiration month participate in RAES whenever he is present in that trading crowd until the next expiration. This change is intended to address the problem of inadequate market maker RAES participation immediately prior to expiration, typically a time of larger volume and increased market maker exposure.

Third, the proposed rule change provides that, in the event there is inadequate RAES participation in SPX at any time, the MPC may require

<sup>3</sup> RAES automatically executes public customer market and marketable limit orders of a certain size (typically ten contracts or fewer) against participating market makers in the CBOE trading crowd at the best bid or offer reflected in the CBOE quotation system.

<sup>4</sup> The proposed rule change was noticed for comment in Securities Exchange Act No. 25821 (April 27, 1988), 53 FR 15935. One commentator submitted a letter, discussed *infra*, concerning the proposal.

<sup>5</sup> See Securities Exchange Act Release No. 23590 (September 4, 1986) 51 FR 32709.

market makers who are members of the trading crowd to sign onto RAES "absent reasonable justification or excuse for non-participation." The MPC will prepare lists on a periodic basis of those market-makers who it deems to be members of the SPX trading crowd. These persons will be notified that they are on the list, and may be called upon to log on to RAES under the rule.

The proposed rule generally retains the disciplinary sanctions of the original rule, which provided that members could be fined pursuant to CBOE Rule 6.20<sup>6</sup> and were subject to disciplinary action by the Business Conduct Committee ("BCC") for their failure to comply with any of the requirements of the rule. The proposed rule also retains a provision authorizing the MPC to suspend a member's RAES participation eligibility, and adds a new provision authorizing the MPC to take such other action "as may be appropriate and allowed" pursuant to Chapter VIII of the Exchange's Rules.<sup>7</sup>

**III. Comments Received**

The Commission received two letters from one commentator concerning the CBOE's proposed market maker eligibility requirements.<sup>8</sup> The commentator, the Fossett Corporation ("Fossett"), supports the objectives of the rule but believes that voluntary participation by market makers currently excluded from RAES by the in-person trading requirement is preferable

<sup>6</sup> Rule 6.20 provides that two Floor Officials, upon a finding that a market maker has impaired the maintenance of a fair and orderly market or impaired public confidence in the operations of the Exchange, may fine the market maker a maximum of \$1000. The imposition of this fine may be appealed to the Exchange's Appeals Committee, which must appoint a hearing panel of no fewer than three persons and create a record of its proceedings.

<sup>7</sup> See, e.g., CBOE Rule 8.12, outlining remedial actions available to the MPC upon a determination that market makers (either individually or collectively as members of a trading crowd) have failed to meet minimum performance standards. The MPC may suspend, terminate or restrict a market maker's registration or appointment to one or more options classes; restrict appointments to additional option classes; relocate options classes; and prohibit a member from trading at a particular station. Any action taken by the MPC is reviewable by the CBOE Board of Directors or a panel composed of at least three Board members. The review panel or the Chairman of the Board may grant or deny a stay of the Committee's action. See also CBOE Rule 8.2.

<sup>8</sup> See letter from J. Stephen Fossett, President, Fossett Corporation, to Jonathan G. Katz, Secretary, SEC, dated May 24, 1988 ("Fossett Letter I") and letter to Holly Smith, Special Counsel, Division of Market Regulation, SEC, dated June 27, 1988 ("Fossett Letter II"). Copies of both letters are available in the Commission's Public Reference Room in Washington, DC, in File No. SR-CBOE-88-02.

to coercing participation by in-crowd market makers. Specifically, Fossett believes that the in-person requirement is "an unnecessary barrier to competition for SPX RAES trades, given that there are other market makers who but for the in-person requirement would sign on the system." <sup>9</sup> Rather than empower the MPC to require participation by trading crowd members, Fossett proposes that, first, if RAES participation is determined to be inadequate, market makers not physically present in that trading crowd should be allowed to log on RAES in SPX if they so desire, provided that they agree to remain on the system until the next expiration. Second, if the level of participation is still insufficient or if immediate action is required in order to make RAES available, then the MPC could require market makers in the trading crowd to sign on. Fossett suggests that, in order to avoid constant changes in the application of the rule, the in-person requirement be lifted for an extended period of time (2 or 3 months), after which, if in-person participation is adequate, the in-person requirement would be re-instated until participation was again insufficient.

Fossett believes this alternative is preferable to the system proposed by the Exchange because it is more likely to result in continuous, adequate participation by market makers, introduce additional capital into the system by non-trading crowd members, and improve the quality of the SPX market. It believes the proposal put forward by the Exchange, on the other hand, would impose unjustifiable burdens on competition in the SPX options market in violation of section 6(b)(5) and 6(b)(6) of the Act.<sup>10</sup> Finally, Fossett asserts that the proposal may chill market making by in-crowd trading members by presenting them with the possibility of forced, involuntary RAES participation.

Fossett also commented on the disciplinary action provision of the proposal, suggesting that the maximum potential penalty for violating participation requirements should be explicitly stated in the rule, so that members have notice of their potential

<sup>9</sup> Fossett letter I, *id.* at 4. The commentator states the intent of the in-person requirement apparently was "to help build up the size of the SPX crowd" and if, two years later, RAES participation by SPX crowd members is insufficient, then the in-person requirement has not been effective.

<sup>10</sup> Sections 6(b)(5) and 6(b)(6) require, respectively, that the rules of a national securities exchange be designed to "remove impediments to and perfect the mechanisms of a free and open market," and "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act."

liability and to ensure that penalties are commensurate with the significance of the violation. Fossett believes it is unfair for the Exchange to present its members with the possibility of unlimited fines, suspension of market maker appointments, and expulsion from RAES, and proposes instead that a fine not exceeding \$1000 (\$5000 for multiple violations) and a three month suspension from RAES participation (1 year for multiple violations) be established as the maximum penalties that the MPC may impose.

In response to the comments of the Fossett Corporation, the CBOE states that its proposed rule does in fact authorize the MPC to waive the in-person requirement as and when it deems appropriate, thereby providing for participation by non-trading crowd members when determined to be appropriate by the MPC.<sup>11</sup> The Exchange believes, however, that the ability of the MPC to require participation in the first instance by in-crowd members is consistent with the Exchange Act. In regard to the suggestion that the rule specify a maximum fine, the Exchange argues that its Business Conduct Committee ("BCC"), the only CBOE Committee authorized to levy fines for violations of the proposed rule, does not presently have a maximum fine limit, and that it would be inappropriate to establish such a limit in Chapter XVII (Discipline) of the Exchange Rules.

**IV. Discussion**

The CBOE's proposed rule change is expressly intended to address problems identified during the pilot period with the current eligibility criterion. The chief problem, highlighted most significantly during the market crash in October 1987, concerns the willingness of individual market makers to participate voluntarily on a continuous basis in RAES during periods of unusual and unpredicted market volatility. Under such circumstances, if market makers defect from an automatic execution system an exchange may be forced to discontinue its operation, thereby contributing to investor uncertainty and market instability.<sup>12</sup> The CBOE proposal is designed to ensure the continued operation of RAES, particularly during periods of increased market volatility, by requiring market maker

<sup>11</sup> See letter from Frederic M. Kreiger, Associate General Counsel, CBOE, to Jonathan G. Katz, Secretary, SEC, dated June 8, 1988.

<sup>12</sup> See discussion of performance of options small order execution systems, in *The October 1987 Market Break: A Report by the Division of Market Regulation*, SEC (February 3, 1988) ["Market Break study"] at 8-8 to 8-10.

participation during expiration months (periods historically associated with volatility increases) and on occasions when the Exchange determines that RAES participation is inadequate.

The Commission believes the proposed rule change is a positive step in strengthening the integrity of the RAES system. The proposed rule change is identical in all material respects to a rule change recently approved by the Commission that revised the market maker eligibility criteria for participation in RAES in equity options.<sup>13</sup> As with the recently approved proposal, we believe the instant proposed rule change is consistent with the Act because it assists in ensuring sufficient levels of market maker participation in RAES under all trading circumstances, including during periods of high volatility. Although the modifications concerning market maker participation suggested by the commentator may indeed be a viable approach, we believe the CBOE should be afforded some discretion to design a system that is consistent with the Act. The discussion below responds to the issues raised by the Fossett Corporation.

**a. Market Maker Participation**

First, the Commission notes the relatively narrow degree of dissimilarity between the Fossett proposal and the Exchange proposal. The CBOE has chosen to provide the MPC with discretion to act in a variety of ways to alleviate inadequate market maker participation. The MPC may require in the first instance in-crowd market maker participation, or it may first respond by waiving the in-person requirement, or it may take both actions simultaneously. In contrast, Fossett believes it is preferable to require the MPC in almost every instance to try to attract non-crowd participation prior to requiring RAES participation by trading crowd members. Notably, under both proposals trading crowd members could be required to participate in RAES.

The Commission does not believe that the CBOE's grant of authority and discretion to the MPC to demand participation by a certain group of CBOE members prior to, or instead of, voluntary participation by another group is inconsistent with the purposes of the Act. We believe an exchange reasonably may differentiate for certain purposes between those broker-dealers who regularly accommodate customer order flow and perform other market

<sup>13</sup> See Securities Exchange Act Release No. 25995 (August 15, 1988).



making responsibilities in a particular options class—i.e., crowd makers—from those who do not regularly perform these functions for that class.<sup>14</sup> It is consistent with the Act for an exchange to accord to, and demand from, the former group certain privileges and responsibilities such as access to, and trading with, orders entered through its automatic execution facilities, when there is a legitimate goal to be furthered thereby. In the present case we find such a purpose in the Exchange's need to ensure levels of in-person market maker participation sufficient to accommodate customer order flow in its RAES system.

Second, the Commission notes that it is not required to approve the least anti-competitive means of achieving a regulatory objective, but rather must weigh competing regulatory goals and ensure that the means selected is not inconsistent with the Act.<sup>15</sup> Although Fossett's suggested modification may be a viable alternative consistent with the Act's goals, we cannot find for that reason alone that the CBOE's proposed rule is inconsistent with those same goals. Moreover, we believe that the rule change as proposed by the CBOE may have benefits not contemplated by the Fossett proposal. For example, the rule change may have a positive impact on options pricing by providing in-crowd market makers with an incentive to ensure that quotations are updated on a timely basis.

Third, although not an issue raised by the commentator, the Commission wishes to emphasize its belief that it is consistent with the Act for an exchange to require participation by trading crowd market makers in an exchange's small order execution system. To find otherwise would be inconsistent with the investor protection goals of the Act and accord insufficient weight to the experience of some options exchanges during the market crash, when market maker defections from execution systems such as RAES resulted in their virtual shutdown. Indeed, in its study of market behavior in October 1987, the Commission's Division of Market Regulation suggested that the "performance of small order execution systems during the week of October 19

evidences the need for the CBOE and the [American Stock Exchange] to revisit their rules governing market maker and registered options trader ("ROT")<sup>16</sup> participation in these systems."<sup>17</sup> The Division recommended that both the CBOE and the Amex consider adopting more stringent policies with respect to market maker participation, including obligations similar to those proposed by the National Association of Securities Dealers, Inc. ("NASD") following the market crash. An NASD rule change, recently approved by the Commission, makes participation in the NASD's Small Order Execution System ("SOES") mandatory for all market makers in NASDAQ/NMS Securities.<sup>18</sup>

#### b. Disciplinary Sanctions

The Fossett Corporation has argued that a maximum penalty possible for violation of the new market maker participation requirements should be specifically set forth in the rule. The Commission disagrees. We believe that it is in the public interest for both the MPC and the BCC to have some degree of flexibility in fashioning remedies, and we do not believe that the requirements imposed on market makers by the proposed rule are so unique or onerous as to require the establishment of maximum penalties. On the contrary, we believe that determinations regarding the severity of a market maker's violation of this rule and the nature of the remedy, are best left to the discretion of committees which are required to consider the totality of the circumstances. Where those committees abuse that discretion, the member has the ability to appeal the fine imposed to the Commission. We note that other rules of the CBOE and other exchanges do not contain maximum or fixed penalties for rule violations.<sup>19</sup> Indeed, the Commission recently approved proposals by the NYSE and Amex to eliminate the maximum limit on fines

<sup>14</sup> Like CBOE market makers, Amex ROTs trade on the floor for their own accounts and are provided favorable margin treatment in return for making markets in one or more option classes. ROTs must engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market. See Amex Rule 958.

<sup>15</sup> See Market Break study, *supra* note 12, at 8-22.

<sup>16</sup> See Securities Exchange Act Release No. 25791 (June 9, 1988).

<sup>17</sup> See, e.g., Amex rule 114(e) (Registered Equity Market Makers may be suspended in addition to or in lieu of penalties that may be imposed pursuant to the Exchange's general disciplinary rules); NYSE Rule 476 (in disciplinary proceedings the Hearing Panel may impose their choice of a wide range of disciplinary sanctions).

that may be imposed in connection with an exchange disciplinary action.<sup>20</sup>

We also do not agree with the Fossett Corporation that it is inappropriate to delegate to the MPC the authority to suspend or restrict a market maker's registration for failure to comply with the requirements of the proposed rule. The Commission believes that these sanctions and others provided for in Chapter VIII of the Exchange Rules legitimately may be imposed for a failure to comply with the rule so long as the Exchange provides minimum standards of due process to the parties involved. The Commission has reviewed carefully the CBOE's disciplinary process as codified in XVII of its rules, and believes that it is consistent with the due process requirements of the Act.<sup>21</sup>

#### V. Conclusion

The Commission has concluded after careful review that the proposed rule change discussed herein is consistent with the requirements of the Act and the rules and regulations thereunder, in particular, the requirements of section 6<sup>22</sup> and 11A.<sup>23</sup> Accordingly, the Commission is approving the proposed rule change for a six month period to run from the date of this order.

It is therefore ordered, pursuant to section 19(b)(2)<sup>24</sup> of the Act, that the proposed rule change be, and hereby is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Date: December 20, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29742 Filed 12-27-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26376; File No. SR-NSCC-88-08]

#### Self-Regulatory Organizations; National Securities Clearing Corporation; Order Granting Approval of a Proposed Rule Change Concerning NETWORKING

On September 12, 1988, the National Securities Clearing Corporation

<sup>20</sup> See Securities Exchange Act Release No. 25276 (January 20, 1988).

<sup>21</sup> See Section 6(b)(7), 6(d)(1) and 19(e)(2) of the Act. Moreover, any broker-dealer sanctioned in a disciplinary proceeding by the CBOE for violating an Exchange rule has a right to appeal the Exchange's decision to the Commission. 15 U.S.C. 78e(d)(2) (1982).

<sup>22</sup> 15 U.S.C. 78e(b)(2) (1982).

<sup>23</sup> 15 U.S.C. 78k-1 (1982).

<sup>24</sup> 17 CFR 200.30-3(a)(12) (1985).

("NSCC") filed a proposed rule change (File No. SR-NSCC-88-08) with the Commission pursuant to Section 19(b) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> The proposal would authorize NSCC to enhance its Mutual Fund Settlement, Entry, and Registration Verification Service ("Fund/Serv") by providing a new service, NETWORKING, designed to enable the transmission of customer account data between NSCC's broker-dealer and mutual fund processing members. On September 29, 1988, the Commission published notice of this proposed rule change in the Federal Register to solicit comments from interested persons.<sup>2</sup> To date, no comments have been received. As discussed below, the Commission is approving this proposal.

#### I. Description

The proposed rule change augments NSCC's Fund/Serv<sup>3</sup> by adding a new service known as NETWORKING which centralizes and standardizes data communication system for the exchange of customer account level activity information between broker-dealers and mutual fund processors.<sup>4</sup> The proposal will provide Fund/Serv broker-dealer participants with the ability to provide mutual funds, through a centralized and automated facility, with the information to establish sub-accounts for each customer to reflect customer positions within the broker-dealer's omnibus account at the mutual fund.

Fund members<sup>5</sup> will be able to transmit such customer account information such as: name of customer, address, account number, tax identification number, number or dollar amount of shares, dividends, purchases and redemptions, and name of registered representative. Because of differing arrangements between broker-dealers and mutual funds, information submitted by broker-dealers to the fund will vary. NETWORKING can accommodate variable information, because it provides broker-dealers and mutual funds with a wide array of optional data fields and free-formatted fields.

<sup>1</sup> 15 U.S.C. 78(b)(1).

<sup>2</sup> See Securities Exchange Act Release No. 26110 (September 23, 1988), 53 FR 38133 (September 29, 1988).

<sup>3</sup> NSCC has operated Fund/Serv since 1986. See Securities Exchange Act Release No. 25146 (November 20, 1987), 52 FR 45418.

<sup>4</sup> Participants which use NETWORKING are not limited to communicating through NETWORKING and may use other methods to communicate with each other if they wish.

<sup>5</sup> A Fund member is any NSCC member that utilizes the services of Fund/Serv and includes full service NSCC members, Fund/Serv-only broker-dealers, and mutual fund members.

Broker-dealer and mutual fund participants may use NETWORKING to provide each other with information needed to update customer accounts. A broker-dealer may establish sub-accounts at the time of initial purchase, or for existing accounts, by the submission of the appropriate data to the fund at any subsequent time. When a customer makes an additional purchase or redemption request through the broker-dealer, that broker-dealer may use NETWORKING to provide the mutual fund with information to update the customer account. Likewise, a mutual fund also may use NETWORKING to notify the broker-dealer that a transaction has occurred in a customer account, such as when the customer engages in a transaction directly with the fund, but the customer requests that the broker-dealer maintain records of the account balances.<sup>6</sup> Moreover, broker-dealers and mutual funds may use NETWORKING to transmit account balance information needed to verify a broker-dealer's aggregate account and customer sub-account information. Dividend distributions, change of customer's address, and a change in the customer's registered representative also may be transmitted through NETWORKING. NSCC's role in NETWORKING is to transmit data between the two parties. Each party which submits data through NETWORKING is responsible for the accuracy of the information. NSCC will not create or change any account information. NSCC, however, provides participants with technical assistance, including detailed programming information, to enable them to transmit data through NETWORKING and has staff available to answer questions and handle any problems that might arise.

NSCC has developed certain safeguards to minimize the possibility of errors in receiving or transmitting data. When NSCC receives data from a Fund member, the Fund member must inform NSCC of the number of submissions sent. NSCC counts the records received to determine whether it received the correct number of submissions and sends an input acknowledgement record to the Fund member which submitted the data. If NSCC does not receive the correct number of records, NSCC will telephone the sender to resolve the

<sup>6</sup> For example, some mutual funds send regular dividend checks directly to the broker-dealer's customer and allow optional direct dividend reinvestments. That customer may decide to return the check to the mutual fund for reinvestment. Through NETWORKING, the mutual fund would be able to notify promptly the customer's broker-dealer of an optional reinvestment so the broker-dealer can update its records accordingly.

discrepancy. Likewise, when NSCC submits data to a Fund member, NSCC will inform the recipient of the number of records it plans to send so that the recipient will be able to count the records submitted and inform NSCC if there is a discrepancy. NSCC also performs edit checks on the data which it receives from Fund members to ensure, among other things, that data are presented in the correct format. NSCC will reject data from Fund members with the following deficiencies: missing/invalid entries in any data field, missing/invalid identification codes, and numeric codes where letter codes should be (and vice versa).

NSCC has developed an identification code security system to ensure that only authorized users with valid identification codes may gain access to NETWORKING. In addition, all NETWORKING participants must use dedicated telephone lines to transmit data to or receive data from NSCC.

#### II. NSCC's Rationale

NSCC believes that the proposed rule change is consistent with the requirements of the Act in that it will promote the prompt and accurate clearance and settlement of securities transactions. NSCC established NETWORKING at the request of an Investment Company Institute (ICI) task force, "to create a system that will permit an ongoing exchange of data and information between mutual funds and brokers [by] bringing efficiencies to brokers and funds and eliminating much of the paperwork and other problems that presently exist".<sup>7</sup> NSCC believes that it will better serve its participants and enable them to better serve mutual fund purchasers by implementing NETWORKING.

#### III. Discussion

The Commission believes the proposal is consistent with Section 17A of the Act. Specifically, the proposal will facilitate the prompt and accurate clearance and settlement of mutual fund transactions and the safeguarding of mutual fund transactions and funds.

NETWORKING provides participants with the ability to transmit mutual fund customer account information in a centralized and automated fashion. Before NETWORKING, broker-dealers were required to devise and maintain different communications systems to

<sup>7</sup> See letter from Donald E. O'Connor, Vice President-Operations, Investment Company Institute, to David Kelly, President, National Securities Clearing Corporation, dated April 7, 1988.



convey customer account information to each mutual fund processor. Thus, the Commission believes NETWORKING provides broker-dealers with a more efficient means of communicating customer account information between broker-dealers and funds, and will further enhance the prompt and accurate clearance and settlement of customer-side mutual fund transactions.

The proposal provides certain safeguards to ensure the integrity of customer account information sent through the NETWORKING system. NSCC also provides participants with technical assistance and has developed safeguards to prevent unauthorized users from gaining access to the system. The Commission believes that NETWORKING has appropriate safeguards with regards to securities, funds and the underlying records associated with mutual funds transactions.<sup>8</sup>

NETWORKING also may decrease communication, trade processing and account maintenance costs for the funds and broker-dealers because NETWORKING will facilitate the development and implementation of a standard data format and data transmission format to replace the myriad of different formats which currently exist among mutual fund groups.<sup>9</sup> NETWORKING also may

<sup>8</sup> NSCC currently uses only dedicated telephone lines to transmit NETWORKING data. If in the future NSCC wishes to use another means of transmitting NETWORKING data, it must file its proposal as a proposed rule change under section 19(b) (2) of the Act.

<sup>9</sup> The Commission expects NSCC to file procedures, processing timeframes, forms and requirements for record layouts regarding Fund/Serv and any subsequent changes regarding that service for Commission review under section 19(b) and Rule 19b-4 thereunder. See, Securities Exchange Act Release No. 17258 (October 30, 1988), 45 FR 73906.

Rules of a clearing agency include, among other things, its articles of incorporation, by-laws, rules and such of the stated policies, practices and interpretations ("SPPI") of such clearing agency as the Commission, by rule, may determine necessary to be deemed rules of such clearing agency. See section 3(a) (27) of the Act. Rule 19b-4 defines an SPPI as: (1) any material aspect of the operation of the facilities of the SRO; or (2) any statement made generally available to the membership of, to all participants in, or to persons having or seeking access ("specified persons") to facilities of an SRO that establishes or changes any standard, limit, or guideline, with respect to: (i) the rights, obligations, or privileges of specified persons; or (ii) the meaning, administration or enforcement of an existing rule. The Commission has deemed certain SPPIs to be rules of a clearing agency. Generally, a clearing agency SPPI is deemed to be a proposed rule change unless it meets one of two exclusions: (1) it is reasonably and fairly implied by an existing SRO rule; or (2) it is concerned solely with the administration of the SRO and is not an SPPI with respect to the administration, meaning, or enforcement of an existing SRO rule. As explained in Securities Exchange Act Release No. 17258,

enable broker-dealers to adapt more quickly and inexpensively to new types of mutual fund products or enhancements to existing products because of increased standardization and lower software programming requirements.

The Commission believes that NETWORKING provides broker-dealers and mutual fund agents with an efficient method of updating customer account information and provides broker-dealers with an efficient method of obtaining timely updated customer account information. Currently, some broker-dealers, to ensure that they have current account balance information (e.g., purchase and redemption information and dividend and dividend reinvestment information), request that the mutual funds send them physical certificates so that they will have an independent check on the number of customer-held shares in any particular fund. Thus, the proposal may facilitate the immobilization of securities certificates, consistent with section 17A(e) of the Act.

Broker-dealers have an obligation under the Act to have adequate internal controls to maintain accurate customer account information and to safeguard customer securities and funds. Similarly, mutual funds and their agents have an obligation under the Investment Company Act of 1940 ("Investment Company Act") and the Act to provide adequate internal controls, reconciliation of accounts, and timely updating of shareholder account information. Broker-dealers, mutual funds, and their agents should note that their use of NETWORKING does not affect their obligation to comply with the requirements under the Act or the Investment Company Act.

#### IV. Conclusion

For the reasons discussed above, the Commission finds that the proposed rule change is consistent with the Act and, in particular, Section 17A.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR-

neither of the two exclusions were intended to cover SPPIs that affect the manner in which members or others do business or in which the system functions, in a way that is not reasonably foreseeable from the rule to which the SPPI applies. See 45 FR 73913 n.76. Procedures, processing timeframes, forms, and requirements for record layouts regarding operational aspects of clearing agency services that are widely distributed to clearing agency members and that establish industry practice, impose significant costs to clearing agency members, or change current industry practice would be considered proposed rule changes under Rule 19b-4 under the Act.

NSCC-88-08) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Dated: December 20, 1988.

Jonathan G. Katz,  
Secretary.  
[FR Doc. 88-29743 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-26377; File Nos. SR-NSCC-87-12 and SR-NSCC-88-04]

#### Self Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Changes Concerning Fund/Serv

On October 15, 1987, the National Securities Clearing Corporation ("NSCC") filed a proposed rule change (File No. SR-NSCC-87-12) under section 19(b) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> to authorize and establish a new category of broker-dealer membership, Fund/Serv-only broker-dealer membership, under NSCC's Mutual Fund Settlement, Entry and Registration Verification Service ("Fund/Serv").<sup>2</sup> The proposal also revises NSCC's rules concerning Fund/Serv clearing fund contributions and the use of such funds to satisfy member defaults or other Fund/Serv losses.

On May 20, 1988, NSCC filed a proposed rule change (File No. SR-NSCC-88-04) with the Commission pursuant to section 19(b) of the Act, to clarify certain NSCC rules, including rules concerning Fund/Serv clearing fund deposits. On August 31, 1988, the Commission published notice of this proposed rule change in the Federal Register to solicit comments from interested persons.<sup>3</sup> The Commission approved the proposed rule changes on a temporary basis.<sup>4</sup> To date, no comments have been received. This order approves both proposed rule changes.

<sup>1</sup> 15 U.S.C. 78(b)(1).

<sup>2</sup> Securities Exchange Act Release No. 25175 (December 4, 1987), 52 FR 47471.

<sup>3</sup> Securities Exchange Act Release No. 26031 (August 25, 1988), 53 FR 33508.

<sup>4</sup> See Securities Exchange Act Release Nos. 26146 (September 30, 1988), 53 FR 39565; 25861 (June 28, 1988), 53 FR 28486; 25641 (May 2, 1988), 53 FR 16488; and 25200 (January 26, 1988), 53 FR 3101. In the January 26, 1988, temporary approval order the Commission requested NSCC to submit certain information to enable it to determine whether to approve permanently the proposal. NSCC submitted the requested information on April 25, 1988, and September 12, 1988.

#### I. Description

The proposed rule changes amend NSCC's Mutual Fund Settlement, Entry Registration Verification Service ("Fund/Serv").<sup>5</sup> The proposal authorizes a new category of broker-dealer membership, whose activities would be restricted exclusively to Fund/Serv. The proposal defines the term "Fund/Serv broker-dealer" as a registered broker-dealer who has joined NSCC pursuant to the provisions of NSCC's Rule 2, section 2(i), which limits the Fund/Serv broker-dealer's use of NSCC services to only Fund/Serv ("Fund/Serv-only broker-dealer").<sup>6</sup> Fund/Serv-only broker-dealers are required to satisfy substantially the same standards as other broker-dealers seeking to obtain or retain access to NSCC services.<sup>7</sup> In addition, NSCC has designed a new questionnaire for Fund/Serv-only applicants.<sup>8</sup>

The proposal revises NSCC's Clearing Fund Rule (Rule 4) by changing the method of calculating a broker-dealer Fund members' clearing fund contribution. Under the proposal, a broker-dealer Fund member's mandatory contributions to the Fund/Serv clearing fund could range from \$5,000 to \$20,000, and would be based on the maximum size of its debits with any

<sup>5</sup> NSCC has operated Fund/Serv since 1986. Fund/Serv first received approval as a one year pilot program (See Securities Exchange Act Release No. 22928, February 20, 1986, 51 FR 6954) and received permanent approval in November, 1987 (See Securities Exchange Act Release No. 25146 (November 20, 1987), 52 FR 45418).

<sup>6</sup> The proposal also modifies NSCC's rules by changing the term "Fund/Serv member", which is used to describe all NSCC members that utilize Fund/Serv, to "Fund member". Full-service NSCC members, Fund/Serv-only broker-dealers, and mutual fund members are included in the term "Fund member".

<sup>7</sup> Unlike full service NSCC members, Fund/Serv-only broker-dealers are not required to join a registered securities depository.

<sup>8</sup> The questionnaire must be filed by Fund/Serv-only broker-dealer applicants and must be updated annually. The information which NSCC requires is used to determine whether to accept the applicant for membership and whether such membership should be continued. The questionnaire requires certain organizational and financial information such as: the name and form of the organization (corporation, partnership, or sole proprietorship); the date the organization began doing business; the names of the chief executive officer, financial officer and operational officer; the number of staff (registered representatives and operational personnel); the numbers and locations of branch offices; the names of outside counsel, accounting firms, and the date of the last annual audit; the applicant's exchange memberships, name of the designated examining authority, and the date of its last inspection; recordkeeping information including whether a service bureau is used, the methods of recordkeeping, locations of books and records; the names of mutual funds it performs transactions in; the largest anticipated daily money settlement with any one mutual fund; bonding; and pending investigations or litigation.

Individual mutual fund group ("debit limit").<sup>9</sup> While the minimum deposit for Fund/Serv-only broker-dealers is \$5,000 in cash, the clearing fund requirement increases to \$10,000 for broker-dealer Fund members with debit limits of up to \$500,000 and to \$20,000 with debit limits that equal or exceed the \$500,000 limit. NSCC will review broker-dealer Fund member debit limits monthly and will adjust member contribution requirements accordingly.

The proposal outlines how NSCC plans to satisfy losses or liabilities arising from a Fund/Serv member default. Fund/Serv is not a guaranteed service, so NSCC's first line of defense in the event of a default is to withhold credits from broker-dealers in the event of a mutual fund default, or reverse credits due to Mutual funds in the event of a broker-dealer default. NSCC also protects itself by paying Fund members in next-day funds, which provides it with the ability to stop particularly payments, if necessary.<sup>10</sup>

If NSCC is unable to recover the payment from either party (e.g., a double default), NSCC will look to the defaulting broker-dealer fund members' contribution to NSCC's Fund-Serv clearing fund ("Fund/Serv Allocation") to make it whole. If the defaulting member's contribution to the Fund/Serv Allocation is insufficient, and that member is a full-service member, NSCC will look to that member's other clearing fund contributions to make it whole.<sup>11</sup> If the loss remains unsatisfied, NSCC may look to retained earnings, or the entire Fund/Serv Allocation. If the Fund/Serv Allocation is insufficient to satisfy a loss, NSCC will assess Fund/Serv broker-dealer members, on a *pro rata* basis, based on their use of Fund/Serv,

<sup>9</sup> All full service broker-dealer Fund members, except Fund/Serv-only broker-dealers, must deposit a minimum clearing fund contribution of \$10,000 in cash (unless changed by the Board of Directors).

<sup>10</sup> Mutual fund Fund/Serv participants are not required to make a clearing fund contribution. Instead NSCC collects funds from mutual funds at 1:00 p.m., in advance of any payments to broker-dealers. Once funds are collected from mutual funds, NSCC pays any funds owed to broker-dealers (between 4:00 p.m. and 7:00 p.m. for New York city broker-dealers and between 3:00 p.m. and 5:00 p.m. for broker-dealers outside of New York city). Thus, NSCC rules provide for the withholding of payments to broker-dealers in the event of a mutual fund default. See Securities Exchange Act Release No. 22928 (February 20, 1986), 51 FR 6954.

<sup>11</sup> If the defaulting member has incurred other obligations to NSCC arising out of the use of other NSCC systems or services, NSCC's rules provide that any funds for such systems or services will be used first to satisfy losses resulting from that system or service. Any remaining clearing fund deposits may be used to satisfy losses or liabilities resulting from the operation of Fund/Serv.

to satisfy the loss.<sup>12</sup> If the loss still is not satisfied, and if all Fund members withdraw, NSCC may use the entire clearing fund to recover the loss. If the loss remains unsatisfied, then NSCC may assess its entire membership to satisfy the loss.<sup>13</sup>

The proposal amends NSCC's rules concerning how the Fund/Serv Allocation may be used. The proposal limits the use of the Fund/Serv Allocation to satisfying losses or liabilities resulting from the operation of Fund/Serv. Thus, the Fund/Serv Allocation may not be used to satisfy losses or liabilities from other NSCC services or systems.<sup>14</sup>

#### II. NSCC's Rationale

NSCC believes that the proposals are consistent with the Act and will encourage greater participation in a centralized settlement system for mutual fund transactions. Specifically, NSCC believes the proposals will promote the prompt and accurate clearance and settlement of mutual fund transactions and will not adversely affect NSCC's ability to safeguard securities and funds within its custody or control. NSCC also believes that the establishment of the Fund/Serv-only broker-dealer category and the associated financial and operational standards will encourage greater participation in Fund/Serv while minimizing the risk to which NSCC is exposed by allowing a new class of participants to use this service.

NSCC has examined the basis for its Clearing Fund requirements and believes that the proposed Fund/Serv clearing fund contribution levels appropriately reflect the level of risk to which it is exposed. Because Fund/Serv is not a guaranteed system, NSCC believes that the major risk to Fund/Serv is the risk that both parties to a transaction will default on its obligations

<sup>12</sup> If the Fund/Serv Allocation is applied to satisfy a loss, NSCC shall obtain sufficient funds to replenish the Allocation by charging each member on a *pro rata* basis, based on prior use of Fund/Serv. Members may, within 10 business days of receipt of a notice of a *pro rata* charge, give notice to NSCC that they plan to withdraw from Fund/Serv and avoid liability for any subsequent assessments.

<sup>13</sup> If the clearing fund is applied to satisfy a loss, NSCC shall obtain sufficient funds to replenish the clearing fund by charging each member on a *pro rata* basis, based on prior use of NSCC services (except for Fund/Serv). Members may, within 10 business days of receipt of a notice of a *pro rata* charge, give notice to NSCC that they plan to withdraw from NSCC and avoid liability for any subsequent assessments.

<sup>14</sup> NSCC Rule 4 states that the Fund/Serv Allocation is a separate fund which may be used to satisfy losses or liabilities resulting from the operation of Fund/Serv. See Securities Exchange Act Release No. 25322 (July 18, 1988) 53 FR 27915.

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to NSCC. Thus, NSCC believes that its proposed clearing fund contributions appropriately reflects the risk of a double default by basing clearing fund contributions on the Fund member's highest payment obligation to any fund group.

### III. Discussion

The Commission believes that the proposals are consistent with Section 17A of the Act. The proposals are consistent with NSCC's obligation to maintain appropriate financial responsibility standards, promote prompt and accurate clearance and settlement of mutual fund transactions, and do not appear to affect adversely NSCC's ability to safeguard funds and securities within its custody or control.

Section 17A(b)(4)(B) of the Act contemplates that a registered clearing agency will develop financial responsibility, operational capacity, experience, and competency standards to use in determining whether to accept, deny, or condition the participation of any class of participant. Under the proposal, NSCC will apply to Fund/Serv-only broker-dealer applicants essentially the same financial and operational standards as NSCC applies to other broker-dealer applicants and will obtain appropriate information concerning each applicant through its member questionnaire. The Commission believes that through the development of the Fund/Serv-only membership questionnaire, and the use of NSCC's existing basic broker-dealer membership requirements and surveillance and compliance procedures, NSCC has established adequate standards for examining the financial responsibility, operational capacity, experience, and competency of applicants to use in determining whether to accept, deny, or condition the participation of potential Fund/Serv-only members.<sup>15</sup>

The Commission believes that the proposal to establish a new Fund/Serv-only broker-dealer membership category promotes the prompt and accurate clearance and settlement of mutual fund securities transactions because it will expand the range of broker-dealers using a standardized, automated clearance and settlement system. Allowing Fund/Serv-only broker-dealers to join Fund/Serv creates efficiencies not only for those broker-dealers, but also for existing mutual fund members

because it brings more of their transaction volume into a centralized and automated environment, and thus, enables them to process their mutual fund transactions promptly and accurately. Moreover, the expansion of Fund/Serv membership facilities furthers the purpose of Section 17A of the Act to establish a national system for the prompt and accurate clearance and settlement of mutual fund transactions.

The Commission believes that the Fund/Serv Allocation appropriately reflects the level of risk associated with Fund/Serv, including the risk of a double default.<sup>16</sup> As noted in the Division of Market Regulation's ("Division") Registration Standards ("Standards"), the Act requires a clearing agency, "to establish by rule an appropriate level of clearing fund contributions based, among other things, on its assessment of the risk to which it is subject."<sup>17</sup> The greatest potential risk to Fund/Serv is that both participants to a transaction will default on their obligations. NSCC monitors its members financial conditions and has developed appropriate pay and collect procedures to minimize that risk.

The Commission believes that Fund/Serv's loss allocation arrangements are consistent with the Act and are consistent with prior NSCC loss allocation decisions. Although the Commission believes that a different balancing of interests might justify a different result, particularly with respect to the allocation of non-default, system and non-default "other than system" losses,<sup>18</sup> the Fund/Serv loss allocation scheme may aid in promoting the prompt and accurate clearance and settlement of securities transactions. NSCC previously has set limits on the use of its clearing funds to satisfy losses caused by member defaults and, thereby, has limited mutualization of default risks. In 1982, NSCC amended its rules to preclude mutualization of member default risks between sole users of its Envelope Settlement Service ("ESS") and sole users of NSCC's Continuous Net Settlement System ("CNS").<sup>19</sup> In approving those changes,

<sup>15</sup> Nevertheless, the Commission notes that NSCC conducts an annual review of its financial exposure ("annual risk assessment").

<sup>17</sup> See Securities Exchange Act Release No. 16900 at 55-58, 45 FR 41920.

<sup>18</sup> The Commission notes that neither the Act, nor the Standards require clearing agencies to mutualize default risks associated with particular services among all users.

<sup>19</sup> See Securities Exchange Act Release No. 19230 (November 10, 1982), 47 FR 51999.

the Commission focused on whether the clearing fund adequately protected NSCC and its participants from losses arising from participant defaults and other losses. The Commission noted that, "clearing fund protection can be organized responsibly in different ways at different clearing agencies".<sup>20</sup> Thus, the Commission determined that it was not improper for NSCC's Board to decide to limit the use of clearing fund contributions to satisfying losses arising from a particular service in light of the fact that the clearing funds designated for those services (ESS and CNS), independently met the statutory and Division standards by adequately protecting participants and the clearing agency from potential losses arising from those services.

NSCC also previously has established special membership categories that limited participation to one service and did not require participants using that service, to make clearing fund contributions that might be subject to assessment for service-related, system related, or general clearing agency losses or liabilities. For example, in 1984, NSCC established the Municipal Bond Corporation System ("MCOM") and a new membership class, Municipal Bond Comparison Only ("MCO") members, whose access to NSCC services was limited to MCOM. NSCC determined not to require MCOs to contribute to NSCC's general clearing fund (or any other more limited fund).<sup>21</sup> Moreover, the Commission has previously approved NSCC's decision not to require clearing fund contributions from mutual funds using Fund/Serv exclusively.<sup>22</sup>

The proposal currently under consideration, draws a line between a non-guaranteed service (such as Fund/Serv) and all other services (such as trade comparison and accounting) by limiting users of a non-guaranteed service (such as Fund/Serv) to losses generated by this service (default or otherwise). The Commission recognizes that Fund/Serv is a relatively new service that is still under development. Thus, limiting the Fund/Serv Allocation to satisfying losses arising from Fund/Serv may encourage greater broker-dealer participation in Fund/Serv. Moreover, as discussed above, NSCC

<sup>20</sup> *Id.*, at 28.

<sup>21</sup> See Securities Exchange Act Release No. 20795 (March 28, 1984), 49 FR 22427.

<sup>22</sup> Because of the unlikely risk of loss from mutual fund payment defaults, NSCC does not require clearing fund contributions from mutual funds using Fund/Serv. See Securities Exchange Act Release Nos. 23133 (April 18, 1988), 52 FR 9803 and 22928 (February 20, 1988), 51 FR 6954.

has taken appropriate steps to provide adequate protection to other NSCC participants from the risks associated with Fund/Serv. Finally, the Commission is satisfied that controls surrounding NSCC operations will assure review of the adequacy of its loss allocation rules and procedures.<sup>23</sup>

### V. Conclusion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulation thereunder, applicable to clearing agencies, and in particular, the requirements of Section 17A of the Act and the Standards. The Commission further finds that the structure, purpose and limitation on the use of the Fund/Serv Allocation to satisfy losses arising from Fund/Serv do not expose NSCC or its participants to an unreasonable risk.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed changes (SR-NSCC-87-12 and SR-NSCC-88-04) be and hereby are approved.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Dated: December 20, 1988.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-29744 Filed 12-27-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-26379; File No. SR-PSE-88-26]

### Self-Regulatory Organizations; Notice of Proposed Rule Change by Pacific Stock Exchange, Inc., Relating to Adoption of a Rule Further Defining the Authority of the PSE's Examinations Department as a Designated Examining Authority

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 23, 1988, the Pacific Stock Exchange Incorporated ("PSE" or "Exchange") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by PSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>23</sup> NSCC, like other registered clearing agencies, must obtain an annual evaluation of its system of internal accounting controls. In addition, NSCC conducts an annual assessment of risks and related safeguards associated with its clearing activities. The Commission directs NSCC to reconsider the Fund/Serv Allocation in the course of its annual risk assessment activities.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will amend PSE Rule VII so as to further illustrate the authority of the PSE Examinations Department to require compliance from those relevant PSE members who are within the scope of the PSE's power as the Designated Examining Authority. Specifically, the proposed rule change will give the PSE the authority to examine the financial responsibility and/or operational conditions of any member or member organization. The proposed rule gives the Exchange the authority to require a member or member organization to furnish requested information in the course of such examinations including, if the PSE deems it necessary, books and records as well as sworn or unsworn testimony.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B) and (C) below, of the most significant aspects of such statements.

#### (A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Changes

Under its authorization to function as a self-regulatory organization for the trading of securities, the PSE is empowered to act as a "designated examining authority" over certain specific PSE members.

To fulfill this obligation, the PSE Examinations Department is required to perform regular inspection duties for the purpose of insuring that the members under its authority are complying with the various PSE and SEC financial rules and regulations. In order to more adequately fulfill this regulatory function, the Exchange proposes to amend PSE Rule VII so as to provide the Examinations Department with more specifically defined authority in order to inspect the books and records of the members over which it is responsible.

The proposed rule amendments are consistent with sections 6(b) and 6(c) of the Act, in general, and section 6(b)(5) and 6(c)(3)(A) in particular, in that they will help to maintain those standards of

compliance which act to help insure the protection of investors and the public interest.

#### (B) Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule changes imposes no burden on competition.

#### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Comments on the proposed rule change were neither requested nor received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approved such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change be disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC, 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission and all written communications relating to the proposed rule change between the Commission and any persons, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552 will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC, 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR-PSE-88-26 and should be submitted by January 18, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.



Dated: December 20, 1988.  
Jonathan G. Katz,  
Secretary.  
[FR Doc. 88-29745 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 33-6810]

#### Securities Uniformity

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Publication of release announcing a Memorandum of Understanding between the National Association of Securities Dealers and the North American Securities Administrators Association regarding a model uniform marketplace exemption from state securities registration requirements.

**SUMMARY:** This release publishes the Memorandum of Understanding (MOU) on a uniform model marketplace exemption that has been approved by the National Association of Securities Dealers, Inc. ("NASD") and the North American Securities Administrators Association, Inc. ("NASAA"). As a basis for the exemption, the MOU sets out criteria that must be met for a marketplace to receive the exemption, including numerical listing, corporate governance, voting rights, maintenance, decertification, and information sharing standards. The MOU was a product of discussion between the parties that was facilitated by the Securities and Exchange Commission ("SEC") or "Commission". Section 19(c) of the Securities Act of 1933 (the "Securities Act")<sup>1</sup> directs the SEC to pursue maximum uniformity in Federal and State regulatory standards.

**FOR FURTHER INFORMATION CONTACT:** Kathryn V. Natale, Assistant Director (202/272-2405), or Peter Sultan, Attorney (202/272-2411), Division of Market Regulation, Securities and Exchange Commission, 450 5th Street, NW., Mail Stop 5-1, Washington, DC 20549.

#### SUPPLEMENTARY INFORMATION:

##### I. Discussion

Greater uniformity in securities regulation was endorsed by Congress with the enactment of section 19(c) of the Securities Act in the Small Business Investment Incentive Act of 1980 (the "Investment Incentive Act"). Section 19(c) authorizes the SEC to cooperate with any association of state securities regulators that can assist in carrying out the declared policy of section 19(c). The declared policy of the section is that

there should be greater Federal and State cooperation in securities matters, including: (1) Maximum effectiveness of regulation; (2) maximum uniformity in Federal and State standards; (3) minimum interference with the business of capital formation; and (4) a substantial reduction in costs and paperwork to diminish the burdens of raising investment capital, particularly by small business, and to diminish the costs of the administration of the government programs involved.

Consistent with these stated goals and policies, the Commission has served to facilitate discussions between the NASD and NASAA<sup>2</sup> on the scope of a uniform marketplace exemption from securities registration requirements for exchange-listed securities and securities designated as NASDAQ National Market System ("NASDAQ/NMS") Securities. Those discussions have been successfully completed. The MOU was approved by the NASD Board of Governors on May 9, 1988, and by the NASAA membership on October 10, 1988.

The Commission welcomes the development of a uniform standard in the MOU for treating NASDAQ/NMS and exchange-listed securities. The NASDAQ/NMS market has undergone considerable growth and development in recent years. NASDAQ/NMS Securities have become subject to real-time transaction and quotation reporting. In addition, all current NASDAQ/NMS issues are required to be registered under either section 12(b) or 12(g) of the Securities Exchange Act of 1934 ("Act"), and are subject, therefore, to the period reporting, proxy and shortswing profit requirements imposed by Sections 13, 14 and 16 of the Act. Furthermore, with the expansion of the surveillance capabilities of the NASD with respect to NASDAQ/NMS Securities, the Commission believes that the NASD provides investors in these securities substantially equivalent protection against abuse as is provided investors in exchange-traded securities. With the adoption by the Commission earlier this year of Rule 19c-4 under the Act,<sup>3</sup> NASDAQ/NMS Securities and most exchange-listed issues are subject to equivalent shareholder disenfranchisement protections. For these reasons, the Commission believes that NASDAQ/NMS and exchange-listed securities trade in an environment subject to substantially equivalent disclosure, regulatory and surveillance protections, and deserve to be treated comparably.

The Commission does not regard uniform listing standards among securities markets as an objective of section 19(c). Nor does the Commission intend by its endorsement of uniformity in state exemptive criteria to take a position on the costs or benefits of so-called "merit" regulation by the States. Uniformity in state exemptive criteria does appear, however, to promote the objectives of section 19(c), and the Commission endorses the MOU on this basis.

The text of the MOU follows. Although the MOU refers to the American Stock Exchange and the New York Stock Exchange as parties, these exchanges have not yet become signatories.

#### II. Memorandum of Understanding

Whereas, the Securities and Exchange Commission ("SEC"), pursuant to section 19(c) of the Securities Act of 1933, has facilitated discussions among the North American Securities Administrators Association, Inc. ("NASAA"), the National Association of Securities Dealers, Inc. ("NASD") and the New York Stock Exchange, Inc., and American Stock Exchange, Inc., ("the Exchanges") to achieve maximum uniformity in federal and state regulatory standards in the form of a uniform model marketplace exemption from state securities registration requirements for securities listed on the NASDAQ National Market System ("NASDAQ/NMS") and the Exchanges; and

Whereas, NASAA, the NASD and the Exchanges desire to develop a mechanism to ensure that the implementation of the exemption granted to NASDAQ/NMS and the Exchanges is administered pursuant to the exemptive provisions;

Now, therefore, it is mutually understood and agreed between the parties that the guidelines outlined hereafter (the "exemptive provisions") shall be the basis for such a uniform exemption:

1. The exchange or association shall require at least the following standards to be met for listing or designation of securities of an issuer on the exchange or quotation system:

	Alt. No. 1	Alt. No. 2
Net tangible assets <sup>1</sup> .....	\$4,000,000	\$12,000,000
Public float.....	500,000	1,000,000
Pre-tax income.....	750,000	
Net income.....	400,000	
Shareholders <sup>2</sup> .....	800/400	800/400
Market value of float.....	3,000,000	15,000,000
Minimum bid.....	\$5/Share	
Operating history.....		3 years

<sup>2</sup> See Securities Exchange Act Release No. 25891 (July 7, 1988), 53 FR 28378.

<sup>1</sup> 15 U.S.C. 77a et seq.

<sup>1</sup> "Net Tangible Assets" is defined for purpose of this memorandum to include the value of patents, copyrights and trademarks but to exclude the value of good will.  
The minimum number of shareholders under each alternative is 800 for companies with 500,000 for companies to 1,000,000 shares publicly held for 400 for companies with over 1,000,000 shares publicly held, or 400 for companies with over 500,000 publicly held and daily trading volume in excess of 2,000 shares per day for six months.

The rules of each association shall require at least two authorized market makers for each issuer.

2. The exchange or association shall require at least the following minimum corporate governance standards for its domestic issuers:

#### a. Distribution of Annual and Interim Reports.

i. Each issuer shall distribute to shareholders copies of an annual report containing audited financial statements of the company and its subsidiaries. The report shall be distributed to shareholders a reasonable period of time prior to the company's annual meeting of shareholders and shall be filed with the exchange or association at the time it is distributed to shareholders.

ii. Each issuer which is subject to SEC Rule 13a-13 shall make available to shareholders copies of quarterly reports including statements of operating results either prior to or as soon as practicable following the company's filing its Form 10-Q with the SEC. If the form of such quarterly report differs from the Form 10-Q, both the quarterly report and the Form 10-Q shall be filed with the exchange or association. The statement of operations contained in quarterly reports shall disclose, as a minimum, any substantial items of an unusual or non-recurrent nature and net income and the amount of estimated federal taxes.

iii. Each issuer which is not subject to SEC Rule 13a-13 and which is required to file with the SEC, or another federal or state regulatory authority, interim reports relating primarily to operations and financial position, shall make available to shareholders reports which reflect the information contained in those interim reports. Such reports shall be made available to shareholders either before or as soon as practicable following filing with the appropriate regulatory authority. If the form of the interim report made availability to shareholders differs from that filed with the regulatory authority, both the report to shareholders and the report to the regulatory authority shall be filed with the exchange or association.

b. Independent Directors. Each issuer shall maintain a minimum of two independent directors on its board of directors. For purposes of this section, "independent director" shall mean a

person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship which, in the opinion of the board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.

c. Audit Committee. Each issuer shall establish and maintain an audit committee, a majority of the members of which shall be independent directors.

d. Shareholder Meetings. Each issuer shall hold an annual meeting of shareholders and shall provide notice of such meeting to the exchange or association.

e. Quorum. Each issuer shall provide for a quorum as specified in its by-laws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33 1/3 percent of the outstanding shares of the company's common voting stock.

f. Solicitation of Proxies. Each issuer shall solicit proxies and provide proxy statements for all meetings of shareholders and shall provide copies of such proxy solicitation to the exchange or association.

g. Conflicts of Interest. Each issuer shall conduct an appropriate review of all related party transactions on an ongoing basis and shall use the company's audit committee or a comparable body for the review of potential conflict of interest situations where appropriate.

h. Shareholder Approval Policy. Each issuer shall require shareholder approval of the issuance of securities in connection with the following:

i. Options plans or other special remuneration plans for directors, officers or key employees.

ii. Actions resulting in a change in control of the issuer.

iii. The acquisition, direct or indirect, of a business, a company, tangible or intangible assets or property or securities representing any such interests:

(1) From a director, officer or substantial security holder of the company (including its subsidiaries and affiliates) or from any company or party in which one of such persons has a direct or indirect interest;

(2) Where the present or potential issuance of common stock or securities convertible into common stock could result in an increase in outstanding common shares of 25% or more.

(3) Voting Rights. a. the rules of each exchange shall provide as follows: No rule, stated policy, practice, or interpretation of this exchange shall permit the listing, or the continuance of

the listing of any common stock or other equity security of a domestic issuer, if, on or after July 7, 1988, the issuer of such security issues any class of security, or takes other corporate action, with the effect of nullifying, restricting or disparately reducing the per share voting rights of holders of an outstanding class or classes of common stock of such issuer registered pursuant to Section 12 of the Securities Exchange Act of 1934 ("Act").

b. The rules of each association shall provide as follows: No rule, stated policy, practice, or interpretation of this association shall permit the listing on NASDAQ/NMS ("authorization"), or the continuance of authorization, of any common stock or other equity security, of a domestic issuer, if, on or after July 7, 1988, the issuer of such security issues any class of security, or takes other corporate action, with the effect of nullifying, restricting, or disparately reducing the per share voting rights of holders of an outstanding class or classes of common stock or such issuer registered pursuant to Section 12 of the Act.

c. For purposes of paragraphs a. and b. of this section, the following shall be presumed to have the effect of nullifying, restricting or disparately reducing the per share voting rights of an outstanding class or classes of common stock:

i. Corporate action to impose any restriction on the voting power of shares of the common stock of the issuer held by a beneficial owner or record holder based on the number of shares held by such beneficial or record holder.

ii. Corporate action to impose any restriction on the voting power of shares of the common stock of the issuers held by a beneficial or record holder based on the length of time such shares have been held by such beneficial or record holder;

iii. Any issuance of securities through an exchange offer by the issuer for shares of an outstanding class of common stock of the issuer, in which the securities issued have voting rights greater than or less than the per share voting rights of any outstanding class of the common stock of the issuer;

iv. Any issuance of securities pursuant to a stock dividend, or any other type of distribution of stock, in which the securities issued have voting rights greater than the per share voting rights of any outstanding class of the common stock of the issuer.

d. For purposes of paragraphs a. and b. of this section, the following, standing alone, shall be presumed not to have the effect of nullifying, restricting, or



disparately reducing the per share voting rights of holders of an outstanding class or classes of common stock:

i. The issuance of securities pursuant to an initial registered public offering;

ii. The issuance of any class of securities, through a registered public offering, with voting rights not greater than the per share voting rights of any outstanding class of the common stock of the issuer;

iii. The issuance of any class of securities to effect a bona fide merger or acquisition, with voting rights not greater than the per share voting rights of any outstanding class of the common stock of the issuer;

iv. Corporate action taken pursuant to state law requiring a state's domestic corporation to condition the voting rights of a beneficial or record holder of a specified threshold percentage of the corporation's voting stock on the approval of the corporation's independent shareholders.

e. Definitions. The following terms shall have the following meaning for purposes of this section, and the rules of each exchange and association shall include such definitions for the purposes of the prohibition in paragraphs a. and b., respectively, of this section:

i. The term "common stock" shall include any security of an issuer designated as common stock and any security of an issuer, however designated, which, by statute or by its terms, is common stock (e.g., a security which entitles the holders thereof to vote generally on matters submitted to the issuers security holders for a vote).

ii. The term "equity security" shall include any equity security defined as such pursuant to Rule 3a11-1 under the Act. (17 CFR 240.3a11-1)

iii. The term "domestic issuer" shall mean an issuer that is not a "foreign private issuer" as defined in Rule 3b-4 under the Act (17 CFR 240.3b-4).

iv. The term "security" shall include any security defined as such pursuant to section 3(a)(10) of the Act, but shall exclude any class of security having a preference or priority over the issuer's common stock as to dividends, interest payments, redemption or payments in liquidation, if the voting rights of such securities only become effective as a result of specified events, not relating to an acquisition of the common stock or the issuer, which reasonably can be expected to jeopardize the issuer's financial ability to meet its payment obligations to the holders of that class of securities.

4. Maintenance Criteria. After listing or authorization for quotation on an exchange or quotation system, a security

must meet the following criteria to continue to be listed or authorized for quotation on the exchange or quotation system:

a. The issuer of the security has net tangible assets of at least:

i. \$2,000,000 if the issuer has sustained losses from continuing operations and/or net losses in two of its three most recent fiscal years; or

ii. \$4,000,000 if the issuer has sustained losses from continuing operations and/or net losses in three of its four most recent fiscal years.

b. There are at least 200,000 publicly held shares.

c. There are at least 400 shareholders or at least 300 shareholders of round lots.

d. The aggregate market value of publicly held shares is at least \$1,000,000.

5. The administrator may decertify a specific national securities exchange or the NASDAQ National Market System designation, by an order issued pursuant to paragraph 11 of this Memorandum of Understanding, if the administrator determines that the listing requirements for the exchange or designation requirements of the system have been so changed or insufficiently applied that the protection of investors contemplated by the original listing or designation requirements is no longer afforded.

6. The administrator shall have the authority to deny the exemption from registration of, or revoke, a specific issue of securities, by an order issued pursuant to paragraph 11 of this Memorandum of Understanding.

7. The association and the exchanges shall promptly notify the administrator of the delisting of an issue of securities by their marketplace.

8. In order to attain maximum effectiveness of regulation and maximum uniformity of federal and state standards, each association and exchange will cooperate, coordinate and share information with NASAA concerning the operations of their respective marketplaces to insure proper implementation of the exemptive provisions. For purposes of furthering the goal of cooperation and resolving differences, the signatories to the Memorandum of Understanding shall meet annually on or about the anniversary date of the signing of the Memorandum.

9. This marketplace exemption shall apply to all securities of an issuer (including initial public offerings) as of the date those securities are listed or approved for listing upon notice of issuance upon a marketplace exempted by this agreement, and to all securities listed or approved for listing upon notice

of issuance as of \_\_\_\_\_, and to any other security of the same issuer which is of senior or substantially equal rank, any security called for by subscription rights or warrants or any warrant or right to purchase or subscribe to any of the foregoing.

10. The administrator shall have the authority to deny the exemption by rulemaking to a category of securities when necessitated by the public interest and for the protection of the investors by an order issued to paragraph 11 of this Memorandum of Understanding.

11. Any action taken by a state securities administrator as contemplated in this Memorandum of Understanding, including but not limited to actions set forth in paragraphs 5, 6 and 10 of this Memorandum, must comply with an applicable state law respecting administrative procedures which law at a minimum provides for notice of hearing to all interested parties, opportunity for hearing, written findings of fact and conclusions of law and judicial appeal.

12. NASAA, the Exchanges and the NASD will use their best efforts to make available on a timely basis information from existing data bases regarding offerings of securities subject to the exemption.

Signatures:

North American Securities Administrators Association, Inc.

By: (signed) \_\_\_\_\_  
National Association of Securities Dealers, Inc.

By: (signed) \_\_\_\_\_  
New York Stock Exchange, Inc.

By: \_\_\_\_\_  
American Stock Exchange, Inc.

By: \_\_\_\_\_  
By the Commission.

Jonathan G. Katz,  
Secretary.

Dated: December 16, 1988.

[FR Doc. 88-29594 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. IC-16706; File No. 812-7167]

#### Richard Alan Daniels; Filing of Application

December 22, 1988.

Notice is hereby given that Richard Alan Daniels ("Daniels" or "Applicant") 5210 Park Side Trail, Solon, Ohio 44139, has filed an application ("Application") requesting an order of the Commission pursuant to section 9(c) of the Investment Company Act of 1940, as amended (the "Act"), that would grant a permanent exemption from the prohibitions of sections 9(a) (1) and (2) of the Act, applicable to him by virtue of

an injunction entered against him in 1978 and a criminal conviction in 1983. Daniels requests relief only to the extent necessary to associate, in the capacity described below, with CIGNA Securities, Inc. ("CIGNA").

The Application states that CIGNA is a wholly owned subsidiary of CIGNA, Inc., a national life and casualty insurance carrier. In addition to being a registered investment adviser under the Investment Advisers Act of 1940, and a registered broker-dealer under the Securities Exchange Act of 1934, CIGNA is a principal underwriter for the Cigna Funds Group, a Massachusetts business trust and registered open-end company under the Act.

The Application further states that CIGNA proposes to employ Daniels as a registered representative to sell mutual funds, public and private real estate partnership interests, oil and gas partnerships and equipment lease partnerships. Daniels' activities will be confined to those of a registered representative engaged in sales and he will not perform any other function in connection with CIGNA's activities as principal underwriter for the funds. Daniels has been employed since June 1987 by CIGNA Individual Financial Services Company ("CIFSCO"), which is also a wholly owned subsidiary of CIGNA, Inc., as an estate planner and life insurance salesman.

On July 19, 1978, in an action entitled *SEC v. Price, Allen & Stevens, Inc.*,<sup>1</sup> Daniels consented, without admitting or denying the allegations in the Commission's complaint, to the entry of an order that permanently enjoined him from violating the registration and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>2</sup> In 1983, Daniels was convicted, pursuant to a plea agreement, in a related criminal action.<sup>3</sup>

Section 9(a) of the Act provides, in relevant part, that it is unlawful for any person to serve or act in the capacity of employee, officer, director, member of an advisory board, investment adviser, or depositor of any registered investment company, or principal underwriter for any registered open-end company, if such person, or any affiliated person of a company, has been convicted within ten years of any felony or misdemeanor involving the purchase

or sale of any security, or, by reason of any misconduct, has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.

Section 9(c) of the Act authorizes the Commission to grant exemptions from the prohibitions of section 9(a), either unconditionally or on an appropriate temporary or other conditional basis. Applications for exemption must establish that the prohibitions of section 9(a) are unduly or disproportionately severe as applied to the applicant, or that the applicant's conduct has been such as not to make it against the public interest or the protection of investors to grant the application.

The provisions of section 9(a) would preclude Applicant from associating with CIGNA unless the relief requested pursuant to section 9(c) of the Act in this Application is granted. Applicant submits that the prohibitions of section 9(a) of the Act would be unduly and disproportionately severe as applied to him, and that his conduct has been such as to make it not against the public interest or the protection of investors to grant him an exemption from its provisions.

In support of this contention, Applicant submits that:

1. Daniels has complied fully with the terms of the injunction in the Commission's civil proceedings and has observed the bar of the Commission's administrative order since the entry thereof;

2. Daniels' personal circumstances have changed since the time of his improper conduct, over eleven years ago, and he has built a reputation for integrity among members of his professional community;

3. Daniels' duties and responsibilities under the terms of his proposed employment with CIGNA (which contemplates strict monitoring and supervision of this conduct) will be confined to those of a registered representative engaged in sales and not otherwise involve him in any way in the business of, nor will he be required to perform any other function in connection with, CIGNA's underwriting activities for the funds. Moreover, Daniels will be employed in a branch office of CIGNA that is both physically and organizationally isolated from CIGNA's other underwriting functions for the Funds.

4. Under the terms of his proposed employment with CIGNA, Daniels' activities will be carefully and intensively supervised.

Based upon the foregoing, Applicant requests that the Commission, pursuant

to section 9(c) of the Act, grant him a permanent exemption from the provisions of section 9(a) operative as a result of the injunction entered against him in 1979 and the conviction in 1983, to the extent necessary to permit him to associate with CIGNA in the capacity described in the Application.

Applicant represents that he acknowledges, understands, and agrees that the Commission's issuance of the order requested by the Application shall not prejudice nor limit the Commission's rights in any manner with respect to any investigation, enforcement action, or proceeding under section 9(b) of the Investment Company Act, based, in whole or in part, upon conduct other than that giving rise to the Application.

Notice is further given that any interested person may, not later than January 20, 1989, at 5:30 p.m., submit to the Commission in writing a request for a hearing on the Application, accompanied by a statement as to the nature of his or her interest, the reasons for such request, and the issues, if any, of fact or law proposed to be controverted. Any such request should be addressed to: Secretary, Securities and Exchange Commission, Washington, D.C. 20549. A copy of such request shall be served personally or by mail upon Applicant at the address stated above. Proof of such service (by affidavit or, in the case of an attorney, by certificate) shall be filed contemporaneously with the request. As provided by Rule 0-5 of the Rules and Regulations promulgated under the Act, an order disposing of the Application herein will be issued as of course following said date unless the Commission orders a hearing upon request or upon the Commission's own motion. Persons who request a hearing, or advice as to whether a hearing is ordered, will receive any notices and orders issued in this matter, including the date of the hearing (if ordered) and any postponement thereof.

By the Commission.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29797 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. IC-16697; 811-5060]

#### First Commercial Separate Account A; Notice of Application

December 20, 1988.

AGENCY: Securities and Exchange Commission ("SEC").

<sup>1</sup> Civil Action No. C-78-868 (N.D. Ohio).

<sup>2</sup> In related administrative proceedings instituted by the Commission, Daniels was barred from association with any broker, dealer, investment company, or investment adviser. *In the Matter of Price, Allen & Stevens Securities Corporation*, Securities Exchange Act Release No. 16164 (Sept. 8, 1979).

<sup>3</sup> *U.S. v. Daniels*, Case No. CR82-108 (N.D. Ohio).



**ACTION:** Notice of Application on Form N-8F under the Investment Company Act of 1940 (the "1940 Act").

**Applicant:** First Commercial Separate Account A.

**Relevant 1940 Act Sections:** Order requested under Section 8(f).

**Summary of Application:** Applicant seeks an order declaring that it has ceased to be an investment company.

**Filing Date:** December 6, 1988.

**Hearing or Notification of Hearing:** If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on January 23, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street, NW., Washington, DC, 20549. Applicant, One Blue Hill Plaza, Pearl River, New York 10965.

**FOR FURTHER INFORMATION CONTACT:** David S. Goldstein, Special Counsel (202) 272-3012 (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

#### **Applicant's Representations**

1. The Applicant has no separate legal existence under the law of the State of New York, pursuant to which it was created in 1986. On March 18, 1987, the Applicant filed a registration statement of Form N-8A and N-8B-2 as a unit investment trust under the 1940 Act, and a registration statement for flexible premium variable life insurance policies on Form S-6 under the Securities Act of 1933, which was never made effective.

2. The Applicant does not have any assets or policyholders nor did it ever make a public offering of securities.

3. The Applicant has not, within the last 18 months, transferred any of its assets to a separate trust. In addition, the Applicant is not a party to any litigation or administrative proceeding and is not now engaged, nor does it intend to engage, in any business activities.

For the Commission, by the Division of Investment, under delegated authority.  
Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29788 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-26383; File No. SR-NYSE-88-39]

#### **Self-Regulatory Organizations; Proposed Rule Change by New York Stock Exchange, Inc. Relating to Qualitative Standards Governing Listing of Units and Constituent Securities As Set Forth in New Paragraph 703.16 of the NYSE Listed Company Manual**

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78a(b)(1) notice is hereby given that on December 12, 1988, the New York Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The proposed addition to the NYSE Listed Company Manual is set forth in new § 703.16. It establishes qualitative listing criteria for a new type of security consisting of two or more constituent securities which, in the aggregate, are designed to replicate the economic characteristics of shares of a class of outstanding stock. The proposed new paragraph reads as follows:

#### **703.16 Units and Constituent Securities**

A corporation may be interested in issuing a security consisting of two or more constituent securities which, in the aggregate, are designed to replicate the economic characteristics typically associated with ownership of shares of a class of outstanding stock of the corporation and have a term in excess of three years. Thus, a corporation might issue a unit consisting of, for example, several constituent securities, each of which is separable from the others and may trade by itself or in combination with one or all of the other constituent securities. This approach may permit investors to separate their securities holdings into distinct trading components representing discrete interests in the income and capital

appreciation potential of the securities involved.

The unit, the separate securities comprising the unit and any combination of securities comprising the unit may be globally certificated in the manner provided with respect to bonds under the provisions of Para. 501.02(B) and security holders' interests therein may be transferred by book entry. Issuers shall, upon request, disclose to holders of the unit or the constituent securities the provisions of the securities that would otherwise have been available pursuant to the content and engraving requirements of Section 5.

The Exchange will consider the listing of such units and their constituent securities provided the issuer has its common stock listed on the Exchange or such common stock is qualified for listing, including compliance with Rule 19c-4, and the issuer intends to list its common stock simultaneous with the listing of such securities. While the Exchange has not set any minimum numerical criteria for the listing of such issues, the issues must be of sufficient size and distribution to warrant trading in the Exchange market system. The Exchange has set certain numerical delisting criteria for the units and constituent securities and will normally give consideration to suspending or removing the units and constituent securities from trading if the aggregate market value of publicly held units is less than \$2,000,000 and the number of publicly held units is less than 100,000.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

#### **(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

(1) **Purpose.**—The proposed addition to the NYSE Listed Company Manual establishes qualitative listing criteria for

units and constituent securities.<sup>1</sup> A corporation may be interested in issuing a security consisting of two or more constituent securities which, in the aggregate, are designed to replicate the economic characteristics typically associated with ownership of shares of a class of outstanding stock of the corporation. Thus, a corporation might issue a unit of, for example, several constituent securities, each of which is separable from the others and may trade by itself or in combination with one or all of the other constituent securities. This approach may permit investors to separate their securities holdings into distinct trading components representing discrete interests in the income and capital appreciation potential of the securities involved.

The securities may include, but are not limited to, any combination of the following:

- Common stock
- Preferred stock
- Warrants
- Debt securities

The aforementioned description of the benefits and attributes of the unit and component securities is not all-inclusive, but is intended to encompass securities having substantially the same scope and purpose described.

(2) **Statutory Basis.**—The proposed rule change is consistent with Section 6(b)(5) of the Securities Exchange Act of 1934 as amended ("the Act"). This section, among other things, requires Exchange rules to be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the Exchange. Furthermore, the proposed rule amendment is consistent with section 11(A)(a)(1)(c)(ii) of the Act in that it will tend to assure fair competition among exchange markets and between

<sup>1</sup> The Commission notes that several issuers have filed Form S-4 with the Commission for exchange offers of unbundled stock units for common stock. These unbundled stock units would trade on the NYSE under the listing standards of this proposed rule change. See, also SR-NYSE-88-40 for treatment of these securities under Rule 19c-4 of the Act.

exchange markets and markets other than exchange markets.

#### **(B) Self-Regulatory Organization's Statement on Burden on Competition**

The proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act.

#### **(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others**

The Exchange has neither solicited nor received written comments concerning its proposed rule change.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the Federal Register or with such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the abovementioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 18, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Date: December 21, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29800 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

[Rel. No. IC-16707; 811-3697]

#### **The Piedmont Income Fund, Inc.; Notice of Deregistration**

December 21, 1988.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for deregulation under the Investment Company Act of 1940 ("1940 Act").

**Applicant:** The Piedmont Income Fund, Inc.

**Relevant 1940 Act Section:** Section 8(f).

**Summary of Application:** Applicant seeks an order declaring that it has ceased to be an investment company.

**Filing date:** The application was filed on November 28, 1988, and amended on December 20, 1988.

**Hearing or Notification of Hearing:** If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m., on January 17, 1989. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicant with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit or, for lawyers, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

**ADDRESSES:** Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicant, 2859 Paces Ferry Road, Suite 1900, Atlanta, GA 30339.

**FOR FURTHER INFORMATION CONTACT:** Victor R. Siclari, Staff Attorney, at (202) 272-3026 or Stephanie M. Monaco, Branch Chief, at (202) 272-3030 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** Following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier who can be contacted at (800) 231-3282 (in Maryland (301) 258-4300).



## Applicant's Representations

1. Applicant was incorporated in the District of Columbia and is registered as an open-end, diversified, management investment company under the 1940 Act. William Whitehead Lowry, Registered Investment Advisor, Inc. ("Adviser") is Applicant's investment adviser and Johnson, Lane, Space, Smith & Co., Inc. is Applicant's principal underwriter.

2. Due to certain changes in the Internal Revenue Code, Applicant's ability to achieve its investment objectives was adversely affected. Applicant informed at shareholders of this fact and, consequently, all shareholders, except for Wm. W. Lowry & Associates, Inc. ("WWLA"), redeemed their shares at current net asset value. Thereafter, WWLA, Applicants initial shareholder and the Adviser's parent, redeemed its shares in order to ensure that the other shareholders would receive full value for their shares and because WWLA had undertaken to reimburse Applicant for certain unamortized organization expenses.

3. On May 29, 1986, Applicant's Board of Directors unanimously approved the dissolution and winding up of Applicant. Although Applicant was liquidated, it was not dissolved at that time because its Board and officers were considering the possibility of changing Applicant's investment objectives, commencing operations again, or selling Applicant. However, no such actions ever took place, and on October 25, 1988, by Unanimous Written Consent, the Board again approved the dissolution of Applicant and authorized the officers to wind up Applicant's affairs. Applicant was dissolved under the laws of District of Columbia on November 22, 1988.

3. The principal expenses incurred in connection with Applicant's dissolution and winding up of its affairs were, and will be, borne by the Adviser.

4. Applicant has been inactive since June 1986, and is neither engaging in nor proposing to engage in any business activities other than those necessary for the winding up of its affairs. In addition, Applicant has no security holders or assets, no debts or other liabilities, and is not a party to any litigation or administrative proceeding.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-29739 Filed 12-27-88; 8:45 am]

BILLING CODE 8010-01-M

[File No. 22-18862]

## Application and Opportunity for Hearing; Union Tank Car Co.

December 21, 1988.

Notice is hereby given that Union Tank Car Company (the "Company") has filed an application pursuant to clause (ii) of section 310(b)(1) of the Trust Indenture Act of 1939 (hereinafter sometimes referred to as the "Act") for a finding by the Securities and Exchange Commission (the "Commission") that the trusteeship of Continental Illinois National Bank and Trust Company of Chicago (the "Bank") under indentures dated as of December 1, 1977 (the "1977 Indenture") which was heretofore qualified under the Act and May 15, 1986 (the "1986 Indenture") which was not qualified under the Act because the securities were exempt from registration under the Securities Act, between the Company and Bank and under an indenture dated October 1, 1988 (the "1988 Indenture") between Company and Bank which has not been qualified under the Act, is not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify Bank from acting as trustee under the aforementioned indentures.

Section 310(b) of the Act provides in part that if a trustee under an indenture qualified under the Act has or shall acquire any conflicting interest (as defined in the section), it shall, within ninety days after ascertaining that it has such conflicting interest, either eliminate such conflicting interest or resign. Subsection (1) of that section provides, with certain exceptions stated therein, that a trustee under a qualified indenture shall be deemed to have a conflicting interest if such trustee is trustee under another indenture of the same obligor.

## The Company Alleges:

(1) Pursuant to the 1977 Indenture, the Company has outstanding 20,919,000 aggregate principal amount of its 8.35% Sinking Fund Equipment Trust Certificates (the "1977 Certificates") and pursuant to the 1986 Indenture, the Company has outstanding \$40,656,341 aggregate principal amount of its 8 1/8% Equipment Trust Certificates (the "1986 Certificates"). The 1977 Certificates were registered under the Securities Act of 1933 (the "1933 Act") and the 1977 Indenture was qualified under the Act. The 1986 Certificates were exempt from registration.

(2) Pursuant to the 1988 Indenture, the Company has outstanding \$48,750,000 aggregate principal amount of its 10.03% Equipment Trust Certificates Due 2003

(the "Notes"). The Notes have not been registered under the 1933 Act and the 1988 Indenture has not been qualified under the Act on the basis that the Notes will be offered or sold in a private placement exempt from registration under the 1933 Act.

(3) The Company is not in default under the 1977 Indenture, the 1986 Indenture and the 1988 Indenture. The Company's obligations under the 1977 Indenture, the 1986 Indenture and the 1988 Indenture rank *pari passu inter se*. Each of the 1977 Indenture, the 1986 Indenture and the 1988 Indenture is secured by a separate group of specifically identified railroad cars.

(4) The provisions of the 1977 Indenture, the 1986 Indenture and the 1988 Indenture are not so likely to involve a material conflict of interest as to make it necessary in the public interest or for the protection of investors to disqualify the Bank from acting as Trustee under said Indentures.

The Company has waived notice of hearing, hearing and any and all rights to specify procedures under the Rules of Practice of the Commission in connection with this matter. For a more detailed statement of the matters of fact and law asserted, all persons are referred to said application which is on file in the Offices of the Commission's Public Reference Section, File Number 22-18862, 450 Fifth Street, NW., Washington, DC 20549.

Notice is further given that any interested persons may, no later than January 18, 1989, request in writing that a hearing be held on such matter stating the nature of his interest, the reasons for such request and the issues of law or fact raised by such application which he desires to controvert, or he may request that he be notified if the Commission orders a hearing thereon. Any such request should be addressed: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. At any time after said date, the Commission may issue an order granting the application, upon such terms and conditions as the Commission may deem necessary or appropriate in the public interest and for the protection of investors, unless a hearing is ordered by the Commission. For the Commission, by the Division of Corporation Finance, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 88-29739 Filed 12-27-88; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-16705; File No. 612-7146]

## Western Reserve Life Assurance Co. of Ohio, et al.

December 21, 1988.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: Western Reserve Life Assurance Co. of Ohio ("Western Reserve"), WRL Series Annuity Account of Western Reserve Life Assurance Co. of Ohio ("Series Account") and Pioneer Western Distributors, Inc. ("PWD").

## Relevant 1940 Act Sections:

Exemption requested pursuant to section 6(c) from sections 26(a)(2)(C) and 27(c)(2).

Summary of Application: Applications seek an order to the extent necessary to permit the deduction of a mortality and expense charge from the assets of the Series Account in connection with the sale of certain variable annuity contracts (the "Contract").

Filing Date: The Application was filed on October 11, 1988.

Hearing or Notification of Hearing: If no hearing is ordered, the requested exemption will be granted. Any interested person may request a hearing on this Application or ask to be notified if a hearing is ordered. Any request must be received by the SEC by 5:30 p.m. on January 17, 1989. Request a hearing in writing, giving the nature of your interest, the reasons for the request, and the issues you contest. Serve the Applicants with the request either personally or by mail, and also send a copy to the Secretary of the SEC along with proof of service by affidavit or, in the case of an attorney-at-law, by certificate. Request notification of the date of a hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549; Applicants, c/o Western Reserve Life Assurance Co. of Ohio, 201 Highland Avenue, Largo, Florida 34640.

FOR FURTHER INFORMATION CONTACT: Wendell M. Faria, Staff Attorney, at (202) 272-3450 or Clifford E. Kirsch, Special Counsel, at (202) 272-2081 (Division of Investment Management, Office of Insurance Products and Legal Compliance).

## SUPPLEMENTARY INFORMATION:

Following is a summary of the Application; the complete Application is available for a fee from either the SEC's Public Reference Branch in person or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

## Applicants' Representations

1. Western Reserve is a stock life insurance company organized under the laws of the State of Ohio. The Series Account is a separate investment account of Western Reserve established to act as a funding entity of variable annuity contracts. It was established under Ohio law pursuant to a resolution of the Board of Directors of Western Reserve adopted on April 12, 1988. The Series Account is registered with the SEC as a unit investment trust; a registration statement on Form N-4 has been filed with the SEC.

2. The Series Account is currently divided into three Sub-Accounts. Each Sub-Account will invest in shares of a single portfolio of the WRL Series Fund (the "Fund"). The Fund, a registered open-end management investment company, is a series mutual fund which currently contains three portfolios.

3. Pursuant to a distribution agreement between Western Reserve and PWD, an affiliate of Western Reserve and the principal underwriter of the Contract, PWD will act as distributor of the Contract.

4. The Contract is an individual flexible purchase payment contract which provides for an initial purchase payment and for subsequent purchase payments as frequently as the Owner desires. Contract values may accumulate on a fixed or variable basis, while payment of annuity benefits will be on a fixed basis only. An Owner makes investment decisions under the Contract by directing the allocation of purchase payments and contract value to the Sub-Accounts and the Fixed Account. Contract values allocated to the Fixed Account are combined with all General Account assets of Western Reserve.

5. A Contingent Deferred Sales Charge may be assessed against contract values when withdrawn or surrendered. The length of time from receipt of a Purchase Payment to the time of a withdrawal or Surrender determines whether the Contingent Deferred Sales Charge will be deducted. The charge is a percentage of the amount withdrawn or surrendered (not to exceed the aggregate amount of Purchase Payments made during the five years immediately preceding the withdrawal or Surrender request).

The charge is as follows:

Charge	Length of time from receipt of purchase payment (Number of years)
5 percent	0-5.
0 percent	Over 5.

For the first withdrawal or Surrender during each Contract Year, the Contingent Deferred Sales Charge is waived for the first 10% of the Contract Value that is subject to the charge.

6. On each Anniversary through the Maturity Date, Western Reserve will deduct an annual Administration Fee of \$30 as partial compensation for the cost of providing administrative services under the Contracts. The Administration Fee is deducted from each Sub-Account and the Fixed Account in proportion to the value each bears to the Contract Value. Western Reserve does not expect to earn a profit on the Administrative Fee. Even if administrative expenses increase, Western Reserve guarantees that it will not increase the amount of the Administrative Fee.

7. A collection fee of \$1.25 will be charged to process any Purchase Payment under payment modes other than annual or single pay plans, unless such fee is waived by Western Reserve. Western Reserve may waive the collection fee when circumstances result in a savings of administrative expenses, such as when multiple contracts are billed on a group basis resulting in administrative efficiencies.

8. The Contract provides that during the accumulation period a mortality and expense risk charge will be deducted daily by Western Reserve in an amount equal on an annual basis to 1.25% of the average daily net assets of the Series Account. Of such charges, approximately .60% is for assuming the mortality risk and .65% is for assuming the expense risk. Western Reserve assumes the mortality risk that the Annuitants under the Contract as a class may live longer than expected (necessitating a greater number of annuity payments) and that it may have to pay a death benefit in excess of a Contract's cash value. Western Reserve assumes the expense risk that its expenses may be higher than the deduction for such expenses. The rate imposed for the mortality and expense risk charge is contractual and may not be changed by Western Reserve.

9. Applicants represent that they have reviewed publicly available information about the level of the mortality and expense risk charges under comparable variable annuity contracts currently being offered in the industry, taking into



consideration such factors as current charge levels, the manner in which charges are imposed, presence of charge level or annuity rate guarantees and the markets in which the Contract will be offered. Based upon the foregoing, Applicants represent that the maximum charges under the Contract are within the range of industry practice for comparable contracts. Applicants will maintain and make available to the Commission upon request a memorandum outlining the methodology underlying this representation.

10. Applicants do not believe that the sales load imposed under the Contract will necessarily cover the expected costs of distributing the Contract. Any "shortfall" will be made up from the general account assets which may include profits from the mortality and expense risk charge. Western Reserve has concluded that there is a reasonable likelihood that the distribution financing arrangement being used in connection with the Contract will benefit the Series Account and the Contract Owners. Western Reserve will keep and make available to the Commission upon request a memorandum setting forth the basis for this representation.

11. Applicants further represent that the Series Account will invest only in underlying fund(s) which have undertaken to have a board of directors/trustees, a majority of whom are not interested persons of the fund, formulate and approve any plan under Rule 12b-1 under the Act to finance distribution expenses.

For the Commission, by the Division of Investment Management, pursuant to delegatged authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29738 Filed 12-27-88; 8:45 am]  
BILLING CODE 8010-01-M

## DEPARTMENT OF STATE

[Public Notice 1088; Delegation of Authority No. 171]

### Assistant Secretary for Oceans and International Environmental and Scientific Affairs

By virtue of the authority vested in me by section 4 of the Act of May 26, 1949 (63 Stat. 111; 22 U.S.C. 2658), as amended, I hereby delegate to the Assistant Secretary for Oceans and International Environmental and Scientific Affairs the functions relating to the advisory body vested in the Secretary of State by section 5 of Pub. L. Number 100-629, November 7, 1988.

The Assistant Secretary for Oceans and International Environmental and

Scientific Affairs may redelegate to officers and employees under his direction and supervision any of the functions delegated to him above, except those required by law to be approved by higher authority.

Date: December 8, 1988.

George P. Shultz,  
Secretary of State.

[FR Doc. 88-29824 Filed 12-27-88; 8:45 am]  
BILLING CODE 4710-09-M

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Advisory Circular: Equipment, Systems, and Installations in Part 23 Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of availability of proposed advisory circular (AC) and request for comments.

**SUMMARY:** This notice announces the availability of and request for comments on a proposed AC which provides information and guidance concerning equipment, systems, and installations in Part 23 airplanes.

**DATE:** Comments must be received on or before February 29, 1989.

**ADDRESS:** Send all comments on the proposed AC to: Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, Standards Office (ACE-110), 601 East 12th Street, Kansas City, Missouri 64106.

**FOR FURTHER INFORMATION CONTACT:** Mike Dahl, Aerospace Engineer, Standards Office (ACE-110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106; commercial telephone (816) 426-6941 or FTS 867-6941.

**SUPPLEMENTARY INFORMATION:** Any person may obtain a copy of this proposed AC by writing to: Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, Standards Office (ACE-110), 601 East 12th Street, Kansas City, Missouri 64106.

#### Comments Invited

Interested parties are invited to submit comments on the proposed AC. Commenters must identify AC 23.1309-X. All communications received on or before the closing date for comments will be considered by the FAA before issuing the final AC. The proposed AC

and comments received may be inspected at the Standards Office (ACE-110), Room 1656, Federal Office Building, 601 East 12th Street, Kansas City, Missouri, between the hours of 7:30 a.m. and 4:00 p.m. weekdays, except Federal holidays.

#### Background

Prior to amendment 23-14 to Part 23 of the FAR (effective December 20, 1973), neither Part 3 of the Civil Air Regulations (CAR) nor Part 23 of the FAR contained reliability requirements for equipment, systems, and installations for small airplanes. In 1968, the FAA instituted an extensive review of the airworthiness standards of Part 23 in light of the worldwide experience with small airplanes. Because of the increased use of and reliance on systems and equipment in Part 23 airplanes during all weather conditions, the FAA promulgated § 23.1309 (38 FR 31823, Nov. 19, 1973) to provide for an acceptable level of reliability for such equipment, systems, and installations in the interest of safety. Accordingly, the FAA is proposing and requesting comments on AC 23.1309-X which will provide an acceptable means of compliance with the requirements of § 23.1309.

Issued in Kansas City, Missouri, December 15, 1988.

Don C. Jacobsen,  
Acting Manager, Small Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. 88-29877 Filed 12-27-88; 8:45 am]  
BILLING CODE 4910-13-M

#### [Summary Notice No. PE-88-49]

#### Petition for Exemption; Summary of Petitions Received; Dispositions of Petitions Issued

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of petitions for exemption received and of dispositions of prior petitions.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication

of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

**DATE:** Comments on petitions received must identify the petition docket number involved and must be received on or before January 18, 1989.

**ADDRESS:** Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Petition Docket No. —, 800 Independence Avenue, SW., Washington, DC 20591.

**FOR FURTHER INFORMATION:** The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on December 19, 1988.

Denise Donohue Hall,  
Manager, Program Management Staff.

#### Petitions for Exemption

**Docket No.:** 23430.

**Petitioner:** Douglas Aircraft Company.

**Regulations Affected:** 14 CFR 61.57(c).

**Description of Relief Sought:** To extend Exemption No. 3754, as amended, that allows petitioner's pilots to meet the pilot-in-command landing recency requirements by using a Phase I simulator. Exemption No. 3754, as amended, will expire on April 30, 1989.

**Docket No.:** 25721.

**Petitioner:** Dennis G. Buehn.

**Sections of the FAR Affected:** 14 CFR 21.191(d) and 91.42.

**Description of Relief Sought:** To allow certification of the Grumman HU-16 Albatross as an experimental "exhibition" aircraft with operational limitations permitting operation throughout the continental United States.

**Docket No.:** 25732.

**Petitioner:** World Jet Corporation.

**Sections of the FAR Affected:** 14 CFR 135.89(h)(3).

**Description of Relief Sought:** To allow petitioner to operate its turbojet aircraft under § 121.333(c) of the FAR.

**Docket No.:** 24800.

**Petitioner:** Tennessee Air Cooperative, Inc.

**Regulations Affected:** 14 CFR 103.1(e)(1).  
**Description of Relief Sought/**

**Disposition:** To allow petitioner to operate powered ultralight vehicles at an empty weight of more than 254 pounds.

**Grant, December 9, 1988, Exemption No. 5001.**

[FR Doc. 88-29675 Filed 12-27-88; 8:45 am]

BILLING CODE 4910-13-M

#### Federal Railroad Administration

[FRA Waiver Petition Docket Number RSOR-88-1]

#### Petition for Relief From the Requirements of Railroad Operating Practices Regulation; Union Pacific Railroad, Co.

In accordance with 49 CFR 211.9 and 211.41, notice is hereby given that Union Pacific Railroad Company has petitioned the Federal Railroad Administration (FRA) for permanent relief from the requirements § 218.25 of FRA's rules entitled Railroad Operating Practices.

Part 218, Subpart B, Blue Signal Protection of Workmen, requires protection of railroad employees engaged in the inspection, testing, repair, and servicing of rolling equipment, whose activities require them to work on, under, or between such equipment and subject them to danger of personal injury posed by any movement of such equipment.

Section 218.25, "Workmen on Main Track", states, in part, that: "(a) A blue signal must be displayed at each end of the rolling equipment; and (b) If the rolling equipment to be protected includes one or more locomotives, a blue signal must be attached to the controlling locomotive at a location where it is readily visible to the engineman or operator at the controls of that locomotive."

The Union Pacific Railroad proposes to install a remotely controlled blue signal system on the main tracks at Hinkle, Oregon, where locomotive fueling and related servicing tasks are performed, in lieu of a workman manually attaching a blue signal at each end of every train. The "remote-controlled power blue flag system would be installed with a switch circuit closure to permit a positive readback indication of flag position. The control would be located at the fueling facility and only be accessible by the craft performing fueling operations. If trains being fueled were short enough to clear crossover switches at Milepost 185.50 or the Spokane Subdivision wye switches at approximately Milepost 184.7, the Union

Pacific would manually protect." The Union Pacific Railroad believes that this proposal is in compliance with the spirit and purpose of the regulation.

Interested persons are invited to participate in this proceeding by submitting written views and comments. FRA has not scheduled an opportunity for oral comment since the facts do not appear to warrant it. If any interested party desires an opportunity for oral comment, he or she should notify FRA, in writing, before the end of the comment period and specify the basis for his or her request. Communications concerning this proceeding should identify the appropriate FRA Waiver Petition Docket Number RSOR-88-1 and must be submitted in triplicate to the Docket Clerk, Office of the Chief Counsel, Federal Railroad Administration, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590.

Communications received before February 10, 1989 will be considered by FRA before final action is taken. Comments received after that will be considered as far as practicable. All comments received will be available for examination both before and after the closing date for comments, during regular business hours in Room 8201, Nassif Building, 400 Seventh Street, SW., Washington, DC.

Issued in Washington, DC, on December 19, 1988.

J.W. Waish,  
Associate Administrator for Safety.  
[FR Doc. 88-29732 Filed 12-27-88; 8:45 am]  
BILLING CODE 4910-06-M

#### National Highway Traffic Safety Administration

#### Petition for Exemption From the Vehicle Theft Prevention Standard

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Grant of petition for exemption.

**SUMMARY:** This notice grants the petition by Toyota Motor Corporation (Toyota) for an exemption from the parts marking requirements of the vehicle theft prevention standard for two Toyota carlines for Model Year (MY) 1990. The agency grants this exemption under section 605 of the Motor Vehicle Information and Cost Savings Act. The agency has determined that the anti-theft devices which the petitioner intends to install on these lines as standard equipment are likely to be as effective in reducing and deterring motor vehicle theft as would compliance with the



parts marking requirements. Therefore the agency grants the petition.

**DATE:** The exemption granted by this notice will become effective beginning with the 1990 model year.

**SUPPLEMENTARY INFORMATION:** This agency received a submission dated August 30, 1988 from Toyota Motor Corporation (Toyota) seeking an exemption from the parts marking requirement of the vehicle theft prevention standard (49 CFR Part 541), pursuant to the requirements of 49 CFR Part 543, *Petitions for Exemption from the Vehicle Theft Prevention Standard*. The agency reviewed the August 30, 1988 submission and concluded that it constituted a complete petition. Accordingly, August 30, 1988 is the date on which the statutory 120 day period for processing Toyota's petition began. The agency further decided to grant the company's request under 49 CFR Part 512 to treat new product plans for Model Year 1990 and certain details about the anti-theft system as confidential business information.

In its petition, Toyota included a detailed description of the identity, design, and location of the components of the anti-theft devices, including diagrams of the components and their location in the vehicle. Toyota states that the two MY 1990 carlines that are the subject of this petition will have an anti-theft device similar or superior to that which is currently standard on the Toyota Supra and Cressida models.

The anti-theft device installed in both lines is a comprehensive security alarm system that monitors for an opening of the vehicle's doors or hood, senses the removal of the trunk key cylinder, and prohibits unauthorized operation of the engine. Toyota described an anti-theft device that is activated by removing the key from the ignition, ensuring that the hood and trunk/hatch are closed and that the passenger door is locked, and then locking the driver's door with or without a key. These steps engage the starter interruption relay. They also arm an audible and visual alarm which is triggered by sensors in the doors, trunk/hatch, and engine hood.

Toyota has requested that the anti-theft system and its components for both carlines be provided confidential treatment and not released to the public. The agency granted Toyota's request for confidential treatment on September 27, 1988, pursuant to 49 CFR 512.6.

Toyota addresses the reliability and durability of this system by indicating the results of its prototype design verification testing program which examined the integrity of the system under actual field conditions. These

tests are the same reliability and durability tests used for the approved anti-theft devices installed on the Supra and Cressida. Reliability is improved by designing relay circuits, which provide for alarm by lights and horn, connected in series to avoid erroneous alarms due to a short circuit in the relays. Also, as mentioned earlier, a security status indicator lamp is provided to let the driver know the state of arming. This indicator can be used to check whether the system is working properly, thus improving reliability.

Toyota believes that its anti-theft device will reduce and deter theft of the two MY 1990 carlines based on reduced theft rates of the Supra and Cressida carlines. The Supra and Cressida have been equipped with a similar anti-theft device since MY 1985, with an improvement modification in MY 1987. Compared to MY 1983/1984 theft rates, the Supra carline had a 31 percent decrease in theft rates for MY 1985, an 82 percent decrease for MY 1986, and a 63 percent decrease for MY 1987. The Cressida carline had an 18 percent decrease in MY 1985, a 25 percent decrease in MY 1986, and a 51 percent increase in MY 1987 theft rates. (All figures provided are per 1,000 vehicles.) NHTSA has granted Toyota's request for confidentiality concerning how the anti-theft system in the MY 1990 carlines constitutes an improvement over the approved anti-theft system in the Supra and Cressida carlines.

Based on the preceding information, NHTSA believes that the anti-theft system to be installed as standard equipment on the two MY 1990 Toyota carlines will be as effective in reducing and deterring motor vehicle theft as compliance with the requirements of the theft prevention standard (49 CFR Part 541). The agency granted Toyota's petition for exemption from the parts-marking requirements of Part 541 for the Supra and Cressida carlines beginning with the 1987 Model Year (See 51 FR 26334).

This determination is based on the information Toyota submitted with its petition and on other available information. The agency believes that the device will provide the types of performance listed in § 543.6(a)(3): Promoting activation; attracting attention to unauthorized entries; preventing defeat or circumventing of the device by unauthorized persons; preventing operation of the vehicle by unauthorized entrants; and ensuring the reliability and durability of the device.

As required by section 605(b) of the statute and 49 CFR 543.6(a)(4), the agency also finds that Toyota has provided adequate reasons for its belief

that the anti-theft device will reduce and deter theft. This conclusion is based on the information Toyota provided on its device. This information included a description of reliability and functional test procedures prescribed by Toyota's engineering department for the anti-theft system and its components. Toyota noted also that the function and design of its anti-theft device are identical to those of other devices that the agency has considered likely to be at least as effective as complying with Part 541 would be.

The agency notes that the limited and apparently conflicting data on the effectiveness of the pre-standard parts marking programs make it difficult at this early stage of the theft standard's implementation to compare the effectiveness of an anti-theft device with the effectiveness of compliance with the theft prevention standard. The statute clearly requires such a comparison, which the agency has made on the basis of the limited data available.

NHTSA notes that if Toyota wishes in the future to modify the device on which this exemption is based, the company may have to submit a petition to modify the exemption. Section 543.7(d) states that a Part 543 exemption applies only to vehicles that belong to a line exempted under this Part and equipped with the anti-theft device on which the line's exemption was based. Further, § 543.9(c)(2) provides for the submission of petitions "(t)o modify an exemption to permit the use of an anti-theft device similar to but differing from the one specified in that exemption."

The agency wishes to minimize the administrative burden which § 543.9(c)(2) could place on exempted vehicle manufacturers and itself. The agency did not intend in drafting Part 543 to require the submission of a modification petition for every change in the components or design of an anti-theft device. The significance of many such changes could be *de minimus*. Therefore, NHTSA suggests that if Toyota contemplates making any changes the effects of which might be characterized as *de minimus*, then the company should consult the agency before preparing and submitting a petition to modify.

(Authority: 15 U.S.C. 2025, delegation of authority at 49 CFR 1.50).

Issued on: December 22, 1988.

Jeffrey R. Miller,  
Deputy Administrator.  
[FR Doc. 88-29811 Filed 12-27-88; 8:45 am]  
BILLING CODE 4810-59-M

## DEPARTMENT OF THE TREASURY

### Public Information Collection Requirements Submitted to OMB for Review

Date: December 20, 1988.

The Department of Treasury has submitted the following public information collection requirements(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

#### Internal Revenue Service

OMB Number: 1545-0731.

Form Number: None.

Type of Review: Extension.

Title: PS-1-83 NPRM: Certain Elections Under the Subchapter S Revision Act of 1982; PS-259-82 TEMP: Certain Elections Under the Subchapter S Revision Act of 1982; PS-282-82 NPRM: Definition of S Corporation.

Description: The regulations provide the procedures and the statements to be filed by certain individuals for making the election under section 1361(d)(2), the refusal to consent to that election, or the revocation of that election. The statements required to be filed would be used to verify that taxpayers are complying with the requirements imposed by Congress.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 1,250.

Estimated Average Burden Hours Per Response: 30 minutes.

Frequency of Response: Other (non-recurring).

Estimated Total Reporting Burden: 1,252 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,  
Departmental Reports Management Officer.  
[FR Doc. 88-29700 Filed 12-27-88; 8:45 am]  
BILLING CODE 4810-25-M

### Public Information Collection Requirements Submitted to OMB for Review

Date: December 19, 1988.

The Department of Treasury has made revisions and resubmitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue, NW., Washington, DC 20220.

#### Internal Revenue Service

OMB Number: 1545-0023.

Form Number: IRS Form 720.

Type of Review: Resubmission.

Title: Quarterly Federal Excise Tax Return.

Description: Form 720 is used to report excise taxes due from retailers and manufacturers on the sale or manufacturer of various articles to report taxes on facilities and services, and taxes on certain products and commodities (gasoline and windfall profit taxes, etc.). It enables IRS to monitor excise tax liability for various categories on a single form and to collect the tax quarterly in compliance with the law and regulations (Internal Revenue Code 6011).

Respondents: Individuals or households, Businesses or other for-profit.

Estimated Number of Respondents: 201,500.

Estimated Burden Hours Per Response:

Recordkeeping—7 hours, 10 minutes.  
Learning about the law or the form—3 hours, 38 minutes.

Preparing the form—11 hours, 22 minutes.

Copying, assembling, and sending the form to IRS—2 hours, 9 minutes.

Frequency of Response: Quarterly.

Estimated Total Reporting Burden:

49,024,120 hours.

OMB Number: 1545-1024.

Form Number: IRS Form 8656.

Type of Review: Resubmission.

Title: Alternative Minimum Tax—Fiduciaries.

Description: This form was developed to assist fiduciaries in computing the alternative minimum tax under new Code sections 55 through 59. The minimum tax is determined by recomputing the distributable net

income of the fiduciary on a minimum tax basis. The distributable net alternative minimum taxable income is then allocated to the beneficiaries.

Respondents: Businesses of other for-profit.

Estimated Number of Respondents: 1,200,000.

Estimated Burden Hours Per Response:

Recordkeeping—15 hours, 4 minutes.  
Learning about the law or the form—4 hours, 32 minutes.

Preparing and sending the form to IRS—4 hours, 49 minutes.

Frequency of Response: Annually.

Estimated total Reporting Burden:

29,100,000 hours.

Clearance Officer: Garrick Shear (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395-6880, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 88-29701 Filed 12-27-88; 8:45 am]  
BILLING CODE 4810-25-M

### Bureau of Alcohol, Tobacco and Firearms

[Notice No. 677]

### Commerce in Explosives; List of Explosive Materials

Pursuant to the provisions of section 841(d) of Title 18, United States Code, and 27 CFR 55.23, the Director, Bureau of Alcohol, Tobacco and Firearms, must publish and revise at least annually in the *Federal Register* a list of explosives determined to be within the coverage of 18 U.S.C. Chapter 40, Importation, Manufacture, Distribution and Storage of Explosive Materials. This Chapter covers not only explosives, but also blasting agents and detonators, all of which are defined as explosive materials in section 841(c) of Title 18, United States Code. Accordingly, the following is the 1989 List of Explosive Materials subject to regulation under 18 U.S.C. Chapter 40, which includes both the list of explosives (including detonators) required to be published in the *Federal Register* and blasting agents. The list is intended to also include any and all mixtures containing any of the materials in the list. Materials constituting blasting agents are marked by an asterisk. While the list is comprehensive, it is not all inclusive. The fact that an explosive material may not be on the list does not mean that it is



not within the coverage of the law if it otherwise meets the statutory definitions in Section 841 of Title 18, United States Code. Explosive materials are listed alphabetically by their common names followed by chemical names and synonyms in brackets. This revised list supersedes the List of Explosive Materials dated December 30, 1987 (52 FR 49245) and will be effective as of January 1, 1989.

#### List of Explosive Materials

##### A

Acetylides of heavy metals.  
Aluminum containing polymeric propellant.  
Aluminum ophorite explosive.  
Amatex.  
Amatol.  
Ammonal.  
Ammonium nitrate explosive mixtures (cap sensitive).  
\*Ammonium nitrate explosive mixtures (non cap sensitive).  
Aromatic nitro-compound explosive mixtures.  
Ammonium perchlorate having particle size less than 15 microns.  
Ammonium perchlorate composite propellant.  
Ammonium picrate (picrate of ammonia, Explosive D).  
Ammonium salt lattice with isomorphously substituted inorganic salts.  
ANFO [ammonium nitrate-fuel oil].

##### B

Baratol.  
Baronol.  
BEAF [1,2-bis(2-difluoro-2-nitroacetoxyethane)].  
Black powder.  
Black powder based explosive mixtures.  
\*Blasting agents, nitro-carbo-nitrates, including non cap sensitive slurry and water-gel explosives.  
Blasting caps.  
Blasting gelatin.  
Blasting powder.  
BTNEC [bis (trinitroethyl) carbonate].  
BTNEN [bis (trinitroethyl) nitramine].  
BTNN [1,2,4-butanetriol trinitrate].  
Butyl tetryl.

##### C

Calcium nitrate explosive mixture.  
Cellulose hexanitrate explosive mixture.  
Chlorate explosive mixtures.  
Composition A and variations.  
Composition B and variations.  
Composition C and variations.  
Copper acetylides.  
Cyanuric triazide.  
Cyclotrimethylenetrinitramine [RDX].  
Cyclotetramethylenetetranitramine [HMX].  
Cyclonite [RDX].  
Cyclitol.

##### D

DATB [diaminotrinitrobenzene].  
DDNP [diazodinitrophenol].  
DEGDN [diethyleneglycol dinitrate].  
Detonating cord.  
Detonators.  
Dimethylol dimethyl methane dinitrate composition.

Dinitroethyleneurea.  
Dinitroglycerine [glycerol dinitrate].  
Dinitrophenol.  
Dinitrophenolates.  
Dinitrophenyl hydrazine.  
Dinitrosorcinol.  
Dinitrotoluene-sodium nitrate explosive mixtures.  
DIPAM.  
Dipicryl sulfone.  
Dipicrylamine.  
DNBP [dinitropentano nitrile].  
DNPA [2,2-dinitropropyl acrylate].  
Dynamite.

##### E

EDDN [ethylene diamine dinitrate].  
EDNA.  
Ednatol.  
EDNP [ethyl 4,4-dinitropentanoate].  
Erythritol tetranitrate explosives.  
Esters of nitro-substituted alcohols.  
EGDN [ethylene glycol dinitrate].  
Ethyl-tetryl.  
Explosive conitrates.  
Explosive gelatine.  
Explosive mixtures containing oxygen releasing inorganic salts and hydrocarbons.  
Explosive mixtures containing oxygen releasing inorganic salts and nitro bodies.  
Explosive mixtures containing oxygen releasing inorganic salts and water insoluble fuels.  
Explosive mixtures containing oxygen releasing inorganic salts and water soluble fuels.  
Explosive mixtures containing sensitized nitromethane.  
Explosive mixtures containing tetranitromethane (nitroform).  
Explosive nitro compounds of aromatic hydrocarbons.  
Explosive organic nitrate mixtures.  
Explosive liquids.  
Explosive powders.

##### F

Fulminate of mercury.  
Fulminate of silver.  
Fulminating gold.  
Fulminating mercury.  
Fulminating platinum.  
Fulminating silver.

##### G

Gelatinized nitrocellulose.  
Gem-dinitro aliphatic explosive mixtures.  
Guanyl nitrosamino guanyl tetrazene.  
Guanyl nitrosamino guanylidene hydrazine.  
Guncotton.

##### H

Heavy metal azides.  
Hexamite.  
Hexamitrodiphenylamine.  
Hexanitrostilbene.  
Hexogen [RDX].  
Hexogene or octogene and a nitrated N-methylaniline.  
Hexolites.  
HMX [cyclo-1,3,5,7-tetramethylene-2,4,6,8-tetranitramine; Octogen].  
Hydrazinyl nitrate/hydrazine/aluminum explosive system.  
Hydrazoic acid.

##### I

Igniter cord.

##### Igniters.

Initiating tube systems.

##### K

KDNBF [potassium dinitrobenzo-furoxane].

##### L

Lead azide.  
Lead mannite.  
Lead mononitrosorcinolate.  
Lead picrate.  
Lead salts, explosive.  
Lead styphnate [styphnate of lead, lead trinitrosorcinolate].  
Liquid nitrated polyol and trimethylethane.  
Liquid oxygen explosives.

##### M

Magnesium ophorite explosives.  
Mannitol hexanitrate.  
MDNP [methyl 4,4-dinitropentanoate].  
MEAN [monoethanolamine nitrate].  
Mercuric fulminate.  
Mercury oxalate.  
Mercury tartrate.  
Metriol trinitrate.  
Minol-2 [40% TNT, 40% ammonium nitrate, 20% aluminum].  
MMAN [monoethylamine nitrate]; methylamine nitrate.  
Mononitrotoluene-nitroglycerin mixture.  
Monopropellants.

##### N

NIBTN [nitroisobutametrial trinitrate].  
Nitrate sensitized with gelled nitroparaffin.  
Nitrated carbohydrate explosive.  
Nitrated glucoside explosive.  
Nitrated polyhydric alcohol explosives.  
Nitrates of soda explosive mixtures.  
Nitric acid and a nitro aromatic compound explosive.  
Nitric acid and carboxylic fuel explosive.  
Nitric acid explosive mixtures.  
Nitro aromatic explosive mixtures.  
Nitro compounds of furane explosive mixtures.  
Nitrocellulose explosive.  
Nitroderivative of urea explosive mixture.  
Nitrogelatin explosive.  
Nitrogen trichloride.  
Nitrogen tri-iodide.  
Nitroglycerine [NG, RNG, nitro, glyceryl trinitrate, trinitroglycerine].  
Nitroglycide.  
Nitroglycol (ethylene glycol dinitrate, EGDN).  
Nitroguanidine explosives.  
Nitroparaffins Explosive Grade and ammonium nitrate mixtures.  
Nitronium perchlorate propellant mixtures.  
Nitrostarch.  
Nitro-substituted carboxylic acids.  
Nitrourea.

##### O

Octogen [HMX].  
Octol [75 percent HMX, 25 percent TNT].  
Organic amine nitrates.  
Organic nitramines.

##### P

PBX [RDX and plasticizer].  
Pellet powder.  
Penthrinite composition.  
Pentolite.  
PYX [2,6-bis(picrylamino)-3,5-dinitropyridine].  
Perchlorate explosive mixtures.

Peroxide based explosive mixtures.  
PETN [nitropentaerythrite, pentaerythrite tetranitrate, pentaerythritol tetranitrate].  
Picramic acid and its salts.  
Picramide.  
Picrate of potassium explosive mixtures.  
Picratol.  
Picric acid (manufactured as an explosive).  
Picryl chloride.  
Picryl fluoride.  
PLX [95% nitromethane, 5% ethylenediamine].  
Polynitro aliphatic compounds.  
Polyolpolynitrate-nitrocellulose explosive gels.  
Potassium chlorate and lead sulfocyanate explosive.  
Potassium nitrate explosive mixtures.  
Potassium nitroaminotetrazole.

##### R

RDX [cyclonite, hexogen, T4, cyclo-1,3,5-trimethylene-2,4,6-trinitramine; hexahydro-1,3,5-trinitro-S-triazine].  
Safety fuse.  
Salts of organic amino sulfonic acid explosive mixture.  
Silver acetylides.  
Silver azide.  
Silver fulminate.  
Silver oxalate explosive mixtures.  
Silver styphnate.  
Silver tartrate explosive mixtures.  
Silver tetrazene.  
Slurried explosive mixtures of water, inorganic oxidizing salt, gelling agent, fuel and sensitizer (cap sensitive).  
Smokeless powder.  
Sodamol.  
Sodium amatol.  
Sodium azide.  
Sodium dinitro-ortho-cresolate.  
Sodium nitrate-potassium nitrate explosive mixture.  
Sodium picramate.  
Squibs.  
Styphnic acid.

##### T

Tacot [tetranitro-2,3,5,6-dibenzo-1,3a,4,6a-tetrazapentalene].  
TATB [triaminotrinitrobenzene].  
TEGDN [triethylene glycol dinitrate].  
Tetrazene [tetrazene, tetrazine, 1(5-tetrazoly)-4-guanyl tetrazene hydrate].  
Tetranitrocarbazole.  
Tetryl [2,4,6-tetranitro-N-methylaniline].  
Tetrytol.  
Thickened inorganic oxidizer salt slurried explosive mixture.  
TMETN [trimethylethane trinitrate].  
TNEF [trinitroethyl formal].  
TNEOC [trinitroethyl orthocarbonate].  
TNEOF [trinitroethyl orthoformate].  
TNT [trinitrotoluene, trotyl, trilit, triton].  
TorpeX.  
Tridite.  
Trimethylol ethyl methane trinitrate composition.  
Trimethylolthane trinitrate-nitrocellulose.  
Trimonite.  
Trinitroanisole.  
Trinitrobenzene.  
Trinitrobenzoic acid.  
Trinitrocresol.  
Trinitro-meta-cresol.  
Trinitronaphthalene.  
Trinitrophenetol.

Trinitrophenol.  
Trinitrosorcinol.  
Tritonal.

##### U

Urea nitrate.

##### W

Water bearing explosives having salts of oxidizing acids and nitrogen bases, sulfates, or sulfamates (cap sensitive).  
Water-in-oil emulsion explosive compositions.

##### X

Xanthamones hydrophilic colloid explosive mixture.

**FOR FURTHER INFORMATION CONTACT:**  
Firearms and Explosives Operations Branch, Bureau of Alcohol, Tobacco and Firearms, 1200 Pennsylvania Avenue, NW., Washington, DC 20228 (202-566-7591).

Approved: December 16, 1988.

Stephen E. Higgins,

Director.

[FR Doc. 88-29469 Filed 12-27-88; 8:45 am]

BILLING CODE 4810-31-M

#### Customs Service

#### Customs Information Exchange

#### Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories

November 23, 1988.

Re: Executive Order 11651, dated March 4, 1972 (37 FR 4699).

Executive Order 11951, dated January 7, 1977 (42 FR 1453).

The attached guidelines have been developed and revised in accordance with the proposed Harmonized Tariff Schedule of the United States Annotated (HTSUSA) to insure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles.

These guidelines supersede all previous material issued in this regard and are applicable in establishing the appropriate category designations for garments and other items included therein. They represent the present position of the Customs Service.

The Textile and Apparel Category Guidelines should be brought to the attention, and made available, to all interested parties.

For information or advice concerning the application of these guidelines, please contact the appropriate National Import Specialist, Commercial Operations Division, New York Seaport.

Their main telephone number is (212) 466-5848 (FTS 668-5848).

Angela DeGaetano,  
Chief.

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#### Foreword

In order to ensure proper administration of the various textile agreements and accuracy of the statistical data collected, the following guidelines have been established for the uniform application of the textile quota category system. These guidelines do not purport to take into account every possible fabric, construction, and styling combination, since, in wearing apparel especially, each season brings new styles. However, the uses to which most types of garments are put remain relatively constant as in trousers, raincoats, etc. As such, these guidelines are intended as indications of the types of construction and styling most likely to be encountered. Certain types of garments are so closely related in use, though, that the corresponding category designations seem to overlap. In such situations it should be remembered that the guidelines are to be used as an aid in determining the commercial designation and, hence, the classification of an article.

#### Apparel—Sex of Wearer

Distinguishing between male and female attire may present problems. Articles which cannot be identified as either men's or boys' garments or as women's or girls' garments are commonly referred to as "unisex" garments and are classifiable under the provisions for women's and girls' apparel.

Unisex garments are usually sold in both men's and boys' and in women's and girls' departments and stores.



Garments which are only sold in men's or boys' departments or stores are usually not commonly worn by either sex and therefore are not unisex.

In determining whether a garment is identifiable as men's or boys', or as women's or girls', the following should be considered: (1) Sizing, (2) construction, (3) styling, and (4) other factors such as packaging, labelling, etc. Little weight should be given to the consignee or ultimate retailer of a particular shipment or its invoicing. Other factors may be considered and any factor may be determinative by itself or in combination with one or more factors. Note that pullover shirts which button left over right will be considered men's or boys' shirts.

#### Definitions:

For the purposes of these guidelines, the following terms are defined below:

**Babies'**—As provided for in headings 6111 and 6209, includes garments and clothing accessories for young children of a body height not exceeding 86 centimeters. Babies' sizes 0-24 months normally fall within that measurement. Garments and clothing accessories for young children of a body height exceeding 86 centimeters are classifiable in the appropriate provision for boys and girls.

**Tailoring**—The shaping of a fabric into a garment so as to neatly fit the contours of the body by means of cutting, seaming and finishing. Fabrics with a high degree of elasticity, such as some sweater knits, are capable of shaping themselves to the contours of the body without additional work. Garments made from such fabrics requiring minimal cutting and sewing are not considered to be "tailored."

**Mid thigh**—The lowest point reached by the fingertips when the arms are placed at the sides of the body with the fingers extended. This may also be referred to as ¾ length.

What follows is not intended to be an exhaustive treatment of textile quota categories or statistical breakouts. It is simply an attempt to identify problem areas and insure greater uniformity in the classification of merchandise. Nor should it be considered an immutable document.

#### Category:

Cotton—239  
Wool—439  
Man-Made—239  
Other—839

These categories cover all knit and woven apparel and clothing accessories

for young children of a body height not exceeding 86 centimeters.

#### Category:

Cotton—363/369

#### Category designation: Cotton Towels

Towels are divided into four groups—dish, bar mop, shop, and all others. These towels may have a pile construction (usually terry or plush or a combination of the two) or be flat woven.

Dish towels (category 369) and hand towels (category 363) fall within the same size range, 15 to 18 inches wide and 24 to 32 inches long, and are sometimes difficult to distinguish from each other. With one exception, dish towels always have a design printed on them or woven or knit into them. The design may be in the form of pictures of fruit, kitchen utensils, chickens, etc., or may be checks, stripes, or similar patterns. The dish towels that usually do not have a design are light weight, plain woven, nonpile cotton towels that may be similar to, but readily distinguishable from, shop towels which are made from a much coarser fabric. These towels may be longer than the other dish towels.

Hand towels may be plain or patterned (containing decorative work or pictures). When patterned, they are almost always pile constructed. Distinctions between patterned hand towels and dish towels can usually be made based on the type of pattern or design. Kitchen-style motifs obviously would not be printed on bathroom towels. Where a design is susceptible of both kitchen and bathroom uses, the factor that may be determinative is what accompanying articles are in the same shipment (e.g., potholders with the same pattern or design will usually cause the articles to be classified as dish towels while bath towels of the same pattern or design will usually result in classification as other towels in category 363). In no instance will a hand towel be classified as a dish towel solely because it is accompanied by matching potholders or other kitchen articles. In the event that no clear distinction based on pattern, design, or otherwise can be made, the article will be classified as an "other" towel in category 363 because it is readily susceptible to more than one use.

Articles combined into a set may be classified as a set, note 3(a)(b) and (c) of the General Rules of Interpretation. In most cases the towel would impart the essential character to a towel set, G.R.I. 3(b).

Bath mats, which are usually square or rectangular in shape and made from

heavy terry fabric, are not considered towels since they are not intended to be used for a wiping or drying function. They are includable in category 369.

Shop towels (category 369) are dedicated to use in garages, filling stations, machine shops, etc., and are always plain woven nonpile construction, made from a coarse fabric, usually an osnaburg or similar low grade fabric, the average yarn number of which normally falls within the 3 to 12 range. However, some shop towels are made from a heavier duck-type fabric. Shop towels may be square or rectangular in shape and usually vary in size from 16 to 30 inches wide and from 16 to 32 inches long. Shop towels are usually gray (greige) material, but may be colored, usually dull reds, blues, greens, and yellows.

Bar mops are rectangular in shape with either full or ribbed terry on both sides. While sizes may vary, only those bar mops which are 38 to 43 centimeters in width and 46 to 57 centimeters in length fall within category 369. Tolerances are not allowed. Bar mops not within the stated dimensions are included in category 363.

#### Category:

Cotton—333  
Wool—433  
Man-Made—633  
Other—833

#### Category designation: Suit-type coats, men's and boys'

Suit type coats must (1) be tailored, (2) have a full-frontal button or snap opening, (3) have sleeves (of any length), (4) be designated for wear over a lighter outer garment, and (5) have three or more panels (excluding sleeves), of which two are at the front, sewn together lengthwise. They may be waist length (Eisenhower jackets and other casual garments meeting the 3 panel requirement are not "suit-type jackets") or extend to mid-thigh. Sport coats and certain leisure jackets fall within these categories. Sport coats frequently have lapels, back vents, two lower patch or slash pockets, and one or two inner breast pockets. The bottom part of the front opening is usually rounded on single breasted models and straight on double breasted models. Leisure suit jackets come in a variety of styles, with lapels, two or more pockets (usually two or four), and no cuffs. Such features as elbow patches, simulated back belts and bi-swing gussets may be found on all of the above.

Coats which form the upper part of ensembles known commercially as "suits," such as athletic suits, rainsuits,

hunting suits, camouflage suits, etc., are not the suit-type coats intended to be covered in these categories and would normally be placed in breakouts for "other coats," in textile categories 334, 434, 634, or 834.

Coats with suit-type features which have pile or quilted linings over substantial parts of their bodies would also be considered "other coats," and not suit-type coats. However, the presence of quilting over small areas, such as elbow patches, will not prevent a coat with suit-type features from being placed in the "suit-type" breakout categories 333/433/633/833.

#### Category:

Cotton—334  
Wool—434  
Man-Made—634  
Other—834

#### Category designation: Other coats, men's and boys'

#### Category:

Cotton—335  
Wool—435  
Man-Made—635  
Other—835

#### Category designation: Other coats, women's and girls'

Three-quarter length or longer garments commonly known as coats, and other garments such as ski jackets, parkas and waist length jackets fall within this category. Men's and boys' suit-type jackets are not included. However, women's and girls' suit-type jackets and blazers are included; their outer shells consist of 3 or more panels (of which 2 are at the front) sewn together lengthwise. A coat is an outerwear garment which covers either the upper part of the body or both the upper and lower parts of the body. It is normally worn over another garment, the presence of which is sufficient for the wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both. Garments in this category have a full or partial front opening, with or without a means of closure. Coats have sleeves of any length.

Within these categories there are various subdivisions:

(A) **Raincoats** are garments primarily designed for protection against rain other than those which qualify as "water resistant" described below. The water repellency which makes coats suitable as rainwear may be the result of the use of rubber or plastic material or may be the result of treating the fabric with a water repellent substance; the latter method is usual.

(B) **Water resistant coats** must meet the water resistance standard set out in Additional U.S. Note 2, Chapter 82, HTSUSA. Coats which are of fabrics that are visibly coated are provided for elsewhere.

(C) **Shirt-jackets** have full or partial front openings and sleeves, and at the least cover the upper body from the neck area to the waist. They may be within the coat category if designed to be worn over another garment (other than underwear). The following criteria may be used in determining whether a shirt-jacket is designed for use over another garment, the presence of which is sufficient for its wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both:

- (1) Fabric weight equal to or exceeding 10 ounces per square yard (note (D) below re: CPO style shirts).
- (2) A full or partial lining.
- (3) Pockets at or below the waist.
- (4) Back vents or pleats. Also side vents in combination with back seams.
- (5) Eisenhower styling.
- (6) A belt or simulated belt or elasticized waist on hip length or longer shirt-jackets.
- (7) Large jacket/coat style buttons, toggles or snaps, a heavy-duty zipper or other heavy-duty closure, or buttons fastened with reinforcing thread for heavy-duty use.
- (8) Lapels.
- (9) Long sleeves without cuffs.
- (10) Elasticized or rib-knit cuffs.
- (11) Drawstring, elastic or rib-knit waistband.

Note: On knit garments, items 10 and 11 count as one feature.

Garments having features of both jackets and shirts will be categorized as coats if they possess at least three of the above listed features and if the result is not unreasonable. Many such garments will function as the upper part of leisure suits and will be placed in the categories for "suit-type coats." (See discussion of leisure suit jackets under categories 333/433/633/833). Garments not possessing at least 3 of the listed features will be considered on an individual basis.

(D) **CPO-type shirts** possess shirt-jacket styling and may be treated as either a shirt or a jacket depending on the fabric used. When lined they are considered jackets. When unlined and made from a fabric weighing 12 ounces per square yard or more, they are considered jackets; when weighing less than 12 ounces per square yard, they are considered shirts.

(E) Also in these categories are included knit garments which otherwise qualify as cardigan sweaters, but extend

below the mid-thigh or have a quilted lining.

(F) **Cardigans with a sherpa lining**, or a heavy weight fiberfill lining, including quilted linings, used to provide extra warmth to the wearer are included.

(G) **Cardigans which are "tailored"** according to the definition in the Foreword are included.

(H) **Plastic or rubber coated:**

Garments which have an outer surface covered with plastic or rubber which completely obscures the underlying fabric are excluded from these quota categories.

#### Category:

Cotton—336  
Wool—436  
Man-Made—636  
Other—836

#### Category designation: Dresses (including uniforms)

Dresses are at the core of the highly imaginative feminine fashion field, in which the new and the different are the usual. A variety of names is used, including, among others, "gown," "frock," and "sheath." A dress is a one-piece garment for the female (except as noted in infants' wear) covering the top of the body and extending to somewhere from below the mid-thigh to the feet. It is appropriate for wear without other outer garments, and its lower end encloses both legs in a single "tube" (rather than in two, as trousers do). "Tennis dresses," by virtue of their short length are not included here. They are considered shirts or blouses.

Woven garments styled like shirts or blouses which extend below mid-thigh may be included in this category if they are designed and/or are intended for wear as dresses and provide the coverage dresses require.

Dresses with matching or coordinating jackets, vests, boleros, or similar components (sometimes called "two-piece dresses") are classified separately, the dress in this category, the other component elsewhere as appropriate.

This category also includes garments known as sundresses, informal party dresses, floats, etc., of various lengths frequently sold in loungewear departments. The garments are suitable for wear on social occasions in and outside the home and should not be confused with the robes and dressing gowns included in categories 350/459/650/850.

The phrase "including uniform dresses," which formerly appeared in the statistical positions for these items, has been deleted although the category designation is unchanged. The deletion



does not result in the removal from these provisions of any items which were properly included therein, but avoids the possibility of including uniforms which are not, in fact, dresses. Uniform dresses, which are in this category, include one-piece items such as worn by nurses and waitresses. The "suit-type" of uniform, consisting of a jacket and skirt such as worn by airline stewardesses and policewomen, is not included.

#### Category:

Cotton—237  
Wool—459  
Man-Made—237  
Other—859

*Category designation: Playsuits, sunsuits, washsuits, creepers, rompers, etc.*

This category provides for playsuits, sunsuits, washsuits, creepers, rompers, shortalls, and similar apparel for girls, sizes 2-14 and boys 2-7 and, in addition, provides for abbreviated garments, joined between the legs, for women, which are intended to be worn without other attire (outerwear).

Knit man-made fiber blanket sleepers for girls, sizes 2-14 and boys 2-7 are in category 651 and are discussed under categories 351/459/651/851, pajamas and other nightwear. Coveralls and overalls for girls 2-14 and boys 2-7 are also provided for in this category except in the knit man-made fiber area where they are reported under category 659. (Adult male and adult female coveralls, overalls, jumpsuits, shortalls, skirtalls, and similar apparel are included in categories 359 and 659.)

In general, this category covers items of very informal dress for young children (girls 2-14 and boys 2-7) and is essentially a grouping of light-weight playwear garments, although heavier fabrics are also used. Specifically excluded are wearing apparel items primarily intended to protect the wearer from the elements such as snow suits, ski garments, ski overalls, etc. Also excluded from this provision are trouser-type garments which have no fabric bib to cover the upper part of the body. The garments without bibs are reported as trousers even though they may have suspender straps. It should be noted that the bib fronts on the garments within this category provision must be permanently stitched in place and significantly extend up from the waist. Tack stitching and snap-on, zip-on, and button-on methods of attachment are not considered sufficient to create a permanent bib front. In addition, bib backs by themselves on trousers would

not be significant to include such garments in this provision.

Adult garments consisting of a separate top and bottom component are not included in this category and are separately classified in other categories. Two-piece physically connected entireties for girls 2-14 and boys 2-7, such as shirts and shorts having matching buttons and buttonholes, or shoulder loops with suspender straps designed to join the two pieces, which are so manufactured that the use of one without the other is not practicable, are encompassed within this category. However, button/buttonhole sets with pants that can reasonably be worn without the shirt, are not within this provision and are reportable separately.

Previously, two-piece women's tennis dress sets and golf dress sets, consisting of an abbreviated dress-like upper garment and a pair of matching panties were includable as playsuits in these categories. However, under the HTSUSA, this category coverage has not been continued and the two pieces forming these sets are separately classifiable and are no longer included as playsuits in these categories.

Not included in these categories are body suits and tights which fall in categories 359/659.

(1) Body suits are constructed of finely knit fabric which usually includes lycra or spandex yarns. They cover the wearer's torso and may have elastic around the neck, arm and leg openings. They are designed to be form-fitting and they may be intended for use during exercise, dance or similar athletic activity. Body suits are one piece garments. Unitards are body suits with arm and leg coverings and are included as body suits. Body suits are frequently called leotards in the trade.

(2) Tights are form-fitting garments which cover the lower torso and legs. They may have stirrups at the feet. Short tights also cover the lower torso, but only extend to above the knees. Tights are constructed of finely knit fabric which includes Lycra spandex, or similar yarns. They have an elasticized waistband. They are intended for use during exercise, dance or similar athletic activity. They have a gusset in the crotch area and are unsuitable for wear outside the athletic area unless worn in conjunction with a garment which conceals the lower torso.

#### Category:

Cotton—338  
Wool—438  
Man-Made—638  
Silk and Other Vegetable Fibers—838

*Category designation: Knit shirts, men's and boys'*

#### Category:

Cotton—339  
Wool—438  
Man-Made—639  
Silk and Other Vegetable Fibers—838

*Category designation: Knit shirts and blouses, women's and girls'*

Garments included in this category are of the type which are normally worn against the body or over underwear for appearance in public. They possess the following attributes:

(1) A length reaching from the neck area to the vicinity of the waist but may extend as far down as the area of the mid-thigh (see "dresses") and may be alluded to commercially as blouses, sport or dress shirts, polo shirts, pullovers, shells, halters or tops, turtleneck shirts, sweatshirts, T-shirts, etc.

(2) They may have a collar treatment of any type, including a hood, or no collar.

(3) They may have full frontal or back openings, partial openings in front or back, mock openings or no openings (full openings generally require some means of closure for the sake of modesty).

(4) They may have sleeves of any length or no sleeves.

(5) The bottoms are usually hemmed; however, they may be finished otherwise to prevent ravelling.

(6) Construction may be tailored, full-fashioned, etc.

(7) Stitch count:

(a) Included in this category are:

(1) Blouses and shirts of Headings 6105 and 6106, whether classifiable there or in Headings 6103, 6104 or 6112. These garments must have an average of 10 or more stitches per linear centimeter in each direction, counted on an area measuring at least 10 centimeters by 10 centimeters.

(2) Blouses and shirts which do not meet the requirements of Headings 6105 and 6106, either because of their stitch count or for other reasons, but which generally meet the requirements for this category (see Headings 6103, 6104, 6110, and 6112).

(b) Not included in this category are sweaters, whether known as pullovers, vests, or cardigans, which are constructed essentially with 9 or fewer stitches per 2 centimeters measured in the horizontal direction.

(8) In women's and girls' wear, garments with oversized or excessively revealing arm or neck openings, which are precluded from wear alone because they do not conform to conventional

modesty standards, are excluded from consideration as shirts or blouses and are considered tops.

Various names are given to garments placed in these categories and certain distinctions must be made for proper statistical reporting. Listed below are certain garments which are included in these categories:

(a) *Shirts* in Headings 6105 and 6106 do not include garments with pockets below the waist or with a ribbed waistband or other means of tightening at the bottom of the garment. Garments in Headings 6105 and 6106 must have a full opening or a partial opening starting at the neckline. Heading 6105 does not include sleeveless garments; however, garments in Heading 6106 may be sleeveless. Shirts or other Headings are not subject to the above limitations.

(b) *T-shirts*—All men's and boys' white underwear-style T-shirts, of cotton, are includable in category 352, not in category 338.

Other T-shirts in Heading 6109, which are assigned Category 338/339/638/639/838, must be constructed of the underwear type and from lightweight, knit underwear-type fabric, not napped, nor of pile or terry fabric, with or without pockets, and with long or short close-fitting sleeves. The garments should have a close-fitting or lower neckline (round, square, boat-shaped or V-shaped) and may have decoration, other than lace, in the form of pictures, words, or letters, obtained by printing, knitting, or other processes. The bottom of the garment is usually hemmed. A ribbed waistband, a drawstring, or other tightening at the waist is not allowed. Buttons or other fastenings, openings in the neckline, and collars, are not allowed.

(c) *Sweatshirts* are pullover style garments with long or short length sleeves, snug fitting waist (elastic, drawstring, etc.) and cuffs. Pockets are allowed. A wide variety of neck treatments is permissible from crew, boat, or V-neck to hood and turned-down collar. The body of the garment, as distinct from the cuffs, waistband, neck and/or collar must be of the familiar, close-knit, unpatterned material, significantly napped on the inside. (Sweatshirts with full frontal openings are treated as jackets.)

(d) *Tank tops* are sleeveless with oversized armholes, with or without a significant drop below the arm. The front and the back may have a round, V, U, scoop, boat, square or other shaped neck which must be below the nape of the neck. The body of the garment is supported by straps not over two inches in width reaching over the shoulder. The straps must be attached to the garment

and not be easily detachable. Bottom hems may be straight or curved, side-vented, or of any other type normally found on a blouse or shirt, including blouson or drawstring waists or an elastic bottom. The following features would preclude a garment from consideration as a tank top:

(1) Pockets, real or simulated, other than breast pockets;

(2) Any belt treatment including simple loops;

(3) Any type of front or back neck opening (zipper, button, or otherwise).

It should be borne in mind that a distinction must be made between men's tank tops and singlets (athletic-type undershirts). Tank tops are of a fine knit construction with wider capping on armholes and neckline than singlets, which are made of fine knit light-weight fabric or ribbed construction.

(e) "*Top*" refers to those garments which, except for one or two distinctions in construction, would have fit into any one of the above listed, breakouts. For example, those garments which are commonly referred to as midriffs, tube tops, crop tops, or halter tops do not reach the waist, and are considered tops. (It should be noted that while most halter tops do not reach the waist, the name halter refers to the neck treatment only).

Those garments which cover the chest area only, but reach neither to the shoulders nor to the waist are also included as tops. However, bolero jackets, which are short jackets, usually worn with dresses, are not included as tops. They are considered jackets if they have a full front opening, sleeves of any length and cover the upper part of the body. Another example of a top would be a garment with a full-front or back opening which might otherwise qualify as a shirt or blouse, but does not have any means of closure. Further, a tube-type garment, which may or may not be waist length, having a straight top (with or without attached shoulder straps), and off-the-shoulder tops, does not, strictly speaking, have a "neck-area" as required by the "Shirt and Blouse" guidelines and would be included herein. Also included are tabards. These are sleeveless garments having fully open sides which are secured by ties or other means of closure at the sides.

Capes and ponchos, which are similar garments to tabards except that they have greater coverage because they extend beyond the mid-thigh area, are not included as tops. Garments worn on the upper part of the body over "other wearing apparel," for example, vests or sleeveless jackets, are also excluded from tops.

#### Category:

Cotton—340  
Wool—440  
Man-Made—640  
Other—840

*Category designation: Men's and boys' shirts, not knit*

These categories cover male outer garments which extend from the neck and shoulder areas to or below the waist. A shirt should have a full or partial front opening, which closes left side over right side. These garments are worn over underwear or the skin and are considered conventional attire indoors and outdoors without other garments over them; they suffice the wearer except where circumstances dictate that a further degree of formality is required or where weather conditions necessitate additional protection. Shirts must have sleeves.

At the present time, distinctions made between types of collars, the presence of shirttails, or color pattern are helpful, but not definitive, in characterizing shirts as dress, sport or work garments. As an example, all types may have collarbands and tails and be solid colored. It is possible, however, to determine characteristics which lend themselves to shirts designed for specific uses; these characteristics are listed below.

#### Dress Shirts

A nonknit dress shirt should have collar and sleeve sizes stated in inches in men's sizes and in years or months in boys' sizes. For men's sizes: The collar size should be specific (i.e., 15, not 15-15½) while the sleeve length can be a combination such as 32-33 or 34-35, consistent with trade practice. Short sleeve dress shirts will usually show a single collar size, perhaps with an explanatory phrase such as "half sleeve."

The term "With two or more colors in the warp and/or the filling" is applicable to garments containing fabrics, excluding pockets, collars, cuffs, plackets, and other insignificant components, with different color yarns in the warp and the filling, or which have different color yarns within the warp or within the filling. For the purposes of this term, different shades of the same color are considered different colors, and white is considered a color. The color may be the fibers' natural color or may be the result of a bleaching or dyeing process. If the result of a dyeing process, the color may be added at any stage in the manufacture of the fabric, in the fiber, yarn, or, in the case of cross-dyeing, in the fabric stage.



**Category:**

Cotton—341  
Wool—440  
Man-Made—641  
Other—840

*Category designation: Blouses, shirts, and shirt-blouses nonknit Women's and Girls'*

This category provides for nonknit blouses and shirts for women and girls. Blouses are outer garments usually extending from the neck or shoulders to the vicinity of the waistline. However, also included in the category are overblouses and similar garments which may extend to the mid-thigh area or below, and which are frequently slit up the leg. Blouses may have a collar treatment of any type or no collar. The closure may be positioned on the front, back, or side, or the garment may even be without closure as in a pullover. Also included in the category are shirts, the feminine counterpart of men's and boys' shirts, from which they may be distinguished by size, style and, usually, fastenings. However, those shirts having a partial front opening on the neckline which fastens or overlaps left over right are considered to be shirts for men or boys and excluded from this category. See Foreword for discussion of unisex.

Outerwear garments known as camisoles, bandeaus and similar garments which may be described as tops, are excluded from this category.

Ties and scarves imported and intended to the sold with blouses and shirts, not permanently attached, are classifiable regardless of width with the blouses or shirts in this category unless there is a compelling reason for separate classification.

**Category:**

Cotton—342  
Wool—442  
Man-Made—642  
Other—842

*Category designation: Skirts, women's and girls'*

This category provides for skirts, including wrap skirts, and culottes for women and girls. Skirts are outer garments covering the body below the waistline, and extend from the waist to nearly any length, dependent upon the fashion of the day. These garments usually have side or rear closures but may occasionally have a front closure. The lower end of the skirt must enclose both legs in a single tube with no fabric surrounding either leg separately. Distinguished from skirts in this respect, but includable in these categories, are culottes which, while retaining the frontal appearance of a skirt with regard

to silhouette and fullness, are constructed so that the garment is cut up the middle and each leg is individually surrounded by fabric. However, when worn, the leg separation is not apparent when viewed from the front. It should be noted that gaucho pants have a construction similar to culottes but without the fullness, and for category purposes are classifiable as pants.

**Category:**

Cotton—See below<sup>1</sup>  
Wool—443  
Man-Made—643  
Other—843

*Category designation: Suits, men's and boys'*

Men's and boys' suits consist of:

- (1) A suit coat or jacket and one pair of trousers, breeches, or shorts
- (2) A suit coat or jacket, vest and one pair of trousers, breeches, or shorts

All components of the suit must be of identical fabric as to construction, style, color, and composition, and of corresponding or compatible size. The coat or jacket must be tailored and consist of 4 or more panels, two in front and two in back, exclusive of sleeves, sewn together lengthwise; it must have a full-frontal opening (zippers not allowed); sleeves of any length; and be designed for wear over a shirt but not over another coat, jacket, or blazer. It may be waist length, as in an Eisenhower jacket, or extend below the waist to any point slightly below the mid-thigh. Vests and trousers of contrasting fabrics or colors are not included as parts of suits and should be reported as individual articles under appropriate HTSUSA numbers.

Ensembles such as athletic suits, athletic uniforms, rain suits, ski suits, work uniforms, etc., are not included in this category and should not be reported as such even though the components are of identical fabric.

The term "suit" includes the following sets of garments, whether or not they fulfill all the above conditions:

Morning dress, comprising a plain jacket (cutaway) with rounded tails hanging well down at the back, and striped trousers;

Evening dress (tailcoat), generally made of black fabric, the jacket of which is relatively short at the front, does not close, and has narrow skirts cut in the hips and hangs down behind;

<sup>1</sup> Where no specific breakout appears for "suits", the parts will be placed in the breakouts appropriate to each garment. "Suit-type jackets" is considered superior to "coats" and where there is no provision for "suit-type jackets," "coats" will apply.

Dinner jacket suits, in which the jacket is similar in style to an ordinary jacket (though perhaps revealing more of the shirt front), but has shiny silk or imitation silk lapels.

**Category:**

Cotton—See below<sup>2</sup>  
Wool—444  
Man-Made—644  
Other—844

*Category designation: Suits, women's, and girls'*

Women's and girls' suits feature some degree of tailoring and are designed for wear on business and social occasions when some degree of formality is required. The components are always bought and sold as a unit.

The term suit means a set of garments composed of two or three pieces made up in identical fabric and comprising:

One garment designed to cover the lower part of the body and consisting of trousers, breeches or shorts (other than swimwear), a skirt or a divided skirt, having neither braces nor bibs, and

One suit coat or jacket the outer shell of which, exclusive of sleeves, consists of four or more panels (two in front and two in back) sewn together lengthwise, designed to cover the upper part of the body. A tailored waistcoat may also be included.

All of the components of a suit must be of the same fabric construction, style, color and composition; they must also be of corresponding or compatible size. If several separate components to cover the lower part of the body are entered together (e.g., trousers and shorts, or a skirt or divided skirt and trousers), the constituent lower part shall be the trousers, or, in the case of women's or girls' suits, the skirt or divided skirt, the other garments being considered separately.

Ensembles such as athletic suits, athletic uniforms, rain suits, ski suits, snow suits, work uniforms, etc., are excluded from this category.

**Category:**

Cotton—345  
Wool—445/446  
Man-Made—645/646  
Noncotton vegetable fiber—845  
Silk—846

<sup>2</sup> Where no specific breakout appears for "suits," the suit components will be placed in breakouts appropriate to each garment.

*Category designation: Sweaters and cardigans, knit*

(1) Included in this category are garments commercially known as cardigans, sweaters, pullovers, sweater vests, etc. They cover the upper body from the neck or shoulders to the waist or below (as far as the mid-thigh area).

(2) Sweaters in this category may have a collar treatment of any type, including a hood, or no collar, and any type of neckline; they may be pullover style or have full or partial front or back opening; they may be sleeveless or have sleeves of any length and any type of pocket treatment. Sweaters may also have an attached scarf. Cardigans have a full-front opening. The presence of a turned down collar would not exclude a cardigan from the sweater designation.

Cardigans with a sherpa lining or a heavy weight fiberfill lining, including quilted linings, both of which are used to provide extra warmth to the wearer, are excluded from consideration in this category.

(3) Stitch count: All garments reaching from the neck area to the waist or as far as the mid-thigh, except tailored suit coats, car coats, sport coats, jackets, robes and dressing gowns, etc., having essentially 9 or fewer stitches per 2 centimeters measured in the horizontal direction and meeting the general description herein are considered sweaters.

**Category:**

Cotton—347/348  
Wool—447/448  
Man-Made—647/648  
Other—847

*Category designation: Trousers, breeches and shorts, men's and boys', women's and girls'*

This category includes outerwear garments with leg separations extending to the vicinity of the upper thigh or below. They are held by various means, chiefly through waist or hip cinching mechanisms such as elasticized or ribbed waistbands, belts, or adjustable tabs; but permanently affixed suspenders can also be used without the garment being excluded from this category. Excluded are trousers with permanently attached front bibs extending more than six inches, as measured from the lowest point of the rise, above the natural waistline, panties, bloomers, and culottes described in categories 342/442/642/842. Included are specialized versions of trousers and shorts such as riding breeches, jodhpurs, gaucho pants, knickers, jogging shorts, and trousers with back bibs of whatever height.

Trousers which continue above the natural waistline for a short distance including self-fabric strap extensions, are included. These garments are called "suspenders pants" or are sometimes incorrectly termed "jumpsuits". If the fabric extension above the natural waistline extends beyond six inches as measured from the lowest point of the rise, the garments would not be included in this category.

Garments commercially known as jogging or athletic shorts are normally loose-fitting short pants usually extending from the waist to the upper thigh and usually have an elastic waistband. They may resemble swim trunks for men, boys, or male infants, which are not included in this category. Swim trunks will usually have an elasticized waist with a drawstring and a full lightweight support liner. Garments which cannot be recognized as swim trunks will be considered shorts.

**Category:**

Cotton—349  
Wool—459 ("Other")  
Man-Made—649  
Other—859

*Category designation: Brassieres and other body-supporting garments*

This category covers the named items and others of kindred nature; it does not cover items such as prosthetic or orthopedic appliances or "bandage" type articles. It also does not cover articles mainly intended to support apparel, such as garter belts.

Articles named in the designation, imported in an unfinished condition, are included. Parts, such as garter pads, closures, and shoulder straps, are not includable in this category.

This category does not cover waist trimmers. Waist trimmers are not garments since they serve none of the functions traditionally associated with garments or clothing. They are classifiable under the provisions for articles not specially provided for.

This category also does not cover garments containing Lycra spandex, or similar elastic-type yarns, the primary purpose of which is to cause the garment to fit snugly under outer garments. These garments are not considered "body-supporting."

**Category:**

Cotton—350  
Wool—459 ("Other")  
Man-Made—650  
Other—850

*Category designation: Robes and dressing gowns*

Dressing gowns, including bath robes, beach robes, lounging robes and similar apparel. Physical characteristics which are expected in garments included in this category include:

- (1) Looseness.
- (2) Length, reaching to the mid thigh or below.
- (3) Usually a full or partial front opening, with or without a means of closure.
- (4) Sleeves are usually, but not necessarily, present.

Included as lounging robes and similar apparel are those garments worn in the home for comfort which are inappropriate for wear on social occasions in and outside the home.

Excluded are those worn as street attire or over outerwear for protection from soil or wear, such as smocks.

Smoking jackets and similar garments, while having a marginally similar appearance to items included in this category, are in fact substantially different in use. Smoking jackets and similar garments are tailored, traditionally from a woven fabric, frequently a satin or brocade. They are semiformal by nature and are, by contrast to the garments in this category, worn over outerwear, e.g., shirt and pants and, sometimes tie. Such garments are excluded from this category and are considered as "other coats."

**Category:**

Cotton—351  
Wool—459 ("Other")  
Man-Made—651  
Other—851

*Category designation: Pajamas and other nightwear*

Pajamas are worn by both sexes and all ages. They consist of an upper part, pullover or coat style, with long, short, or no sleeves and a lower part, short, intermediate, or long trouser-like garments or of any style panties. The lower part sometimes encloses the feet. Pajamas are sleepwear. Garments called "sleepers" (sometimes called Dr. Denton's), one- or two-piece knit sleeping garments for girls, sizes 2-4 and boys 2-7, buttoning in front or back and with drop seats in the one-piece style, are in this category.

The term "nightwear" is interpreted as meaning "sleepwear" so that certain garments worn in bed in the daytime, as by infants over 86 centimeters in height and the bed-ridden, are included. "Other nightwear" includes various articles worn for sleeping, such as nightgowns, night-shirts, "waltz gowns," etc., but



does not include negligees, bed jackets, "sleep coats," or other apparel designed to be worn over sleepwear. The term "negligee" is loosely used commercially. To the extent that it refers to a garment worn over other nightwear, it is not in this category, and there may be instances in which sets described in total as negligees will have to be separated into the true nightwear items and other items.

Certain children's bed gowns (sometimes invoiced as "day gowns," or simply "gowns") are in this category. They are designed for wear by a child in bed and may be quite ornamental. They are loose and "boxy"-shaped, usually reach from the neck or shoulders to the ankles and have full length front closures.

Blanket sleepers for girls and boys, size 2 and over, are in these categories. Blanket sleepers are knit, footed, sleeping garments. They are usually made of brushed or napped man-made fabric and they cover the upper and lower part of the body. The item usually has wrist length sleeves, rib knit cuffs and a full front zipper closure that extends from the neckline to slightly above the ankle.

#### Category:

Cotton—352  
Wool—459 ("Other")  
Man-Made—852  
Other—852

#### Category designation: Underwear

The term "underwear" refers to garments which are ordinarily worn under other garments and are not exposed to view when the wearer is conventionally dressed for appearance in public, indoors or out-of-doors. Whether or not a garment is worn next to the body of the wearer is not a determinant; babies' diapers, for example, are so worn, as are bathing suits. Neither of these garments are customarily worn under other garments, and they are not underwear.

It should be noted that in distinguishing underwear, it is generally agreed that sleeveless tops with lace inserts or lace edgings are predominantly worn as underwear.

Body supporting garments, although having the characteristics indicated above for underwear, are excluded from the underwear provisions. They are includable in categories 349/459/649/859.

Men's and boys' all-white underwear T-shirts, of cotton, provided for in Heading 6109, are included herein. However, the traditional Chinese, white, knit, men's shirt with round neck, half-placket, and short sleeves is classified

as a shirt in Heading 6105 and placed in Category 338.

Singlets (athletic-type undershirts), which are included in this category, are sleeveless, all-white undergarments constructed of a lightweight, fine ribbed-knit material.

[FR Doc. 88-29756 Filed 12-27-88; 8:45 am]  
BILLING CODE 4820-02-M

#### UNITED STATES INFORMATION AGENCY

##### Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "The Art of Zen" (see list <sup>1</sup>) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the Spencer Museum of Art in Lawrence, Kansas, beginning on or about January 29, 1989 to on or about March 5, 1989, at the Santa Barbara Museum of Art in Santa Barbara, California, beginning on or about April 15, 1989 to on or about June 4, 1989, and at the Herbert F. Johnson Museum of Art in Ithaca, New York, beginning on or about August 28, 1989 to on or about October 29, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the Federal Register.

Date: December 22, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88-29750 Filed 12-27-88; 8:45 am]  
BILLING CODE 4820-01-M

##### Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19,

<sup>1</sup> A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202-485-7979, and the address is Room 700, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547.

1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 FR 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Cezanne: The Early Years 1859-1872" (see list <sup>1</sup>) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the National Gallery of Art in Washington, D.C., beginning on or about January 29, 1989, to on or about April 30, 1989, is in the national interest.

Public notice of this determination is ordered to be published in the Federal Register.

Date: December 22, 1988.

R. Wallace Stuart,

Acting General Counsel.

[FR Doc. 88-29751 Filed 12-27-88; 8:45 am]  
BILLING CODE 4820-01-M

##### Exchanges With USSR, Central and Eastern Europe, and Yugoslavia

USIA invites applications from U.S. educational, cultural and other not-for-profit institutions to conduct exchanges of students and young people with the Soviet Union (including the Baltic States) and Central and Eastern Europe (Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, and Romania) and Yugoslavia. Two million dollars will be available under the aegis of the Samantha Smith Memorial Exchange Program.

Overall authority for these exchanges is contained in the Mutual Educational and Cultural Exchanges Act of 1961, Pub. L. 87-256 (Fulbright-Hays Act). The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and people of other countries; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations and thus to assist in the development of friendly, sympathetic,

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and peaceful relations between the United States and the other countries of the world." Programs under the authority of the Act should be balanced and representative of the diversity of American political, social and cultural life.

#### SUMMARY

The Bureau of Educational and Cultural Affairs of the United States Information Agency announces a program of support for educational and cultural exchanges of students and young people between the U.S. and the USSR and between the U.S. and Yugoslavia, as well as the countries of Central and Eastern Europe, through a wide variety of substantive bilateral activities. USIA seeks to encourage participation of a broad range of sectors, institutions, and geographic areas in the U.S. and in the exchange countries. Grants will be awarded to support projects of up to two years' duration. Preference will be given to projects that expand the range of existing exchanges by scope, field of focus or institutional base, although support for ongoing activities will not be excluded.

Support is offered for three categories of exchange programs: Category A supports exchanges of undergraduate students under the age of 26 between the U.S. and the USSR/Central and Eastern Europe/Yugoslavia for academically focused programs of generally no less than 3 months duration; category B supports exchanges of young people under the age of 21 with the USSR; category C supports exchanges of youth between the U.S. and the countries of Central and Eastern Europe and Yugoslavia. Both existing and new projects are eligible.

Applications must be received by USIA no later than 5:00 p.m. EST on Friday, March 3, 1989.

#### Category A: Academic Exchanges

Grant funding under this category is intended to enhance and expand the scope of U.S. academic exchanges with the USSR, Central and Eastern Europe, and Yugoslavia for undergraduate students under the age of 26. Projects should complement existing exchange programs with these countries.

Applications for substantive undergraduate academic exchange activities will be accepted from accredited, degree-granting U.S. universities or colleges and from not-for-profit organizations engaged in international educational exchange at the undergraduate level. Participants must be citizens either of the U.S. or of the partner country or countries.

Preference will be given to exchanges with institutions not usually or currently involved in exchanges with the U.S. and to exchanges with institutions located outside the capital cities. New contacts with institutions under the jurisdiction of ministries or other organizations that do not usually participate in U.S. academic exchanges are also encouraged.

Priority will be given to the following areas of the arts, humanities, and social sciences: The performing and visual arts (music, dance, painting, sculpture, etc.); the teaching of English as a foreign language; study of the languages and literatures of the USSR (including the Baltic states), Bulgaria, Czechoslovakia, the GDR, Hungary, Poland, Romania, and Yugoslavia; environmental studies (conservation, industrial pollution problems, etc.); anthropology and archeology; cultural and historic preservation; communications (journalism, film, TV and radio); business management and finance; sociology and political science; area studies; international studies and foreign affairs. Exchanges must be a minimum of three months in length.

Applicants for USIA grants for undergraduate academic exchanges with the German Democratic Republic, Poland, and the USSR may also seek support from the "University Affiliations Program," which promotes university linkages through the exchange of U.S. and foreign faculty members and was announced in the Federal Register (Vol. 53, No. 155, August 11, 1988, pp. 30375-30378).

**Language qualifications:** Undergraduate students should have sufficient fluency in the language of the country to be visited to pursue university study in that language and to converse with citizens of the country without the aid of interpreters.

#### Allowable costs for Category A projects:

Project awards will be made in a wide range of amounts but will not normally exceed \$75,000. Grant-funded items of expenditure will be limited to the following categories:

- International travel (limited to partial support for American participants)
- Domestic travel
- Maintenance and per diem
- Academic program costs
- Orientation costs (speaker honoraria are not to exceed \$150 per day per speaker)
- Enrichment programs
- Cultural allowances (not to exceed \$150 per participant)
- Administration (direct and/or indirect costs)—no more than 20% of the amount requested of USIA

It is expected that applications will demonstrate substantial cost sharing, including tuition waivers where applicable.

#### Category B: Youth Exchange With the USSR

Grant funding for projects submitted under this category is intended to encourage the exchange of young people under the age of 21 between the U.S. and the USSR. High school-based exchanges are eligible for support. Participants must be either citizens of the U.S. or the Soviet Union.

**Organizations must document one or more of the following qualifications:** (1) Three years or more of experience in conducting youth exchanges; (2) three years or more of experience in sponsoring substantive activities for young people; (3) experience conducting youth or adult exchanges with the Soviet Union; (4) experience arranging programs for foreign students or visitors in the U.S. In addition, organizations should be able to demonstrate an adequate resource base for conducting programming in more than one location, if the project requires it. Organizations (other than schools) seeking funds for a year or semester high school study program model must be designated by USIA under the "Criteria for Teenager Exchange Visitor Programs."

#### Preference is given for project activities that exhibit the following features:

—Thematic focus—Eligible foci may include, but are not limited to: the arts (theater, dance, music, literature, fine arts, folklore, and film/video); language and culture; English language teaching; conservation and the environment; historic preservation; museum training; political, social, and economic issues; business administration/management; math, and science; and agriculture (rural or farm-based exchanges). For-credit post-secondary study is not eligible for support in this category; nor are performing arts tours or sports exchanges.

—Extensive interaction between American and Soviet youth—substantial interaction between the two societies, e.g., homestays, joint seminars, and summer enrichment or camping programs in both countries.

—Orientation programs—introduction to the program theme, administrative procedures, and substantive issues likely to be raised by their U.S. or Soviet counterparts.

—Minimum stay of four weeks—USIA has a preference for programs in which the duration of stay in country is longer than four weeks. Consideration will be



given to those projects which, for reasons or requirements of the partner country or countries; are shorter, but the length of stay in country should be no less than three weeks.

—Language qualifications—Language capability is desirable, but not required. However, some participants in each incoming delegation should be conversant in English, and some participants in each outgoing delegation should be conversant in Russian.

—Adequate lead/planning time to ensure a successful exchange.

—Evidence that the US organization has the commitment of a counterpart organization in the USSR to engage in the proposed activities.

**Allowable costs for Category B projects:** Project awards will be made in a range of amounts not normally exceeding \$50,000. The primary objective of grant funding is to expand or enhance exchange programs along the lines described above. Therefore, grant-funded items of expenditure will generally be limited to the following categories:

- In-country travel and per diem.
  - Orientation or preparation costs; briefing materials.
  - Speaker honoraria (not to exceed \$150 per day per speaker).
  - Cultural allowances (not to exceed \$150 per participant).
  - Activity fees.
  - International travel, normally limited to partial support for outgoing Americans; it is assumed that Soviet participants' travel will be paid from Soviet sources.
  - Up to 20% of costs requested of USIA may be allotted to indirect and/or administrative costs.
- It is expected that applications will demonstrate substantial cost sharing.

#### Category C: Youth Exchanges With Central/Eastern Europe and Yugoslavia

1. The same criteria and foci as in Category A apply here, except that partner countries are Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and Yugoslavia. Speaking ability in the language of the host country for both American and European participants is desirable, but not required. Under allowable costs, proposals under Category B may include partial or full support for international travel expenses of European youth traveling to the US. Programs may involve the US in partnership with one or more countries.

2. Limited funds will also be available for programs involving youth up to age 25 for these countries.

#### Requirements for Application (All Categories)

1. **Eligibility:** In cases where an application is being submitted on behalf of a US and a USSR or Central and Eastern European/Yugoslav institution, the application must be submitted by the US partner.

2. **Application procedures:** Given the required number of application copies, applicants are urged to keep each application as compact as possible, while including all necessary materials. Applicants must submit one original and eleven [11] complete copies of their proposal to:

For Category A Proposals: The Samantha Smith Memorial Exchange Program, Office of Academic Programs, (E/AEE) Room 208, USIA, 301 4th St. SW., Washington, DC 20547.

For Category B & C Proposals: The Samantha Smith Memorial Exchange Program, Youth Exchange Staff, E/YX Room 357, United States Information Agency, 301 4th Street SW., Washington, DC 20547.

In order to be eligible for review, the proposals must include:

- (1) Summary document: A typed double-spaced abstract of approximately one page;
- (2) Narrative: Total text not to exceed fifteen (15) typed, double-spaced pages, including:

a. A brief (two-page) description of the participating institutions; information on the applicant's prior experience with Soviet, Central and Eastern European or Yugoslav exchanges, if any, including details on numbers and length of exchanges in each direction; and a description of the institution's resources that would support the movement of participants from one location to another [if proposed] during the course of the project; and the identity of the partner organization in the USSR or Central and Eastern Europe/Yugoslavia. Institutions seeking support from USIA for the first time, or those whose experience in the field, of exchanges proposed for support is of less than four years' duration, should state this fact.

N.B. Organizations with less than four years' experience with exchanges are limited by USIA grant guidelines to grants of \$60,000 or less.

b. A detailed description of the proposed exchange, including but not limited to: A statement of specific project goals, with reference to ways in which the proposed exchange will contribute to overall understanding between the U.S. and the partner country; name and qualifications, including language skills, of project

director and senior project personnel; general description of potential participants and their qualification, including language skills; a detailed specific description of program activities, including when and where they will occur, the length of stay in the host country, and the specific number of youth and adults who will participate; and a brief description of the proposed orientation program. Proposals must include a timetable for project activities. Proposals for ongoing activities should identify ways in which the original scope of the exchange will be broadened or enriched as a result of the USIA grant. Each proposal must also include a plan for institutional evaluation of the exchange activity.

(3) A detailed, three-column budget outlining specific expenditures and source(s) from which funds are anticipated. The budget should include any in-kind and cash contributions to the program made by the U.S. and non-U.S. institutions.

Required format for budget: All proposed expenditures should be individually listed, using the format below. Each request for travel should specify the number or round trips by number of participants per year. Each maintenance request should specify number of participants and rate. For per diem, the request should specify daily rate times number of participants times number of days. Breakdowns for each category should be provided. Direct administrative costs absorbed by each institution should be specified along with absorbed salary and benefits under the U.S. and partner institutions columns.

Year 1:  
International travel  
Domestic travel  
Maintenance and per diem costs  
Salary and benefits  
Other direct administrative costs  
Orientation costs  
Enrichment program costs  
Cultural allowances  
Other (specify)

Year 2:  
(repeat above categories for year 2 if necessary)  
Ineligible costs include:  
entertainment, fund-raising and dependents' costs.

(4) Appendices should be kept to a minimum but must include:

(a) Bio-sketches of professional accomplishments of the principal project staff, not to exceed two pages in length each, clearly indicating the level of language skills; overseas experience including experience in the USSR,

Central and Eastern Europe, or Yugoslavia, and particularly with the proposed partner country or countries; experience related to youth or academic exchange, as appropriate; relevant publications and research activities; and citizenship. Bio-sketches for the U.S. project staff must be included; those of non-U.S. staff are desirable but not required.

(b) Documentation of institutional support for the proposed exchange program, including a signed letter of endorsement from the U.S. institution's president, vice-president, chancellor or provost. Proposals should also provide evidence, if possible, in the form of signed letters from or agreements with heads of universities or other organizations, that the designated USSR, Central and Eastern European or Yugoslav partner institutions are prepared to participate in and support the exchange described in the proposal. General agreements signed or under negotiation with the intended partner institution would also be evidence of partner-country interest and should be cited.

(c) A copy of the organization's charter or letters of incorporation.

(d) IRS letter showing the organization's tax exempt status.

(e) List of current board of directors.

3. **Review process:** USIA will acknowledge receipt of all proposals

and will send cover sheets and other forms for completion and return to the Agency to applicants whose proposals have arrived complete and within deadline. Technically eligible proposals will be forwarded to committees of USIA officers for advisory review in conformity with the guidelines and criteria set forth herein prior to funding decisions by delegated officials. All proposals will be reviewed by the Agency's Office of the General Counsel. Category C proposals will also be submitted to the Board of Foreign Scholarships.

Complete applications in both categories consistent with the above guidelines will be reviewed according to the following criteria:

- a. Quality of proposed activities and approaches.
- b. Feasibility of the program plan.
- c. Applicants' experience relevant to program goals.
- d. Language capability of program participants as defined above.
- e. Multiplier effect/impact—the likely impact of the exchange experience on the individual participants, their schools, and communities.
- f. Contribution to expanding the range of U.S.-USSR/Central and Eastern European and Yugoslav exchanges. If the proposal is for support for an established activity, it should provide

evidence of how USIA support would enhance the exchange relationship.

g. Cost effectiveness—Greatest return on each grant dollar.

h. Geographic and program balance—The authorizing legislation requires proportional distribution of grant funds between the USSR and Central and Eastern Europe/Yugoslavia; also between categories A/B and category C.

4. **Deadline:** Complete proposal packages must be received by USIA on or before March 3, 1989, 5:00 p.m. EST. Applicants are responsible for the submission of complete applications. All required items must be received in one package by the deadline.

5. **Notification:** All applicants will be notified of the results of the review process on or about May 15, 1989. Funded proposals will be subject to periodic reporting and evaluation requirements.

#### Inquiries

Category A: Samantha Smith Program Manager, Office of European Academic Exchanges, (202) 465-7420.

Category B & C: Roger Russell, Youth Exchange Staff (202) 465-7299

Dated: December 19, 1988.

Mark Blitz,

Associate Director.

[FR Doc. 29729 Filed 12-27-88; 6:45 am]

BILLING CODE 6230-01-M



## Sunshine Act Meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

### BLACKSTONE RIVER VALLEY NATIONAL HERITAGE CORRIDOR COMMISSION

#### Notice of Meeting

Notice is hereby given in accordance with section 552b of Title 5, United States Code, that a meeting of the Blackstone River Valley National Heritage Corridor Commission will be held on Thursday, January 5, 1989.

The Commission was established pursuant to Pub. L. 99-647. The purpose of the Commission is to assist federal, state and local authorities in the development and implementation of an integrated resource management plan for those lands and waters within the Corridor.

The meeting will convene at 7:00 p.m. at the Lincoln Public Library, Old River Road, Lincoln, Rhode Island, for the following reasons:

1. Cultural Heritage and Land Management Plan status report.
2. Public Information and Education programs status report.
3. Tourism and Economic Development programs status report.
4. Status report on the Woonsocket Rubber Company Building Visitor Center, Woonsocket, Rhode Island.
5. Status report on the Slater Mill Visitor Center, Pawtucket, Rhode Island.
6. Status report on the "Shifting Gears" Research Project.
7. Status report on the Dudley Shuttle Company inventory.

It is anticipated that about twenty people will be able to attend the session, in addition to the Commission members.

Interested persons may make oral or written presentations to the Commission or file written statements. Such requests should be made prior to the meeting to: Lawrence D. Gall, Interim Executive Director, Blackstone River Valley National Heritage Corridor Commission, P.O. Box 34, Uxbridge, MA 01569, Telephone (508) 278-9400.

Further information concerning this meeting may be obtained from Lawrence

Gall, Interim Executive Director of the Commission at the address below.  
Lawrence D. Gall,  
Interim Executive Director, Blackstone River Valley National Heritage Corridor Commission.

[FR Doc. 88-29843 Filed 12-23-88; 11:47 am]  
BILLING CODE 4310-70-M

### FARM CREDIT ADMINISTRATION

#### Farm Credit Administration Board, Special Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), of the special meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The meeting was held at the offices of the Farm Credit Administration in McLean, Virginia, on December 21, 1988, from 9:00 a.m. until such time as the Board concluded its business.

FOR FURTHER INFORMATION CONTACT: David A. Hill, Secretary to the Farm Credit Administration Board, 1501 Farm Credit Drive, McLean, Virginia 22102-5090, (703) 883-4003, TDD (703) 883-4444.  
ADDRESS: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090.

SUPPLEMENTARY INFORMATION: This meeting of the Board was closed to the public. The matter considered at the meeting was: 1. Closed Session

1. Jackson FLB/FLBA, in Receivership.
- Dated: December 22, 1988.  
David A. Hill,  
Secretary, Farm Credit Administration Board.  
[FR Doc. 88-29858 Filed 12-23-88; 9:48 am]  
BILLING CODE 6705-01-M

### BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 11:00 a.m., Tuesday, January 3, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

<sup>1</sup> Session closed to the public—exempt pursuant to 5 U.S.C. 552b(c)(4), (8) and (9).

### Federal Register

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Wednesday, December 28, 1988

STATUS: Closed.

#### MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

#### CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: December 23, 1988.

James McAfee,  
Associate Secretary of the Board.

[FR Doc. 88-29907 Filed 12-23-88; 11:39 am]  
BILLING CODE 6210-01-M

### BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, January 4, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

#### MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

#### CONTACT PERSON FOR MORE INFORMATION:

Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Date: December 23, 1988.

James McAfee,  
Associate Secretary of the Board.

[FR Doc. 88-29908 Filed 12-23-88; 11:39 am]  
BILLING CODE 6210-01-M

### COMMISSION ON CIVIL RIGHTS

December 21, 1988.

PLACE: Stouffer Harbor Place Hotel, 202 East Pratt Street, Baltimore, Maryland 21202.

DATE AND TIME: Monday, January 9, 1989, 3:00 p.m.—6:00 p.m. Tuesday, January 10, 1989, 9:00 a.m.—6:00 p.m.

STATUS OF MEETING: Open to the public.

#### MATTERS TO BE CONSIDERED:

- I. Commission Reorganization
- II. Discussion—Commission Reauthorization
- III. Discussion and Action—Program Planning for FY '89-'90
- A. Current Projects
- B. Proposed Projects
- IV. Staff Briefings
- A. Press Coverage—CPA
- B. Ethics & FOIA Issues—Solicitor
- C. Defame & Degrad—OGC
- D. FACA, SAC Rechartering, Consultants, and Other Administrative Procedures—OSD

PERSONS TO CONTACT FOR FURTHER INFORMATION: John Eastman, Press and Communications Division, (202) 376-8312.

William H. Gillers,  
Solicitor.

[FR Doc. 88-29956 Filed 12-23-88; 3:43 am]  
BILLING CODE 6335-01-M

### COMMISSION ON CIVIL RIGHTS

December 21, 1988.

PLACE: Stouffer Harbor Place Hotel, 202 East Pratt Street, Baltimore, Maryland 21202.

DATE AND TIME: Monday, January 9, 1989, 9:00 a.m.—1:00 p.m.

STATUS OF MEETING: Portion open to the public and portion closed.

#### MATTERS TO BE CONSIDERED:

- I. Approval of Agenda
- II. Approval of Minutes of December Meeting
- III. Announcements
- IV. Discussion and Resolution: Patterson v. McLean Credit Union
- V. SAC Reports
- VI. Staff Director's Report
- VII. Discussion and Action Regarding Revised Draft, Medical Discrimination Against Children with Disabilities
- VIII. Executive Session closed to the public to discuss internal personnel matters
- IX. Future Agenda Items

#### PERSON TO CONTACT FOR FURTHER INFORMATION:

John Eastman, Press and Communications Division, (202) 376-8312.

William H. Gillers,  
Solicitor.

[FR Doc. 88-29957 Filed 12-23-88; 3:43 pm]  
BILLING CODE 6335-01-M

### COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Thursday, January 5, 1989.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED: Regulation of Hybrid and Related Instruments/proposed rules.

Application for designation as a contract market Thirty Day Federal Funds Index futures/New York Cotton Exchange.

#### CONTACT PERSON FOR MORE INFORMATION:

Jean A. Webb, 254-6314.  
Jean A. Webb,  
Secretary of the Commission.  
[FR Doc. 88-30012 Filed 12-23-88; 3:43 pm]  
BILLING CODE 6351-01-M

### COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 11:30 a.m., Friday, January 27, 1989.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254-6314.  
Jean A. Webb,

Secretary of the Commission.

[FR Doc. 88-30013 Filed 12-23-88; 3:43 pm]  
BILLING CODE 6351-01-M

### COMMODITY FUTURES TRADING COMMISSION

TIME AND DATE: 10:00 a.m., Tuesday, January 31, 1989.

PLACE: 2033 K St., NW., Washington, DC, 5th Floor Hearing Room.

STATUS: Open.

#### MATTERS TO BE CONSIDERED:

Applications for designations as contract markets for:  
Japanese Yen Euro-Rate Differential Futures/Chicago Mercantile Exchange.  
Deutsche Mark Euro-Rate Differential Futures/Chicago Mercantile Exchange.  
Pound Sterling Euro-Rate Differential Futures/Chicago Mercantile Exchange.

#### CONTACT PERSON FOR MORE INFORMATION:

Jean A. Webb, 254-6314.  
Jean A. Webb,  
Secretary of the Commission.  
[FR Doc. 88-30014 Filed 12-23-88; 3:43 pm]  
BILLING CODE 6351-01-M

### NUCLEAR REGULATORY COMMISSION

DATE: Weeks of December 26, 1988, January 2, 9, and 16, 1989.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

#### MATTERS TO BE CONSIDERED:

Week of December 26

THERE ARE NO COMMISSION MEETINGS SCHEDULED FOR THE WEEK OF DECEMBER 28.

Week of January 2—Tentative

Thursday, January 5

2:00 p.m.—Briefing on Regulatory Responsibilities and Schedules for the HLW Repository Program (Public Meeting)

3:30 p.m.—Affirmation/Discussion and Vote (Public Meeting) (if needed)

Friday, January 6

10:00 a.m.—Briefing on Staff Actions to Reduce Testing at Power (Public Meeting)

Week of January 9—Tentative

Thursday, January 12

3:30 p.m.—Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of January 16—Tentative

Thursday, January 19

10:00 a.m.—Briefing on Medical Use of By-Product Materials (Public Meeting)  
11:30 a.m.—Affirmation/Discussion and Vote (Public Meeting) (if needed)

ADDITIONAL INFORMATION: By a vote of 5-0 on December 21, 1988, the Commission determined pursuant to 5 U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that Commission business required that "Affirmation of Final Policy Statement On the Professional Conduct of Nuclear Power Plant Operators; Petition for Leave to Intervene in the Comanche Peak Operating License and Construction Permit Amendment Proceedings; Petitions for Review of Three Shoreham Appeal Board Decisions (ALAB-900, ALAB-901, ALAB-902); Order on Seabrook Station (Financial Qualification Issues—Decommissioning Funding and Rule Waiver); and Vote on Authorization to Restart Pilgrim Nuclear Power Plant," scheduled for December 21, 1988, be held on less than one week's notice to the public.

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this date.

TO VERIFY THE STATUS OF MEETINGS CALL: (Recording)—(301) 492-0292.

#### CONTACT PERSON FOR MORE INFORMATION:

William Hill (301) 492-1661.  
December 23, 1988.  
Jack Guttman,  
Office of the Secretary.  
[FR Doc. 88-29991 Filed 12-23-88; 3:43 pm]  
BILLING CODE 7590-01-M



Corrections

Federal Register  
Vol. 53, No. 249  
Wednesday, December 28, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 94

[Docket No. 87-072]

Garbage

Correction

In rule document 88-28579 beginning on page 49974 in the issue of Tuesday,

December 13, 1988, make the following correction:

§ 94.5 [Corrected]

On page 49978, in the first column, in § 94.5(c)(2)(ii), in the first line, remove "being cleared of".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 87-AWA-52]

Establishment of an Airport Radar Service Area; Colorado Springs, CO

Correction

In rule document 88-28838 beginning on page 50494 in the issue of Thursday, December 15, 1988, make the following correction:

On page 50494, in the second column, in the DISCUSSION OF COMMENTS, after the first paragraph, add the following paragraph:

The Air Transport Association expressed support for the ARSA concept and the design of the Colorado Springs ARSA.

BILLING CODE 1505-01-D

Wednesday  
December 28, 1988

Part II

Department of Education

34 CFR Parts 674, 675, and 676  
Perkins Loan Program, College Work-Study Program, and Supplemental Educational Opportunity Grant Program; Final Rule

federal register



## DEPARTMENT OF EDUCATION

## 34 CFR Parts 674, 675, and 676

## Perkins Loan Program, College Work-Study Program, and Supplemental Educational Opportunity Grant Program

AGENCY: Department of Education.

ACTION: Final regulations.

**SUMMARY:** The Secretary amends the regulations for the Perkins Loan, College Work-Study (CWS) and Supplemental Educational Opportunity Grant (SEOG) programs. These amendments interpret provisions of the Higher Education Amendments of 1986 and modify provisions contained in the December 1, 1987 regulations. The interpretations will result in a reduction of administrative burden on institutions and individuals.

**EFFECTIVE DATE:** These regulations become effective either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:** Richard P. Coppage or Michael Oliver, Policy Section, Campus and State Grant Branch, Division of Policy and Program Development, Office of Student Financial Assistance, 400 Maryland Avenue SW., (Room 4018, ROB-3), Washington, DC 20202-5446. Telephone (202) 732-4490.

**SUPPLEMENTARY INFORMATION:** The Perkins Loan, CWS and SEOG programs (known collectively as the campus-based programs) are "need-based" student financial aid programs administered by institutions of higher education. In order to award financial aid under each program, an institution must determine whether a student has financial need. The institution determines a student's financial need by subtracting from the student's educational cost his or her resources and his or her expected family contribution (EFC), i.e., the amount the student, his or her spouse and, in the case of a dependent student, his or her parents, may reasonably be expected to contribute toward his or her educational costs. The EFC is based on the following elements—

(1) The available income of (A) the student and his or her spouse, or (B) the student (and spouse) and the student's parents, in the case of a dependent student, estimated as an amount equal to base year income;

(2) The number of dependents in the family of the student;

(3) The number of dependents in the student's family who are enrolled in a program of postsecondary education on at least a half-time basis and for whom the family may reasonably be expected to contribute toward postsecondary education costs;

(4) The net assets of (A) the student and his or her spouse, and (B) the student (and spouse) and the student's parents, in the case of a dependent student;

(5) The marital status of the student;

(6) Any unusual medical and dental expenses of (A) the student and the student's parents, in the case of a dependent student, or (B) the student and his or her dependents, in the case of an independent student;

(7) The number of dependents of an independent student, or of the parents of a dependent student, other than the student, enrolled in private elementary or secondary institutions and the unreimbursed tuition paid (A) in the case of a dependent student, by the student's parents for such dependent children who are so enrolled, or (B) in the case of an independent student with dependents, by the student or his or her spouse for such dependent children who are so enrolled; and

(8) The additional employment expenses incurred (A) in the case of a dependent student, when both parents of the student are employed or when the family is headed by a single parent who is employed, or (B) in the case of an independent student, when both the student and his or her spouse are employed or when the employed student qualifies as a surviving spouse or as a head of a household under section 2 of the Internal Revenue Code of 1986.

On December 1, 1987, the Secretary published final regulations for the campus-based programs in the Federal Register (52 FR 45738). These regulations require institutions to include as a resource (funds available to help pay for a student's costs) net earnings from employment during the award period (other than CWS employment) that are not included in calculating the EFC. This procedure represented a continuation of previous policy.

The 1986 amendments to Part F of Title IV of the HEA mandated the use of new formulas (Congressional Methodology (CM)) for determining a student's EFC for the campus-based programs. Unlike the old formulas, under which a dependent student's non-need-based earnings during the award period were treated as a resource, the new formulas require that an amount equal to base year income be used in

calculating an EFC for both dependent and independent students.

Beginning with the 1988-89 award year an amount equal to all taxable and untaxable income received during the calendar year preceding the academic year is considered as base year income in calculating the EFC. Thus, for example, in calculating an EFC for the 1988-89 award year, an amount equal to base year 1987 income is used.

The December 1, 1987 regulations require that earnings for student employment, known to the institution, be monitored and adjustments be made to financial aid award packages to prevent overawards. Questions on the continued applicability of the student employment monitoring provision were raised by the financial aid community since non-need-based earnings will now be considered base-year income for the subsequent award period. If the monitoring and adjustment provisions remain intact, these same earnings will also be treated as a resource in the year earned and, thus, will be "double-counted."

As a result of this community concern regarding the treatment of non-need-based earnings, already counted as base year income, as a "resource," the Secretary has issued an interpretative ruling which provides that non-need-based earnings will be treated only as base-year income and not as a resource. As in the past, institutions will continue to be responsible for monitoring earnings from all need-based employment programs to ensure that the student does not receive need-based employment earnings in excess of his or her need. Need-based employment means employment awarded by the institution itself or by another entity to a student who demonstrates a financial need for those funds for the purpose of defraying educational costs of attendance for the award period. Examples of need-based employment would include employment awarded under the Veterans Administration work-study program, and employment provided by a State, if awarded on the basis of financial need for the purposes of defraying educational expenses.

Under the revised regulations, monitoring of non-need-based employment is never required if the student is not employed under the CWS program. Monitoring of non-need-based employment is required only if all of the following conditions are met—(1) the student is employed under the CWS program, (2) the student's financial need has been met, and (3) the institution wishes to continue to employ the student under the CWS program. Under

these revised regulations, monitoring of employment is only required in order to determine when CWS funds may no longer be used to pay wages. Section 443(b)(4) of the HEA provides that for a student employed under the CWS program, at the time income derived from any employment (need-based or non-need-based) exceeds the amount of such student's need by more than \$200, continued employment shall not be subsidized with CWS funds. The Department has interpreted this statutory provision to mean that institutions must terminate CWS compensation for employment when the income from any employment earned subsequent to time that the student's need is met, exceeds the student's need by more than \$200. An institution should not consider CWS earnings, in excess of need, which are less than or equal to \$200, as a resource the following year or as income for purpose of computing the EFC. Earnings from non-need-based employment will be counted as income for the following year.

The institution may not consider non-need-based earnings as a "resource." If, in a specific case, the institution believes that the amount of base year earnings does not accurately reflect the amount a student can be expected to earn in the subsequent award year, the institution has the authority under Section 479A of the HEA to make adjustments to the EFC or to use the projected income in the calculation.

Therefore, the Secretary is amending 34 CFR 674.14, 675.14 and 676.14, regulations applicable to the Perkins Loan, CWS and SEOG programs respectively, to exclude from the definition of "resources" award period non-need-based earnings. Non-need-based earnings are used, however, to count toward the determination of when the \$200 threshold requiring a discontinuation of CWS funding is needed in cases in which the following conditions are met:

(a) The student is employed under the CWS program;

(b) The student's financial need has been met; and

(c) The institution wishes to continue to employ the student under the CWS program.

The following employment case studies illustrate the application of the monitoring requirement:

## Employment case study #1

Julie has a financial need of \$3,000. She was awarded a Pell Grant of \$1,000, and SEOG of \$1,000 and a Perkins Loan of \$1,000. She also has employment off-campus that she obtained herself. The institution has determined this

employment to be non-need-based employment. No monitoring of her earnings is required nor is an adjustment to her student financial aid package required as a result of her non-need-based employment.

## Employment case study #2

Howard has a financial need of \$2,000. He was awarded a CWS job of \$2,000. He also works off-campus in a position which he obtained himself. The institution has determined this employment to be non-need-based employment. He has earned \$2,000 in the College Work-Study program, had job-related costs of \$100 for taxes and uniforms, and the school plans to terminate his employment when he reaches \$2,100 in CWS earnings. The institution must monitor only his CWS employment since it plans to terminate his CWS employment when his need is met.

## Employment case study #3a

Marcia has a financial need of \$5,000. She has been awarded a Perkins Loan of \$2,000 and CWS employment of \$3,000. She also works on campus in the biology lab. The institution considers her biology lab employment to be non-need-based employment and the school plans to terminate her CWS employment when her CWS earnings reach \$3,000. The institution must monitor only her CWS employment until she has earned the \$3,000. No further monitoring is required if her employment under the CWS program is then terminated.

## Employment case study #3b

Please refer to case study 3a. It is nearing the end of the award year and Marcia's Perkins Loan has been fully disbursed. She has earned \$2,900 in CWS earnings and has job-related costs of \$100. The institution wants to continue her CWS employment for four more weeks and expects her additional CWS earnings to be about \$400. The steps the institution must follow are as follows:

(1) The institution must monitor only her CWS employment earnings until she earns a total of \$3,100 in CWS funds (her CWS award amount for \$3,000 plus \$100 in job-related costs).

(2) When her CWS earnings reach \$3,100 the institution must begin monitoring BOTH her subsequent CWS and biology lab earnings.

(3) When the combination of CWS earnings and biology lab earnings, earned subsequent to the time her need was met, exceed \$200, no further CWS funds may be used to pay for her employment. In this case, the additional CWS funds permitted to be paid after

her need has been met may be less than \$200 (e.g., if she earns \$75 from the biology lab employment, only \$125 may be paid from CWS funds for her CWS employment). The institution is free, however, to continue to employ her in the same position on its own payroll; no CWS funds may be used to pay wages for such employment or to defray administrative costs associated with that employment.

Were she employed only under the CWS program, a total of \$3,300 in CWS funds could be expended (\$3,100 to meet her need plus the additional earnings of \$200).

In all of these examples, non-need-based earnings will be treated as base year income for the following award year if the student applies for financial aid.

## Waiver of Notice of Proposed Rulemaking

The Higher Education Amendments of 1986 changed the formulas contained in the HEA, for determining students' EFCs toward their higher education costs for Title IV programs, including the campus-based programs. One change is the requirement that an amount equal to base year income, rather than projected year earnings, be used in determining the EFC. The financial aid community has raised a concern that unless the Department interprets Part F of Title IV of the HEA to require that earnings from non-need-based employment be considered only as part of base year income and not as a resource, these earnings will be "double-counted" by being treated as a resource in the year earned and considered as base year income for the subsequent award year.

The Department had not identified this concern as of the time it published campus-based regulations on December 1, 1987 that continued the Department's former practice of treating non-need-based earnings as a resource. (34 CFR 674.14, 675.14, 676.14.) However, the Department now recognizes that it is necessary to make an interpretative ruling in order to avoid the anomalous consequences identified above, which the Department believes that Congress did not intend. The Department has determined that non-need-based earnings should be treated as part of base year income and not as a resource.

Section 443(b)(4) of the HEA requires that institutions stop funding CWS employment with CWS funds once the CWS recipient has earned more than \$200 above his or her need from any employment, whether or not that employment is need-based. The statutory language is silent as to the



time period to be considered in making the assessment of whether a student's earnings have exceeded his or her need. The Department is issuing an additional interpretative rule to provide this time element, which is necessary to implement the statute. The Department will consider all earnings earned subsequent to the time that a student's need is met, including both need-based and non-need-based earnings, to count toward the determination of when the \$200 threshold requiring a discontinuation of CWS funding is reached. Non-need-based earnings earned prior to the time a student's need is met will not be counted toward meeting the student's need but will instead be used only as part of base year income in the subsequent award year.

As a direct consequence of these interpretative rulings, the Department's monitoring requirements for non-need-based earnings are being eliminated and no adjustments to financial aid packages will be required to be made as a result of such earnings during the award year except with respect to the CWS exception, noted above. Therefore, monitoring of non-need-based employment is not necessary except when an institution continues to fund a student's CWS employment with CWS funds after that student's need has been met. In that circumstance, monitoring will begin when the need has been met and will end when the use of CWS funds is discontinued.

In accordance with Section 431(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1232(b)(2)(A)) and the Administrative Procedure Act, 5 U.S.C. 553, it is the practice of the Secretary to offer interested parties the opportunity to comment on proposed regulations. However, as noted, these amendments are interpretative rules and therefore exempt from rulemaking under 5 U.S.C. 553(b)(A). The changes in the treatment of non-need-based earnings made by these regulations are necessary to effectuate statutory changes made as part of the Higher Education Amendments of 1986.

In the interest of providing immediate guidance to affected parties, the Secretary has decided, pursuant to 5 U.S.C. 553(b)(A), to forego notice and comment procedures for these interpretative rules.

#### Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

#### Paperwork Reduction Act of 1980

These regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

#### Regulatory Flexibility Act

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. The small entities affected are small institutions of higher education. The regulations reduce burden and provide guidance to affected parties. The regulations will not have a significant economic impact on any of the entities affected.

#### Assessment of Educational Impact

The Secretary has determined that regulations in this document would not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

#### List of Subjects in 34 CFR Parts 674, 675, and 676

Education loan programs—education, Student aid, Reporting and recordkeeping requirements.

Dated: November 3, 1988.

Lauro F. Cavazos,  
Secretary of Education.

(Catalog of Federal Domestic Assistance Numbers: Supplemental Educational Opportunity Grant Program, 84.007; College Work-Study Program, 84.033; Perkins Loan Program, 84.038)

The Secretary amends Parts 674, 675, and 676 of Title 34 of the Code of Federal Regulations as follows:

#### PART 674—PERKINS LOAN PROGRAM

1. The authority citation for Part 674 continues to read as follows:

Authority: 20 U.S.C. 1087aa-1087hh and 20 U.S.C. 421-429 unless otherwise noted.

2. Section 674.2(b) is amended by adding, in alphabetical order, a definition of *Need-based employment* to read as follows. (The asterisk indicates provisions common to Parts 674, 675, and 676.)

#### § 674.2 Definitions.

(b) \* \* \*

*Need-based employment:* Employment provided by an institution itself or by another entity to a student who has demonstrated to the institution or the entity (through standards or methods it establishes) a financial need for the earnings from that employment for the purpose of defraying educational

costs of attendance for the award year for which the employment is provided.

3. Section 674.14 is revised to read as follows. (The asterisk indicates provisions common to Parts 674, 675, and 676.)

#### § 674.14 Overaward.

\*(a) *Overaward prohibited.* (1) An institution may only award or disburse a Direct loan or a Perkins loan to a student if that loan, combined with the other resources the student receives, does not exceed the student's financial need.

(2) When awarding and disbursing a Direct loan or a Perkins loan to a student, the institution shall take into account those resources it—

(i) Can reasonably anticipate at the time it awards loan funds to the student;

(ii) Makes available to its students; or

(iii) Otherwise knows about.

(3) If a student receives resources at any time during the award period that were not considered in calculating the loan amount, and the total resources including the loan exceed the student's need, the overaward is the amount that exceeds need.

\*(b) *Resources.* (1) Except as provided in paragraph (b)(2) of this section, the Secretary considers that "resources" include but are not limited to any—

(i) Funds a student is entitled to receive from a Pell Grant, regardless of whether the student applies for the Pell Grant;

(ii) Guaranteed Student Loans;

(iii) Waiver of tuition and fees;

(iv) Grants, including SEOGs and ROTC subsistence allowances;

(v) Scholarships, including athletic scholarships and ROTC scholarships;

(vi) Fellowships or assistantships;

(vii) Insurance programs for the student's education;

(viii) Veterans benefits;

(ix) Net earnings from need-based employment; and

(x) Except as provided in paragraph (b)(3) of this section, long-term loans, including Perkins and Direct Loans and need-based ICLs, made by the institution.

(2) The Secretary does not consider as a resource—

(i) Any portion of the resources described in paragraph (b)(1) of this section that are included in the student's expected family contribution (EFC); and

(ii) Earnings from non-need-based employment.

(3) The institution may treat a Supplemental Loan for Students (SLS), State-sponsored or private loan, PLUS loan, or non-need-based ICL as a

substitute for a student's EFC. However, if the sum of the loan amounts received exceeds the student's EFC, the excess is a resource.

\*(c) *Treatment of resources in excess of need.* An institution shall take the following steps if it learns that a student has received additional resources not included in the calculation of Direct or Perkins Loan eligibility that would result in the student's total resources exceeding his or her financial need by more than \$200:

(1) The institution shall decide whether the student has increased financial need that was unanticipated when it awarded financial aid to the student. If the student demonstrates increased financial need and the total resources do not exceed this increased need by more than \$200, no further action is necessary.

(2) If no increased need is demonstrated, or the student's total resources still exceed his or her need by more than \$200, as recalculated pursuant to paragraph (c)(1) of this section, the institution shall cancel any undisbursed loan or grant (other than a Pell Grant).

(3) If the student's total resources still exceed his or her need by more than \$200 after the institution takes the steps required in paragraphs (c)(1) and (2) of this section, the institution shall consider the amount by which the resources exceed the student's financial need by more than \$200 as an overpayment.

(d) *Liability for and recovery of overpayments.* (1) A student is liable for any overpayment of loan advances made to him or her.

(2) The institution is also liable for an overpayment if the overpayment occurred because the institution failed to follow the procedures set forth in this part. The institution shall restore an amount equal to the overpayment and any administrative cost allowance claimed on that amount to its loan fund even if it cannot collect the overpayment from the student.

(3) If an institution makes an overpayment for which it is not liable, it shall help the Secretary recover the overpayment by making a reasonable effort to contact the student and recover the overpayment. The Secretary regards a written demand to the student for repayment of the overawarded funds, with notice that failure to make that repayment will render the student ineligible for further Title IV aid, constitute such a reasonable effort.

(Authority: 20 U.S.C. 1087dd, 1087hh)

#### PART 675—COLLEGE WORK-STUDY AND JOB LOCATION AND DEVELOPMENT PROGRAMS

Part 675 of Title 34 of the Code of Federal Regulations is amended as follows:

4. The authority citation for Part 675 continues to read as follows:

Authority: 42 U.S.C. 2571-2756z, unless otherwise noted.

5. Section 675.2(b) is amended by adding, in alphabetical order, a definition of *Need-based employment* to read as follows. (The asterisk indicates provisions common to Parts 674, 675, and 676.)

#### § 675.2 Definitions.

(b) \* \* \*

*Need-based employment:* Employment provided by an institution itself or by another entity to a student who has demonstrated to the institution or the entity (through standards or methods it establishes) a financial need for the earnings from that employment for the purpose of defraying educational costs of attendance for the award year for which the employment is provided.

6. Section 675.14 is revised to read as follows. (The asterisk indicates provisions common to Parts 674, 675, and 676.)

#### § 675.14 Overaward.

\*(a) *Overaward prohibited.* (1) An institution may only award CWS employment to a student if the award, combined with the other resources the student receives, does not exceed the student's financial need.

(2) When awarding CWS employment to a student, the institution shall take into account those resources it—

(i) Can reasonably anticipate at the time it awards CWS funds to the student;

(ii) Makes available to its students; or

(iii) Otherwise knows about.

(3) If a student receives resources at any time during the award period that were not considered in calculating the CWS award, and the total resources including the prospective CWS wages exceed the student's need, the overaward is the amount that exceeds need.

\*(b) *Resources.* (1) Except as provided in paragraph (b)(2) of this section, the Secretary considers that "resources" include but are not limited to any—

(i) Funds a student is entitled to receive from a Pell Grant, regardless of

whether the student applies for the Pell Grant;

(ii) Guaranteed Student Loans;

(iii) Waiver of tuition and fees;

(iv) Grants, including SEOGs and ROTC subsistence allowances;

(v) Scholarships, including athletic scholarships and ROTC scholarships;

(vi) Fellowships or assistantships;

(vii) Insurance programs for the student's education;

(viii) Veterans benefits;

(ix) Net earnings from need-based employment; and

(x) Except as provided in paragraph (b)(3) of this section, long-term loans, including Perkins and Direct Loans and need-based ICLs, made by the institution.

(2) The Secretary does not consider as a resource—

(i) Any portion of the resources described in paragraph (b)(1) of this section that are included in the student's expected family contribution (EFC); and

(ii) Earnings from non-need-based employment.

(3) The institution may treat a Supplemental Loan for Students (SLS), State-sponsored or private loan, PLUS loan, or non-need-based ICL as a substitute for a student's EFC. However, if the sum of the loan amounts received exceeds the student's EFC, the excess is a resource.

\*(c) *Treatment of resources in excess of need.* An institution shall take the following steps if it learns that a student has received additional resources not included in the calculation of CWS eligibility that would result in the student's total resources exceeding his or her financial need by more than \$200:

(1) The institution shall decide whether the student has increased financial need that was unanticipated when it awarded financial aid to the student. If the student demonstrates increased financial need and the total resources do not exceed this increased need by more than \$200, no further action is necessary.

(2) If no increased need is demonstrated, or the student's total resources still exceed his or her need by more than \$200, as recalculated pursuant to paragraph (c)(1) of this section, the institution shall cancel any undisbursed loan or grant (other than a Pell Grant).

(d)(1) An institution may fund a student's CWS employment with CWS funds only until the amount of the CWS award has been earned or until the student's financial need, as recalculated under paragraph (c)(1) of this section, is met.



(2) Notwithstanding the provisions of paragraph (d)(1) of this section, an institution may provide additional CWS funding to a student whose need has been met until that student's cumulative earnings from all employment occurring subsequent to the time his or her financial need has been met exceed \$200.

(Authority: 42 U.S.C. 2753(b)(3))

Part 676 of Title 34 of the Code of Federal Regulations is amended to read as follows:

7. The authority citation for Part 676 continues to read as follows:

Authority: 20 U.S.C. 1070b-1070b-3, unless otherwise noted.

#### PART 676—SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM

8. Section 676.2(b) is amended by adding, in alphabetical order, a definition of *Need-based employment* to read as follows. (The asterisk indicates provisions common to Parts 674, 675, and 676.)

##### § 676.2 Definitions.

(b) \* \* \*

\* *Need-based employment:* Employment provided by an institution itself or by another entity to a student who has demonstrated to the institution or the entity (through standards or methods it establishes) a financial need for the earnings from that employment for the purpose of defraying educational costs of attendance for the award year for which the employment is provided.

9. Section 676.14 is revised to read as follows. (The asterisk indicates provisions common to Parts 674, 675, and 676.)

##### § 676.14 Overaward.

(a) *Overaward prohibited.* (1) An institution may only award or disburse an SEOG to a student if the SEOG, combined with the other resources the student receives, does not exceed the student's financial need.

(2) When awarding and disbursing an SEOG to a student, the institution shall take into account those resources it—

(i) Can reasonably anticipate at the time it award SEOG funds to the student;

(ii) Makes available to its students; or

(iii) Otherwise knows about.

(3) If a student receives resources at any time during the award period that were not considered in calculating the SEOG award, and the total resources including SEOG exceed the student's need, the overaward is the amount that exceeds need.

(b) *Resources.* (1) Except as provided in paragraph (b)(2) of this section, the Secretary considers that "resources" include but are not limited to any—

(i) Funds a student is entitled to receive from a Pell Grant, regardless of whether the student applies for the Pell Grant;

(ii) Guaranteed Student Loans;

(iii) Waiver of tuition and fees;

(iv) Grants, including SEOGs and

ROTC subsistence allowances;

(v) Scholarships, including athletic

scholarships and ROTC scholarships;

(vi) Fellowships or assistantships;

(vii) Insurance programs for the student's education;

(viii) Veterans benefits;

(ix) Net earnings from need-based employment; and

(x) Except as provided in paragraph (b)(3) of this section, long-term loans, including Perkins and Direct Loans and need-based ICLs, made by the institution.

(2) The Secretary does not consider as a resource—

(i) Any portion of the resources described in paragraph (b)(1) of this section that are included in the student's expected family contribution (EFC); and

(ii) Earnings from non-need-based employment.

(3) The institution may treat a Supplemental Loan for Students (SLS), State-sponsored or private loan, PLUS loan, or non-need-based ICL as a substitute for a student's EFC. However, if the sum of the loan amounts received exceeds the student's EFC, the excess is a resource.

(c) *Treatment of resources in excess of need.* An institution shall take the following steps when it learns that a student has received additional resources not included in the calculation of SEOG eligibility that would result in

the student's total resources exceeding his or her financial need by more than \$200:

(1) The institution shall decide whether the student has increased financial need that was unanticipated when it awarded financial aid to the student. If the student demonstrates increased financial need and the total resources do not exceed this increased need by more than \$200, no further action is necessary.

(2) If no increased need is demonstrated, or the student's total resources still exceed his or her need by more than \$200, as recalculated pursuant to paragraph (c)(1) of this section, the institution shall cancel any undisbursed loan or grant (other than a Pell Grant).

(3) If the student's total resources still exceed his or her need by more than \$200 after the institution takes the steps required in paragraphs (c)(1) and (2) of this section, the institution shall consider the amount by which the resources exceed the student's financial need by more than \$200 as an overpayment.

(d) *Liability for and recovery of overpayments.* (1) A student is liable for any SEOG overpayment made to him or her.

(2) The institution is also liable for an overpayment if the overpayment occurred because the institution failed to follow the procedures set forth in this part. The institution shall restore an amount equal to the overpayment and any administrative cost allowance claimed on that amount to its SEOG account even if it cannot collect the overpayment from the student.

(3) If an institution makes an overpayment for which it is not liable, it shall help the Secretary recover the overpayment by making a reasonable effort to contact the student and recover the overpayment. The Secretary regards a written demand to the student for repayment of the overawarded funds, with notice that failure to make that repayment will render the student ineligible for further Title IV aid, to constitute such a reasonable effort.

(Authority: 20 U.S.C. 1070b-1)

[FR Doc. 88-29008 Filed 12-27-88; 8:45 am]

BILLING CODE 4000-01-20

Wednesday  
December 28, 1988

## Part III

# Department of Agriculture

Food and Nutrition Service

7 CFR Part 226

Child Care Food Program; Adult Day  
Care Provision; Interim Rule With  
Request for Comments

federal register



## DEPARTMENT OF AGRICULTURE

## Food and Nutrition Service

## 7 CFR Part 226

## Child Care Food Program: Adult Day Care Provision

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Interim Rule with request for comments.

**SUMMARY:** This interim rule amends the Child Care Food Program (CCFP) regulations by providing Program eligibility for certain adult day care centers. It implements a provision of the Older Americans Act (OAA) Amendments of 1987, which allows these centers to receive cash and commodity assistance available under the CCFP for meals served to eligible enrolled individuals and a provision of the Rural Development, Agriculture and Related Agencies Appropriations Act of 1989, which provides categorical eligibility for free meals for participants of these centers who receive assistance under Title XVI or XIX of the Social Security Act or are members of a household receiving assistance under the Food Stamp Act and defines the income to be included in determining eligibility for free and reduced-price meal benefits.

**DATES:** This interim rule is effective December 28, 1988. To be assured of consideration, comments must be postmarked on or before April 27, 1989.

**ADDRESS:** Comments should be addressed to Mr. Robert M. Eadie, Chief, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, United States Department of Agriculture, 3101 Park Center Drive, Room 515, Alexandria, Virginia 22302. Comments in response to these rules may be inspected at the address above during normal business hours 8:30 a.m. to 5:00 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Eadie or Mr. James C. O'Donnell at the above address or by phone at (703) 756-3620.

**SUPPLEMENTARY INFORMATION:**

## Classification

This rule implements the provisions of the Older Americans Act Amendments of 1987 (Pub. L. 100-175, enacted November 29, 1987) and the Rural Development, Agriculture and Related Agencies Appropriations Act of 1989 (Pub. L. 100-460, enacted October 1, 1988) regarding the participation of adult day care centers in the CCFP. Section

701 of Pub. L. 100-175 requires that the amendments made by that Act take effect on October 1, 1987. Publication of this rule without prior public comment is necessary to implement these provisions as soon as possible, in keeping with the October 1, 1987, effective date of Pub. L. 100-175. With regard to the provisions of Pub. L. 100-460, that legislation became effective upon enactment. Furthermore, those provisions are nondiscretionary. In light of the October 1, 1988, effective date and because the provisions in question are nondiscretionary, the Department believes that the public would be best served by including them in this interim regulation. This will allow earlier participation by institutions which are clearly eligible and will still allow for public comment on those provisions where such comment may be helpful in developing a final rule. Had the Department issued regulations containing the provisions of either legislation in proposed form, CCFP benefits would not have been available to any institution until the final rules were issued. For these reasons, Anna Kondratas, Administrator of the Food and Nutrition Service, has determined, in accordance with 5 U.S.C. 553(b), that it is impracticable and contrary to the public interest to take prior public comment and that good cause exists for publishing this rule without prior public notice and comment. For the same reasons, and in accordance with 5 U.S.C. 553(b), the Administrator has determined that good cause exists for making this rule effective without a 30-day post-publication waiting period.

This action has been reviewed under Executive Order 12291 and has been classified as not major because it will not have an annual effect on the economy of \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rule has also been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 through 612). Pursuant to this review, Anna Kondratas, Administrator of the Food and Nutrition Service, has certified that this interim rule will not have a significant economic impact on a substantial number of small entities.

In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507), the reporting and recordkeeping requirements that are included in this

interim rule have been approved by the Office of Management and Budget under clearance 0584-0055.

This Program is listed in the Catalog of Federal Domestic Assistance under No. 10.558 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (7 CFR Part 3015, Subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

## Background

Pub. L. 100-175, the OAA Amendments of 1987, was enacted on November 29, 1987. Section 401 of that Act amended section 17 of the National School Lunch Act (42 U.S.C. 1766) by adding a new subsection (p). Under that subsection, certain adult day care centers are eligible for cash and commodity assistance under the CCFP. Pub. L. 100-460, the Rural Development, Agriculture and Related Agencies Appropriations Act of 1989, was enacted on October 1, 1988. Section 641 of that legislation further amended section 17(p) by defining the income to be included in determining eligibility for free and reduced-price meals and providing for categorical eligibility for individuals enrolled in adult day care centers who receive assistance under Title XVI or Title XIX of the Social Security Act or are members of a household receiving assistance under the Food Stamp Act of 1977.

In general, given the legislative language of Pub. L. 100-175, the Department views these adult day care centers as eligible for the CCFP in essentially the same manner, and under the same terms and conditions, as those child care centers which are currently eligible for or participating in the Program. There are differences in the nature and ages of the populations they serve, the needs of their clients and, presumably in many cases, the type(s) of organizations which operate them. However, these differences are generally not addressed in the OAA Amendments and will not be dealt with in these regulations, except to the extent that specific legislative provisions dictate or the Department determines that distinctions need to be made. In this regard, the Department invites public comment as to other areas where CCFP regulatory distinctions between child care facilities and adult care facilities may be appropriate.

## Center Eligibility

The OAA Amendments define an eligible adult day care center as "any public agency or private nonprofit

organization, or any proprietary Title XIX or XX center which—(i) is licensed or approved by Federal, State or local authorities to provide adult day care services to chronically impaired disabled adults or persons 60 years of age or older in a group setting outside their homes on a less than 24-hour basis; and (ii) provides for such care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services" (42 U.S.C. 1766(p)(2)(A)). The law limits participation by proprietary Title XIX and Title XX centers to those which receive compensation under Titles XIX and XX for at least 25 percent of their enrolled eligible participants in the calendar month preceding initial application or annual reapplication for Program participation. The Conference Report which accompanies the OAA Amendments (H.R. Rep. 427, 100th Cong., 1st Sess. (1987)) provides further guidance on the type of adult day care center envisioned as eligible. It describes the care offered by these centers as "a community-based group program designed to meet the needs of functionally impaired adults through an individual plan of care" a structured comprehensive program that provides a variety of health, social, and related support services in a protective setting during any part of the day, but less than 24-hour care" (H.R. Rep. 427, 100th Cong., 1st Sess. 85 (1987)).

In § 226.19a(b), these regulations reflect the legislative intent that eligibility for the CCFP be available through a narrowly defined group of centers which provide highly specialized care services to a specific group (i.e., functionally impaired individuals). Thus, the aim of these eligible centers must be to care for the needs of the functionally impaired. The law recognizes, however, that these eligible centers may enroll and provide services to individuals who may not be classified as functionally impaired but who are 60 years of age or older. It stipulates that CCFP reimbursement be made available for meals served to those individuals as well. However, centers which provide care (or socialization/recreation opportunities) only for persons 60 years of age or over who are not functionally impaired are not eligible to participate. In this regard, the Department also considers organizations such as sheltered workshops to be ineligible, even though they may enroll functionally impaired persons. Their overriding purpose is to provide

employment and developmental opportunities and not the type of care envisioned in the law.

## Participant Eligibility

Pub. L. 100-175 provides for CCFP reimbursement for meals served to "persons 60 years of age or older or to chronically impaired disabled persons, including victims of Alzheimer's disease and related disorders with neurological and organic brain dysfunction." Beyond this clause, however, the law does not define "chronically impaired disabled persons." In an attempt to insure that CCFP benefits are available only to persons 60 years of age or older and those who can be determined "chronically impaired" or "functionally impaired", this rule incorporates into the definition of "functionally impaired adult" certain criteria contained in Federal regulations which implement Title II (Federal Old-Age Survivors and Disability Insurance) and Title XVI (Supplemental Security Income for the Aged, Blind and Disabled Program) of the Social Security Act. These regulations (20 CFR Part 404, Appendix 1, Subpart P) are used in determining disability for both those programs. The criteria incorporated in this regulation were selected by the Department based on the intent of Congress in defining eligibility for centers and adults under Pub. L. 100-175. They relate specifically to an individual's ability to carry out activities of daily living and to function independently and effectively. Only those criteria specifically included in this rule will apply in making eligibility determination. Since Pub. L. 100-175 defines adult beneficiaries as those who are 60 years of age or older or chronically impaired, it will be the responsibility of each adult day care center participating in the CCFP to make CCFP eligibility determinations for each adult in care who is less than 60 years of age using the definition of "functionally impaired adult" contained in this rule. Further, participating centers will be required to maintain records to demonstrate how each such eligibility determination is made.

## Meal Reimbursement

As stated in Pub. L. 100-175, the guidelines for CCFP reimbursement to be paid to adult day care centers shall contain provisions designed to assure that CCFP reimbursement "shall not duplicate reimbursement under Part C of Title III of the Older Americans Act of 1965, for the same meals served." (42 U.S.C. 1766(p)(3)(B)). The conference report which accompanied the legislation makes the point that these adult day care centers are eligible for

both the CCFP and Title III feeding programs but that "They could not, however, receive benefits or reimbursement from both programs for the same meal served." (H.R. Rep. 427, 100th Cong., 1st Sess. 85 (1987)). Accordingly, § 226.19a(b)(6) limits reimbursement claims under the CCFP to those meals not claimed under Title III of the Older Americans Act.

In a related area, the Department is aware that some adult day care centers currently receive funds, other than Title III funds, which are available to support the meal service. Centers which receive such funds may continue to use these other funds, even for meals for which it claims reimbursement under the CCFP. However, given the fact that the National School Lunch Act specifically limits the use of Program funds disbursed to institutions to assist in providing meals, the Department considers CCFP reimbursement as their primary source of food assistance and all other sources as supplementary to it. Centers must be able to demonstrate such fund usage in the documentation of nonprofit food service status required under § 226.15(e)(11).

## Center Licensing

Pub. L. 100-175 requires eligible adult day care centers to be "licensed or approved by Federal, State or local authorities to provide adult day care services to chronically impaired disabled adults or persons 60 years of age or older in a group setting outside their homes on a less than 24-hour basis." (42 U.S.C. 1766(p)(1)). In § 226.6(e), the Department has interpreted this to mean that in order for a center to be eligible for CCFP participation, it must have Federal, State or local licensing or approval which is specifically established to regulate such center, or be complying with applicable renewal procedures (unless the State agency has information which indicates renewal will be denied). Further, the Department believes that the law clearly limits eligibility to centers which have such licensing and approval and does not envision participation by centers under the alternate approval methods available to child care centers and day care homes under current CCFP statute. This decision is based on the lack of reference to such alternate approval methods in the portion of the statute concerning adult day care center licensing, unlike the specific reference to such procedures in the statutory provision describing licensing for child care institutions and day care homes (42 U.S.C. 1766(p)(2)(A)(1) and (a)(1)).



## Meal Patterns

Current CCFP regulations contain specific requirements for meals served under the Program. These requirements establish minimum amounts of food, by type, which must be served in order for meals to be reimbursable. In implementing regulations intended to meet the nutritional needs of individuals enrolled in adult day care centers, the Department has reservations about the appropriateness of the current CCFP meal requirements for this group of individuals. Accordingly, the Department has begun the work necessary to evaluate the current meal patterns and, if necessary, to develop appropriate meal requirements for this group. In this regard, the Department welcomes comment on the current meal patterns, as well as suggestions for changes. However, given the need to publish these regulations implementing Program eligibility for adult day care centers as quickly as possible, as well as the time necessary to give adequate consideration to these meal patterns, § 228.20(c) has been amended to specify an interim adult meal pattern and permit certain milk alternates. This added flexibility for milk alternates has been granted to enable adult day care centers to provide meals that better respond to the individual food preferences of adult participants. In the CCFP, as well as the other Child Nutrition Programs, the Department advises that institutions consider the needs of the individuals involved when determining the amounts of food to be served and adjust portion sizes (within the regulatory minimum portion size limits) to meet the needs of participants. Further, the Department recommends that persons responsible for developing menus in these centers make use of information currently available with respect to beneficial dietary strategies. These would include choosing foods which are low in salt, sugar and fats, such as lowfat milk and fresh fruits and vegetables.

## Determining Free and Reduced-price Eligibility in Adult Day Care Centers

Public Law 100-460 contains two provisions which affect the free and reduced-price eligibility determinations for individuals enrolled in adult day care centers. The first establishes a definition of "household" or "family" different than that which has been utilized traditionally in the CCFP. The traditional definition requires the consideration of all income earned by all individuals, related or not, who are living as one economic unit when determining free and reduced-price meal eligibility. The new definition, which

applies only to adult participants, limits the income to be counted to only that earned by the adult participant and his or her spouse and any dependents residing with the adult participant. In this regard, the term "dependent" means an individual or individuals who are economically dependent on the adult participant. Therefore, in the case of an adult participant who is residing with and being cared for by his or her children, the income of the children would not be counted when determining free or reduced-price meal eligibility. The second provision contained in the legislation establishes categorical free meal eligibility criteria specific to the adult participant population. Under previous law and existing regulations, categorical eligibility for free meals is available only to children who are members of food stamp households or AFDC assistance units. Now, persons enrolled in adult centers will be categorically eligible for free meals if they are members of food stamp households or if they receive benefits under Title XVI of the Social Security Act, the Supplemental Security Income (SSI) for the Aged, Blind and Disabled Program, or Title XIX of the Social Security Act, which authorizes the Grants to States for Medical Assistance Programs—Medicaid.

## Other Provisions

The amendments contained in this regulations, although extensive, are for the most part technical in nature. They are extensive primarily because there are numerous references to children, parents, etc., in existing regulations which must be modified to bring a new group of institutions and individual beneficiaries into the CCFP. The provisions which deal solely with these adult day care centers are relatively few in number and are discussed above. They reflect the fact, as previously stated, that these centers will participate in the CCFP essentially under the same requirements as other institutions.

Although Public Law 100-175 was enacted on November 29, 1987, the effective date of the adult day care provision is October 1, 1987. Consequently, based on the effective date of the legislation, the Department is making an exception to: § 228.11(a) that limits retroactive cash and commodity reimbursement to meals served in the calendar month preceding the calendar month in which a written agreement to operate the Program is executed; and § 228.10(e), which requires that final claims be submitted not later than 60 days following the last day of the full month covered by the claim. The

Department is allowing an exception to the latter provision to allow reimbursement retroactive to October 1, 1987, provided that the institution can document that, for any meals claimed: (1) The meals served met all requirements including items and quantities served; (2) free and reduced-price applications were on file if reimbursement for free or reduced-price meals is sought; (3) meal counts by category (free, reduced-price and paid) and type served (breakfast, lunch, supper and supplement) are available; (4) appropriate food service revenue and expenditure records are available; and (5) reimbursement has not been received under Title III of the Older Americans Act for the claimed meals and CCFP reimbursement does not duplicate other funding for the claimed meals. In addition, institutions which intend to claim retroactive reimbursement must have executed a Program agreement with the State agency by March 31, 1989 and must have submitted a claim for reimbursement for each month of operation covering the meals served between October 1, 1987 and the date of the initial program agreement between the State agency and the center by March 31, 1989 or the date set by § 228.10(e), whichever is later. All other institutions should make application to the appropriate State agency as soon as possible and will be subject to the routine reimbursement procedures set out in the Program regulations.

In establishing this general retroactivity, the Department is limiting its applicability to provisions found in existing regulations and Pub. L. 100-175. However, certain other retroactive provisions resulted from the enactment of Pub. L. 100-460. Specifically, adult day care centers may claim retroactive reimbursement for free meals served (1) beginning with October 1, 1987, based on documented food stamp participation; (2) for the period October 1, 1987 to September 30, 1988, based on documented AFDC participation; and (3) beginning October 1, 1988, based on Medicaid and SSI participation. Further, for the period October 1, 1987 through September 30, 1988, the family of an adult participant applying for free or reduced price meals shall include a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit. However, beginning October 1, 1988, adult participants need only report their income and the income of any spouse or dependent(s) with whom they reside when applying for free or reduced-price

meals. These retroactive provisions are found in § 228.25(g).

## List of Subjects in 7 CFR Part 226

Day care, Food assistance programs, Grant programs—Health, infants and children, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, Part 226 is amended as follows:

## PART 226—CHILD CARE FOOD PROGRAM

1. The authority citation for Part 226 is revised to read as follows, and all other authority citations in the Part are removed:

Authority: Secs. 9, 11, 14, 16, and 17, National School Lunch Act, as amended (42 U.S.C. 1758, 1759a, 1762a, 1765 and 1766).

2. Section 226.1 is revised to read as follows:

## § 226.1 General purpose and scope.

This part announces the regulations under which the Secretary of Agriculture will carry out the Child Care Food Program. Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Payments will be made to State agencies or FNS Regional Offices to enable them to reimburse institutions for food service to enrolled participants.

3. In § 226.2:

a. New definitions of "Adult day care center", "Adult day care facility", "Adult participant", "Enrolled participant", "Functionally impaired adult", "Medicaid participant", "Participants", "Proprietary Title XIX center", "SSI participant", "Title XVI" and "Title XIX" are added in alphabetical order.

b. The definitions of "Claiming percentage", "Family", "Free meal", "Income to the program", "Independent center", "Institution", "Meals", "Nonpricing program", "Nonprofit food service", "Nonresidential", "Operating costs", "Pricing program", "Proprietary Title XX center", "Reduced-price meal", "Sponsoring organization" and "Verification" are revised.

c. In the definition of "Documentation," the second sentence is removed and the third sentence is revised.

The additions and revisions specified above read as follows:

## § 226.2 Definitions.

"Adult day care center" means any public or private nonprofit organization or any proprietary Title XIX or Title XX center (as defined in this section) which (a) is licensed or approved by Federal, State or local authorities to provide nonresidential adult day care services to functionally impaired adults (as defined in this section) or persons 60 years of age or older in a group setting outside their homes on a less than 24-hour basis and (b) provides for such care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services. Such centers shall provide a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants through an individual plan of care.

"Adult day care facility" means a licensed or approved adult day care center under the auspices of a sponsoring organization.

"Adult participant" means a person enrolled in an adult day care center who is functionally impaired (as defined in this section) or 60 years of age or older.

"Claiming percentage" means the ratio of the number of enrolled participants in an institution in each reimbursement category (free, reduced-price or paid) to the total of enrolled participants in the institution.

"Documentation" . . . Alternatively, "documentation" for a child who is a member of a food stamp household or an AFDC assistance unit means completion of only the following information on a free and reduced-price application: the name(s) and appropriate food stamp or AFDC case number(s) for the child(ren); and the signature of an adult member of the household: "documentation" for an adult participant who is a member of a food stamp household or is an SSI or Medicaid participant, as defined in this section, means completion of only the following information on a free and reduced-price application: the name(s) and appropriate food stamp case number(s) for the participant(s) or the adult participant's SSI or Medicaid identification number, as defined in this section, and the signature of an adult member of the household.

"Enrolled participant" means an "Enrolled child" (as defined in this section) or "Adult participant" (as defined in this section).

"Family" means, in the case of children, a group of related or nonrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit or, in the case of adult participants, the adult participant, and if residing with the adult participant, the spouse and dependent(s) of the adult participant.

"Free meal" means a meal served under the Program to (a) a participant from a family which meets the income standards for free school meals, or to (b) a child who is automatically eligible for free meals by virtue of food stamp or AFDC reciprocity, or to (c) an adult participant who is automatically eligible for free meals by virtue of food stamp reciprocity or is a SSI or Medicaid participant. Regardless of whether the participant qualified for free meals by virtue of (a), (b) or (c), neither the participant nor any member of their family shall be required to pay or to work in the food service program in order to receive a free meal.

"Functionally impaired adult" means chronically impaired disabled persons 18 years of age or older, including victims of Alzheimer's disease and related disorders with neurological and organic brain dysfunction, who are physically or mentally impaired to the extent that their capacity for independence and their ability to carry out activities of daily living is markedly limited. Activities of daily living include, but are not limited to, adaptive activities such as cleaning, shopping, cooking, taking public transportation, maintaining a residence, caring appropriately for one's grooming or hygiene, using telephones and directories, or using a post office. Marked limitations refer to the severity of impairment, and not the number of limited activities, and occur when the degree of limitation is such as to seriously interfere with the ability to function independently.

"Income to the program" means any funds used in an institution's food service program, including, but not limited to all monies, other than Program payments, received from other Federal, State, intermediate, or local government sources; participant's payments for meals and food service fees; income from any food sales to adults; and other



income, including cash donations or grants from organizations or individuals.

"Independent center" means a child care center, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

"Institution" means a sponsoring organization, child care center, outside-school-hours care center or adult day care center which enters into an agreement with the State agency to assume final administrative and financial responsibility for Program operations.

"Meals" means food which is served to enrolled participants at an institution, child care facility or adult day care facility and which meets the nutritional requirements set forth in this part.

"Medicaid participant" means an adult participant who receives assistance under Title XIX of the Social Security Act, the Grant to States for Medical Assistance Programs—Medicaid.

"Nonpricing program" means an institution in which there is no separate identifiable charge made for meals served to participants.

"Nonprofit food service" means all food service operations conducted by the institution principally for the benefit of enrolled participants, from which all of the Program reimbursement funds are used solely for the operations or improvement of such food service.

"Nonresidential" means that the same participants are not maintained in care for more than 24 hours on a regular basis.

"Operating costs" means expenses incurred by an institution in serving meals to participants under the Program, and allowed by the State agency financial management instruction.

"Participants" means "Children" or "Adult participants" as defined in this section.

"Pricing program" means an institution in which a separate identifiable charge is made for meals served to participants.

"Proprietary Title XIX center" means any private, for profit center (a) providing nonresidential adult day care services for which it receives compensation from amounts granted to

the States under Title XIX of the Social Security Act and (b) in which Title XIX beneficiaries were not less than 25 percent of enrolled eligible participants in the calendar month preceding initial application or annual reapplication for Program participation.

"Proprietary Title XX center" means any private, for profit center (a) providing nonresidential child or adult day care services for which it receives compensation from amounts granted to the States under Title XX of the Social Security Act and (b) in which Title XX beneficiaries were not less than 25 percent of enrolled eligible participants during the calendar month preceding initial application or annual reapplication for Program participation.

"Reduced-price meal" means a meal served under the Program to a participant from a family which meets the income standards for reduced-price school meals. Any separate charge imposed shall be less than the full price of the meal, but in no case more than 40 cents for a lunch or supper, 30 cents for a breakfast, and 15 cents for a supplement, and for which neither the participant nor any member of his family is required to work in the food service program.

"SSI participant" means an adult participant who receives assistance under Title XVI of the Social Security Act, the Supplemental Security Income (SSI) for the Aged, Blind and Disabled Program.

"Sponsoring organization" means a public or nonprofit private organization which is entirely responsible for the administration of the food program in: (a) One or more day care homes; (b) a child care center, outside-school-hours care centers, or adult day care center which is a legally distinct entity from the sponsoring organization; (c) two or more child care centers, outside-school-hours care centers, or adult day care centers; or (d) any combination of child care centers, adult day care centers, day care homes, and outside-school-hours care centers. The term "sponsoring organization" also includes a for-profit organization which is entirely responsible for administration of the Program in any combination of two or more child care centers, adult day care centers and outside-school-hours care centers which are part of the same legal entity as the sponsoring organization, and which are proprietary Title XIX or XX centers, as defined in this section ("Proprietary Title XIX center", "Proprietary Title XX center").

"Title XVI" means Title XVI of the Social Security Act which authorizes the Supplemental Security Income for the Aged, Blind, and Disabled Program—SSI.

"Title XIX" means Title XIX of the Social Security Act which authorizes the Grants to States for Medical Assistance Programs—Medicaid.

"Verification" means a review of the information reported by institutions to the State agency regarding the eligibility of participants for free or reduced-price meals, and, in addition, for a pricing program, confirmation of eligibility for free or reduced-price benefits under the program. Verification for a pricing program shall include confirmation of income eligibility and, at State discretion, any other information required on the application which is defined as documentation in § 226.2. Such verification may be accomplished by examining information (e.g., wage stubs, etc.) provided by the household or other sources of information as specified in § 226.23(h)(2)(iv). However, if a food stamp or AFDC case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp household or AFDC assistance unit; or, for an adult participant, if a food stamp case number or SSI or Medicaid assistance identification number is provided, verification for such participant shall include only confirmation that the participant is included in a currently certified food stamp household or is a current SSI or Medicaid participant.

#### 4. In § 226.4:

a. Introductory paragraph (b) is revised.

b. Paragraphs (b)(1), (b)(2), (b)(3), (b)(5), (b)(6), (b)(7), (b)(8), and (b)(9), are amended by removing the word "children" in each place it appears and adding in its place the word "participants".

c. In paragraph (g)(2) the first sentence is amended by adding the words ", adult day care centers" following the words "child care centers".

The revision specified above reads as follows:

#### § 226.4 Payments to States and use of funds.

(b) *Center funds.* For meals served to participants in child care centers, adult day care centers and outside-school-hours care centers, funds shall be made available to each State agency in an

amount no less than the sum of the products obtained by multiplying:

#### 5. In § 226.6:

a. Paragraphs (b)(2), (b)(7), and (b)(8) are revised.

b. Introductory paragraph (c) is amended by removing the reference "§ 226.6(j)" and adding the reference "§ 226.6(k)" in its place.

c. Paragraphs (c)(5) and (c)(6) are amended by removing the words "participating children" and adding the word "participants" in its place.

d. Paragraph (c)(11) is revised.

e. The paragraph heading for paragraph (d) is revised.

f. In paragraph (d)(3), the last sentence is amended by removing the reference "§ 226.6(m)" and adding the reference "§ 226.6(n)" in its place.

g. Paragraphs (e) through (o) are redesignated as paragraphs (f) through (p) and a new paragraph (e) is added.

h. Newly redesignated paragraph (f)(7) is revised.

i. In newly redesignated paragraph (f)(8), the first sentence is amended by removing the words "enrolled children" and adding the word "participants" in its place.

j. In newly redesignated paragraph (g), the second and third sentences are revised.

k. In newly redesignated paragraph (h), the sentence is amended by removing the word "children" and adding the word "participants" in its place.

l. Newly redesignated paragraph (i)(1) is amended by adding the words "adult day care centers" following the words "day care homes."

m. In newly redesignated paragraph (k)(9), the second sentence is amended by removing the word "children" and adding the word "participants" in its place.

n. In newly redesignated paragraph (l)(1), the second sentence is amended by adding the word ", adult day care" following the words "child care".

o. Newly redesignated paragraph (l)(3), is amended by adding the words "or adult day care facilities" following the word "facilities".

p. In newly redesignated paragraph (p), the first sentence is amended by removing the reference "§ 226.6(k)" and adding the reference "§ 226.6(l)" in its place.

The revisions specified above read as follows:

#### § 226.6 State agency administrative responsibilities.

(b) . . .

(2) For child care centers, adult day care centers and outside-school-hours care centers, submission of current eligibility information on enrolled participants.

(7) Submission of documentation that all child care centers, adult day care centers, outside-school-hours care centers, and day care homes for which application is made are in compliance with Program licensing/approval provisions;

(8) For proprietary Title XIX or Title XX centers, submission of documentation that they are currently providing nonresidential day care services for which they receive compensation under Title XIX or Title XX of the Social Security Act, and certification that not less than 25 percent of enrolled participants in each such center during the most recent calendar month were Title XIX or Title XX beneficiaries;

(c) . . .

(11) The claiming of Program payment for meals served by a proprietary Title XIX or Title XX center during a calendar month in which less than 25 percent of enrolled participants were Title XIX or Title XX beneficiaries.

(d) *Licensing/approval for child care centers, outside-school-hours care centers and day care homes.* . . .

(e) *Licensing/approval for adult day care centers.* This paragraph prescribes State agency responsibilities to ensure that adult day care centers meet the licensing/approval criteria set forth in this Part. Sponsoring organizations shall submit to the State agency documentation that facilities under their jurisdiction are in compliance with licensing/approval requirements. Independent adult day care centers shall submit such documentation to the State agency on their own behalf. Each State agency shall establish procedures to annually review information submitted by institutions to ensure that all participating adult day care centers either:

(1) Are licensed or approved by Federal, State or local authorities, provided that institutions which are approved for Federal programs on the basis of State or local licensing shall not be eligible for the Child Care Food Program if their licenses lapse or are terminated; or

(2) Are complying with applicable procedures to renew licensing or approval in situations where the State agency has no information that licensing or approval will be denied.

(f) . . .

(7) Inform institutions with separate meal charges of their responsibility to ensure that free and reduced-price meals are served to participants unable to pay the full price and provide to all institutions a copy of the income standards to be used by institutions for determining the eligibility of participants for free and reduced-price meals under the Program.

(g) . . . At a minimum, the State shall annually notify each nonparticipating child care center, outside-school-hours care center, and day care home within the State that is licensed, approved, registered, or receiving funds under Title XX and each nonparticipating adult day care center that is licensed or approved, of the availability of the Program, the requirements for Program participation, and the application procedures to be followed in the Program. The State agency shall make the list of child care centers, adult day care centers, outside-school-hours care centers, and day care homes notified each year available to the public upon request.

#### 6. In § 226.7:

a. Paragraph (b)(2) is amended by removing the words "enrolled children" and adding the word "participants" in its place.

b. In paragraph (i), the second sentence is revised.

c. Paragraph (k) is amended by removing the reference "§ 226.6(j)" and adding the reference "§ 226.6(k)" in its place.

d. Paragraph (l) is revised.

e. Paragraph (m)(1) is amended by removing the words "child's parents" and adding the words "participant's family" in its place.

The revisions specified above read as follows:

#### § 226.7 State agency responsibilities for financial management.

(i) . . . The State agency shall maintain on file a statement of the State's law and policy governing the use of interest earned on advanced funds by sponsors, institutions, child care facilities and adult day care facilities.

(l) *Participation controls.* The State agency may establish control procedures to ensure that payment is not made for meals served to participants attending in excess of the authorized capacity of each independent



center, adult day care facility or child care facility.

#### § 226.8 [Amended]

7. In § 226.8, paragraph (a) is amended by adding the words "XIX and Title" following the word "Title" in the second sentence.

8. In § 226.9:

a. Paragraph (b)(1) is revised.

b. Paragraph (b)(2) is amended by removing the word "children" and adding the word "participants" in its place.

The revision specified above reads as follows:

#### § 226.9 Assignment of rates of reimbursement for centers.

(b) . . .

(1) Require that institutions submit each month's figures for meals served daily to participants from families meeting the eligibility standards for free meals, to participants from families meeting the eligibility standards for reduced-price meals, and to participants from families not meeting such guidelines; or

9. In § 226.10 paragraph (c) is amended by revising the third, fourth and fifth sentences to read as follows:

#### § 226.10 Program payment procedures.

(c) . . . Independent proprietary Title XIX or Title XX centers, for months in which not less than 25 percent of enrolled participants were Title XIX or Title XX beneficiaries, shall submit the percentages of enrolled participants receiving Title XIX or Title XX benefits for the month covered by the claim month. Sponsoring organizations of such centers shall submit the percentage of enrolled participants receiving Title XIX or Title XX benefits for each center for the claim. Sponsoring organizations of such centers shall not include in any claim those centers in which less than 25 percent of enrolled participants were Title XIX or Title XX beneficiaries for the month claimed.

10. In § 226.11:

a. The section title is revised.

b. The first sentence in paragraph (a) is amended by adding the words "adult day care centers" following the words "child care centers".

c. Paragraphs (b) and (c) are revised.

The revisions specified above read as follows:

#### § 226.11 Program payments for child care centers, adult day care centers and outside-school-hours care centers.

(b) Each institution shall report each month to the State agency the total number of meals, by type (breakfasts, lunches, suppers, and supplements), served to participants except that such reports shall be made for a proprietary Title XIX or Title XX center only for calendar months during which not less than 25 percent of enrolled participants were Title XIX or Title XX beneficiaries.

(c) Each State agency shall base reimbursement to each institution on the number of meals, by type, served to participants multiplied by the assigned rates of reimbursement, except that reimbursement shall be payable to proprietary Title XIX and Title XX centers only for calendar months during which not less than 25 percent of enrolled participants were Title XIX or Title XX beneficiaries. In computing reimbursement, the State agency shall either:

(1) Base reimbursement to institutions on actual daily counts of meals served, and multiply the number of meals, by type, served to participants eligible to receive free meals, served to participants eligible to receive reduced-price meals, and served to participants from families not meeting such standards by the applicable national average payment rate; or

(2) Apply the applicable claiming percentage or percentages to the total number of meals, by type, served to participants and multiply the product or products by the assigned rate of reimbursement for each meal type; or

(3) Multiply the assigned blended per meal rate of reimbursement by the total number of meals, by type, served to participants.

#### § 226.12 [Amended]

11. In § 226.12 the concluding text at the end of paragraph (b) is amended by removing the reference "§ 226.6(j)" where it appears and adding the reference "§ 226.6(k)" in its place.

#### § 226.14 [Amended]

12. In Section 226.14, paragraph (a) is amended by removing the reference "§ 226.6(j)" and adding the reference "§ 226.6(k)" in its place.

13. In § 226.15:

a. The first sentence of paragraph (a) is amended by adding the words "Title XIX and" following the word "proprietary".

b. Paragraphs (b)(1), (b)(4), (b)(6), (e)(2), and (e)(4) are revised.

c. Paragraph (e)(3) is amended by removing the reference "§ 226.23(e)(1)(iii)" and adding the reference "§ 226.23(e)(1)(iv)" in its place.

d. Paragraph (e)(11)(ii) is amended by removing the word "children" and adding the word "participants" in its place.

e. Paragraph (g) is amended by removing the reference "§ 226.6(e)(1)" and adding the reference "§ 226.6(f)(1)" in its place.

The revisions specified above read as follows:

#### § 226.15 Institution provisions.

(b) . . .

(1) Except for proprietary Title XIX and Title XX centers and sponsoring organizations or proprietary Title XIX and Title XX centers, evidence of nonprofit status, in accordance with Section 226.15(a).

(4) If an independent child care center or independent outside-school-hours care center, documentation that it meets the licensing/approval requirements of § 226.6(d)(1); or, if an independent adult day care center, the licensing/approval requirements of § 226.19a(b)(3).

(6) For each proprietary Title XIX or Title XX center, documentation that it provides nonresidential day care services for which it receives compensation under Title XIX or Title XX of the Social Security Act and certification that not less than 25 percent of the participants enrolled during the most recent calendar month were Title XIX or Title XX beneficiaries. Sponsoring organizations shall provide documentation and certification for each proprietary Title XIX or Title XX center under its jurisdiction.

(e) . . .

(2) Documentation of the enrollment of each participant including family-size and income information used to determine eligibility for free or reduced-price meals for each participant reported as being in either need category, at child care centers, adult day care centers and outside-school-hours care centers. Such information shall include the social security number of each adult member of the household. However, when a household applies for free meal eligibility on behalf of a child who is a member of a food stamp household or AFDC assistance unit in accordance with § 226.23(e)(1)(iv), such information shall consist of the food stamp or AFDC case number of the child(ren) for whom

free meal benefits are being claimed. When a household applies for free meal eligibility on behalf of an adult participant who is a member of a food stamp household or is an SSI or Medicaid participant in accordance with § 226.23(e)(1)(v), such information shall consist of the food stamp case number or SSI or Medicaid identification number of the adult participant for whom free meal benefits are being claimed.

(4) Daily records indicating the number of participants in attendance and the number of meals, by type (breakfast, lunch, supper, and supplements), served to participants.

14. In § 226.16:

a. Introductory paragraph (b), paragraphs (b)(2), (b)(3), (c), introductory paragraph (d), and paragraphs (d)(1) and (d)(2) are amended by adding the words "and adult day care" following the words "child care" in each place it appears.

b. Paragraph (b)(1) is amended by removing the reference "§ 226.6(e)(2)" and adding the reference "§ 226.6(f)(2)" in its place.

c. Paragraph (d)(4)(i) is revised.

d. Paragraphs (e)(1) and (e)(2) are amended by adding the words "or adult day care" following the words "child care".

e. Paragraph (f) is revised.

f. In paragraph (h), the first sentence is amended by adding the words "adult day care centers" following the words "child care centers".

g. Paragraph (i) is amended by adding the words "and adult day" following the word "child".

h. Paragraph (j) is revised.

The revisions specified above read as follows:

#### § 226.16 Sponsoring organization provisions.

(d) . . .

(4) . . .

(i) Three times each year at each child care center and adult day care center, provided at least one review is made during each child care or adult day care center's first six weeks of Program operations and not more than six months elapse between reviews;

(f) The State agency may require a sponsoring organization to enter into separate agreements for the administration of separate types of facilities (child care centers, day care

homes, adult day care centers, and outside-school-hours care centers).

(j) A for-profit organization shall be eligible to serve as a sponsoring organization for proprietary Title XIX or Title XX centers which have the same legal identity as the organization, but shall not be eligible to sponsor proprietary Title XIX or Title XX centers which are legally distinct from the organization, day care homes, or public or private nonprofit centers.

15. In § 226.17 paragraph (b)(7) is amended by removing the reference "§ 226.23(e)(1)(iii)" and adding the reference "§ 226.23(e)(1)(iv)" in its place.

16. A new § 226.19a is added to read as follows:

#### § 226.19a Adult day care center provisions.

(a) Adult day care centers may participate in the Program either as independent centers or under the auspices of a sponsoring organization; provided, however, that public and private nonprofit centers shall not be eligible to participate in the Program under the auspices of a for-profit sponsoring organization. Adult day care centers participating as independent centers shall comply with the provisions of § 226.15.

(b) All adult day care centers, independent or sponsored, shall meet the following requirements:

(1) Adult day care centers shall provide a community-based group program designed to meet the needs of functionally impaired adults through an individual plan of care. Such a program shall be a structured, comprehensive program that provides a variety of health, social and related support services to enrolled adult participants.

(2) Adult day care centers shall provide care and services directly or under arrangements made by the agency or organization whereby the agency or organization maintains professional management responsibility for all such services.

(3) Adult day care centers shall have Federal, State or local licensing or approval to provide day care services to functionally impaired adults (as defined in § 226.2) or individuals 60 years of age or older in a group setting outside their home on a less than 24-hour basis. Adult day care centers which are complying with applicable procedures to renew licensing or approval may participate in the Program during the renewal process, unless the State agency has information which indicates that renewal will be denied.

(4) Except for proprietary Title XIX or Title XX centers, adult day care centers

shall be public, or have tax-exempt status under the Internal Revenue Code of 1954, or be moving toward compliance with the requirements for tax-exempt status, or be currently operating another Federal program requiring nonprofit status. An adult day care center which has applied to the Internal Revenue Service (IRS) for tax-exempt status may participate in the Program while its application is pending review by IRS. If IRS denies the application for tax-exempt status, the adult day care center shall immediately notify the State agency of such denial and the State agency shall terminate the participation of the center. If IRS certification of nonprofit status has not been received within 12 months of filing the application with IRS, and IRS indicates that the adult day care center has failed to provide all required information, the State agency shall terminate the participation of the adult day care center until such time as IRS tax-exempt status is obtained.

(5) Each adult day care center participating in the Program shall serve one or more of the following meal types:

- (i) Breakfast,
- (ii) Lunch,
- (iii) Supper, and
- (iv) Supplemental food.

Reimbursement shall not be claimed for more than two meals and one supplement provided daily to each adult participant.

(6) Each adult day care center participating in the Program shall claim only the meal types specified in its approved application in accordance with the meal pattern requirements specified in § 226.20. Participating centers may not claim CCFP reimbursement for meals claimed under Part C of Title III of the Older Americans Act of 1965. Reimbursement may not be claimed for meals served to persons who are not enrolled, or for meals served to participants at any one time in excess of the center's authorized capacity, or for any meal served at a proprietary Title XIX or Title XX center during a calendar month when less than 25 percent of enrolled participants were Title XIX or Title XX beneficiaries. Menus and any other nutritional records required by the State agency shall be maintained to document compliance with such requirements.

(7) An adult day care center may obtain meals from a school food service facility, and the pertinent requirements of this part shall be embodied in a written agreement between the center and school. The center shall maintain responsibility for all Program requirements set forth in this part.



(8) Adult day care centers shall collect and maintain current family-size and income information and the social security number of adult household members for participants classified as eligible for free and reduced-price meals, and documentation of the enrollment of participants not eligible for free or reduced-price meals. However, for households applying for free meal eligibility on behalf of adult participants from food stamp households or who are SSI or Medicaid participants in accordance with § 226.23(e)(1)(iv), adult day care centers shall collect and maintain food stamp case numbers or SSI or Medicaid assistance identification numbers in lieu of family-size and income information and social security numbers.

(9) Each adult day care center shall maintain daily records of the number of

meals by type (breakfast, lunch, supper, and supplements) served to enrolled participants, and to adults performing labor necessary to the food service.

(10) Each adult day care center shall maintain records on the age of each enrolled person. In addition, each adult day care center shall maintain records which demonstrate that each enrolled person under the age of 60 meets the functional impairment eligibility requirements established under the definition of "functionally impaired adult" contained in this Part.

17. In § 226.20:

a. Paragraph (c) is revised.

b. Paragraph (h) is amended by removing the words "participating children" and adding the word "participants" in its place.

c. Paragraph (j) is amended by removing the words "child" and

"children" each time the words appear and adding the words "participant" and "participants" respectively in their place.

d. A new paragraph (p) is added. The revision and addition specified above read as follows:

#### § 226.20 Requirements for meals.

(c) *Meal patterns for children age one through 12 and adult participants.* When individuals over age one participate in the Program, the total amount of food authorized in the meal patterns set forth below shall be provided in order to qualify for reimbursement.

#### Breakfast

(1) The minimum amount of food components to be served as breakfast as set forth in paragraph (a)(1) of this section are as follows:

Food components	Age 1 up to 3	Age 3 up to 6	Age 6 up to 12 <sup>1</sup>	Adult participants <sup>2</sup>
Milk				
Milk, fluid	½ cup <sup>3</sup>	¾ cup	1 cup	1 cup. <sup>7</sup>
Vegetables and Fruits				
Vegetable(s) and/or fruit(s)	¼ cup	½ cup	½ cup	½ cup.
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s), and juice.	¼ cup	½ cup	½ cup	½ cup.
Bread and Bread Alternates <sup>4</sup>				
Bread	½ slice	½ slice	1 slice	1 slice.
or				
Cornbread, biscuits, rolls, muffins, etc. <sup>4</sup>	½ serving	½ serving	1 serving	1 serving.
or				
Cold dry cereal <sup>5</sup>	¼ cup or ½ oz.	½ cup or ½ oz.	¾ cup or 1 oz.	¾ cup or 1 oz.
or				
Cooked cereal	¼ cup	¼ cup	½ cup	½ cup.
or				
Cooked pasta or noodle products	¼ cup	¼ cup	½ cup	½ cup.
or				
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	½ cup.

<sup>1</sup> Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

<sup>2</sup> For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.

<sup>3</sup> Bread, pasta or noodle products, and cereal grains, shall be wholegrain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with wholegrain or enriched meal or flour; cereal shall be wholegrain or enriched or fortified.

<sup>4</sup> Serving sizes and equivalents to be published in guidance materials by FNS.

<sup>5</sup> Either volume (cup) or weight (oz.) whichever is less.

<sup>6</sup> Adult participants may be served larger-size portions based on the greater food needs of older persons, but shall not be served less than the minimum quantities specified for adult participants.

<sup>7</sup> For adult participants, 8 ounces of yogurt, 1½ ounces of natural cheese or 2 ounces of processed cheese may be substituted to meet the milk requirement. However, one serving a day must be fluid milk. Further, it is recommended that no more than two servings of milk/milk alternate be provided in a day. When cheese is used to fulfill the dairy requirement, it may not be used as a meat/meat alternate at the same meal service.

#### Lunch or Supper

(2) The minimum amounts of food components to be served as lunch or

supper as set forth in paragraph (a)(2) of this section are as follows:

Food components	Age 1 up to 3	Age 3 up to 6	Age 6 up to 12 <sup>1</sup>	Adult participants <sup>2</sup>
Milk				
Milk, fluid	½ cup <sup>3</sup>	¾ cup	1 cup	1 cup. <sup>10</sup>
Vegetables and Fruits <sup>3</sup>				
Vegetable(s) and/or fruit(s)	¼ cup total	½ cup total	¾ cup total	¾ cup total.
Bread and Bread Alternates <sup>4</sup>				
Bread	½ slice	½ slice	1 slice	1 slice.

Food components	Age 1 up to 3	Age 3 up to 6	Age 6 up to 12 <sup>1</sup>	Adult participants <sup>2</sup>
or				
Cornbread, biscuits, roll, muffins, etc. <sup>3</sup>	½ serving	½ serving	1 serving	1 serving.
or				
Cooked pasta or noodle products	¼ cup	¼ cup	½ cup	½ cup.
or				
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	½ cup.
Meat and Meat Alternates				
Lean meat or poultry or fish <sup>4</sup>	1 oz.	1½ oz.	2 oz.	2 oz.
or				
Cheese	1 oz.	1½ oz.	2 oz.	2 oz.
or				
Eggs	1 egg	1 egg	1 egg	1 egg.
or				
Cooked dry beans or peas	¼ cup	½ cup	½ cup	½ cup.
or				
Peanut butter or soybean butter or other nut or seed butters.	2 tbsp.	3 tbsp.	4 tbsp.	4 tbsp.
or				
Peanuts or soybeans or tree nuts or seeds. <sup>7</sup>	½ oz. <sup>8</sup> = 50%	¾ oz. <sup>8</sup> = 50%	1 oz. <sup>8</sup> = 50%	1 oz. <sup>8</sup> = 50%.
or				
An equivalent quantity of any combination of the above meat/meat alternates.				

<sup>1</sup> Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

<sup>2</sup> For purposes of the requirements outlined in this subsection, a cup means a standard measuring cup.

<sup>3</sup> Serve 2 or more kinds of vegetable(s) and/or fruit(s). Full-strength vegetable or fruit juice may be counted to meet not more than one-half of this requirement.

<sup>4</sup> Bread, pasta or noodle products, and cereal grains shall be wholegrain or enriched; cornbread, biscuits, rolls, muffins, etc., shall be made with wholegrain or enriched meal or flour.

<sup>5</sup> Serving sizes equivalents to be published in guidance materials by FNS.

<sup>6</sup> Edible portion as served.

<sup>7</sup> Tree nuts and seeds that may be used as meat alternates are listed in program guidance.

<sup>8</sup> No more than 50% of the requirement shall be met with nuts or seeds. Nuts or seeds shall be combined with another meat/meat alternate to fulfill the requirement. For purpose of determining combinations, 1 oz. of nuts or seeds is equal to 1 oz. of cooked lean meat, poultry or fish.

<sup>9</sup> Adult participants may be served larger-size portions based on the greater food needs of older persons, but shall not be served less than the minimum quantities specified for adult participants.

<sup>10</sup> For adult participants, 8 ounces of yogurt, 1½ ounces of natural cheese or 2 ounces of processed cheese may be substituted to meet the milk requirement. However, one serving a day must be fluid milk. Further it is recommended that no more than two servings of milk/milk alternate be provided in a day. When cheese is used to fulfill the dairy requirement, it may not be used as a meat/meat alternate at the same meal service.

#### Supplemental Food

(3) The minimum amounts of food components to be served as

supplemental food as set forth in paragraph (a)(3) of this section are as follows. Select two of the following four

components. (Juice may not be served when milk is served as the only other component.)

Food components	Age 1 up to 3	Age 3 up to 6	Age 6 up to 12 <sup>1</sup>	Adult participants <sup>2</sup>
Milk				
Milk, fluid	½ cup <sup>3</sup>	¾ cup	1 cup	1 cup. <sup>8</sup>
Vegetables and Fruits				
Vegetable(s) and/or fruit(s)	¼ cup	½ cup	¾ cup	¾ cup.
or				
Full-strength vegetable or fruit juice or an equivalent quantity of any combination of vegetable(s), fruit(s) and juice.	¼ cup	½ cup	¾ cup	¾ cup.
Bread and Bread Alternates <sup>4</sup>				
Bread	½ slice	½ slice	1 slice	1 slice.
or				
Cornbread, biscuits, rolls, muffins, etc. <sup>4</sup>	½ serving	½ serving	1 serving	1 serving.
or				
Cold dry cereal <sup>5</sup>	¼ cup or ½ oz.	½ cup or ½ oz.	¾ cup or 1 oz.	¾ cup or 1 oz.
or				
Cooked cereal	¼ cup	¼ cup	½ cup	½ cup.
or				
Cooked pasta or noodle products	¼ cup	¼ cup	½ cup	½ cup.
or				
Cooked cereal grains or an equivalent quantity of any combination of bread/bread alternate.	¼ cup	¼ cup	½ cup	½ cup.
Meat and Meat Alternates				
Lean meat or poultry or fish <sup>4</sup>	½ oz.	½ oz.	1 oz.	1 oz.
or				
Cheese	½ oz.	½ oz.	1 oz.	1 oz.
or				
Eggs	½ egg	½ egg	1 egg	1 egg.
or				
Cooked dry beans or peas	¼ cup	¼ cup	½ cup	½ cup.



Food components	Age 1 up to 3	Age 3 up to 6	Age 6 up to 12 <sup>1</sup>	Adult participants <sup>2</sup>
or Peanut butter or soybean butter or other nut or seed butters.	1 tbsp.....	1 tbsp.....	2 tbsp.....	2 tbsp.
or Peanuts or soybeans or tree nuts or seeds. <sup>3</sup>	½ oz.....	½ oz.....	1 oz.....	1 oz.
or An equivalent quantity of any combination of the meat/meat alternates.				

<sup>1</sup> Children age 12 and up may be served adult size portions based on the greater food needs of older boys and girls, but shall be served not less than the minimum quantities specified in this section for children age 6 up to 12.

<sup>2</sup> For purposes of the requirements outlined in this paragraph, a cup means a standard measuring cup.

<sup>3</sup> Bread, pasta or noodle products, and cereal grains shall be wholegrain or enriched, cornbread, biscuits, rolls, muffins, etc., shall be made with wholegrain or enriched meal or flour; cereal shall be wholegrain or enriched or fortified.

<sup>4</sup> Serving size and equivalents to be published in guidance materials by FNS.

<sup>5</sup> Either volume (cup) or weight (oz.), whichever is less.

<sup>6</sup> Edible portion as served.

<sup>7</sup> Tree nuts and seeds that may be used as meat alternates are listed in program guidance.

<sup>8</sup> Adult participants may be served larger-size portions based on the greater food needs of older persons, but shall not be served less than the minimum quantities specified for adult participants.

<sup>9</sup> For adult participants, 8 ounces of yogurt, 1½ ounces of natural cheese or 2 ounces of processed cheese may be substituted to meet the milk requirement. However, one serving a day must be fluid milk. Further, it is recommended that no more than two servings of milk/milk alternate be provided in a day. When cheese is used to fulfill the dairy requirement, it may not be used as a meat/meat alternate at the same meal service.

(p) *Adult participant meal provisions.* When persons enrolled in adult day care centers participate in the Program, the total amount of food authorized in the meal patterns for age six to twelve as set forth in § 226.20(c) shall be provided, at a minimum, in order to qualify for reimbursement.

#### § 226.21 [Amended]

18. In § 226.21:

a. Paragraph (a)(5) is amended by removing the word "children" and adding the word "participants" in its place.

b. Paragraph (b) is amended by removing the reference "§ 226.6(h)" where it appears and adding the reference "§ 226.6(i)" in its place.

19. In § 226.23, the first sentence of paragraph (a) is amended by adding the words "and adult day care" following the words "child care".

20. In § 226.23 paragraph (b) is amended by removing the word "children" the second time it appears and adding the word "participants" in its place.

21. In § 226.23 paragraph (c) is amended as follows:

a. Paragraph (c)(2) is revised.

b. Paragraph (c)(3) is amended by removing the word "children" where it appears and adding the word "participants" in its place.

c. Paragraph (c)(5) is amended by removing the word "child" and adding the word "person" in its place.

The revisions specified above read as follows:

#### § 226.23 Free and reduced-price meals.

(c) \* \* \*

(2) A description of the method or methods to be used in accepting

applications from families for free and reduced-price meals. Such methods will ensure that applications are accepted from households on behalf of children who are members of AFDC assistance units or food stamp households or, for adult participants, who are members of a food stamp household or SSI or Medicaid participants;

22. In § 226.23, the fourth and fifth sentences of paragraph (d) are revised and three new sentences are added to read as follows:

(d) \* \* \* The release issued by child care institutions which charge separately for meals shall announce the availability of free and reduced-price meals to children meeting the approved eligibility criteria. The release issued by child care institutions shall also announce that children who are members of AFDC assistance units or food stamp households are automatically eligible to receive free meal benefits. The release issued by adult day care centers which charge separately for meals shall announce the availability of free and reduced-price meals to participants meeting the approved eligibility criteria. The release issued by adult day care centers shall also announce that adult participants who are members of food stamp households or who are SSI or Medicaid participants are automatically eligible to receive free meal benefits. All releases shall state that meals are available to all participants without regard to race, color, national origin, sex, age or handicap.

#### § 226.23 [Amended]

23. In § 226.23 paragraph (e) is amended as follows:

a. Paragraphs (e)(1)(i) and (e)(1)(ii) are revised. The paragraph heading for paragraph (e)(i) is republished for the convenience of the reader.

b. Paragraph (e)(1)(iii) is redesignated as paragraph (e)(1)(iv) and a new paragraph (e)(1)(iii) is added.

c. A new paragraph (e)(1)(v) is added.

d. In paragraph (e)(2) the paragraph heading and introductory paragraph are revised and paragraphs (e)(2)(ii), (e)(2)(v), (e)(2)(vi), and (e)(2)(vii) are revised.

e. Paragraph (e)(2)(iv) is amended by removing the word "child" the second time it appears and adding the word "person" in its place.

f. Paragraph (e)(3) is amended by removing the word "parents" and adding the word "household" in its place.

g. Paragraph (e)(4) is revised.

h. In paragraph (e)(5) the second sentence is amended by removing the words "parent or guardian" and adding the word "household" in its place.

The revisions specified above read as follows:

(e)(1) *Application for free and reduced-price meals.* (i) For the purpose of determining eligibility for free and reduced-price meals, institutions other than sponsoring organizations of day care homes shall distribute applications for free and reduced-price meals to the families of participants enrolled in the institution. Sponsoring organizations of day care homes shall distribute applications for free and reduced-price meals to day care home providers who wish to enroll their eligible children in the Program. The application, and any

other descriptive material distributed to such persons, shall contain only the family-size income levels for reduced-price meal eligibility with an explanation that households with incomes less than or equal to these levels are eligible for free or reduced-price meals. Such forms and descriptive materials may not contain the income standards for free meals. However, such forms and materials distributed by child care institutions shall state that, if a child is a member of a food stamp household or AFDC assistance unit, the child is automatically eligible to receive free CCFP meal benefits, subject to the completion of the application as described in § 226.23(e)(1)(ii) of this part: such forms and materials distributed by adult day care centers shall state that, if an adult participant is a member of a food stamp household or is a SSI or Medicaid participant, the adult participant is automatically eligible to receive free CCFP meal benefits, subject to completion of the application as described in § 226.23(e)(1)(iii) of this part.

(ii) Except as provided in paragraph (e)(1)(iv) of this section, the application for children shall contain a request for the following information:

(A) The names of all children for whom application is made;

(B) The names of all other household members;

(C) The social security number of all adult household members 21 years of age or older or an indication that a household member does not possess one;

(D) The total current household income, and the income received by each household member identified by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income received or withdrawn from any other source, including savings, investments, trust accounts, and other resources);

(E) A statement to the effect that "In certain cases, foster children are eligible for free and reduced-price meals regardless of household income. If such children are living with you and you wish to apply for such meals, please contact us."

(F) A statement which includes substantially the following information: "Section 9 of the National School Lunch Act requires that, unless you provide a food stamp or AFDC case number for your child, you must provide the social security numbers of all adult members of your household in order for your child to be eligible for free or reduced-price meals. Provision of these social security numbers is not mandatory, but failure to

provide the numbers will result in a denial of the application for free or reduced-price meals. This notice must be brought to the attention of all household members whose social security numbers are disclosed. The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application. These verification efforts may be carried out through program reviews, audits, and investigations and may include contacting employers to determine income, contacting a food stamp or welfare office to determine current certification for receipt of food stamps or AFDC benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to prove the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal action if incorrect information is reported." State agencies and institutions shall ensure that the notice complies with section 7 of Pub. L. 93-579. If a State or local agency plans to use the social security numbers for CCFP verification purposes in a manner not described by this notice, the notice shall be altered to include a description of those uses; and

(G) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution under applicable State and Federal criminal statutes.

(iii) Except as provided in paragraph (e)(1)(v) of this section, the application for adults shall contain a request for the following information:

(A) The names of all adults for whom application is made;

(B) The names of all other household members;

(C) The social security number of all adult household members 21 years of age or older or an indication that a household member does not possess one;

(D) The total current household income, and the income received by source of income (such as earnings, wages, welfare, pensions, support payments, unemployment compensation, social security, and other cash income

received or withdrawn from any other source, including savings, investments, trust accounts and other resources);

(E) A statement which includes substantially the following information: "Section 9 of the National School Lunch Act requires that, unless you provide a food stamp case number or SSI or Medicaid assistance identification number for the adult for whom benefits are sought, you must provide the social security numbers of all adult members of your household in order for the adult for whom benefits are sought to be eligible for free or reduced-price meals. Provision of these social security numbers is not mandatory, but failure to provide the numbers will result in a denial of the application for free or reduced-price meals. This notice must be brought to the attention of all household members whose social security numbers are disclosed. The social security numbers may be used to identify household members in carrying out efforts to verify the correctness of information stated on the application. These verification efforts may be carried out through program review, audits and investigations and may include contacting employers to determine income, contacting a food stamp or welfare office to determine current certification for receipt of food stamps, contacting the issuing office of SSI or Medicaid benefits to determine current certification for receipt of these benefits, contacting the State employment security office to determine the amount of benefits received, and checking the documentation produced by household members to provide the amount of income received. These efforts may result in loss or reduction of benefits, administrative claims or legal action if incorrect information is reported." State agencies and institutions shall ensure that the notice complies with section 7 of Pub. L. 93-579. If a State or local agency plans to use the social security numbers for CCFP verification purposes in a manner not described by this notice, the notice shall be altered to include a description of those uses; and

(F) The signature of an adult member of the household which appears immediately below a statement that the person signing the application certifies that all information furnished is true and correct; that the application is being made in connection with the receipt of Federal funds; that Program officials may verify the information on the application; and that the deliberate misrepresentation of any of the information on the application may subject the applicant to prosecution



under applicable State and Federal criminal statutes.

(v) If they so desire, households applying on behalf of adults who are members of food stamp households or SSI or Medicaid participants may apply for free meal benefits under this paragraph rather than under the procedures described in paragraph (e)(1)(iii) of this section. Households applying on behalf of adults who are members of food stamp households or SSI or Medicaid participants shall be required to provide:

(A) The names and food stamp case numbers or SSI or Medicaid assistance identification numbers of the adults for whom automatic free meal eligibility is claimed; and

(B) The signature of an adult member of the household as provided in § 226.23(e)(1)(iii)(F).

In accordance with § 226.23(e)(1)(iii)(G), if a food stamp case number or SSI or Medicaid assistance identification number is provided it may be used to verify the current food stamp or SSI or Medicaid certification for the adult(s) for whom free meal benefits are being claimed. Whenever households apply for benefits for adults not receiving food stamps or SSI or Medicaid benefits, they must apply in accordance with the requirements set forth in § 226.23(e)(1)(iii).

(2) *Letter to households.* Institutions shall distribute a letter to households or guardians of enrolled participants in order to inform them of the procedures regarding eligibility for free and reduced-price meals. The letter shall accompany the application required under paragraph (e)(1) of this section and shall contain:

(ii) How a participant's household may make application for free or reduced-price meals;

(v) A statement to the effect that participants having family members who become unemployed are eligible for free or reduced-price meals during the period of unemployment, provided that the loss of income causes the family income during the period of unemployment to be within the eligibility standards for those meals;

(vi) Except in the case of adult participants, a statement to the effect that in certain cases foster children are eligible for free or reduced-price meals regardless of the income of such household with whom they reside and that households wishing to apply for such benefits for foster children should contact the institution; and

(vii) An explanation that households receiving free and reduced-price meals must notify appropriate institution officials during the year of any decreases in household size or increases in income of over \$50 per month or \$600 per year or—

(A) In the case of households of enrolled children that provide a food stamp or AFDC case number to establish a child's eligibility for free meals, any termination in the child's certification to participate in the Food Stamp or AFDC Programs, or

(B) In the case of households of adult participants that provide a food stamp case number or an SSI or Medicaid assistance identification number to establish an adult's eligibility for free meals, any termination in the adult's certification to participate in the Food Stamp, SSI or Medicaid Programs.

(4) *Determination of eligibility.* When a completed application furnished by a family indicates that the family meets the eligibility criteria for free or reduced-price meals, the participants from that family shall be determined eligible for free or reduced-price meals. Institutions that are pricing programs shall promptly provide written notice to each family informing them of the results of the eligibility determinations. When the information furnished by the family is not complete or does not meet the eligibility criteria for free or reduced-price meals, institution officials must consider the participants from that family as not eligible for free or reduced-price meals, and must consider the participants as eligible for "paid" meals. When information furnished by the family of participants enrolled in a pricing program does not meet the eligibility criteria for free or reduced-price meals, pricing program officials shall provide written notice to each family denied free or reduced-price benefits. At a minimum, this notice shall include:

(i) The reason for the denial of benefits, e.g., income in excess of allowable limits or incomplete application;

(ii) Notification of the right to appeal;

(iii) Instructions on how to appeal; and

(iv) A statement reminding the household that they may reapply for free or reduced-price benefits at any time during the year.

The reasons for ineligibility shall be properly documented and retained on file at the institution.

#### § 226.23 [Amended]

24. In § 226.23 paragraph (f) is amended by removing the word "children" and adding the word "participants" in its place.

25. In § 226.23 paragraph (h) is amended as follows:

a. Introductory paragraph (h) is amended by removing the reference "§ 226.6(k)" where it appears and adding the reference "§ 226.6(l)" in its place.

b. Paragraph (h)(1), the second sentence of paragraph (h)(2)(i), paragraph (h)(2)(iii), introductory paragraph (h)(2)(iv), paragraphs (h)(2)(iv)(A), (h)(2)(iv)(C) and (h)(2)(v) are revised.

c. Paragraph (h)(2)(iv)(D) is removed.

d. Paragraph (h)(4) is amended by removing the words "enrolled children" and adding the word "participants" in its place.

The revisions specified above should read as follows:

(h) \* \* \*

(1) *Verification procedures for nonpricing programs.* State agency verification procedures for nonpricing programs shall consist of a review of all approved free and reduced-price applications on file to ensure that: (i) The application has been correctly and completely executed by the household; (ii) the institution has correctly determined and classified the eligibility of enrolled participants for free or reduced-price meals based on the information included on the application submitted by the household; (iii) the institution has accurately reported to the State agency the number of enrolled participants meeting the criteria for free or reduced-price meal eligibility and the number of enrolled participants that do not meet the eligibility criteria for those meals; and (iv) in addition, the State agency may conduct further verification of the information provided by the household on the approved application for program meal eligibility. If this effort is undertaken, the State agency shall conduct this further verification for nonpricing programs in accordance with the procedures described in paragraph (h)(2) of this section.

(2) \* \* \*

(i) \* \* \* However, (A) if a food stamp or AFDC case number is provided for a child, verification for such child shall include only confirmation that the child is included in a currently certified food stamp household or AFDC assistance unit; or (B) if a food stamp case number or SSI or Medicaid assistance identification number is provided for an

adult, verification for such adult shall include only confirmation that the adult is included in a currently certified food stamp household or is currently certified to receive SSI or Medicaid benefits.

(iii) Households shall be informed in writing that they have been selected for verification and they are required to submit the requested verification information to confirm their eligibility for free or reduced-price benefits by such date as determined by the State agency. Those households shall be informed of the type or types of information and/or documents acceptable to the State agency and the name and phone number of an official who can answer questions and assist the household in the verification effort. Households of enrolled children selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp or AFDC Program, they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of a current "Notice of Eligibility" for Food Stamp or AFDC Program benefits or equivalent official documentation issued by a food stamp or welfare office which shows that the children are members of households or assistance units currently certified to participate in the Food Stamp or AFDC Programs. An identification card for either program is not acceptable as verification unless it contain an expiration date. Households of enrolled adults selected for verification shall also be informed that if they are currently certified to participate in the Food Stamp Program or SSI or Medicaid Programs, they may submit proof of that certification in lieu of income information. In those cases, such proof shall consist of (A) a current "Notice of Eligibility" for Food Stamp benefits or equivalent official documentation issued by a food stamp or welfare office which shows that the adult participant is a member of a household currently certified to participate in the Food Stamp Program. An identification card is not acceptable as verification unless it contains an expiration date; or (B) official documentation issued by an appropriate SSI or Medicaid office which shows that the adult participant currently receives SSI or Medicaid assistance. An identification card is not acceptable as verification unless it contains an expiration date. All households selected for verification shall be advised that failure to cooperate with verification efforts will result in a termination of benefits.

(iv) Sources of information for verification may include written evidence, collateral contacts, and/or systems of records.

(A) *Written evidence* shall be used as the primary source of information for verification. Written evidence includes written confirmation of a household's circumstances, such as wage stubs, award letters, letters from employers, and, for enrolled children, current certification to participate in the Food Stamp or AFDC Programs, or, for adult participants, current certification to participate in the Food Stamp, SSI or Medicaid Programs. Whenever written evidence is insufficient to confirm eligibility, the State agency may use collateral contacts.

(C) *Systems of records* to which the State agency may have routine access are not considered collateral contacts. Information concerning income, family size, or food stamp/AFDC certification for enrolled children, or food stamp/SSI/Medicaid certification for enrolled adults, which is maintained by other government agencies and to which a State agency can legally gain access may be used to confirm a household's eligibility for CCFP meal benefits. One possible source could be wage and benefit information maintained by the State unemployment agency, if that information is available. The use of any information derived from other agencies must be used with applicable safeguards concerning disclosure.

(v) Verification by State agencies of receipt of food stamps, AFDC, SSI or Medicaid benefits shall be limited to a review to determine that the period of eligibility is current. If the benefit period is found to have expired, or if the household's certification has been terminated, the household shall be required to document their income eligibility.

26. In § 226.25:

a. Paragraph (c) is amended by removing the word "children" and adding the word "participants".

b. A new paragraph (g) is added. The addition specified above reads as follows:

#### § 226.25 Other provisions.

(g) *Special retroactivity provisions.* Notwithstanding any other provisions contained in this Part, the following shall apply:

(1) State agencies shall provide reimbursement for meals served by any adult day care center between October 1, 1987 and the date of the initial

Program agreement between the State agency and the center under the following conditions, provided that:

(i) The center can document that, for any meals claimed:

(A) Meals served met all requirements including items and quantities served;

(B) Free and reduced-price applications were on file if reimbursement for free or reduced-price meals is sought;

(C) Meal counts by category (free, reduced-price and paid) and type served (breakfast, lunch, supper and supplement) are available;

(D) Appropriate food service revenue and expenditure records are available;

(E) Reimbursement has not been received under Title III of the Older Americans Act for the claimed meals and CCFP reimbursement does not duplicate other funding for the claimed meals; and

(ii) The initial agreement between the State agency and the center is executed no later than March 31, 1989, and the claims for reimbursement for the meals served between October 1, 1987 and the date of the initial agreement between the State agency and the center are received by the State agency no later than March 31, 1989 or the date set by § 226.10(e), whichever is later.

(2) Alternative documentation for free meal eligibility for adult participants shall be based on the following:

(i) Beginning with October 1, 1987, documentation of membership in a food stamp household;

(ii) For the period October 1, 1987 through September 30, 1988, documentation of membership in an AFDC assistance unit; and

(iii) Beginning October 1, 1988, documentation of receipt of assistance under Medicaid or SSI.

(3) For the period October 1, 1987 through September 30, 1988, the family of an adult participant applying for free or reduced-price meals shall include a group of related or unrelated individuals, who are not residents of an institution or boarding house, but who are living as one economic unit. However, beginning October 1, 1988, the family of an adult participant applying for free or reduced-price meals shall include only the adult participant and any spouse or dependent(s) residing with the adult participant.

27. In § 226.26, paragraphs (a) and (e) are revised to read as follows:

#### § 226.26 Program information

(a) In the States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont:



Northeast Regional Office, FNS, U.S.  
Department of Agriculture, 10 Causeway  
Street, Room 501, Boston, MA 02222-  
1065.

(e) In the States of Colorado, Iowa,  
Kansas, Missouri, Montana, Nebraska,  
North Dakota, South Dakota, Utah and  
Wyoming: Mountain Plains Regional  
Office, FNS, U.S. Department of  
Agriculture, 1244 Speer Boulevard, Suite  
903, Denver, CO 80204.

Anna Kondratas,  
Administrator, Food and Nutrition Service.  
Date: December 21, 1988.  
[FR Doc. 88-29656 Filed 12-27-88; 8:45 am]  
BILLING CODE 3410-30-M

# federal register

Wednesday  
December 28, 1988

## Part IV

### Department of Housing and Urban Development

Office of the Assistant Secretary for  
Community Planning and Development

Comprehensive Homeless Assistance  
Plan; Revised Notice



# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## Office of the Assistant Secretary for Community Planning and Development

[Docket No. N-88-1716; FR-2386]

## Comprehensive Homeless Assistance Plan; Revised Notice

**AGENCY:** Office of the Assistant Secretary for Community Planning and Development, HUD.

**ACTION:** Notice.

**SUMMARY:** This Notice specifies revised requirements for the Comprehensive Homeless Assistance Plan (CHAP), as authorized by Subtitle A of Title IV of the Stewart B. McKinney Homeless Assistance Act (the McKinney Act). The revised requirements take effect upon publication, and will govern the award and use of amounts made available under Title IV of the McKinney Act, until final CHAP regulations are published for effect in November 1989.

The CHAP requirements govern the provision of assistance for each of Title IV's homeless assistance authorities administered by HUD: The Emergency Shelter Grants (ESG) program, the Supportive Housing Demonstration program, the Supplemental Assistance for Facilities to Assist the Homeless (SAFAH) program, and the Section 8 Housing Assistance Payments program for the Moderate Rehabilitation of Single Room Occupancy (SRO) Units for the Homeless. Under the McKinney Act, HUD may not make assistance available under any of these programs to, or within the jurisdiction of, States or certain larger metropolitan cities and urban counties (ESG formula cities and counties), unless the jurisdiction has a HUD-approved CHAP.

The CHAP provisions also apply to States receiving assistance under the Department of Labor's Job Training for the Homeless authority contained in Subtitle C of Title VII of the McKinney Act. Such States are required to describe how they will coordinate job training projects with other services for the homeless assisted under the Act.

This Notice provides that the CHAP requirements will be those set forth in the original CHAP Notice (52 FR 30628, published on August 14, 1987), revised to reflect amendments contained in the Stewart B. McKinney Homeless Assistance Amendments Act of 1988. The 1988 Amendments provide for: (1) Annual submission of CHAPs; (2) sharing of information copies of CHAPs among States and ESG formula cities and counties; (3) consideration of

available facilities to assist the homeless in preparation of the CHAP; (4) identification of a CHAP contact person for information on the contents of the jurisdiction's CHAP; (5) an assurance in the CHAP that each grantee, recipient, and project sponsor will administer, in good faith, a policy designed to ensure that the homeless facility is free from the illegal use, possession, or distribution of drugs or alcohol by its beneficiaries; (6) a substantive response by the State or ESG city or county to timely HUD recommendations on the annual CHAP performance report; and (7) information from Federal agencies to help coordinate State homeless assistance efforts in States that have designated a contact person or agency to carry out such coordination.

In addition, this Notice implements section 8001 of the Augustus F. Hawkins-Robert B. Stafford Elementary and Secondary School Improvement Amendments of 1988. This amendment eliminates the requirement that the Secretary of Education distribute funds for the Adult Education for the Homeless Program under Title VII of the McKinney Act on the basis of CHAP data.

HUD also seeks public comment on the requirements set forth in this Notice. The Notice, and the public comments that the Department receives on it, will form the basis for a final CHAP rule that the Department will publish by November 7, 1989.

**EFFECTIVE DATE:** December 28, 1988. Comprehensive Homeless Assistance Plans must be submitted to HUD no later than February 13, 1989.

**DATE:** Comments must be received by February 27, 1989.

**ADDRESS:** Interested persons are invited to submit comments regarding this Notice to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** For general information concerning HUD provisions under Title IV of the McKinney Act, or for information concerning Emergency Shelter Grants to ESG formula cities and counties: James R. Broughman, Director, Entitlement Cities Division, Room 7282, telephone (202) 755-5977. For matters relating to Emergency Shelter Grants to States and State CHAPs: James N. Forsberg,

Director, State and Small Cities Division, Room 7184, telephone (202) 755-6322. For matters relating to the Supportive Housing Demonstration Program: Morris Bourne, Director, Transitional Housing Development Staff, Room 9140, telephone (202) 755-9075. The address for all HUD contacts is: Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410.

For the Department of Labor provisions under Title VII, John D. Heinberg, Office of Strategic Planning and Policy Development, Employment and Training Administration, Room N-5629, Frances Perkins Building, 200 Constitution Avenue, Washington, DC 20210, telephone (202) 535-0882.

For the Department of Education voluntary CHAP provisions under Title VII, Sarah Newcombe, Office of Vocational and Adult Education, 400 Maryland Avenue, SW., Room 4512, Washington, DC 20202, telephone (202) 732-2237. (None of these telephone numbers is toll-free).

**SUPPLEMENTARY INFORMATION:** The information collection requirements contained in this notice have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 and have been assigned OMB control number 2506-0093. Public reporting burden for each of these collections of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Information on the estimated public reporting burden is provided under the Preamble heading, *Other Matters*. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Housing and Urban Development, Rules Docket Clerk, 451 Seventh Street, SW., Room 10276, Washington, DC 20410; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

### I. Purpose of Notice

This Notice has two purposes. It announces the requirements for the Comprehensive Homeless Assistance Plan (CHAP), as authorized by Subtitle A of Title IV of the Stewart B. McKinney Homeless Assistance Act (Pub. L. 100-77, approved July 22, 1987) (the McKinney Act). It also requests public comments on these requirements. The requirements specified in this Notice,

and the public comments on them, will form the basis for the Department to issue a final CHAP rule by November 7, 1989. This timing and method of implementation are required by section 485 of the Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100-628, approved November 7, 1988) (the 1988 Amendments).

The CHAP requirements established in this Notice consist of those set forth in the initial Notice to implement Subtitle A (52 FR 30628, published on August 14, 1987), as amended to reflect the CHAP revisions under the 1988 Amendments. These requirements will apply to the award and use of amounts made available for the homeless assistance programs of Title IV of the McKinney Act, until effective final CHAP regulations are published.

Section II of the Notice discusses the background of the CHAP requirements in the McKinney Act. Section III addresses the changes made to the CHAP authority by the 1988 Amendments.

Section IV specifies all the requirements applicable to the CHAP under the original August 14, 1987 CHAP Notice, as amended to reflect the 1988 Amendments. This is designed to assist the reader by providing a single point of reference for all applicable CHAP requirements.

The Notice also has three Appendices. Appendix A lists the jurisdictions that must have an approved CHAP, if Title IV assistance is to be made available to them, or within their jurisdiction. Appendix B contains highlights of the amendments made to each of the Title IV housing assistance programs by the 1988 Amendments. Readers should familiarize themselves with these changes, since they may affect the content of the CHAP to be submitted in accordance with this Notice. Appendix C contains a chart summarizing, on a program-by-program basis, the CHAP requirements for each of the grantees and recipients under Title IV of the McKinney Act.

### II. The Stewart B. McKinney Homeless Assistance Act

On July 22, 1987, the President signed the McKinney Act into law. Title IV of the Act contained a number of homeless assistance and related provisions to be administered by HUD.

Subtitle A established requirements for the CHAP. The initial CHAP requirements were set forth in a Notice published on August 14, 1987 (52 FR 30628). This provision prohibited HUD from making assistance under Title IV's programs available to, or within the

jurisdiction of, States, or metropolitan cities or urban counties eligible for a formula allocation under the Emergency Shelter Grants program (ESG formula cities and counties), unless the jurisdiction had a HUD-approved CHAP. In addition, individual applications for Title IV assistance were required to include a certification that the activities proposed for assistance were consistent with the jurisdiction's approved CHAP.

The CHAP was also required in connection with programs administered by the Departments of Education and Labor under Title VII of the Act. Section 702 originally required the Secretary of Education to distribute funds under the Adult Education for the Homeless Programs on the basis of assessments of the homeless population made in State CHAPs.

Under section 732, States were required to describe in their CHAPs how they would coordinate job training demonstration projects for homeless individuals under Subtitle C of Title VII with other services for homeless individuals assisted under the Act.

Subtitle B of the McKinney Act reauthorized with amendment the Emergency Shelter Grants program that was initially authorized in HUD's regular appropriation for fiscal year 1987.<sup>1</sup> Final regulations implementing the Emergency Shelter Grants program were published on August 10, 1988 (53 FR 30186).

Subtitle C authorized the Supportive Housing Demonstration program. This program had two components—a reauthorization (with amendment) of the Transitional Housing Demonstration program (also originally authorized in HUD's regular fiscal year 1987 appropriation),<sup>2</sup> and a new program of Permanent Housing for the Handicapped Homeless. Final regulations implementing both elements of the Supportive Housing Demonstration were published on June 24, 1988 (53 FR 23898).

Subtitle D created a new program of Supplemental Assistance for Facilities to Assist the Homeless (SAFAH). A Notice implementing the SAFAH

program for fiscal year 1988 was published on October 19, 1987 (52 FR 38880).

Subtitle E provided new funding authority for the Section 8 Moderate Rehabilitation program. The authority was made available to public housing agencies (PHAs) to be used in connection with the moderate rehabilitation of Single Room Occupancy (SRO) housing. Homeless individuals were to be given a first priority for occupancy in assisted units. A Notice implementing the SRO program under Subtitle E for fiscal year 1988 was published on October 15, 1987 (52 FR 38380).

The reader is urged to review the regulations and Notices covering these homeless assistance authorities in conjunction with the CHAP requirements specified in this Notice. In addition, it should be noted that several of the requirements included in these homeless assistance regulations have been affected by the 1988 Amendments. The Department intends to issue Notices implementing the 1988 Amendments as expeditiously as possible, consistent with the 60-day statutory deadline. These Notices should be consulted for a complete discussion and interpretation of the legislative changes affecting each McKinney Act program.

Since, however, CHAPs may be due before the publication of these Notices, readers may wish to review Appendix B for highlights of the program changes resulting from the 1988 Amendments. These highlights may help States and ESG formula cities and counties fashion their CHAPs pending publication of more detailed guidance in the subsequent Notices.

### III. Stewart B. McKinney Homeless Assistance Amendments Act of 1988

The 1988 Amendments were signed into law on November 7, 1988 (Pub. L. 100-628). This legislative enactment made the following changes to the McKinney Act's CHAP provisions:

#### 1. Annual CHAP Submission

The 1988 Amendments provide for the annual submission of CHAPs by States and ESG formula cities and counties. The original McKinney Act required a one-time CHAP submission. CHAP jurisdictions may amend their CHAPs as they deem appropriate.

The Department believes that the following language in the Report of the House Committee on Banking, Finance and Urban Affairs is instructive regarding Congress' intent in providing for the annual submission of CHAPs:

<sup>1</sup> Section 101(g), Pub. L. 99-500 (approved October 18, 1986) and Pub. L. 99-591 (approved October 30, 1986), making appropriations as provided for in Part C of Title V of H.R. 5313, 99th Cong., 2d Sess. (1986) as passed by the House of Representatives and by the Senate), to the extent and in the manner provided for in H. Rep. No. 977, 99th Cong., 2d Sess. (1986).

<sup>2</sup> Section 101(g), Pub. L. 99-500 (approved October 18, 1986) and Pub. L. 99-591 (approved October 30, 1986), making appropriations as provided for in Part B of Title V of H.R. 5313, 99th Cong., 2d Sess. (1986) (as passed by the House of Representatives and by the Senate), to the extent and in the manner provided for in H. Rep. No. 977, 99th Cong., 2d Sess. (1986).



The Committee created the Comprehensive Homeless Assistance Plan (CHAP) requirement in order that States and local communities provide a strategy to assist the homeless and provide coordination of services within their jurisdiction. The Committee bill requires the annual submission of the CHAP by States and local governments to ensure the planning of services to the homeless within communities is current. The Committee believes that the CHAP can bring together public and private organizations that serve the homeless. (H. Rep. No. 718, Part 2, 100th Cong., 2d Sess. 33 (1988)).

Consequently, States and ESC formula grantees must annually submit a CHAP that meets the requirements of this Notice.

For purposes of receiving ESG grant amounts during fiscal year 1989, States and ESC formula cities and counties will be required to submit their CHAP by February 13, 1989. Thereafter, CHAPs must be submitted by October 1 of each year.

The Department encourages States and ESC formula cities and counties to review and revise their existing CHAPs as they deem appropriate. All submissions under this Notice, however, must contain a complete CHAP that addresses each of the required elements. Submissions in the nature of amendments to existing CHAPs will not be approved (of course, this is not intended to preclude the submission of amendments following CHAP approval). States and ESC formula cities and counties that fail to obtain approval of a CHAP in accordance with the requirements of this Notice and applicable provisions of the McKinney Act will not be eligible to participate in the homeless assistance programs under Title IV of the Act.

## 2. Response to HUD Recommendations

The 1988 Amendments require that, as a condition of future McKinney Act homeless assistance, each State and ESC formula grantee respond to HUD's recommendations on the jurisdiction's report describing its performance in implementing its CHAP. However, this requirement only applies if the recommendations are provided to the jurisdiction not later than 60 days before the end of the fiscal year: i.e., by each July 31. Given this time frame, the Department has selected May 31 as the final submission date for annual performance reports.

This overall schedule will give the Department the time necessary to formulate and transmit its recommendations to the jurisdictions involved. It will also provide the jurisdictions with adequate time to substantively respond to HUD's

recommendations, and to make any appropriate changes to its CHAP for the succeeding fiscal year.

The annual performance report must address the period between that reviewed in the last performance report and April 30 of the year in question. For example, the report due on May 31, 1990 must cover the period from May 1, 1989 through April 30, 1990. HUD intends to separately provide guidance on the content of the CHAP performance report.

It should be noted that the first CHAP performance report will be due by May 31, 1989. The report should cover the period from the jurisdiction's initial CHAP approval (pursuant to the August 14, 1987 Notice) through April 30, 1989. The August 14, 1987 CHAP Notice required submission of the report by January 31, 1989 for the period ending December 31, 1988. The May 31, 1989 date specified in this Notice replaces the earlier submission date.

This change will put CHAP jurisdictions on the appropriate schedule and, by extending the report due date, will provide them with additional experience under Title IV's programs that may enhance the value of the CHAPs and the annual performance report in their future planning under the McKinney Act.

The 1988 Amendments simply require CHAP jurisdictions to "respond" to HUD's recommendations. This Notice requires that the response be "substantive." The Department believes that this is merely a clarification: A response that is not substantive would not further the HUD/jurisdiction dialogue that is contemplated by the amendment and, thus, would render the provision meaningless.

## 3. Relationship to Available Facilities

The 1988 Amendments alter the CHAP content by requiring that States and ESC formula grantees: (a) Develop a strategy to meet the needs of the homeless population with available services and facilities within their jurisdictions; and (b) provide an explanation of how McKinney Act assistance will "complement and enhance" the available services and facilities in their jurisdiction. Under the original McKinney Act, CHAP jurisdictions were only required to address these issues in light of available services.

## 4. Drug- and Alcohol-Free Facilities

The 1988 Amendments require CHAPs to contain an assurance that each grantee, recipient, and project sponsor (as appropriate) will administer, in good faith, a policy designed to ensure that

the homeless facility is free from the illegal use, possession, or distribution of drugs or alcohol by its beneficiaries. The Department proposes to implement this requirement as follows:

### A. Assistance to States and ESC Formula Cities and Counties

States, ESC formula cities and counties, and Territories that receive assistance from HUD under the Emergency Shelter Grants, Supportive Housing (both Transitional and Permanent Housing components), and SAFAH programs are responsible for carrying out the drug/alcohol-free assurance in their programs. This requirement applies whether or not the grantee or another entity actually carries out the assisted activities. Thus, States and ESC formula grantees receiving assistance from HUD in the Emergency Shelter Grants program are responsible for administering the assurance, even though they distribute amounts to units of general local government and nonprofit organizations in accordance with Subtitle B of the McKinney Act. Similarly, States receiving assistance under the Permanent Housing program are responsible for carrying out the assurance, even though the permanent housing will be operated by nonprofit organizations or PHAs.

### B. Assistance Within the Jurisdiction of a State or ESC Formula City or County

As noted in greater detail later, Title IV of the McKinney Act makes a number of entities eligible to receive assistance that are not States or ESC formula cities or counties. These include units of general local government and nonprofit organizations receiving reallocated amounts from HUD in the Emergency Shelter Grants program; units of general local government and other governmental entities and nonprofit organizations in the Transitional Housing and SAFAH programs; and PHAs participating in the Section 8 Moderate Rehabilitation program to provide SRO units for the homeless.

Since the CHAP for the State or ESC formula grantee must contain the drug/alcohol-free assurance, that jurisdiction will be responsible for ensuring that the ultimate ESG recipient carries out its activities in accordance with the assurance. The McKinney Act requires the CHAP jurisdiction in which the assisted activities are to be located to certify that the activities proposed for assistance are consistent with the CHAP. At a minimum, CHAP jurisdictions must satisfy themselves that the grantee will adhere to the

requirements of the assurance as a condition of providing the certification of consistency with the CHAP.

CHAP jurisdictions have broad latitude to ensure that the actual performance of grantees and recipients in carrying out their activities comports with the assurance's requirements. Options could include conditioning future certifications of consistency with the jurisdiction's CHAP on acceptable performance under the assurance.

### C. Time for Which the Assurance Must Be Carried Out

Grantees/recipients must continue to carry out the terms of the assurance as long as the assisted facility is used as a facility for the homeless. Readers should consult the Notices to be published for each of the Title IV programs for the time periods for which assisted facilities are required to be used as homeless facilities.

### D. Sanction for Failure To Carry Out the Assurance

If HUD determines that a drug/alcohol-free assurance has not been carried out in accordance with the requirements of this Notice, it may require additional actions or further assurances to be provided by the State or ESC formula city or county before approving subsequent CHAPs to ensure that the assurance is properly administered.

### E. Relation to the Anti-Drug Abuse Act of 1988

The Department wishes to advise readers that additional drug-related requirements will apply to the McKinney homeless assistance programs under the Anti-Drug Abuse Act of 1988 (Pub. L. 100-690, approved November 18, 1988). The Department will provide further guidance on grantee and recipient responsibility to implement these new requirements in a separate Notice or Notices in the Federal Register.

### 5. Information Copies

When submitting a CHAP to HUD, the 1988 Amendments require States to provide an information copy of their CHAPs to all ESC formula cities and counties located in the State. Similarly, each ESC formula city and county is required to provide a copy of its CHAP to the State in which it is located. This provision is intended to improve the coordination of State and local homeless assistance efforts. The names, addresses, and telephone numbers of the contact for a particular CHAP jurisdiction may be obtained for this purpose from the local HUD field office.

States and ESC formula cities and counties that fail to comply with this provision are ineligible to receive assistance under Title IV of the McKinney Act.

It should be emphasized that it was not Congress' intent that this requirement delay the CHAP submission process. The House Committee on Banking, Finance and Urban Affairs reported:

The exchange of the CHAP is for informational purposes only. The Committee does not intend this requirement to delay the submission of a CHAP or require each government entity to approve one another's CHAP before submission to HUD. (H. Rep. No. 718, *supra*, at 33).

Consistent with this guidance, copies of the CHAP should be submitted to the applicable State or ESC formula grantees at the same time the CHAP is forwarded to HUD for review and approval. To monitor compliance with this provision, each State or ESC formula grantee must include a certification with its CHAP submission to HUD that it has transmitted the appropriate CHAP information copies.

### 6. Contact Person or Agency

Each CHAP must identify a contact person or agency for the jurisdiction involved, including an address and telephone number. The purpose of this requirement is to provide a single point of reference for information concerning the contents of the jurisdiction's CHAP.

### 7. Coordination

The 1988 Amendments provide for a cooperative Federal-State homeless assistance information effort. States are authorized to designate a State agency or contact person to coordinate homeless assistance efforts in the State. If they do so, each Federal agency that provides assistance under the McKinney Act is required to provide the designated State agency or contact person with "such information as may be appropriate" to facilitate the coordination of homeless assistance efforts. The Conference Report on the 1988 Amendments limits this exchange of information to "appropriate program information." (H. Rep. No. 1089, *supra* at 71.)

It should be noted that HUD will not automatically construe the designated contact person or agency under paragraph 6 to be the person or agency that will assume coordination responsibilities. The State must separately specify the person or agency it selects for this purpose, if it chooses to make any designation at all.

The contact under paragraph 6 is only required to provide informational

services on the CHAP, whereas the entity under this paragraph is required to assume greater responsibilities by coordinating homeless assistance efforts in the State. While the contact entity may also serve as the coordinating entity under this paragraph by assuming the additional coordination functions, it is not necessary that the same entity fulfill both functions.

It should also be noted that the coordination function under this paragraph is available only to States. ESC formula cities and counties are not eligible to participate in it.

### 8. Adult Education for the Homeless Program

In addition to the 1988 Amendments, an amendment to section 702 of the McKinney Act was contained in omnibus education legislation, the Augustus F. Hawkins-Robert B. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100-217. Section 6001 of this Act removed the requirement that the Secretary of Education distribute funds for the Adult Education for the Homeless Program based upon CHAP data. It converted the program from a formula program to a discretionary program, and required the Secretary to consider the number of homeless adults receiving literacy and basic skills training in each project as a factor in making discretionary awards. Plans to provide for the educational needs of homeless adults are submitted in each State's adult education plan submitted directly to the Secretary of Education every four years. States may continue to include State Education Agencies in their CHAP process at the State's option, although CHAP data are not required for formula purposes.

## IV. CHAP Requirements

### 1. Definitions

For purposes of paragraph 2.A. of this section:

(a) The term *State* means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(b) The term *ESG formula city or county* or *ESG formula grantee* means a metropolitan city or an urban county, as defined in sections 102(a) (4) and (6), respectively, of the Housing and Community Development Act of 1974 (the 1974 Act), that is eligible for a formula allocation under the Emergency



Shelter Grants program under 24 CFR 576.43. The eligibility of these grantees under 24 CFR 576.43(b) is generally limited to those whose allocations, based on their prior year's CDBG allocations under the 1974 Act, exceed .05 percent of the current year's Emergency Shelter Grants appropriation.

Appendix A contains a complete list of the jurisdictions that must have an approved CHAP, if assistance under Title IV of the McKinney Act is to be made available to them or within their jurisdiction.

## 2. Requirement for Plan

### A. Prohibition of Assistance—In General

HUD may not make assistance available under any of the provisions of Title IV of the McKinney Act to, or within the jurisdiction of, a State or an ESG formula city or county, unless:

(i) The jurisdiction annually submits and receives HUD approval of a CHAP.

(ii) At the same time that it submits its CHAP to HUD:

(a) A State submits an information copy of its CHAP to each ESG formula city and county located in the State.

(b) Each ESG formula city or county submits an information copy of its CHAP to the State in which it is located.

### B. Assistance to States and ESG Formula Cities and Counties

Each State or ESG formula city or county that applies for assistance under any of the homeless assistance programs contained in Title IV of the McKinney Act must have a HUD-approved CHAP. States and ESG formula cities and counties must have an approved CHAP in the following circumstances in Title IV's programs:

#### Emergency Shelter Grants

—States receiving formula allocations under § 576.43 and reallocations under §§ 576.61, 576.63, and 576.67.

—ESG formula cities and counties receiving formula allocations or assistance from a State under § 576.43, and reallocations under §§ 576.63 and 576.67.

—Territories receiving allocations under § 576.45 and reallocations under §§ 576.65 and 576.67.

#### Transitional Housing and SAFAH

—States receiving a grant under either program.

—ESG formula cities and counties receiving a grant under either program.

#### Permanent Housing for the Handicapped Homeless

—States receiving a grant under the program.

### C. Recipients That Receive Amounts from Other Jurisdictions (other than HUD)

Title IV of the McKinney Act contains several instances in which the *applicant* and the *ultimate recipient* may be different. Thus:

—In the Emergency Shelter Grants program, States apply for assistance, but must distribute all amounts to units of general local government and/or (as added by the 1988 Amendments) to private nonprofit organizations, as they deem appropriate.

—In the Emergency Shelter Grants program, units of general local government—both those that receive funding from HUD or the State—may distribute amounts to nonprofit organizations.

—In the Permanent Housing element of the Supportive Housing Demonstration program, States apply for assistance, even though nonprofit organizations and (as added by the 1988 Amendments) PHAs carry out the assisted activities.

In each of these instances, the CHAP requirements apply to the *applicant* and *not the ultimate recipient*, since only the applicant has the right to seek funding under the statute and to enter into a grant agreement with the Department. Thus, depending on the applicant, the following types of jurisdictions must have approved CHAPs for each affected program:

#### Emergency Shelter Grants

—For units of general local government receiving amounts from the State, and for non-profit organizations receiving amounts either from the State or from a unit of general local government, there is no need to be concerned about the CHAP, since the State or the appropriate ESG formula city or county must have had an approved CHAP as a condition of funding availability.

#### Permanent Housing for the Handicapped Homeless

—For all project sponsors—nonprofit organizations or PHAs—the State must have the approved CHAP.

It should also be noted that if the applicant must have an approved CHAP to receive Title IV assistance, but it does not, it is irrelevant that the actual assisted activities will be carried out in a jurisdiction with a CHAP. For example, a State seeking funding under the Permanent Housing component of

the Supportive Housing Demonstration program may not compensate for its failure to have an approved CHAP by applying for funding for a nonprofit or PHA that wishes to carry out an assisted project within the jurisdiction of an ESG formula grantee that has an approved CHAP.

### D. Other Direct Assistance Recipients

As noted above, Subtitle A also prohibits the award of Title IV funds "within the jurisdiction" of entities that are subject to the CHAP requirements, but that do not have an approved CHAP. This could affect funding for the following entities that are eligible to apply for and receive Title IV funding directly from HUD:

—Units of general local government and other governmental entities receiving reallocated amounts in the Emergency Shelter Grants program.

—Nonprofit organizations receiving reallocated amounts in the Emergency Shelter Grants program.

—Units of general local government (other than ESG formula cities and counties) receiving grants in the Transitional Housing element of the Supportive Housing Demonstration and the SAFAH programs.

—Nonprofit organizations receiving grants in the Transitional Housing element of Supportive Housing Demonstration program and the SAFAH program.

—Public Housing Agencies (PHAs) receiving Section 8 Moderate Rehabilitation for SROs under Subtitle E of Title IV.

For each of these cases, the following types of jurisdictions must have approved CHAPs:

#### Emergency Shelter Grants

—For reallocations to States or units of general local government (other than ESG formula cities and counties), the State must have an approved CHAP.

—For reallocations to nonprofit organizations, the CHAP jurisdiction in which the proposed activities are to be located must have an approved CHAP. Thus, if the activities are to be located in an ESG formula city or county or Territory, the city, county, or Territory (as appropriate) must have the approved CHAP. If the proposed activities are not to be located in these jurisdictions, then the State must have the approved CHAP.

#### Transitional Housing and SAFAH

—For units of general local government (other than ESG formula cities and counties) receiving Transitional Housing or SAFAH

assistance, the State must have the approved CHAP.

—For nonprofit organizations receiving Transitional Housing or SAFAH assistance, special rules apply. If the proposed project is to be located in an ESG formula city or county, the city or county must have the approved CHAP. If, however, the city or county does not have an approved CHAP, assistance may be made available if the State has an approved CHAP.

If the project is to be located outside an ESG formula city or county, the State must have an approved CHAP.

—For governmental entities (other than units of general local government) receiving assistance under the Transitional Housing and SAFAH programs, the CHAP jurisdiction in which the project is to be located must have the approved CHAP. Thus, if the proposed project is to be located within the jurisdiction of an ESG formula city or county, the city or county (as appropriate) must have the approved CHAP. If the proposed activities are not to be located in these jurisdictions, the State must have the approved CHAP.

**Section 8 Moderate Rehabilitation for SRO units**

For PHAs applying for Section 8 SRO Moderate Rehabilitation assistance, the jurisdiction within which the project is to be located determines the CHAP requirement: if the project is to be within the jurisdiction of an ESG formula city or county, the city or county must have the approved CHAP; otherwise, the State.

**E. Summary Chart**

Appendix C to this Notice contains a chart illustrating the various CHAP requirements discussed in paragraphs 2.B. through D. of this section for each of the housing assistance programs of Title IV of the McKinney Act.

### F. Indian Tribes

Tribes are eligible applicants under the Transitional Housing component of the Supportive Housing Demonstration program and the program of Supplemental Assistance for Facilities to Assist the Homeless. For purposes of assistance under these programs, HUD uses the definition of Indian tribes for the CDBG program contained in section 102(a)(17) of the 1974 Act: Any Indian tribe, band, group, and nation, including Alaska Indians, Aleuts, and Eskimos, and any Alaskan Native Village, of the United States, which is considered an eligible recipient under the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638) or under

chapter 67 of title 31, United States Code.

As noted above, the CHAP's funding prohibition applies only to assistance provided to, or within the jurisdiction of, States or ESG formula grantees. Because of the unique, sovereign status of these tribes, they are properly considered outside the jurisdiction of these governments. Thus, Indian tribes may apply for and receive assistance within their jurisdiction without submission and approval of a CHAP, or the submission of a certification of consistency of proposed activities with the CHAP. However, it is worth noting that if an Indian tribe seeks to carry out homeless assistance activities outside of its jurisdiction, it would be required to obtain a certification that its proposed activities are consistent with the CHAP for the jurisdiction in which the activities are to be located.

## 2. CHAP Content

CHAPs must contain the following elements:

### A. Need for Assistance

A statement describing the need, or lack thereof, for assistance provided under each of the programs included in Subtitles B through E of Title IV of the McKinney Act: i.e., the need for assistance provided by the Emergency Shelter Grants program; both the Transitional and Permanent Housing components of the Supportive Housing Demonstration program; the SAFAH program; and the Section 8 SRO Moderate Rehabilitation authority.

### B. Inventory of Facilities and Services

A brief inventory of facilities and services that assist the homeless population in the jurisdiction.

### C. Needs/resources Strategy

A strategy:

(i) To match the needs of the homeless population with available facilities and services in the jurisdiction; and

(ii) To recognize the special needs of the various types of homeless individuals, particularly families with children, the elderly, the mentally ill, and veterans.

### D. Relation Between McKinney Act Assistance and Available Resources

An explanation of how assistance under each of the authorities referred to above in Subtitles B through E of Title IV of the Act will complement and enhance the available facilities and services.

### E. Contact Point

An identification of the appropriate person or agency to contact for information on the contents of the CHAP, including their address and telephone number.

### F. Information Copies

In the case of a State, a certification that it transmitted an information copy of its CHAP to each ESG formula city or county within its jurisdiction at the same time that it submitted its CHAP to HUD. In the case of an ESG formula city or county, a certification that it transmitted an information copy of its CHAP to the State in which it is located at the same time that it submitted its CHAP to HUD.

### G. Drug- and Alcohol-Free Facilities Assurance

An assurance that each grantee, recipient, and project sponsor (as appropriate) will administer, in good faith, a policy designed to ensure that the homeless facility is free from the illegal use, possession, or distribution of drugs or alcohol by its beneficiaries.

### H. Coordination

If a State designates an agency or contact person to coordinate homeless assistance efforts in the State, an identification of the person or agency, along with the appropriate address and telephone number.

### I. Department of Labor Job Training Demonstrations

In the case of States, a description of how the jurisdiction will coordinate job training demonstration projects for the homeless under Subtitle C of Title VII of the McKinney Act with other services for homeless individuals assisted under the Act.

In preparing the required information, jurisdictions should be aware that failure to address each of elements A. through G. of the CHAP (including the need for, and effect of, assistance under elements A. and D., above, for each of Title IV's programs) will result in disapproval of the CHAP. In addition, failure to indicate a need for assistance under any of Subtitles B through E will result in disapproval of a subsequent application for assistance under any such Subtitle on grounds that the

\* States are defined for purposes of the Department of Labor's authority under Subtitle C of Title VII of the 1987 McKinney Act, as amended, as the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.



application is inconsistent with the CHAP.

Element I. pertains to the Department of Labor's authority under Title VII of the McKinney Act. This element must be included in the CHAP, but failure to include it will not be grounds for HUD disapproval of an otherwise approvable CHAP. States should note, however, that failure to include this element—while not affecting their eligibility for Title IV assistance—could affect their participation under the Title VII program. Questions regarding Element I. should be addressed to the individual listed at the beginning of this Notice as a contact point for the Department of Labor.

In developing CHAPs, it should be noted that section 103 of the Act defines "homeless" or "homeless individual" to include:

- (a) An individual who lacks a fixed, regular, and adequate nighttime residence; and
  - (b) an individual who has a primary nighttime residence that is—
    - (i) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
    - (ii) An institution that provides a temporary residence for individuals intended to be institutionalized; or
    - (iii) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.
- The term does not include a prison inmate.

For the Permanent Housing component of the Supportive Housing Demonstration, the following definition of "handicapped homeless person" is used:

A handicapped individual who is a homeless individual within the meaning of section 103, is at risk of becoming a homeless individual or is a handicapped individual who has been a resident of transitional housing carried out pursuant to provisions made effective by section 101(g) of Public Law 99-500 or 99-591 (the initial Transitional Housing Demonstration).

In addition, the scope of the Emergency Shelter Grants program has been broadened by the 1988 Amendments to include homelessness prevention as an eligible program activity. Consequently, in developing their CHAPs, CHAP jurisdictions should be aware of this new ESG-eligible activity for this new "at risk" population. The reader is advised to refer to Appendix B of this Notice for a summary of this legislative amendment.

Section 401 of the McKinney Act requires CHAPs to cover the "jurisdiction" of States and ESG formula cities and counties, and requires the CHAP to contain information for "that jurisdiction". Since the Act does not limit the term "jurisdiction", and cities and counties are located within the "jurisdiction" of the States, the State CHAP must address the CHAP elements for all its jurisdictions, including ESG formula cities and counties.

### 3. Plan Submission

CHAPs must be forwarded to the responsible HUD Field Office, and be received or postmarked, no later than February 13, 1989. Thereafter, CHAPs must be submitted by October 1 of each year.

### 4. Plan Review and Approval

HUD will process and review each CHAP as expeditiously as possible, and will approve the CHAP, unless HUD determines that is plainly does not satisfy the required CHAP content, described above. HUD will provide written notification to each jurisdiction that submits a CHAP of its approval, within 30 days after its receipt by HUD.

If a CHAP is disapproved, HUD will notify the jurisdiction of the disapproval, within 15 days of the determination to disapprove. The notification will inform the jurisdiction of the reasons for the disapproval, as well as the steps that need to be taken to make the CHAP acceptable. If HUD fails to notify the jurisdiction that its CHAP has been disapproved within the 15-day period, the CHAP will be deemed approved.

Since the 15-day period for HUD to notify a jurisdiction of disapproval of its CHAP is triggered by HUD's decision to disapprove—an event that, unbeknownst to the jurisdiction, may occur early or late in the 30-day review period—a jurisdiction receiving no notice may assume that its CHAP has been approved 45 days after HUD's receipt of the jurisdiction's CHAP.

HUD will permit amendments to, or the resubmission of, any CHAP, including one that has been disapproved. The procedures and time periods set forth in this section for the review and approval or disapproval of the initial submission of CHAPs also govern subsequent amendments to a CHAP, or its resubmission.

It should be noted, however, that the requirements of individual programs authorized by the McKinney Act may impose time limits that affect when approved CHAPs must be in place. These requirements may, in turn, cause a jurisdiction to have to amend or

resubmit its CHAP. Additional information on these requirements may be found in the Federal Register documents implementing each of the Title IV programs.

### 5. Performance Reports

Each jurisdiction that has an approved CHAP must review annually the progress it has made in carrying out its CHAP, and must report annually the results of its review to HUD. Reports will be due not later than May 31 of each year, and must cover the period between that addressed in the last report and April 30 of the year in question.

The report that was to have been due by January 31, 1989 will be due instead on May 31, 1989, and must cover the entire period from the date of the jurisdiction's first CHAP approval pursuant to the August 14, 1987 CHAP Notice through April 30, 1989. HUD will review these reports, and make such recommendations as may be appropriate.

In addition, each jurisdiction that has an approved CHAP must provide a substantive response to recommendations made by HUD on its annual performance report, provided that HUD's recommendations are received by the jurisdiction at least 60 days before the beginning of the fiscal year (i.e. by July 31). Assistance under Title IV of the McKinney Act may not be made available to, or within the jurisdiction of, any State or ESG formula grantee that fails to review and report its progress to HUD, or that fails to make a substantive response to timely HUD recommendations on the performance report, as described above.

### 6. Assistance Applications

Any application for assistance under Title IV of the McKinney Act must contain, or be accompanied by, a CHAP certification of consistency. This certification must be provided by the public official responsible for submitting the CHAP for the jurisdiction in which the proposed activities are to be located. The certification is intended to inform HUD that the applicant's proposed activities are consistent with the jurisdiction's CHAP.

The regulations and Notices governing each of Title IV's programs should be consulted for specific certification requirements.

### 7. Waivers

The Secretary of HUD may waive any requirement of this Notice that is not required by law, whenever it is determined that undue hardship will

result from applying the requirement, or where application of the requirement would adversely affect the purposes of Subtitle A of Title IV of the McKinney Act.

### V. Other Matters

#### Environmental Requirements

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50, which implement section 102(2)(C) of the

National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection during regular business hours in the Office of the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

#### Information Collection Requirements

The collection of information

requirements contained in this rule have been submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980 and have been assigned OMB control number 2506-0093. The following sections of the Notice have been determined by the Department to contain collection of information requirements. Information on these requirements is provided as follows:

TABULATION OF ANNUAL REPORTING BURDEN NOTICE—COMPREHENSIVE HOMELESS ASSISTANCE PLAN

Description of information collection	Section of notice affected	Number of respondents	Number of responses per respondent	Total annual responses	Hours per response	Total hours
Annual submission of CHAPs	III.1.	375	1	375	31.00	11,625.00
Sharing of information copies of CHAPs	III.5.	375	1	375	.75	281.25
Assurance of drug-free homeless facility	III.4.	375	1	375	.25	93.75
Annual performance report	III.2.	375	1	375	16.00	6,000.00
Substantive response to HUD recommendations on annual performance report	III.2.	125	1	125	3.00	375.00
Total burden hours						18,375.00

### Federalism Impact

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the provisions of this Notice have "federalism implications" within the meaning of the Order, and, thus, meet the Order's threshold of applicability. Each of the 1988 Amendments to the CHAP imposes additional requirements on State and local governments and, therefore, has substantial, direct effects on the States and their political subdivisions.

It is not, however, necessary to assess these federalism implications, since the Notice simply implements statutory directives, about which the Department has little or no discretion. For this reason, the General Counsel has determined that preparation of a Federalism Assessment under section 6(b) of the Order is not warranted.

### Family Impact

The General Counsel, as the Designated Official for Executive Order 12806, *the Family*, has determined that the provisions of this Notice do not have the potential for significant impact on family formation, maintenance, and general well-being within the meaning of the Order. The CHAP serves primarily as a State and local tool for assessing homeless need and coordinating available resources, including assistance under Title IV of the

McKinney Act. Any effect that the 1988 Amendments may have on families would be purely hypothetical.

In addition, the Notice implements statutory mandates that leave little or no discretion for the Department. In this circumstance, it is not necessary to conduct a detailed assessment of the family impact occasioned by the 1988 Amendments to the CHAP authority.

### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 14.178 and 14.231.

### List of Subjects

Grant programs: Housing and community development, Emergency shelter grants, Reporting and recordkeeping requirements.

Authority: Sec. 485, Stewart B. McKinney Homeless Assistance Amendments Act of 1988 (Pub. L. 100-628, approved November 7, 1988); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: December 16, 1988.

Jack R. Stokvis,  
Assistant Secretary for Community Planning and Development.

### Appendix A—Jurisdictions Subject to the Plan

#### I. All States and the Commonwealth of Puerto Rico

#### II. Territories:

Virgin Islands  
Guam  
American Samoa

Northern Mariana Islands  
Trust Territory of the Pacific Islands (Palau)

### III. ESG Formula Metropolitan Cities and Urban Counties:

State and Community  
Alabama: Birmingham, Huntsville, Mobile, Montgomery, and Jefferson County.  
Alaska: Anchorage.  
Arizona: Mesa, Phoenix, Tucson, Maricopa County, and Pima County.  
Arkansas: Little Rock.  
California: Anaheim, Berkeley, Compton, El Monte, Fresno, Glendale, Inglewood, Long Beach, Los Angeles, Oakland, Oxnard, Pasadena, Pomona, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Jose, Santa Ana, Stockton, Alameda County, Contra Costa County, Fresno County, Kern County, Los Angeles County, Marin County, Orange County, Riverside County, Sacramento County, San Bernardino County, San Diego County, San Joaquin County, San Mateo County, Santa Clara County, Sonoma County, and Ventura County.  
Colorado: Colorado Springs, Denver, and Adams County.  
Connecticut: Bridgeport, Hartford, New Britain, New Haven, and Waterbury.  
Delaware: Wilmington, and New Castle County.  
District of Columbia: Washington.  
Florida: Fort Lauderdale, Hialeah, Jacksonville, Miami, Miami Beach, Orlando, St. Petersburg, Tallahassee, Tampa, Brevard County, Broward County, Dade County, Escambia County, Hillsborough County, Orange County, Palm Beach County, Pasco County, Pinellas County, Polk County, Seminole County, and Volusia County.

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Georgia: Albany, Atlanta, Augusta, Columbus, Macon, Savannah, Cobb County, De Kalb County, and Fulton County.  
Hawaii: Honolulu.  
Illinois: Chicago, Cicero, East St Louis, Evanston, Oak Park, Peoria, Rockford, Cook County, DuPage County, Lake County, Madison County, St Clair County, and Will County.

Indiana: Evansville, Fort Wayne, Gary, Hammond, Indianapolis, South Bend, Terre Haute, and Lake County.  
Iowa: Des Moines, and Sioux City.  
Kansas: Kansas City, Topeka, and Wichita.  
Kentucky: Covington, Lexington-Fayette, Louisville, and Jefferson County.  
Louisiana: Baton Rouge, New Orleans, Shreveport, and Jefferson Parish.  
Maine: Portland.

Maryland: Baltimore, Anne Arundel County, Baltimore County, Montgomery County, and Prince Georges County.  
Massachusetts: Boston, Cambridge, Fall River, Lawrence, Lowell, Lynn, Medford, New Bedford, Newton, Quincy, Somerville, Springfield, and Worcester.

Michigan: Dearborn, Detroit, Flint, Grand Rapids, Kalamazoo, Pontiac, Saginaw, Genesee County, Oakland County, and Wayne County.

Minnesota: Duluth, Minneapolis, St Paul, and Hennepin County.

Mississippi: Jackson.  
Missouri: Kansas City, St Joseph, St Louis, and St Louis County.

Nebraska: Omaha.  
Nevada: Las Vegas, and Clark County.

New Hampshire: Manchester.  
New Jersey: Atlantic City, Bayonne, Camden, East Orange, Elizabeth, Jersey City, Newark, Paterson, Trenton, Bergen County, Burlington County, Camden County, Essex County, Gloucester County, Hudson County, Middlesex County, Monmouth County, Morris County, Ocean County, and Union County.

New Mexico: Albuquerque.  
New York: Albany, Babylon Town, Binghamton, Buffalo, Islip Town, Mount Vernon, New Rochelle, New York, Niagara Falls, Rochester, Schenectady, Syracuse, Tonawanda Town, Troy, Utica, Yonkers, Erie County, Monroe County, Nassau County, Onondaga County, Orange County, Rockland County, Suffolk County, and Westchester County.

North Carolina: Charlotte, Greensboro, Raleigh, and Winston Salem.

Ohio: Akron, Canton, Cincinnati, Cleveland, Columbus, Dayton, Lakewood, Springfield, Toledo, Youngstown, Cuyahoga County, Franklin County, Hamilton County, Montgomery County, and Stark County.

Oklahoma: Oklahoma City, and Tulsa.  
Oregon: Portland, Clackamas County, and Washington County.

Pennsylvania: Allentown, Altoona, Chester, Erie, Harrisburg, Johnstown, Lancaster, Philadelphia, Pittsburgh, Reading, Scranton, Upper Darby Township, Wilkes-Barre, York, Allegheny County, Beaver County, Berks County, Bucks County, Chester County, Delaware County, Lancaster County, Luzerne County, Montgomery County, Washington County, Westmoreland County, and York County.

Rhode Island: Pawtucket, Providence, and Woonsocket.

South Carolina: Greenville County.  
Tennessee: Chattanooga, Knoxville, Memphis, and Nashville-Davidson.  
Texas: Amarillo, Austin, Beaumont, Brownsville, Corpus Christi, Dallas, El Paso, Fort Worth, Houston, Laredo, Lubbock, McAllen, San Antonio, Waco, Bexar County, Harris County, Hidalgo County, and Tarrant County.

Utah: Provo, Salt Lake City, and Salt Lake County.

Virginia: Newport News, Norfolk, Portsmouth, Richmond, Roanoke, Virginia Beach, Arlington County, and Fairfax County.

Washington: Seattle, Spokane, Tacoma, Clark County, King County, Pierce County, and Snohomish County.

West Virginia: Charleston, and Huntington.  
Wisconsin: Madison, Milwaukee, and Racine.

Puerto Rico: Aguadilla, Arecibo, Bayamon Municipio, Caguas Municipio, Carolina Municipio, Guaynabo Municipio, Humacao Municipio, Mayaguez Municipio, Ponce Municipio, San Juan Municipio, Toa Baja Municipio, and Trujillo Alto Mun.

**Appendix B—Highlights of Amendments to Subtitles B Through E of Title IV of the Stewart B. McKinney Homeless Assistance Act Made by the Stewart B. McKinney Homeless Assistance Amendments Act of 1988**

Note: The reader is advised that the following represents only highlights of the legislative amendments made by the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, which may be helpful for purposes of preparing the CHAP submission for fiscal year 1989. However, it is important that the full text of the Notices being published to implement the 1988 Amendments be consulted for a complete description of how the Department intends to implement these legislative requirements.

#### Title IV—Housing Assistance

##### Subtitle B—Emergency Shelter Grants

1. Sec. 421, *Distribution of Assistance by States to Private Nonprofit Organizations*. Permits States (in addition to units of general local government) to distribute amounts directly to private nonprofit organizations, if the unit of general local government certifies that it approves of the project.

2. Sec. 422, *Essential Services*. —Increases the base percentage of assistance that may be used for essential services from 15 to 20 percent.

—Measures the 20 percent against "the aggregate amount of all assistance to a State or local government" rather than against "the amount of any assistance to a local government," as provided by current law. In the case of States, the 20 percent limitation on the use of funds to provide essential services will be applied against the overall State grant rather than individually against amounts that units of general local government and nonprofit organizations receive from the State.

3. Sec. 423, *Homelessness Prevention as an Eligible Activity*. Adds homelessness prevention as an eligible ESG activity. Homelessness prevention involving short-term financial assistance to individuals or

families that have received eviction notices or notices of termination of utility services may qualify for assistance only if:

—The individual or family is unable to make the required payments due to a sudden reduction in income;  
—The assistance is necessary to avoid eviction or termination of services;  
—There is a reasonable prospect that the family will be able to resume payments within three months; and

—The assistance provides:  
A new homeless prevention activity; or  
A quantifiable increase in the level of homeless prevention activities already being provided.

This category of eligible activity is treated as "essential services" and, therefore, is included under the 20 percent limitation on the use of grant amounts for these services. (See paragraph 2, above.)

#### 4. Sec. 424, *Required Use of Building as Shelter*.

In the case of assisted essential services or operating costs (under sections 414(a) (2) or (3), respectively, of the 1987 McKinney Act) requires a recipient to certify it will provide services or shelter to the homeless for the period during which the assistance is provided, without regard to a particular site or structure, as long as the same general population is served.

#### Subtitle C—Supportive Housing

5. Sec. 441, *Availability of Operating and Technical Assistance for New Structures*. Provides that operating and technical assistance may be made available in connection with existing or newly constructed dwellings. Redefines "project" to provide that operating and technical assistance may be made available independently of assisted acquisition or rehabilitation.

6. Sec. 442, *Project Sponsor*. Adds PHAs as eligible project sponsors under the permanent housing program.

7. Sec. 443, *Maximum Period of Residence in Transitional Housing*. Amends the purpose of transitional housing as facilitating the movement of homeless individuals to independent living within 24 months or a longer period determined necessary by HUD, instead of "within a reasonable amount of time, as determined by the Secretary."

8. Sec. 444, *Definition of Permanent Housing*. Authorizes HUD to waive the 8-person limitation on the number of residents that may reside in a permanent housing project, if the applicant demonstrates that (i) local market conditions dictate development of a larger project and (ii) a larger development will achieve the neighborhood integration objectives of the program within the context of the affected community.

9. Sec. 445, *Use of Advances to Repay Debt*. Provides that advances for the cost of acquisition or rehabilitation may be used for the repayment of any outstanding debt on a loan made to purchase an existing structure for use as supportive housing, but only if the structure was not used as supportive housing before receipt of assistance. This amendment applies to notifications of awards on or after November 1, 1987.

10. Sec. 446, *Limit on Grants*. Places \$200,000 cap on the amount of a supportive housing grant for moderate rehabilitation. (See item 13 for authority to increase the limitation for high cost areas.)

11. Sec. 447, *Eligible Activities*. —Makes operating costs eligible for assistance under the permanent housing program, not to exceed 50% of the annual operating costs for the first year and 25% for the second year.

—Permits supportive housing recipients to receive both an advance for acquisition or rehabilitation and a moderate rehabilitation grant.

12. Sec. 448, *Employment Assistance*. Authorizes grants for employment assistance programs for residents of transitional housing. Adds the extent to which the project contains such a program to the selection criteria.

#### 13. Sec. 449, *Limits on Advances and Grants*.

—Authorizes the Secretary to increase from \$200,000 to \$400,000 the limit on advances for acquisition or rehabilitation and moderate rehabilitation in areas that HUD finds have high acquisition and rehabilitation costs.

—Authorizes advances for new construction in a limited situation, designed, according to the Conference Report, to permit funding of a model supportive housing project on land donated by the University of California at Berkeley.

#### 14. Sec. 450, *Site Control*.

Contains the following provisions regarding ownership or control of the project site by supportive housing applicants:

—Requires applications for supportive housing to include reasonable assurances that the applicant will own or control the site within six months for notification of an award.

—Authorizes an applicant to obtain ownership or control of a suitable site different from the site specified in the application.

—Requires recapture and reallocation of the grant award, if the applicant fails to obtain ownership or control within one year from notification of the award.

—Applies to notifications on or after November 1, 1987.

Specifies as a selection criterion the extent to which the applicant or project sponsor has control of the site.

15. Sec. 451, *Flood Plain Restrictions*. Prohibits the flood protection standards that apply to supportive housing from being more restrictive than the standards applicable under Executive Order 11988 (May 24, 1977) to the other programs under title IV.

#### 16. Sec. 452, *Matching Requirements*.

—Requires recipients of supportive housing assistance under section 423(a) (1) and (2) to match it with an equal amount of non-Federal funds. Requires each State submitting an application for permanent housing for handicapped homeless persons to certify it will supplement the amount of assistance under that section with an equal amount of non-Federal funds.

—Defines non-Federal funds to include salaries paid to staff, salaries paid to residents under an employment assistance program, and the value of volunteer time and services, in addition to sources permitted under current law.

#### Subtitle D—Supplemental Assistance for Facilities to Assist the Homeless

##### 17. Sec. 463, *Site Control*.

Contains the following provisions regarding ownership or control of the project site by SAFAH applicants:

—Requires applications for SAFAH funding to include reasonable assurances that the applicant will own or control the site within six months from notification of an award.

—Authorizes an applicant to obtain ownership or control of a suitable site

different from the site specified in the application.

—Requires recapture and reallocation if an applicant fails to obtain ownership or control within one year from notification of the award.

—Applies to notifications on or after November 1, 1987.

#### Subtitle E—Miscellaneous Provisions

##### 18. Sec. 461, *Section 8 Assistance for Single Room Occupancy Dwellings*.

—Permits assistance under the program to be used for the moderate rehabilitation of efficiency units, if the owner agrees to pay the additional costs of rehabilitating and operating the units.

—Defines major spaces that must be protected by a water sprinkler system to mean hallways, large common areas, and other areas specified in local fire, building, or safety codes.

—Requires HUD to increase annually the current \$14,000 per-unit cost limitation by the amount necessary to take into account increases in construction costs during the previous year. The first increase is effective with respect to assistance provided on or after October 1, 1988.

##### 19. Sec. 462, *Administrative Provisions (Assumption of Environmental Review)*.

Makes the provisions of, and regulations and procedures applicable under, section 104(g) of the Housing and Community Development Act of 1974 applicable to assistance and projects under title IV of the McKinney Act. Section 104(g) provides for assumption of environmental review responsibilities by recipients. The reader should refer to the Notices being published for each of the McKinney homeless programs for a complete discussion of how these environmental standards will be implemented.

#### Appendix C—Jurisdictions That Must Have a HUD-Approved CHAP

Grantee/recipient	Entity that must have approved CHAP
Emergency Shelter Grants Program:	
State—formula allocations under § 576.43 and reallocations under §§ 576.61, 576.63, and 576.67	State.
ESG Formula City—formula allocations under § 576.43 or assistance from a State under § 576.43, and reallocations under §§ 576.63 and 576.67.	ESG Formula City.
ESG Formula County—formula allocations under § 576.43 or assistance from a State under § 576.43, and reallocations under §§ 576.63 and 576.67.	ESG Formula County.
Territory—allocations under § 576.45 and reallocations under §§ 576.65 and 576.67	Territory.
Unit of General Local Government (other than an ESG Formula City or County)—distributions from a State under § 576.55.	State.
Unit of general local government that is participating in an urban county that is an ESG Formula County—distributions from a State under § 576.55 or reallocations under § 576.67.	ESG Formula County.
Nonprofit Organization—distributions from a State (added by 1988 McKinney Act).....	State.
Nonprofit Organization—distributions from unit of general local government.....	If amounts distributed by an ESG Formula City or County, the City or County; otherwise, the State.
Unit of General Local Government (other than an ESG formula city or county)—reallocations under § 576.67	State.
Any unit of general local government that proposes to use all or a portion of its grant assistance for a facility located outside of its jurisdiction, whether the grant is received directly as a formula allocation (or as a distribution thereof), or as a reallocation.	If the proposed activities are to be located in: —An ESG formula city or county, then the city or county; —Otherwise, the State.
Nonprofit Organization—reallocations under § 576.67	If the proposed activities are to be located in: —A Territory, the Territory; —An ESG Formula City or County, the City or County; —Otherwise, the State.
Transitional housing component of the supportive housing demonstration and the Supplemental assistance for facilities to assist the Homeless Program:	
State.....	State.
ESG Formula City or County.....	ESG Formula City or County.



Grantee/recipient	Entity that must have approved CHAP
Unit of General Local Government (other than an ESG Formula City or County) .....	State.
Governmental Entity (other than a unit of general local government) .....	If project is to be located within an ESG Formula City or County, the City or County; otherwise, the State.
Tribe .....	No CHAP Requirement.
Non-Profit Organization .....	If the project is to be located within an ESG Formula City or County, the City or County; if the City or County does not have an approved CHAP, the State must have one. If the project is to be located outside an ESG Formula City or County, the State.
Permanent housing component of the supportive housing demonstration:	
State .....	State.
Section 8 Housing Assistance Payments Program for the moderate rehabilitation of single room occupancy (SRO) units:	
Public Housing Agencies (PHAs) .....	If the project is located within an ESG Formula City or County, the City or County. If outside an ESG Formula City or County, the State.

[FR Doc. 88-29791 Filed 12-27-88; 8:45 am]  
BILLING CODE 4210-32-M

Wednesday  
December 28, 1988

## Part V

## Department of Justice

Office of Justice Programs  
Office of Juvenile Justice and  
Delinquency Prevention

Missing and Exploited Children's  
Assistance Program; National Resource  
Center and Clearinghouse; Notice of  
Solicitation for Applications

federal register



## DEPARTMENT OF JUSTICE

## Office of Justice Programs

## Office of Juvenile Justice and Delinquency Prevention

## Missing and Exploited Children's Assistance Program; National Resource Center and Clearinghouse

**AGENCY:** Office of Juvenile Justice and Delinquency Prevention, Justice.

**ACTION:** Notice of issuance of a solicitation for applications to continue the provision of the national resource center and clearinghouse, technical assistance, training and associated services concerning missing and exploited children.

**SUMMARY:** The Office of Juvenile Justice and Delinquency Prevention (OJJDP) pursuant to section 404(b) of the Missing Children's Assistance Act, title IV of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. 5601 *et seq.*, as amended by the Juvenile Justice and Delinquency Prevention Amendments of 1988, subtitle F of title VII of Pub. L. 100-690, November 18, 1988, requires the Administrator of OJJDP, through grants or contracts, to support, develop, and implement programs that will coordinate and facilitate activities that provide technical assistance and training that will be of assistance to parents, legal guardians, state, local and nonprofit agencies with respect to those issues associated with missing and exploited children as defined by title IV.

This solicitation will support the continuation of a national toll-free hotline and a national resource center and clearinghouse that will provide information, technical assistance and training to state and local governments, public and private nonprofit agencies and individuals on issues related to missing and exploited children.

This solicitation is to continue the support of a national resource center and clearinghouse function supported by OJJDP since 1984.

The award will be made for a project period of 3 years. One cooperative agreement will be awarded with an initial budget period of 12 months. Up to \$1,875,000 will be allocated for the initial award.

**FOR FURTHER INFORMATION CONTACT:** Robert O. Heck, Program Manager, Special Emphasis Division, OJJDP, 202/724-5914, 633 Indiana Ave. NW., Washington, DC 20531.

**SUPPLEMENTARY INFORMATION:**

- I. Introduction and Background
- II. Program Objectives

- III. Program Strategy
- IV. Dollar Amount and Duration
- V. Eligibility Requirements
- VI. Application Requirements
- VII. Criteria for Applicant Selection
- VIII. Submission Requirements
- IX. Civil Rights Compliance

**I. Introduction and Background**

The Administrator of OJJDP awarded a grant, with discretionary funds, to The National Center for Missing and Exploited Children (NCMEC) on April 1, 1984. Title IV of the JJDP Act was enacted by Congress on October 12, 1984. The original award was to establish a national resource center and clearinghouse designed to provide technical assistance to State and local governments, individuals, parents, and other agencies in locating and recovering missing children; to coordinate programs in the field that focus on reuniting missing children with their lawful custodians; to develop, publish, and disseminate instructive materials about programs, techniques, and services responsive to missing children issues; and to provide technical assistance to law enforcement agencies, State and local government agencies, individuals, and other agencies addressing missing children issues relative to prevention, investigation, reunification, and treatment in missing and exploited children cases.

This solicitation conforms to the requirements of the 1988 Title IV amendments that require OJJDP to solicit competition for the continuance of the functions of a national resource center and clearinghouse.

**II. Program Objectives**

A. Establish and operate a 24-hour national toll-free telephone line by which individuals may report information regarding the location of any missing child, or other child 13 years of age or younger, whose whereabouts are unknown to such child's legal custodian, and request information pertaining to procedures necessary to reunite the child with the child's legal custodian.

B. Establish and operate a national resource center and clearinghouse designed:

1. To provide information to State and local governments, public and private nonprofit agencies, and individuals regarding:
  - a. Free or low cost legal, restaurant, lodging, and transportation services that are available for the benefit of missing children and their families;
  - b. The existence and nature of programs being carried out by Federal Agencies to assist missing children and their families; and

c. The lawful use of school records and birth certificates to identify and locate missing children.

2. To provide technical assistance and training to State and local governments including law enforcement and other appropriate entities in:

- a. Investigating, reporting, locating, recovering, and facilitating the reuniting of missing children with their families and/or lawful custodians;
- b. Parental kidnapping cases;
- c. National and/or regional missing children poster distribution;
- d. Developing and distributing information and training publications relevant to missing, abducted, and exploited children's issues; and
- e. Operation and information system development.

3. To provide technical assistance and training to private nonprofit agencies, individuals and juvenile justice and other youth service professionals in:

- a. Assisting in the reporting, searching, locating, recovering, and facilitating the reuniting of missing children with their families and/or lawful custodians; and
- b. Parental kidnapping cases;
- c. National and/or regional missing children poster distribution; and
- d. Developing and distributing information and training publications relevant to missing, abducted and exploited children's issues.

4. To coordinate public and private programs that locate, recover or reunite missing children with their legal custodians.

5. To disseminate nationally information about innovative and model missing children's programs, services, and legislation at the State and local level.

6. To provide technical assistance and training to appropriate agencies and custodial parents in cases of national and international noncustodial parental kidnapping and coordinate efforts with the U.S. Department of State and Interpol.

7. To monitor ongoing missing child case work that has been undertaken in 8,000 missing child cases. Some of the tasks involved in this case work are as follows: technical assistance contacts with parents, law enforcement, private attorneys, prosecutors, F.B.I., Interpol, State Department and support groups; and case follow-up activities verifying full NCIC entries, review of recent sightings and providing relevant leads to cognizant agencies.

**III. Program Strategy**

This solicitation and resulting cooperative agreement is to ensure the

effective continuance by OJJDP of a national resource center and clearinghouse function for the training and technical assistance program to law enforcement agencies, State and local governments, entities of the criminal justice system, public and private nonprofit agencies, and individuals in the prevention, investigation, prosecution, and treatment of abducted, missing, and exploited children and in assisting, locating, and reuniting the missing children with their families or legal custodians.

The successful applicant will be required to demonstrate the experience and capability to provide professional program continuity for the national resource center and clearinghouse program. The successful applicant must demonstrate in detail the ability to establish the technical subject matter expertise that will provide knowledgeable and credible program continuation and program technology transfer to parents, criminal justice system professionals, and nonprofit and community agencies.

The Missing Children National Resource Center and Clearinghouse Program will require the successful applicant to provide and arrange for all necessary personnel, facilities, equipment, materials, and services required for the successful continuation of the existing program.

These include the following activities:

1. Provide to State and local governments, public and private nonprofit agencies, and individuals information regarding free or low cost legal, restaurant, lodging, and transportation services that are available for the benefit of missing children and their families;
2. Provide information to State and local governments, public and private nonprofit agencies, and individuals regarding the existence and nature of programs being carried out by Federal agencies to assist missing/exploited children and their families;
3. Provide technical assistance and training to criminal justice agencies, State and local governments, elements of the criminal justice and youth service system, public and private nonprofit agencies, organized missing/exploited children community organizations, and individuals in locating, recovering, and reuniting missing children with their family or legal custodian;
4. Provide for a national 24-hour toll-free telephone line by which individuals may report information regarding the location of any missing child, and request information pertaining to the necessary procedures to reunite such child with the child's legal custodian(s);

5. Provide information derived from the national 24-hour toll-free telephone line to appropriate entities;

6. Coordinate the operation of the 24-hour toll-free telephone line with the operation of the national communications system established to service runaways (under section 313 of the Runaway Homeless Youth Act 42 U.S.C. 5715);

7. Coordinate public and private programs which seek to locate, recover, or reunite missing children with their legal custodians;

8. Disseminate information and provide technical assistance and training about comprehensive, innovative, community, multi-agency missing children programs, services, and legislation;

9. Provide information to State and local governments, public and private nonprofit agencies and individuals to facilitate the lawful use of school records and birth certificates to identify and locate missing children; and

10. Provide technical assistance and training for State Clearinghouses established to assist in locating and recovering missing children.

**IV. Dollar Amount and Duration**

The award will be made for a project period for 3 years. One cooperative agreement will be awarded with an initial budget period of 12 months. Up to \$1,875,000 will be allocated for the initial award.

The noncompetitive continuation awards for the additional budget periods may be withheld for justifiable reasons. They include: (1) The results of the first year do not justify further program activity; (2) the recipient is delinquent in submitting required reports; (3) adequate grantor agency funds are not available to support the project; (4) the recipient has failed to show satisfactory progress in achieving the objectives of the project or otherwise failed to meet the terms and conditions of the award; (5) the recipient's management practices have failed to provide adequate stewardship of grantor agency funds; (6) outstanding audit exceptions have not been cleared; and (7) any other reason that would indicate continued funding would not be in the best interest of the Government.

**V. Eligibility Requirements**

Applications are invited from public agencies and not-for-profit private organizations. Applicant organizations may choose to submit joint proposals with other eligible organizations as long as one organization is designated in the application as the applicant and co-applicants are designated as such. The

applicant and co-applicants must demonstrate fully the required experience to deliver support services as required in Section VI.

Applicants must demonstrate, in addition to program knowledge and support experience, programmatic and fiscal management capabilities to effectively implement a project of this size and scope. Applicants who fail to demonstrate that they have the capability to manage this program will be ineligible for funding consideration.

**VI. Application Requirements**

All applicants must submit a completed Standard Form 424, Application for Federal Assistance (SF 424), including a program narrative, detailed budget, and budget narrative. All applications must include the information outlined in this section of the solicitation outline in (Section VI) in Part IV, Program Narrative of the application (SF-424). The Program Narrative should not exceed 70 double-spaced pages in length.

In accordance with Executive Order 12549, 28 CFR 67.510, applicants must also provide a certification they have not been debarred (voluntarily or involuntarily) from the receipt of Federal funds. Form 4061/2, which will be supplied with the application package, must be submitted with the application.

In submitting applications that contain more than one organization, the relationships among the parties must be set forth in the application. As a general rule, organizations that describe their relationships in the development of products or the provision of certain services as primarily cooperative or collaborative in nature, will be considered co-applicants. In the event of co-applicant submissions, one co-applicant must be designated as the principal applicant and payee to receive and disperse project funds and be responsible for the supervision and coordination of the activities of the other co-applicants.

Under this arrangement, each organization would agree to be jointly and severally responsible for all project funds and services. Each co-applicant must sign the SF-424 and indicate their acceptance of the conditions of the joint and several responsibility with the other co-applicants.

Applications that include noncompetitive contracts for the provision of specific services must include a sole source justification for any procurement in excess of \$10,000.

The following information must be included in the application:



**A. Organizational Capability**

Applicants must demonstrate that they are eligible to compete for this cooperative agreement and have substantial organizational experience and resources that can be directly applied to provide programmatic support that will assure OJJDP the effective continuance of a national resource center and clearinghouse function for the training and technical assistance program to law enforcement agencies, State and local governments, elements of the criminal justice system, public and private nonprofit agencies, and individuals in the prevention, investigation, prosecution, and treatment of the missing and exploited children cases and in assisting in the locating and reuniting of the missing children with families or legal custodians. The criteria used in Section VII of this solicitation is based upon the responsiveness of applicant to the program information and descriptions found in this solicitation, especially Sections I, II, III, V, and VI.

**B. Organizational Experience**

1. Applicants must demonstrate that they have the requisite knowledge of and experience with the missing and exploited children issue to provide capable, responsible management of a national resource center and clearinghouse.
2. Applicants must demonstrate experience and expertise in providing technical assistance and training to the diverse audience requiring such services with regard to the missing and exploited children issues described in this solicitation.
3. Applicants must demonstrate the ability to develop training materials that will service varied recipient needs.
4. Applicants must demonstrate the ability to intake, manage, utilize, and provide service with regard to high volume issues related to telephone and computer traffic.
5. Applicants must demonstrate extensive information system experience to facilitate and service the high volume technical assistance information needs that require fast, and accurate responses.
6. Applicants must demonstrate the ability to provide continuity of comprehensive missing and exploited children issue services in response to the program objectives and strategies described in this solicitation.

**C. Program Objectives**

A statement of the applicants' understanding of the objectives and tasks associated with the program

should be included. The application should include a problem statement and a discussion of the potential contribution of this program to the missing and exploited children issues.

**D. Program Strategy**

Applicants should describe the proposed approach for achieving the objectives of the program (Section II), and the requirement of the program strategy section (Section III).

**E. Program Implementation Plan**

Applicants should prepare a plan that outlines the major activities involved in implementing the program; how resources will be applied; and how the program will be managed. The plan should include an organizational chart depicting the roles and responsibilities of key personnel and organizational functional components. Applicants must provide detailed position descriptions, qualifications, and criteria for selection for the positions. Part-time and practitioner professionals should also be included, with a statement of their qualifications and experience that would directly relate to the service needs of this program.

**F. Time and Task Plan**

Applicants should develop a three-year task/time plan, indicating proposed major milestone activities and estimated cumulative costs.

**G. Products**

Applicants should describe possible or existing program products that may or will be developed or utilized to service the program and should describe how and who will be served by these products.

**H. Program Budget**

Applicant shall provide a three year budget, separately for each year. Co-applicant associated costs must be detailed separately and accounted for in as much detail as the principal applicant.

**VII. Criteria for Applicant Selection**

All applicants will be evaluated and rated based on the extent to which they meet the following criteria:

In general, all applications will be reviewed in terms of their ability to demonstrate requisite experience to continue the development and service activities of a national resource center and clearinghouse for servicing missing and exploited children issues. The experience and knowledge involved for delivery of these services in a capable, efficient and professional manner is, of course, a vital evaluation.

Applications will be evaluated by a peer review panel appointed by the Administrator of OJJDP. The results of this review will be the relative ranking of applicants based on average numerical scores assigned by the peer reviewers. The highest ranked applicant will be considered the applicant recommended by the panel for funding. The Administrator will consider the peer panel recommendations in selecting a single applicant for the award of a cooperative agreement.

The selection criteria and their point values (weights) are as follows:

1. Applicant's demonstrated organizational experience and program management capabilities in the areas described and defined throughout this solicitation (especially Sections II, III, V, VI); experience working with the various missing children issue groups and agencies at the national, State, municipal, community, and individual levels; providing technical assistance, training and information products related to missing and exploited children; providing missing child case assistance and coordination; promoting the development of professional approaches to missing children issues; providing assistance in organizational development processes for improved delivery of services relating to missing children issues; and applicant's staff experience relevant to the missing children issues and their capabilities to address the perceived program needs. (35 points)
2. Applicant's demonstrated understanding of and approach to implementing the program objectives of organizing, servicing and maintaining the high level service delivery demands of a national resource center and clearinghouse for missing children. (30 points)
3. Applicant's key staff and consultant's relevant experience and qualifications. (25 points)
4. The extent to which the applicant has provided a sound and fully-justified budget that is cost effective to the service provided. (10 points)

**VIII. Submission Requirements**

All applicants responding to this solicitation are subject to the following requirements:

1. Organizations that plan to respond to this announcement are requested to submit a written notification of their intent to apply to OJJDP by January 20, 1989. Such notification should specify the name of the organization; co-applicants; and contact persons. This notification submission is optional and

will be used only to estimate the application review workload.

2. Upon request to OJJDP, the necessary forms for application (SF424) will be provided, along with Department certification information. Applications must be delivered to OJJDP by 4:30 p.m. on February 27, 1989. Applicants must submit the original signed application and three copies to OJJDP. Those applications sent by mail should be addressed to OJJDP, U.S. Department of Justice, 633 Indiana Ave. NW., Washington, DC 20531. Hand-delivered applications should be delivered to the 633 Indiana Avenue address between the hours of 7:30 a.m. and 4:30 p.m.,

except Saturdays, Sundays, or Federal Holidays.

3. OJJDP will notify applicants in writing of the receipt of their application. Subsequently, applicants will be notified by letter as to the decision made regarding whether or not their application will be recommended for funding.

**IX. Civil Rights Compliance**

A. All recipients of OJJDP assistance must comply with the non-discrimination requirements of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended; Section 504 of the Rehabilitation Act of 1973, as amended; Title IX of Education

Amendment of 1972; and the Age Discrimination Regulations (28 CFR Part 42, Subparts C, D, E, and G).

B. In the event a Federal or State court agency or State administrative agency makes a finding of discrimination, after a due process hearing, on the grounds of race, color, religion, national origin, or sex against a recipient of funds, the recipient will forward a copy of the finding to the Office for Civil Rights, Office of Justice Programs.

Verns L. Speirs,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 88-29755 Filed 12-27-88; 8:45 am]

BILLING CODE 4410-10-M



# **federal register**

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Wednesday  
December 28, 1988

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## **Part VI**

### **Department of Education**

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**34 CFR Part 538**  
**Transition Program for Refugee Children;  
Final Regulations**



## DEPARTMENT OF EDUCATION

## 34 CFR Part 538

## Transition Program for Refugee Children

**AGENCY:** Department of Education.  
**ACTION:** Final regulations.

**SUMMARY:** The Secretary amends the regulations for the Transition Program for Refugee Children. This program currently provides financial assistance through grants to State educational agencies and subgrants to local educational agencies to provide special educational services to refugee children enrolled in public and nonprofit private schools. The current regulations were reviewed for regulatory burden reduction. These final regulations are issued as a result of that review.

**EFFECTIVE DATE:** These regulations take effect either 45 days after publication in the Federal Register or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jonathan Chang, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, 400 Maryland Avenue SW. (Room 5086, Mary E. Switzer Building), Washington, DC 20202-6641. Telephone: (202) 732-5708.

**SUPPLEMENTARY INFORMATION:** The Transition Program for Refugee Children is authorized by the Refugee Act of 1980, 8 U.S.C. 1522 (a), (c), (d), as amended by the Refugee Assistance Extension Act of 1986 (Pub. L. 99-605).

Regulations for this program were initially published in the Federal Register on January 14, 1981 (46 FR 3380).

On February 28, 1988, the Secretary published a notice of proposed rulemaking for this program in the Federal Register (53 FR 5956). There are no differences between the NPRM and these final regulations.

## Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, nine parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations follows.

## The Proposed Threshold Eligibility Requirement for LEAs

**Comments:** The Secretary received a number of comments on the definition of an "eligible local educational agency" proposed in § 538.4. The comments

opposed the definition's establishment of a requirement that an LEA must serve at least twenty eligible children to be eligible for a subgrant from an SEA. They stated that small LEAs often serve less than twenty eligible children but that these LEAs also have a need for Federal financial assistance to serve the special educational needs of any eligible children. The commenters also stated that small LEAs have fewer resources than larger LEAs to devote to providing special educational services to eligible children.

**Discussion:** The Refugee Act of 1980 provides that the Secretary may make grants for projects to provide special educational services to refugee children in elementary and secondary schools where a demonstrated need has been shown. While the Secretary recognizes the commenters' concerns, the Secretary believes that if an LEA will not be serving at least twenty students, it does not have a demonstrated need for Federal financial assistance. The Secretary expects that this eligibility provision will concentrate funding where it is most needed and will increase per-pupil funding by approximately ten percent in eligible LEAs.

The Secretary recognizes that this provision will eliminate the eligibility for subgrants for many of those LEAs that are currently eligible. However, the Secretary estimates that only ten percent of the children currently served by the program attend schools in those LEAs.

**Changes:** None.

## Deletion of the Secretary's Emergency Funding Authority

**Comment:** One commenter stated that under the present international situation a sudden influx of refugees might occur. The commenter contends that by removing the Secretary's emergency funding provision from the regulations, the Secretary would not be able to respond to such an emergency in a timely manner.

**Discussion:** The Secretary believes that there is no reason to retain this provision in the regulations. While this provision is deleted, the Secretary continues to have the authority to request the enactment of a supplemental appropriation to increase funding under the Refugee Act should an emergency influx occur. The Secretary also believes that all available funds for the program should be allocated to the States to assist in providing special education services to eligible refugee children currently enrolled in schools within eligible LEAs, rather than retaining

funds for an emergency that might not occur.

**Changes:** None.

## Executive Order 12291

These final regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

## Executive Order 12606

These regulations will have a positive impact on the family and are consistent with the requirements of Executive Order 12606—The Family. These regulations strengthen the authority and participation of parents in the education of their children. For example, the regulations specifically authorize the use of funds to provide training to parents to enable them to participate more effectively in the education of their children (§ 538.10(a)(2)(ii)).

## Regulatory Flexibility Act Certification

The Secretary certifies that these final regulations will not have a significant economic impact on a substantial number of small entities.

To the extent that these regulations affect States and State agencies they will not have an impact on small entities because States and State agencies are not considered small entities under the Act. Small entities participating in the program are small LEAs. These regulations will reduce burdens for small LEAs, but they will not have a significant economic impact on individual LEAs.

## Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

## Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

## List of Subjects in 34 CFR Part 538

Education, Elementary and secondary education, Grant programs—education, Refugees.

Dated: December 13, 1988.

(Catalog of Federal Domestic Assistance Number 84.146, Transition Program for Refugee Children)

Lauro F. Cavazos,  
 Secretary of Education.

The Secretary revises Part 538 of Title 34 of the Code of Federal Regulations to read as follows:

## PART 538—TRANSITION PROGRAM FOR REFUGEE CHILDREN

## Subpart A—General

Sec.

538.1 Transition Program for Refugee Children.

538.2 Who is eligible to apply for a grant under the Transition Program for Refugee Children?

538.3 What regulations apply?

538.4 What definitions apply?

## Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

538.10 What activities are eligible for grant assistance under the program?

## Subpart C—How Does a State Apply for a Grant?

538.20 What documents does the State submit to receive a grant?

## Subpart D—How Does the Secretary Make a Grant to a State?

538.30 How does the Secretary review an application submitted by an SEA?

538.31 What formula is used to determine the amount of a grant?

## Subpart E—How Does a State Make a Subgrant to an Applicant?

538.40 For what purposes may an LEA apply for a subgrant?

538.41 How does the State determine the amount of a subgrant?

## Subpart F—What Conditions Apply to a State and Its Subgrantees Under the Program?

538.50 What should a State do if an LEA does not apply for a subgrant?

538.51 What are the restrictions on costs under this program?

538.52 Under what circumstances may the Secretary arrange for providing services under this program?

Authority: 8 U.S.C. 1522 (a), (c), (d), unless otherwise noted.

## Subpart A—General

## § 538.1 Transition Program for Refugee Children.

(a) The Transition Program for Refugee Children provides assistance to meet the special educational needs of eligible children who are enrolled in public and nonprofit private elementary and secondary schools.

(b) This program funds formula grants to States based on the number of eligible children in the States.

(Authority: 8 U.S.C. 1522 (a), (d))

## § 538.2 Who is eligible to apply for a grant under the Transition Program for Refugee Children?

(a) A State educational agency (SEA) is eligible to apply for a grant to assist eligible local educational agencies (LEAs) in its State in providing special educational services to eligible children, or to assist the SEA in providing those services pursuant to § 538.50, if the State has an approved plan for the administration of refugee resettlement programs in its State on file with the Director of the Office of Refugee Resettlement (ORR) in the Department of Health and Human Services (HHS).

(b) Requirements pertaining to submission and approval of the State plan are contained in 45 CFR Part 400 (Refugee Resettlement Program; Plan and Reporting Requirements for States).

Authority: 8 U.S.C. 1522 (a), (c), (d))

## § 538.3 What regulations apply?

The following regulations apply to the Transition Program for Refugee Children:

(a) The regulations in 34 CFR Part 538.

(b) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 76 (State-Administered Programs), Part 77 (Definitions That Apply To Department Regulations), Part 79 (Intergovernmental Review of Department of Education Programs and Activities), and Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements for State and Local Governments).

(Authority: 8 U.S.C. 1522(d))

## § 538.4 What definitions apply?

(a) **Definitions in EDGAR.** The following terms used in this part are defined in 34 CFR 77.1:

Applicant  
 Application  
 Award  
 EDGAR  
 Elementary school  
 Nonprofit  
 Private  
 Secondary school

Secretary

State

State educational agency

(b) **Other Definitions.** The following definitions also apply to this part:

"Act" means the Immigration and Nationality Act as amended by the Refugee Act of 1980 (Pub. L. 96-212), 8 U.S.C. 1522(a), (c), (d).

"Eligible children" means children who—

(1)(i) Are admitted into the United States under section 207 of the Act;

(ii) Are granted asylum in the United States under section 208 of the Act;

(iii) Are paroled into the United States as a refugee or asylee under section 212(d)(5) of the Act; or

(iv) Are admitted for permanent residence in the United States, provided the individual child previously held a status in paragraph (1)(i), (ii), or (iii) of this definition;

(2) Are within the age limit for which the applicable State is required or permitted under State law to provide free public elementary and secondary school education for students; and

(3) Have been admitted into the United States for no more than two years at the elementary school level, or for no more than three years at the secondary school level, and who are enrolled in public or nonprofit private elementary or secondary schools.

"Eligible local educational agency" means—

(1) A public board of education or other public authority that will serve at least twenty eligible children who are enrolled in public or nonprofit private schools within the geographic service area under its jurisdiction and is legally constituted within a State for either administrative control of or direction of, or to perform service functions for, public elementary or secondary schools in—

(i) A city, county, township, school district, or other political subdivision of a State; or

(ii) Such combination of school districts or counties a State recognizes as an administrative agency for its public elementary or secondary schools; or

(2) Any other public institution or agency that has administrative control and direction of a public elementary or secondary school and serves a geographic area in which it will serve at least twenty eligible children enrolled in public or nonprofit private schools.

(Authority: 8 U.S.C. 1522(a), (c), (d))



**Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?****§ 538.10 What activities are eligible for grant assistance under the program?**

(a) The following are examples of services that may be provided under this program:

(1) Special supplemental educational services may be provided, with emphasis on instruction to improve English language skills of eligible children, so as to enable those children to achieve and maintain a satisfactory level of academic performance. These services may include—

(i) Testing to determine the educational needs of eligible children;

(ii) Special English language instruction;

(iii) Bilingual education;

(iv) Remedial programs of instruction; and

(v) Special materials and supplies.

(2) Up to 15 percent of the award may be used to provide support services for the eligible children, including but not limited to—

(i) Inservice training for educational personnel to work with eligible children to enable them more effectively to provide services to those children;

(ii) Training for parents of eligible children to enable them to participate more effectively in the education of their children; and

(iii) School counseling and guidance services for eligible children, including referrals to appropriate social and health agencies.

(b) An SEA may use up to one percent of the total funds it receives—

(1) To ensure proper and efficient administration of funds under this program; and

(2) To provide technical assistance to subgrantees and others who are providing services under this program to eligible children.

(c) An eligible LEA may use up to one percent of the total funds it receives for the administration of the program. The remaining funds must be used for the activities under paragraph (a) of this section.

(d) Funds awarded under the program to any State must be used so as to supplement the level of State and local funds that, in the absence of those payments, would have been expended for special programs for eligible children, and in no case to supplant those State and local funds, except that nothing in this paragraph shall preclude a local educational agency from using funds under this part for activities carried out under an order of a court of the United States or of any State

respecting services to be provided to eligible children because of their limited English proficiency, as defined in section 703(l) of the Bilingual Education Act (20 U.S.C. 3221 *et seq.*), or to carry out a plan approved by the Secretary as adequate under Title VI of the Civil Rights Act of 1964 with respect to those services for those children.

(Authority: 8 U.S.C. 1522(a), (d))

**Subpart C—How Does a State Apply for a Grant?****§ 538.20 What documents does the State submit to receive a grant?**

(a) An SEA shall submit to the Secretary an application containing the following:

(1) A narrative that demonstrates the need for assistance.

(2) A count of the number of eligible children to be served by the program.

(3) The date or dates on which the count was taken.

(4) A program plan that includes—

(i) A brief description of the SEA's method of counting children eligible for assistance under this program; and

(ii) A brief description of the SEA's plan for administering, monitoring, and evaluating the program; and

(iii) A brief description of how the SEA will provide services, if any, to eligible children pursuant to § 538.50.

(b) The Secretary may specify, in a notice published in the Federal Register, a period during which the State's count under paragraph (a)(2) of this section must be taken.

(Authority: 8 U.S.C. 1522(a), (d))

(OMB Approval No. 1885-0503)

**Subpart D—How Does the Secretary Make a Grant to a State?****§ 538.30 How does the Secretary review an application submitted by an SEA?**

The Secretary approves an application submitted by an SEA if the application complies with the requirements in this part.

(Authority: 8 U.S.C. 1522(a), (c), (d))

**§ 538.31 What formula is used to determine the amount of a grant?**

To determine the amount of a grant to an SEA, the Secretary—

(a) Determines the average per pupil allocation by dividing the total amount of the available funds for grants in a fiscal year by the sum of all eligible children to be served by eligible LEAs or pursuant to § 538.50, counted by SEAs with approved applications; and

(b) Multiplies an SEA's child count by the average per pupil allocation determined under paragraph (a) of this section.

(Authority: 8 U.S.C. 1522(a), (d))  
(OMB Approval No. 1885-0503)

**Subpart E—How Does a State Make a Subgrant to an Applicant?****§ 538.40 For what purposes may an LEA apply for a subgrant?**

An eligible LEA may apply to the SEA for a subgrant to provide services to eligible children enrolled in public and nonprofit private schools within its jurisdiction.

(Authority: 8 U.S.C. 1522(a), (d))

(OMB Approval No. 1885-0503)

**§ 538.41 How does the State determine the amount of a subgrant?**

In determining the amount of a subgrant to an eligible LEA, the SEA—

(a) Divides the amount of funds available to serve eligible children by the total number of eligible children to be served in the State to determine the amount of funds available for each eligible child; and

(b) Multiplies an eligible LEA's count of eligible children the LEA will serve by the quotient obtained in paragraph (a) of this section.

(Authority: 8 U.S.C. 1522(a), (d))

(OMB Approval No. 1885-0503)

**Subpart F—What Conditions Apply to a State and Its Subgrantees Under the Program?****§ 538.50 What should a State do if an LEA does not apply for a subgrant?**

If an LEA does not apply for a subgrant to serve eligible children in either public or nonprofit private schools, or both, within its jurisdiction, the SEA may not include those children in its count of eligible children under § 538.20 of these regulations, unless the LEA has at least 20 eligible children in the geographic area it serves, and the SEA—

(a) Arranges through subgrants, contracts, or cooperative agreements with public and nonprofit agencies, organizations, or institutions (which may include institutions of higher education) for the provision of services to the eligible children who would not be served; or

(b) Provides services directly to those children.

(Authority: 8 U.S.C. 1522(a), (d))

**§ 538.51 What are the restrictions on costs under this program?**

Funds may not be used under this program for—

(a) Construction, repair, remodeling, or alteration of facilities or sites;

(b) Payments of stipends to participants in inservice training or other workshops, including costs of participant travel, meals or lodging associated with this training; or

(c) Payments for the provision of health or social services.

(Authority: 8 U.S.C. 1522(a), (d))

**§ 538.52 Under what circumstances may the Secretary arrange for providing services under this program?**

If a State is prohibited by law from providing educational services to children enrolled in nonprofit private elementary or secondary schools, or if the Secretary determines that an SEA or eligible LEA is unwilling or has substantially failed to provide educational services on an equitable basis to eligible children enrolled in

nonprofit private schools, the Secretary may—

(a) Arrange for other means of providing services to these children; and

(b) Deduct the cost of providing these services, including any administrative costs, from the appropriate SEA grant allocation.

(Authority: 8 U.S.C. 1522(a), (d))

[FR Doc. 88-29847 Filed 12-27-88; 8:45 am]

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(b) Payments of stipends to participants in inservice training or other workshops, including costs of participant travel, meals or lodging associated with this training; or

(c) Payments for the provision of health or social services.

(Authority: 8 U.S.C. 1522(a), (d))

**§ 538.52 Under what circumstances may the Secretary arrange for providing services under this program?**

If a State is prohibited by law from providing educational services to children enrolled in nonprofit private elementary or secondary schools, or if the Secretary determines that an SEA or eligible LEA is unwilling or has substantially failed to provide educational services on an equitable basis to eligible children enrolled in

nonprofit private schools, the Secretary may—

(a) Arrange for other means of providing services to these children; and

(b) Deduct the cost of providing these services, including any administrative costs, from the appropriate SEA grant allocation.

(Authority: 8 U.S.C. 1522(a), (d))

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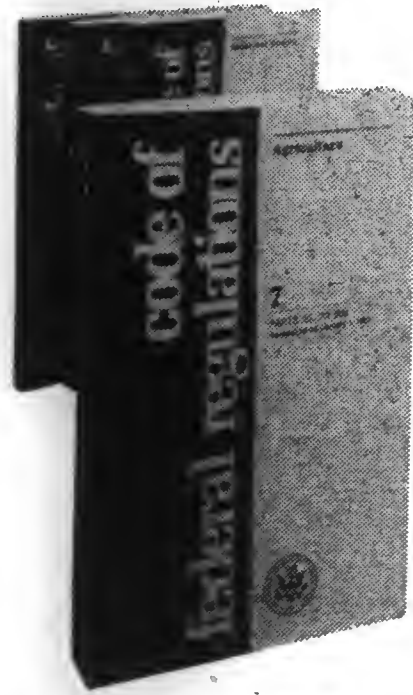
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## Rules and Regulations

Federal Register

Vol. 53, No. 250

Thursday, December 29, 1988

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## DEPARTMENT OF AGRICULTURE

## Agricultural Stabilization and Conservation Service

## 7 CFR Part 719

## Farm Marketing Quotas, Acreage Allotments, and Production Adjustment; Reconstitution of Farms, Allotments, Quotas, Bases, and Acreages

**AGENCY:** Agricultural Stabilization and Conservation Service, Commodity Credit Corporation, USDA.

**ACTION:** Interim Rules.

**SUMMARY:** This rule adopts as final, without change, the interim rule which was published on March 1, 1988 (53 FR 6119) which amended 7 CFR Part 719.

This rule also sets forth an interim rule which amends the regulations at 7 CFR Part 719 governing the reconstitution of allotments, marketing quotas, bases, and acreages under the production adjustment, and marketing quota and conservation programs administered by the Agricultural Stabilization and Conservation Service (ASCS) and Commodity Credit Corporation (CCC). These amendments are necessary to improve the administration of programs authorized by the Agricultural Adjustment Act of 1938, as amended, and the Agricultural Act of 1949, as amended.

**EFFECTIVE DATE:** The final and interim rules are effective December 29, 1988.

**Comments:** With respect to the interim rule, comments must be received January 30, 1989 in order to be assured of consideration.

**ADDRESS:** Interested persons are invited to send written comments on the interim rule to the Director, Cotton, Grain, and Rice Price Support Division, U.S. Department of Agriculture, P.O. Box 2415, Washington, DC 20013. All written

submissions made pursuant to this notice will be made available for public inspection in Room 3630-South Building, USDA, between the hours of 8:15 a.m. and 4:45 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Jane Salem, Management Analyst, Cotton, Grain, and Rice Price Support Division, ASCS, U.S. Department of Agriculture, P.O. Box 2415, Washington, DC 20013, (202) 447-7635.

**SUPPLEMENTARY INFORMATION:** The final rule and interim rule have been reviewed under U.S. Department of Agriculture (USDA) procedures established in accordance with provisions of Departmental Regulations 1515-1 and Executive Order 12291, and has been classified as "not major." It has been determined that these program provisions will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The provisions of 7 CFR Part 719 do not provide financial assistance to producers of agricultural commodities. Accordingly, the Catalog of Federal Domestic Assistance does not list titles and numbers for the reconstitution of allotments, quotas, bases, and acreages. However, the constitution of a farm does provide the basis for determining producer eligibility with respect to programs administered by the Agricultural Stabilization and Conservation Service (ASCS) and the Commodity Credit Corporation (CCC) which are identified by program numbers 10.051 through 10.068 in the Catalog of Federal Domestic Assistance.

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule or this interim rule since neither ASCS nor CCC is required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of either rule.

It has been determined by an environmental evaluation that this action will have no significant impact on the quality of the human environment. Therefore, neither an environmental

assessment nor an Environmental Impact Statement is needed.

This program/activity is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

Information collection requirements contained in the regulations (7 CFR Part 719) have been approved by the Office of Management and Budget (OMB) in accordance with the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB numbers 0560-0025 and 0560-0033. This interim rule amends 7 CFR Part 719 to make changes which will result in more efficient program administrations and to make certain changes for clarity.

## Final Rule

The regulations governing the reconstitution of allotments, marketing quotas, bases, and acreages under production adjustment, marketing quota and conservative programs which are administered by ASCS and CCC are found at 7 CFR part 719. An interim rule was published on March 1, 1988 (53 FR 6119) which amended this part for clarity and to provide for the more effective administration of programs administered by ASCS and CCC. One comment was received in response to the interim rule. The commenter stated that the rule called for "the decombining of all farms which have a peanut quota and are combined across county lines where the owners are not the same". This suggested change was not adopted because the intent of the interim rule was to provide regulations for constitution and reconstitution of farms which were initiated subsequent to the publication date of the rule, and not to decombine farms comprised of land which was properly constituted under prior regulations. Accordingly, the March 1, 1988 interim rule is adopted as a final rule without change.

## Interim Rule

Based upon a further review of the regulations set forth at 7 CFR Part 719 it has been determined that additional amendments will further clarify the manner in which reconstitutions of farms are made by ASCS and will provide enhanced administration of ASCS and CCC programs by providing



more flexibility to producers with respect to the reconstitution of farms. Accordingly, the following changes are made by this interim rule.

Section 719.2(f) of the current regulations defines the term "cropland". This interim rule clarifies and expands the definition to provide that in addition to one-row shelterbelt plantings that two-row shelterbelt plantings may be considered to be cropland.

Section 719.2(ff) is added to define the term "substantive change" which is used to determine whether a reconstitution of land is required.

Section 719.3(b)(3) of the current regulations is applicable to all allotment and quota crops. This interim rule amends § 719.3(b)(3) to provide that the provision applies to tobacco only and expands the provision to provide for more flexibility in considering land as a single farming unit with respect to crops of tobacco.

Section 719.3(b)(7) of the March 1, 1988 interim rule is applicable to all crops. This interim rule amends § 719.3(b)(7) to provide that the provisions of that section apply only to acreage base crops and expands the provision to provide for more flexibility in considering land as a single farming unit with respect to acreage base crops.

This interim rule also adds a § 719.3(b)(8) for clarity to provide specific provisions for peanuts. It is not intended that this provision will require the division of any peanut farm that contains land located in different counties provided the farm was and is otherwise correctly constituted.

Section 719.3(d)(1) of the current regulations provides, generally, that a reconstitution is required when a change occurs that results in the farm no longer meeting the criteria for a single farming unit. This interim rule amends this section to provide that a change in an operation must be substantive and not merely to transfer allotments which are subject to sale or transfer.

Section 719.3(d)(3) refers to "his". This interim rule removes the gender specific term.

Section 719.3(d)(7) of the March 1, 1988 interim rule is redesignated § 719.3(d)(9). In order to enhance the administration of the Conservation Reserve Program, this interim rule adds a new § 719.3(d)(7) to provide that a reconstitution shall be required when one or more owners of the farm refuse to sign a Conservation Reserve Program contract, while one or more owners on the same farm want to enter into a Conservation Reserve Program contract.

This interim rule further adds a new § 719.3(d)(8) to provide that the Deputy Administrator may require

reconstitution of land sold for or devoted to nonagricultural uses.

Section 719.7(b)(1)(iv) of the March 1, 1988 interim rule is applicable to reconstitutions of farms by division or combination. This interim rule amends § 719.7(b)(1)(iv) to provide that the provision applies to reconstitutions by division only so that abuses of acreage reduction programs are minimized.

In order to provide producers greater flexibility in reconstituting land as one unit, this interim rule adds a § 719.7(b)(4) to provide that reconstitutions of farms on which there is no cropland may be effective for the current crop year.

Section 719.8(c)(4)(i) of the March 1, 1988 interim rule refers to the seller and purchaser of land. For clarity, this interim rule amends § 719.8(c)(4)(i) to refer to transferring owner and transferee in lieu of seller and purchaser.

Section 719.8(c)(4)(iii) of the March 1, 1988 interim rule provides that with respect to reconstitutions using the designation by landowner method of division, neither the tract transferred from the parent farm nor the remaining portion of the parent farm shall receive or retain allotments, quotas, or bases in excess of allotments, quotas, and bases for similar farms in the same area having allotments, quotas, and bases with respect to the commodity or commodities involved. In order to more accurately establish farms for purposes of program administration, this interim rule provides that, in addition to those provisions, the cropland available for and adapted to producing the commodity shall be considered. The interim rule further provides that with respect to upland cotton and rice, both the tract transferred from the parent farm and the remaining portion of the parent farm shall receive or retain at least one-tenth acre of crop acreage base.

Section 719.8(d)(2) of the March 1, 1988 interim rule refers to divisions which became effective in the 1985 or earlier crop year. This interim rule removes that reference and consolidates the provisions of that section for clarity.

Section 719.10 of the March 1, 1988 interim rule excludes land devoted to trees from being considered to be cropland. Since trees may be planted as vegetative cover under several CCC conservation programs, the exclusion has been removed. This interim rule further provides that with respect to preservation of cropland classification, the Deputy Administrator may determine the period of time vegetative cover will be classified as cropland.

Since producers will soon be executing contracts to participate in the 1989 price support and production adjustment programs, this interim rule will become effective upon date of publication in the Federal Register. Comments are requested on this interim rule, however, and will be taken in consideration in developing the final rule.

#### List of Subjects in 7 CFR Part 719

Acreage allotments.

#### PART 719

##### Final Rule

The interim rule published in the Federal Register on March 1, 1988 (53 FR 6119) is adopted as a final rule without change.

##### Interim Rule

7 CFR Part 719 is amended as follows:

#### PART 719—[AMENDED]

1. The authority citation for 7 CFR Part 719 is revised to read as follows:

Authority: 52 Stat. 68, as amended, 72 Stat. 995, as amended, 79 Stat. 1211, as amended, 7 U.S.C. 1375, 1378, 1379; 79 Stat. 1206, as amended, 1210, 7 U.S.C. 1801 note, 1838, 1305; 99 Stat. 1460-1464, as amended, 7 U.S.C. 1461-1469.

2. In § 719.2, paragraphs (f) (2), (3), and (4) are revised and paragraph (ff) is added to read as follows:

#### § 719.2 Definitions.

- (f) . . . . .
- (2) Is not currently tilled, but it can be established that such land:
  - (i) Has been tilled in a prior year; and
  - (ii) Is suitable for crop production.
- (3) Is currently devoted to one- or two-row shelterbelt planting.

(4) Is preserved as cropland in accordance with § 719.10. Land classified as cropland shall be removed from such classification upon a determination by the county committee that the land is:

- (i) Removed from agricultural production;
- (ii) No longer suitable for production of crops;
- (iii) Devoted to trees (other than those set forth in accordance with § 719.10 or one- or two-row shelterbelt plantings) which were planted in the preceding year except that land planted to trees:

(A) From September 1 through December 31 of the preceding year shall retain its cropland classification for the succeeding year.

(B) In the current year shall retain its cropland classification for the current year; or

(iv) No longer preserved as cropland in accordance with the provisions of § 719.10 and does not meet the conditions in paragraphs (f) (1) through (3) of this section.

(ff) Substantive change means a significant modification in cropping practice, equipment, labor, accounting system or management with respect to a farming operation.

3. In § 719.3, paragraphs (b)(3), (b)(7), (d)(1), and (d)(3) are revised, paragraph (d)(7) is redesignated as (d)(9) and revised, and paragraphs (b)(8), (d)(7) and (d)(8) are added to read as follows:

#### § 719.3 Farm constitution.

(b) . . . . .

(3) Land across county lines when the tobacco allotments or quotas established for the land involved cannot be transferred from one county to another county by lease, sale, owner, or operator. However, this paragraph shall not apply if:

(i) All of the land is owned and operated by one person and all such land is contiguous;

(ii) Two or more tracts are located in counties that are contiguous in the same state and are owned by the same person if:

(A) A burley tobacco quota is established for one or more of the tracts; and

(B) The county committee determines that the tracts will be operated as a single farming unit as set forth in § 719.4(e); or

(iii) Because of a change in operation, tracts or parts of tracts will be divided from the parent farm that currently has land in more than one county, and there is no change in operation and ownership of the remainder of the farm, or if there is a change in ownership, the new owner agrees in writing to the constitution of the farm.

(7) For acreage base crops, land located in counties that are not contiguous. However, this paragraph shall not apply if:

- (i) Counties touch at a corner;
- (ii) Counties are divided by a river;
- (iii) Counties do not touch because of a correction line adjustment; or
- (iv) The land is within 20 miles, by road, or other land that will be a part of the farming unit.

(8) For peanut quotas, land across:

(i) County lines when the peanut quotas established for the land involved cannot be transferred; or

(ii) State lines.

(d) . . . . .

(1) A substantive change has occurred in the operation of the land after the last constitution or reconstitution and as a result of such change the farm does not meet the conditions for constitution of a farm as set forth in paragraph (b) of this section except that no reconstitution shall be made if the county committee determines that the primary purpose of the change in operation is to establish eligibility to transfer allotments subject to sale or lease;

(3) An owner requests in writing that the owner's land no longer be included in a farm which is composed of tracts under separate ownership.

(7) One or more owners of the farm refuse to sign a Conservation Reserve Program contract, while one or more owners on the same farm want to enter into a Conservation Reserve Program contract;

(8) In accordance with guidelines issued by the Deputy Administrator, land is sold for or devoted to nonagricultural uses;

(9) Notwithstanding the provisions of paragraphs (d)(1) through (d)(7) of this section, a reconstitution shall not be approved if the county committee determines that the primary purpose of the reconstitution is to:

- (i) Increase the amount of program benefits received;
- (ii) Meet the acreage reduction requirements of production adjustment programs;
- (iii) Avoid liquidated damages or penalties which are assessed under a production adjustment program;
- (iv) Correct an erroneous acreage report; or
- (v) Circumvent any other program provision.

4. In § 719.7, paragraph (b)(1)(iv) is revised and paragraph (b)(4) is added to read as follows:

#### § 719.7 Reconstitution of allotments, quotas, bases, and acreages.

(b) . . . . .

(1) . . . . .

(iv) Notwithstanding the provisions of paragraph (b)(1) (i) and (ii) of this section, a division may be effective for the current program year if the county committee, with the concurrence of the State committee, determines that the purpose of the request for reconstitution is not to perpetrate a scheme or device the effect of which is:

(A) To avoid the statutes and regulations governing commodity programs;

(B) To obtain additional program benefits for the relevant crop year;

(C) To avoid the assessment of liquidated damages under a protection adjustment contract;

(D) To eliminate a marketing quota penalty;

(E) To correct an erroneous acreage report;

(F) To gain allotment, quota, or base history protection;

(G) To plant excess acreage of a program crop in an acreage reduction program; or

(H) To avoid cross compliance requirements.

(4) Reconstitutions of farms on which there is no cropland may be effective for the current crop year.

5. In § 719.8, paragraphs (c)(4) (i), (iii), and (d)(2) are revised to read as follows:

#### § 719.8 Rules for determining farms, allotments, quotas, bases and acreages when reconstitution is made by division.

(c) . . . . .

(4) . . . . .

(i) The transferring owner and transferee shall file a signed written memorandum of understanding of the designation with the county committee before the farm is reconstituted and before a subsequent transfer of ownership of the land. The heirs of an estate that acquire an interest in real property may use this method to designate the allotments, quotas, bases, and acreages for allocation to a tract of land which is sold before dividing the parent farm among the heirs in settling an estate. The designation by the administrator or executor of the estate shall not be accepted in lieu of a designation by the heirs.

(iii) Both the tract transferred from the parent farm and the remaining portion of the parent farm shall receive or retain allotments, quotas, and bases that are consistent with allotments, quotas, and bases for similar farms in the same area having allotments, quotas, and bases with respect to the commodity or commodities involved, considering the cropland available for and adapted to producing the commodity. With respect to upland cotton and rice, in addition to the above provisions, both the tract transferred from the parent farm and the remaining portion of the parent farm shall receive or retain at least one-tenth acre of these crop acreage bases.



(d) \* \* \*

(2) *Bases.* (i) Unless the provisions of paragraph (b) or (c) of this section apply, the contribution method shall be used to divide crop acreage bases when:

(A) The farm being divided is the result of reconstitution by a combination which became effective with respect to the 1982 or subsequent crop year;

(B) A crop acreage base was established for one or more tracts at the time of combination; and

(C) Acreage did not exceed the crop acreage base in any year the farm was in combination.

(ii) The contribution method shall not be used to divide crop acreage bases when the county committee determines, with the concurrence of the State committee, that the use of the contribution method would not result in an equitable distribution of crop acreage bases considering available land, cultural operations, and changes in type of farming.

6. Section 719.10 is revised to read as follows:

**§ 719.10 Preservation of cropland.**

Cropland acreage established and maintained in vegetative cover under authorized conservation programs administered by the Agricultural Stabilization and Conservation Service, or comparable practices carried out without Federal cost-sharing, including approved volunteer cover, shall retain its cropland classification for the period of time that the cover is maintained or as otherwise established by the Deputy Administrator.

Signed at Washington, DC on December 22, 1988.

Milton Hertz,

Executive Vice President, Commodity Credit Corporation and Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 88-29816 Filed 12-28-88; 8:45 am]

BILLING CODE 3410-06-M

**Agricultural Marketing Service**

**7 CFR Part 1230**

[No. LS-88-103]

**Pork Promotion, Research, and Consumer Information**

**AGENCY:** Agricultural Marketing Service; USDA.

**ACTION:** Interim final rule.

**SUMMARY:** This interim final rule amends regulations issued under the Pork Promotion, Research, and Consumer Information Order (Order) by: (1) Revising the table which lists the Tariff Schedule of the United States

(TSUS) numbers identifying imported pork and pork products subject to assessments under the Order to conform with a new numbering system—the Harmonized Tariff System (HTS) to be implemented by the U.S. Customs Service (USCS), and (2) including a new chart listing the HTS numbers of live porcine animals subject to assessment.

**DATES:** Effective January 1, 1989. Comments must be received by January 30, 1989.

**ADDRESS:** Send two copies of comments to Ralph L. Tapp, Chief, Marketing Programs and Procurement Branch; Livestock and Seed Division; Agricultural Marketing Service; USDA, Room 2610-S; P.O. Box 96456; Washington, DC 20090-6456. Comments will be available for public inspection during regular business hours at the above office in Room 2610 South Building, 14th and Independence Avenue, SW; Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ralph L. Tapp, Chief, Marketing Programs and Procurement Branch, (202) 447-2650.

**SUPPLEMENTARY INFORMATION:** This interim final rule has been reviewed under USDA procedures established to implement Executive Order No. 12291 and Departmental Regulation 1512-1, and is hereby classified as a nonmajor rule under the criteria contained therein.

This action was also reviewed under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) Many importers may be classified as small entities. This interim final rule merely (1) revises the table containing the numbers identifying imported pork and pork products listed in the table in § 1230.110 (53 FR 27478) in the regulations from the former TSUS numbers to the HTS numbers to conform with the USCS conversion to the new HTS, and (2) includes a table listing HTS numbers of live porcine animals subject to assessment. In addition, the action will not impose any requirements on importers beyond those previously discussed in the September 5, 1986, issue of the *Federal Register* (51 FR 31898), when it was determined that the Order would not have a significant effect upon a substantial number of small entities. The conversion to the new HTS numbering system to be implemented by the USCS is merely a technical change and will impose no new requirements on the industry. Accordingly, the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact upon a substantial number of small entities.

The Pork Promotion, Research, and Consumer Information Act of 1985 (7

U.S.C. 4801-4819) approved December 23, 1985, authorizes the establishment of a national pork promotion, research, and consumer information program. The program is funded by an assessment of 0.25 percent of the market value of live porcine animals sold in the United States and an equivalent amount on imported live porcine animals, pork, and pork products. The final Order establishing a pork promotion, research, and consumer information program was published in the September 5, 1986, issue of the *Federal Register* (51 FR 31898) and assessments began on November 1, 1986. The Order requires importers of live porcine animals to pay an amount equal to 0.25 percent of their market value, and importers of pork and pork products to pay an amount which represents 0.25 percent of the value of the live porcine animals from which the pork and pork products were derived, based upon the most recent annual seven-market average price for barrows and gilts, as published by the Department. As a matter of practicality, the assessment on imported pork and pork products is expressed in dollars per pound. The formula for converting the live animal equivalent of 0.25 percent of the value of the live animal to an assessment per pound is described in the supplementary information accompanying the Order and published in the September 5, 1986, issue of the *Federal Register* (51 FR 31901). The schedule of assessments is listed in a table in § 1230.110 of the regulations (53 FR 27478) for each type of pork and pork product identified by a TSUS number. Although TSUS numbers for imported live porcine animals did not appear in the table in § 1230.110 of the regulations (53 FR 27478), such animals were subject to assessment at a rate specified in § 1230.71 of the Order (7 CFR 1230.71). The TSUS numbers of live porcine animals subject to assessment under the Order were published in an issue of the Department of Treasury News, United States Customs Service dated September 28, 1986.

The USCS is implementing a new numbering system, the Harmonized Commodity Description and Coding System, otherwise known as the Harmonized Tariff System (HTS), to replace the current TSUS numbering system. The HTS numbering system will become effective January 1, 1989, as part of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418, 102 Stat. 1107).

The purpose of this interim final rule is to revise the present table found under § 1230.110 of the regulations (53 FR 27478) to reflect the change from the

current TSUS numbering system listed therein to the HTS numbering system, and to include the HTS numbers for live porcine animals. This revised table lists the HTS numbers for pork and pork products which conform to the previously listed TSUS numbers. Additionally, a separate table lists the HTS numbers of imported live porcine animals subject to assessment. This change will permit the USCS to collect assessments due on imported live porcine animals, pork, and pork products in conjunction with its regular importation processing and collection system.

The new HTS uses an 11 digit number to identify specific imports of live porcine animals, pork, and pork products compared with a 7 digit number used in the TSUS system. Under the HTS, some of the major TSUS categories for live porcine animals, pork, and pork products subject to assessment have been subdivided into new categories which have been assigned HTS numbers; other major TSUS categories remained unchanged, but were renumbered with HTS numbers.

As a result of these changes from the TSUS system to the HTS, the 13 TSUS categories of pork and pork products listed in the table in § 1230.110 of the

regulations (53 FR 27478) subject to assessment have been expanded to 27 HTS categories, and the one TSUS category for live porcine animals has been expanded to three HTS categories. The live porcine animals, pork, and pork products subject to assessment and the assessment remain unchanged.

A comparison of the new HTS numbers and the former TSUS numbers of live porcine animals, pork, and pork products subject to assessment under the Act and Order, and a description of the type of pork, pork products, or porcine animals represented by corresponding new HTS numbers may be found in the following chart.

HTS No.	HTS article description	TSUS No.
<b>Imported Live Porcine Animals</b>		
0103.10.00004	Live swine: Purebred breeding animals .....	100.8500
0103.91.00006	Other: Weighing less than 50 kg each .....	100.8500
0103.92.00005	Weighing 59 kg or more each .....	100.8500
<b>Imported Pork and Pork Products</b>		
0203.11.00002	Meat of swine, fresh, chilled, or frozen: Fresh or chilled: Carcasses and half-carcasses .....	106.4020
0203.12.10009	Hams, shoulders and cuts thereof, with bone in: Processed .....	107.3020
0203.12.90002	Other .....	106.4020
0203.19.20000	Other: Processed .....	107.3060
0203.19.40006	Other .....	106.4020
0203.21.00000	Frozen: Carcasses and half-carcasses .....	106.4040
0203.22.10007	Hams, shoulders and cuts thereof, with bone in: Processed .....	107.3020
0203.22.90000	Other .....	106.4040
0203.29.20008	Other: Processed .....	107.3060
0203.29.40004	Other .....	106.4040
0206.30.00006	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled or frozen: Of swine, fresh or chilled .....	106.8000/106.8500
0206.41.00003	Of swine, frozen: Livers .....	106.8000/106.8500
0206.49.00005	Other .....	106.8000/106.8500
0210.11.00003	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal: Meat of swine: Hams, shoulders and cuts thereof, with bone in .....	107.3020
0210.12.00208	Belilles (streaky) and cuts thereof: Bacon .....	107.3040/107.3540
0210.12.00404	Other .....	107.3040/107.3540
0210.19.00005	Other .....	107.3060
1601.00.20007	Sausages and similar products, or meat, meat offal or blood; food preparations based on these products: Pork .....	107.1000/107.1500
1602.41.20203	Other prepared or preserved meat, meat offal or blood: Of swine: Hams and cuts thereof: Containing cereals or vegetables .....	107.3515/107.3525
1602.41.20409	Other: Boned and cooked and packed in airtight containers: In containers holding less than 1 kg .....	107.3515/107.3525
1602.41.90002	Other .....	107.3020
1602.42.20202	Shoulders and cuts thereof: Boned and cooked and packed in airtight containers: In containers holding less than 1 kg .....	107.3515/107.3525
1602.42.20408	Other .....	107.3515/107.3525
1602.42.40002	Other .....	107.3020
1602.49.20009	Other, including mixtures Offal Other: Not containing cereals or vegetables: Boned and cooked and packed in airtight containers .....	107.3560



HTS No.	HTS article description	TSUS No.
1602.49.40005	Other .....	107.3060

Pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because (1) the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418, 102 Stat. 1107) requires that the USCS implement the HTS numbering system effective January 1, 1989, with the existing TSUS system in place until that date. Publication of this interim final rule, with an effective date of January 1, 1989, will provide for the continuation of the collection of assessments on imported live porcine animals, pork, and pork products under § 1230.110 of the regulations (53 FR 27476) issued under the order (7 CFR Part 1230), as authorized by the Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801-4819), by the USCS in conjunction with its regular importation processing and collection system; and (2) interested persons are afforded a 30-day comment period to submit written comments. Any comments which are received by January 30, 1989, will be considered prior to any finalization of this interim final rule.

#### List of Subjects in 7 CFR Part 1230

Administrative practice and procedure, Advertising, Agricultural research, Live porcine animal, Marketing agreement, Meat and meat products, Pork and pork products.

For the reasons set forth in the preamble, 7 CFR Part 1230 is amended as follows:

#### PART 1230—PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION

1. The authority citation for 7 CFR Part 1230 continues to read as follows:

Authority: 7 U.S.C. 4801-4819.

2. Amend Subpart B—Rules and Regulations, by revising § 1230.110 to read as follows:

#### § 1230.110 Assessments on imported live porcine animals, pork, and pork products.

The following HTS categories of imported live porcine animals are subject to assessment at the rate specified.

Live Porcine animals	Assessment
0103.10.00004	0.25 percent customs entered value.
0103.91.00006	0.25 percent customs entered value.
0103.92.00005	0.25 percent customs entered value.

The following HTS categories of pork and pork products are subject to assessment at the rate specified.

Pork and Pork products	Assessment
0203.11.00002	.18 cents/lb.
0203.12.10009	.18 cents/lb.
0203.12.90002	.18 cents/lb.
0203.19.20000	.21 cents/lb.
0203.19.40006	.18 cents/lb.
0203.21.00000	.18 cents/lb.
0203.22.10007	.18 cents/lb.
0203.22.90000	.18 cents/lb.
0203.29.20008	.21 cents/lb.
0203.29.40004	.18 cents/lb.
0206.30.00006	.18 cents/lb.
0206.41.00003	.18 cents/lb.
0206.49.00005	.18 cents/lb.
0210.11.00003	.18 cents/lb.
0210.12.00208	.19 cents/lb.
0210.12.00404	.19 cents/lb.
0210.19.00005	.21 cents/lb.
1601.00.20007	.25 cents/lb.
1602.41.20203	.28 cents/lb.
1602.41.20409	.28 cents/lb.
1602.41.90002	.18 cents/lb.
1602.42.20202	.28 cents/lb.
1602.42.20408	.28 cents/lb.
1602.42.40002	.18 cents/lb.
1602.49.20009	.25 cents/lb.
1602.49.40005	.21 cents/lb.

Done at Washington, DC, on December 22, 1988.

J. Patrick Boyle,  
Administrator.

[FR Doc. 88-29915 Filed 12-28-88; 8:45 am]

BILLING CODE 3410-92-M

#### 7 CFR Part 1260

[No. LS-88-101]

#### Beef Promotion and Research

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule.

**SUMMARY:** This interim final rule amends the Beef Promotion and Research Order (Order) to (1) change the Tariff Schedule of the United States (TSUS) numbers which identify imported cattle, beef, and beef products subject to assessments under the Order to conform with a new numbering system—the Harmonized Tariff System to be implemented by the U.S. Customs Service; (2) expand the table concerning the assessment rates for imported cattle, beef, and beef products to include four new categories for edible meat offal of bovine animals; and (3) clarify the language pertaining to the expenses of the Cattlemen's Beef Promotion and Research Board (Board).

**DATES:** Effective January 1, 1989. Comments must be received by January 30, 1989.

**ADDRESS:** Send two copies of comments to Ralph L. Tapp, Chief, Marketing Programs and Procurement Branch; Livestock and Seed Division; Agricultural Marketing Service; USDA, Room 2610-S; P.O. Box 96458; Washington, DC 20090-6458. Comments will be available for public inspection during regular business hours at the above office in Room 2610 South Building, 14th and Independence Avenue, SW; Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Ralph L. Tapp, Chief, Marketing Programs and Procurement Branch, (202) 447-2650.

**SUPPLEMENTARY INFORMATION:** This interim final rule has been reviewed under USDA procedures established to implement Executive Order No. 12291 and Departmental Regulation 1512-1, and is hereby classified as a nonmajor rule under the criteria contained therein.

This action was also reviewed under the Regulatory Flexibility Act (RFA), (5 U.S.C. 601 et seq.). Many importers may be classified as small entities. This interim final rule (1) revises the table containing the numbers identifying imported cattle, beef, and beef products listed in table 1260.172 in the Order (7 CFR 1260.172) from the former Tariff Schedule of the United States (TSUS) numbers to the Harmonized Tariff System (HTS) numbers to conform with the USCS conversion to the new HTS, (2) expands the table to include four new categories for edible meat offal of bovine animals, and (3) clarifies the language pertaining to expenses of the

Cattlemen's Beef Promotion and Research Board. Except for the second change, this action will not impose any requirements on importers beyond those previously discussed in the July 18, 1988, issue of the *Federal Register* (51 FR 26132), when it was determined that the Order would not have a significant effect upon a substantial number of small entities. The conversion to the new HTS numbering system to be implemented by the USCS is merely a technical change and will impose no new requirements on the industry. It is estimated that the increase in total assessments collected on imports as a result of the change made in this interim final rule will be less than 1 percent over a 12-month period as a result of the new assessments. This impact will be minimal. Any additional costs will be outweighed by the benefits derived from the operations of the Beef Promotion and Research Program. The changes in the language pertaining to the expenses of the Board are merely for clarification. Accordingly, the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact upon a substantial number of small entities.

The Beef Promotion and Research Act of 1985 (7 U.S.C. 2901 et seq.) approved December 23, 1985, authorizes the establishment of a national beef promotion and research program. The program is funded by a \$1.00 per head assessment on all cattle marketed in the United States and an equivalent amount of assessment on imported cattle, beef, and beef products. The final Order establishing a beef promotion and research program was published in the July 18, 1986, issue of the *Federal Register* (51 FR 26132) and assessments began on October 1, 1986. The Order requires importers of cattle to pay to the USCS, upon importation, an assessment of \$1.00 per head of cattle imported. Also importers of beef and beef products, which includes veal, must pay to the USCS, upon importation, an assessment equivalent to \$1.00 per head. As a matter of practicality, the assessment on imported beef and beef products is expressed in dollars per

pound for each type of such products. The formula for converting the live animal equivalent of \$1.00 per head to an assessment per pound is described in the supplementary information accompanying the Order and published in the July 18, 1986, issue of the *Federal Register* (51 FR 26136). The initial schedule of assessments is listed in a table in § 1260.172 (7 CFR 1260.172) of the Order for each type of beef and beef product identified by a TSUS number. Edible meat offal of bovine animals was not previously included in the list of TSUS numbers listed in the Order as subject to assessment upon importation. It is estimated that total assessments collected on imports will increase by less than 1 percent over a 12-month period as a result of these assessments.

The USCS is implementing a new numbering system, the Harmonized Commodity Description and Coding System, otherwise known as the Harmonized Tariff System (HTS), to replace the current Tariff Schedule of the United States numbering system. The HTS numbering system will become effective January 1, 1989, as part of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418, 102 Stat. 1107).

One of the purposes of this interim final rule is to revise the present table found under § 1260.172 (7 CFR 1260.172) of the Order to reflect the change from the current TSUS numbering system listed therein to the HTS numbering system. This revised table lists (1) the HTS numbers for imported cattle, beef, and beef products which conform to the previously listed TSUS numbers and are subject to assessment under the Order, and (2) the HTS numbers for edible meat offal of bovine animals which were not identified under the previous TSUS numbering system but are subject to assessment under the Order. This change permits the USCS to continue to collect assessments due on imported cattle, beef, and beef products already being assessed, and begin collection of assessments due on edible meat offal of bovine animals in conjunction with its regular importation processing and collection system.

The new HTS system uses an 11 digit number to identify specific imports such as cattle, beef, or beef products compared with a 7 digit number used in the TSUS system. Under the HTS, some of the major TSUS categories for cattle, beef, and beef products subject to assessment have been subdivided and the new categories have been assigned HTS numbers; other major TSUS categories remained unchanged, but were renumbered with HTS numbers; and the veal category under the TSUS numbering system has been subdivided and renumbered with HTS numbers.

Under the TSUS system, edible beef offal was not identified by a specific TSUS number as were other types of beef and beef products. Consequently, edible beef offal was not included in the table in § 1260.172 (7 CFR 1260.172) of the Order for assessment purposes. However, under the new HTS, edible beef offal is identified by four separate HTS numbers. These numbers have been included in the revised table.

As a result of these changes from the TSUS system to the HTS system there are 8 categories which cover imported cattle subject to assessment compared with the previous 10 TSUS categories. The 16 TSUS categories of beef and beef products listed in the table in the Order subject to assessment have been expanded to 24 HTS categories and 2 subcategories. Four new categories have been added. The cattle, beef, and beef products subject to assessment and the assessment under the TSUS system remain unchanged. The four new categories will be assessed at a rate equivalent to \$1.00 per head according to the formula described in the supplementary information accompanying the Order and published in the July 18, 1986, issue of the *Federal Register* (51 FR 26136). The assessment rate is .20 cents per pound for each new category. The following chart lists a comparison of the new HTS numbers and the former TSUS numbers for imported cattle, beef, and beef products subject to assessment under the Act and Order.

HTS No.	HTS article description	TSUS No.
Imported Live Cattle		
Live bovine animals:		
Purebred breeding animals:		
Dairy:		
0102.10.00103	Male .....	100.0130
0102.10.00201	Female .....	100.0140
Other:		
0102.10.00309	Male .....	100.0130
0102.10.00504	Female .....	100.0150



HTS No.	HTS article description	TSUS No.
0102.90.20004	Other: Cows imported specially for dairy purposes	100.5000
0102.90.40206	Other: Weighing less than 90 kg each	100.4000/100.4300
0102.90.40402	Weighing 90 kg or more but less than 320 kg each	100.4500
0102.90.40607	Weighing 320 kg or more each	100.5300/100.5500
<b>Imported Beef and Beef Products</b>		
0201.10.00103	Meat of bovine animals, fresh or chilled: Carcasses and half-carcasses:	106.1080
0201.10.00906	Veal	106.1020
	Other	
	Other cuts with bone in:	
	Processed:	
0201.20.20009	High-quality beef cuts	107.6100
0201.20.40005	Other	107.6200
0201.20.60000	Other	106.1020
	Boneless:	
	Processed:	
0201.30.20007	High-quality beef cuts	107.6100
0201.30.40003	Other	107.6200
0201.30.60008	Other	106.1060
	Meat of bovine animals, frozen: Carcasses and half-carcasses:	
0202.10.00102	Veal	106.1080
0202.10.00905	Other	106.1040
	Other cuts with bone in:	
	Processed:	
0202.20.20008	High-quality beef cuts	107.6100
0202.20.40004	Other	107.6200
0202.20.60009	Other	106.1040
	Boneless:	
	Processed:	
0202.30.20006	High-quality beef cuts	107.6100
0202.30.40002	Other	107.5500/107.6200
0202.30.60007	Other	107.6200
0206.10.00000	Edible offal of bovine animals, swine, sheep, goats, horses, asses, mules or hinnies, fresh, chilled, or frozen:	na
	Of bovine animals, fresh or chilled:	
0206.21.00007	Tongues	na
0206.22.00006	Livers	na
0206.29.00009	Other	na
0210.20.0002	Meat and edible meat offal, salted, in brine, dried or smoked; edible flours and meals of meat or meat offal:	107.4000/107.4500/(na- edible beef offal).
	Meat of bovine animals	
	Sausages and similar products, of meat, meat offal or blood; food preparations based on these products:	
	Other:	
1601.00.40003	Beef in airtight containers	107.2000
1601.00.60204	Other	107.2520
	Beef	
	Other prepared or preserved meat, meat offal or blood:	
	Of bovine animals:	
1602.50.05004	Offal	107.4000/107.4500
	Other:	
	Not containing cereals or vegetables:	
1602.50.09000	Cured or pickled	107.4820/107.4840
	Other:	
	In airtight containers:	
	Comed beef:	
1602.50.10203	In containers holding less than 1 kg	107.4820/107.4840
1602.50.10409	Other	107.4840
	Other:	
1602.50.20201	In containers holding less than 1 kg	107.5220/107.5240
1602.50.20407	Other	107.5240
1602.50.60006	Other	107.6300

This interim final rule also clarifies the language pertaining to the expenses of the Cattlemen's Beef Promotion and Research Board found in § 1260.151(a) of the Order (7 C.F.R. 1260.151(a)) and established in the final rule on July 18, 1986, at 51 FR 26141. That section provides that the Board is authorized to incur such expenses (including provision for a reasonable reserve) as the

Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and enable it to exercise its powers and perform its duties in accordance with that subpart. It further provides that such expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal period. The same provision in the proposed rule, found at 51 FR 8990 and

designated as § 1260.171, stated that "administrative expenses" incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal period.

The Beef Promotion and Research Act (7 U.S.C. 2901 *et seq.*) which authorizes the Order limits only "administrative expenses" to the 5 percent limit. Section 2904(4)(D) (7 U.S.C. 2904 (4)(D)) provides

that the total costs of collection of assessments and administrative staff incurred by the Board during any fiscal year shall not exceed 5 percentum of the projected total assessments to be collected by the Board for such fiscal year.

It is in a separate provision, not subject to the 5 percent limitation, that the Act authorizes a reasonable reserve. Section 2904(8)(C) (7 U.S.C. 2904(8)(C)) provides that the assessments shall be used for payment of the costs of plans and projects as provided for in paragraph (4), and expenses in administering the Order, including administrative costs incurred by the Secretary after the order has been promulgated, and to establish a reasonable reserve.

Thus, under the Act, only those expenses associated with the annual cost of collecting assessments and maintaining the Board's administrative staff ("administrative expenses") are subject to the 5 percent limit. The Act does not include the reserve as an administrative expense and therefore the reserve is not to be included in the 5 percent limit.

To clarify that the reserve is not subject to the 5 percent limitation under the Act and the Order, this interim final rule substitutes the word "Administrative" for the word "such" as the first word in the second sentence of § 1260.151(a) (7 CFR 1260.151(a)) and the phrase "expenses authorized in the paragraph" is substituted for the word "such" in the last sentence of that same paragraph.

Pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the *Federal Register* because: (1) The Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418, 102 Stat. 1107) requires that the USCS implement the HTS numbering system effective January 1, 1989 with the existing TSUS system in place until that date. Publication of this interim final rule with an effective date of January 1, 1989 will provide for the continuation of the collection of assessments on imported cattle, beef, and beef products under the Beef Promotion and Research Act (7 U.S.C. 2901 *et seq.*) and Order (7 CFR Part 1260) by the USCS in conjunction with its regular importation processing and collection system; (2) this action expands the table concerning the assessment rates for imported cattle,

beef and beef products to include four new categories for edible meat offal which will appear in the new HTS numbering system and therefore, these changes should be implemented concurrently with the HTS numbering changes; (3) the remaining changes in this action concerning the expenses of the Board are for clarity; and (4) interested persons are afforded a 30-day comment period to submit written comments. Any comments which are received by January 30, 1989 will be considered prior to any finalization of this interim final rule.

#### List of Subjects in 7 CFR Part 1260

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreement, Meat and meat products, Beef and beef products.

For the reasons set forth in the preamble, 7 CFR Part 1260 is amended as follows:

#### PART 1260—BEEF PROMOTION AND RESEARCH

1. The authority citation for 7 CFR Part 1260 continues to read as follows:

Authority: 7 U.S.C. 2901 *et seq.*

2. Revise 1260.151 to read as follows:

#### § 1260.151 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve), as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with this subpart. Administrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal period. Expenses authorized in this paragraph shall be paid from assessments collected pursuant to § 1260.172.

3. Revise § 1260.172(b)(2) to read as follows:

#### § 1260.172 Assessments.

(b) \* \* \*

(2) The assessment rates for imported cattle, beef, and beef products are as follows:

	Assessment
Live cattle:	
0102.10.00103	\$1.00/hd.
0102.10.00201	1.00/hd.
0102.10.00309	1.00/hd.
0102.10.00504	1.00/hd.

	Assessment
0102.90.20004	1.00/hd.
0102.90.40206	1.00/hd.
0102.90.40402	1.00/hd.
0102.90.40607	1.00/hd.
Beef and beef products:	
0201.10.00103	.77 cents/lb.
0201.10.00906	.20 cents/lb.
0201.20.20009	.28 cents/lb.
0201.20.40005	.27 cents/lb.
0201.20.60000	.20 cents/lb.
0201.30.20007	.26 cents/lb.
0201.30.40003	.27 cents/lb.
0201.30.60008	.27 cents/lb.
0202.10.00102	.20 cents/lb.
0202.10.00905	.77 cents/lb.
0202.20.20008	.28 cents/lb.
0202.20.40004	.27 cents/lb.
0202.20.60009	.20 cents/lb.
0202.30.20006	.28 cents/lb.
0202.30.40002	.27 cents/lb.
0202.30.60007	.27 cents/lb.
0206.10.00000	.20 cents/lb.
0206.21.00007	.20 cents/lb.
0206.22.00006	.20 cents/lb.
0206.29.00009	.20 cents/lb.
0210.20.00002	.35 cents/lb.
1601.00.40003	.25 cents/lb.
1601.00.60204	.25 cents/lb.
1602.50.05004	.35 cents/lb.
1602.50.09000	.35 cents/lb.
1602.50.10203	.35 cents/lb.
1602.50.10409	.35 cents/lb.
1602.50.20201	.37 cents/lb.
1602.50.20407	.37 cents/lb.
1602.50.60006	.38 cents/lb.

Done at Washington, D.C. on December 22, 1988.

J. Patrick Boyle,  
Administrator.

[FR Doc. 88-29914 Filed 12-28-88; 8:45 am]  
BILLING CODE 3410-02-M

#### Animal and Plant Health Inspection Service

#### 9 CFR Part 78

[Docket No. 88-196]

#### Brucellosis in Cattle; State and Area Classifications

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule.

**SUMMARY:** We are affirming without change an interim rule that amended the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Puerto Rico from Class Free to Class A.

**EFFECTIVE DATE:** January 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Dr. Jan Huber, Senior Staff Veterinarian, Cattle Diseases and Surveillance Staff, VS, APHIS, USDA, Room 812, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; 301-436-8389.



**SUPPLEMENTARY INFORMATION:****Background**

In an interim rule published in the *Federal Register* and effective September 20, 1988 (53 FR 36433-36434, Docket Number 88-134), we amended the regulations in 9 CFR Part 78 governing the interstate movement of cattle because of brucellosis by changing the classification of Puerto Rico from Class Free to Class A. Comments on the interim rule were required to be postmarked or received on or before November 21, 1988. We did not receive any comments. The facts presented in the interim rule still provide a basis for this rule.

**Executive Order 12291 and Regulatory Flexibility Act**

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

Cattle are moved interstate for slaughter, for use as breeding stock, or for feeding. Changing the brucellosis status of Puerto Rico from Class Free to Class A imposes certain testing and other requirements on the interstate movement of cattle from Puerto Rico. However, these requirements will not affect the interstate movement of cattle to recognized slaughtering establishments or quarantined feedlots, or the interstate movement of cattle from certified brucellosis free herds. The change in the brucellosis status of Puerto Rico may decrease the opportunity for other movements of cattle out of Puerto Rico since, in most cases, the cattle would first have to be tested and found negative for brucellosis. However, no cattle are being moved out of Puerto Rico, either interstate or into foreign countries.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has

determined that this action will not have a significant economic impact on a substantial number of small entities.

**Paperwork Reduction Act**

The regulations in this part contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

**Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

**List of Subjects in 9 CFR Part 78**

Animal diseases, Brucellosis, Cattle, Hogs, Quarantine, Transportation.

**PART 78—BRUCELLOSIS**

Accordingly, we are adopting as a final rule without change, the interim rule that amended 9 CFR Part 78 and that was published at 53 FR 36433-36434 on September 20, 1988.

Authority: 21 U.S.C. 111-114a-1, 114g, 115, 117, 120, 121, 123-128, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

Done in Washington, D.C., this 22nd day of December 1988.

James Glosser,  
Administrator, Animal and Plant Health  
Inspection Service.  
December 21, 1988.

[FR Doc. 88-29913 Filed 12-28-88; 8:45 am]  
BILLING CODE 3410-34-M

**NUCLEAR REGULATORY COMMISSION****10 CFR Parts 170 and 171****Revision of Fee Schedules**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (Commission or NRC) is amending its regulations by revising its fee schedules contained in 10 CFR Parts 170 and 171. The revised fee schedules will result in those power reactor, fuel cycle facility and materials applicants and licensees requiring the greatest expenditure of NRC resources paying the greatest fees. This permits NRC to more completely recover under 10 CFR Part 170 costs incurred for identifiable services for power reactor, fuel cycle facility and major materials applicants and licensees. This action also

implements fee legislation enacted by Congress in December 1987. All applicants and licensees currently subject to fees under 10 CFR Parts 170 and 171 are affected by this rule.

**EFFECTIVE DATE:** January 30, 1989.

**ADDRESSES:** Copies of the written public comments are available for public inspection and copying for a fee at the NRC Public Document Room at 2120 L Street NW., Washington, DC, in the lower level of the Gelman Building.

**FOR FURTHER INFORMATION CONTACT:** Lee Hiller, Assistant Controller, U.S. Nuclear Regulatory Commission, Washington, DC 20055, Telephone: 301-492-7351.

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Responses to Comments
- III. Changes Included in the Final Rules
- IV. Section-by-Section Analysis
- V. Environmental Impact: Categorical Exclusion
- VI. Paperwork Reduction Act Statement
- VII. Regulatory Analysis
- VIII. Regulatory Flexibility Certification
- IX. Backfit Analysis

**I. Background**

On June 27, 1988 (53 FR 24077-24093), the Commission published in the *Federal Register* a notice of proposed rulemaking for revisions to 10 CFR Part 170 ("Fees for Facilities and Materials Licensees and Other Regulatory Services \* \* \*") and Part 171 ("Annual Fees for Power Reactor Operating Licenses"). This action was necessary for the Commission to update the current fee schedules in Part 170 and to implement the requirements of section 5601 of the Omnibus Budget Reconciliation Act of 1987, as signed into law on December 22, 1987 (Pub. L. 100-203). Section 5601 amended section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA—Pub. L. 99-272), which requires the Commission to collect annual charges from its licensees. As discussed in the notice of proposed rulemaking published on June 27, 1988, the amendment requires the NRC to collect under 10 CFR Parts 170 and 171, as well as under other provisions of law, not less than 45 percent of the Commission's budget for each of Fiscal Years 1988 and 1989 (Option 1).

The proposed rule also sought comments on a second option to not change 10 CFR Part 170, but only raise the annual fees under 10 CFR Part 171 to reach the 45 percent mandate of Pub. L. 100-203 for FY 1988. On August 12, 1988, the Commission published an interim final rule for 10 CFR Part 171 (53 FR 30423) applicable to collections for FY

1988 based upon the second option. The interim rule increased collections from 33 percent to 45 percent of the Commission's FY 1988 budget. Adjusted invoices based on the interim rule were sent to reactor licensees on August 16, 1988.

As discussed in the interim rule, the Commission will proceed with option 1 rather than option 2 as a long-term rule for annual fees. The method for assessing annual fees in this final rule presents a more equitable distribution among the licensed nuclear power reactors of the amount needed to be collected by taking into account the kind of reactor, its location and other considerations in relation to the generic research and other costs associated with power reactor regulation. Under the revised rule, those who require the larger expenditure of NRC resources will pay the larger fees.

**II. Responses to Comments**

The Commission received thirty-two (32) letters commenting on the proposed rule. Twenty letters were from persons mainly concerned with Part 50 facilities and twelve commented on fees for materials licensees.

The comments fell into the following categories:

**Part 170 Comments:**

1. Removal of ceilings.
2. Removal of routine inspection frequencies.
3. Fees for standardized design review.
4. Disparity in certain materials fee categories.

**Part 171 Comments:**

1. Legality of fees.
2. Allocate costs to all persons.
3. Exclude costs serving an independent public benefit.
4. Base fees on specific identifiable services.
5. Exclude research until NRC acts on that research.
6. Include fines, penalties, and interest in fee collections.
7. Other Comments.

The Commission's responses to the comments are as follows:

**Comments on Part 170**

1. Removal of ceilings for reactor and major fuel cycle permits, licenses, amendments, reactor related topical reports and services; and for transportation cask packages and shipping containers. Commenters' main concern about the removal of ceilings for applications and other services is that it removes the predictability of costs for budgeting purposes. In the area

of topical reports, commenters were concerned that it would discourage participation in the topical report program as well as defeat the overall objective of encouraging new and improved predictive models and products.

**Response:** Ceilings are being removed because the Commission strongly supports the concept that those requiring the greatest expenditure of NRC resources should pay the greatest fees. Ceilings contradict that objective. Appendices A and B that were included in the proposed rule of June 27, 1988 (53 FR 24092 and 24093), are non-binding schedules of estimated fees which may still be used for planning purposes in the absence of ceilings and provide adequate information for planning purposes. The upper range in these schedules would only be increased slightly for FY 1989 as a result of using FY 1989 budget costs which changed the hourly rate from \$80 (based on FY 1988 budget) to \$86 for FY 1989. With respect to topical report reviews, the Commission finds no compelling argument to justify retaining a ceiling since those who request reviews of topical reports that require considerable staff work should bear their share of the review costs. The Commission recognizes, however, that there may be some topical reports that are of particular importance and use to the NRC. Therefore, as a matter of agency policy, the NRC may, upon its own initiative or at the request of the applicant, exempt all or part of the topical report fee pursuant to § 170.11(b)(1).

2. Removal of routine inspection frequency. Most materials commenters are concerned that the removal of the frequency for routine inspections will take away their ability to predict what they should budget for inspection fees and create a potential for more frequent inspections than are needed.

**Response:** The Commission's routine inspection program is a structured program to assure that licensees comply with their license conditions and Commission regulations and standards to the extent that the health and safety of the company employees and public are not endangered. As long as a licensee's operations are in compliance with the NRC-issued license, regulations, and standards, the frequency of inspections is not generally expected to be more frequent than what was stipulated in the previous regulation. Therefore, from a budgeting standpoint, if a licensee operates in conformance with its license and the Commission's regulations and standards, the predictability for

inspection fee budget costs remains essentially unchanged.

3. Fees for standardized design. Nuclear power industry commenters questioned the Commission's proposal to defer fees for review of standardized reference designs until referenced by an applicant, or at the end of 5 years (10 years if a design is certified) after design approval, whichever comes first. A few commenters felt that fees should not be charged or should be waived for standardized design reviews to remove any disincentive for the standardization program and what could possibly be unusually extensive costs as a result of the review being a "first-of-a-kind" that might require extensive safety reviews.

**Response:** The Commission's decision to defer fees for standard reference design reviews is based upon a balancing of policy considerations. On the one hand, it is clearly the policy of the Government, and the intent of the Congress, that the Commission collect fees for services rendered to applicants. Thus, standard reference design reviews are not to be performed free of charge. On the other hand, there is a sound and persuasive public policy need to avoid a disincentive to the submittal of standard designs by vendors incorporating the best safety features available for a future generation of reactors. For years, the Commission has supported the use of standard designs (see, e.g., 10 CFR Part 50, Appendix O, and 10 CFR 2.110). On balance, the Commission believes that the deferral of fees for standard design reviews is a reasonable compromise that serves the public interest. Accordingly, the Commission will retain its proposed treatment of fees for standard reference designs.

4. Disparity in certain materials fee categories. Two materials licensees questioned why the license and inspection fees in certain areas are higher when compared with other areas.

**Response:** The NRC recognizes that a part of the current Part 170 fee schedule for materials licenses is outdated and needs revision. For example, the labor rates (staff hours and fees applied) used in calculating fees are based on data that is several years old. The NRC has determined that this is not the appropriate rulemaking to make the necessary adjustments. The NRC contemplates initiating a rulemaking on this issue next year.

**Part 171 Comments**

The Commission notes that the rulemaking to which the following comments are again addressed is of a very limited scope with respect to Part 171. The rulemaking adds two new



definitions to which no comments were addressed, it changes the percent of recovery from 33 percent of the Commission's budget to at least 45 percent, enters a more refined allocation of the annual fee among different classes of power reactors, and eliminates the provision for refunds of the annual fee in excess of 45 percent. The Commission received some comments that go beyond these limited subjects and are therefore not relevant to this rulemaking. Nonetheless, the Commission is responding to them. The response to comments beyond the scope of the rulemaking should not, however, be taken as an admission by the Commission that the issues raised are again open to challenge. Responses to these comments are seen as a matter of courtesy to the commenters and not as reopening these issues to further litigation. These comments and the responses thereto are:

1. **Legality of fees.** Several commenters, in particular law firms representing operators of nuclear power reactors, commented on issues of a legal nature.

**Response.** These comments for the most part repeated comments addressed to the first issuance of 10 CFR Part 171 (final rule issued September 18, 1986; 51 FR 33224) promulgated to implement section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985. That rule was challenged and upheld in its entirety in *Florida Power & Light Co. et al. v. United States*, 846 F.2d 765 (D.C. Cir. 1988). A petition for writ of certiorari challenging that decision is pending in the Supreme Court (*Florida Power & Light Co. v. United States*, No. 88-234).

2. **Allocation of costs.** Some commenters stated that annual fees should be levied on all persons such as materials licensees receiving services from the Commission.

**Response.** Congress provided the Commission with the discretion to determine which categories of licensees or other persons should be charged an annual fee by the Commission. The Commission's decision not to charge materials licensees annual fees was upheld in *Florida Power & Light v. United States*, supra. The Commission has reaffirmed its determination that it will not impose an annual fee on its materials licensees. The Commission has more than 8000 materials licensees. Regulation of these entities requires a minimal expenditure of NRC resources (less than 3 percent of the NRC budget). Moreover, these licensees are an extremely varied class, ranging from large uranium processing operators to small operators involving well logging,

radiography, or the use of gauging devices. In light of the relatively minor resources devoted to regulating these entities and the obvious administrative difficulties in determining how to calculate appropriate annual fees for this large, diverse class of licensees, the Commission will not impose an annual fee on these licensees at this time.

3. Some commenters asserted that the cost basis for annual fees should exclude costs serving an independent public benefit.

**Response.** The concept that costs related to an independent public benefit should not be charged to licensees derives from the case law on application of the Independent Offices Appropriation Act of 1952, 31 U.S.C. 9701 (IOAA). It is not a concept applicable to annual fees charged under COBRA, as amended. The annual fee statute has its own standard independent of the standards applicable to IOAA. In any case, the research performed by the NRC primarily benefits power reactor licensees as part of the system under which those facilities are regulated and allowed to operate in a manner that provides adequate protection to the public health and safety. Therefore, none of the services for which fees are charged provide "independent public benefits" even if this concept were deemed applicable. The Commission's position on this issue was also upheld in *Florida Power & Light v. United States*, supra.

4. Some commenters took the position that fees should be based on specific identifiable services benefitting individual licensees and not on generic agency action.

**Response.** The concept that fees should be levied only for specific services to identifiable recipients is an IOAA standard. It is not a standard that applies to annual fees under COBRA, as amended. It is the Commission's continuing view that the Congress did not intend that IOAA principles be applied to the collection of annual fees under COBRA, as amended. The Commission's determinations in this area were upheld in *Florida Power & Light v. United States*, supra.

5. Some commenters stated that the Commission should not include in its cost basis for annual fees research cost until the Commission acts upon that research and it is shown to provide a benefit.

**Response.** It is the position of the Commission that research devoted to the continued safety of nuclear power reactors is a present service and benefit. This research either confirms that reactors are safe, that some changes will improve safety, or that certain

regulations may no longer be necessary for safe operation. The conduct of research resulting in any of these outcomes is a present benefit. This research provides continuing confidence that licensed reactors can be operated consistent with the public health and safety and the Commission's regulations. We again note that the DC Circuit Court of Appeals in *Florida Power & Light v. United States*, supra, upheld the Commission's decision to include such costs in its annual fee basis.

6. One commenter felt that monies from the collection of fines, penalties and interest should be included in the 45 percent required to be collected.

**Response.** Although related here to the 45 percent level of collection, the same comment was presented with respect to the rule promulgating the 33 percent ceiling. The Commission adheres to its prior position. Fines, penalties and interest are not cost recovery measures, but are disciplinary and intended to deter persons who violate Commission regulations and orders, as well as other licensees, from future violations. Public policy dictates that those paying penalties, fines, or interest should not benefit by recovering a portion of the penalty, fine or interest through a reduced fee. Again, this Commission decision was upheld in *Florida Power & Light v. United States*, supra.

7. **Other Comments on Part 171 Amendments.**

a. Some licensees and their vendors have stated that the additional costs assessed for B&W type reactors are not justified because these plants are not problem plants requiring the greatest expenditure of staff funds and manpower when compared with other reactors.

**Response.** The basis for assessing B&W owners under Part 171, or any licensee (by vendor type), is not based upon performance, but it is an allocation of fee based upon corresponding costs (FTE and obligations) to the NRC to perform generic type activities associated with that type of reactor (vendor type). Some specific activities questioned (i.e., "Continuing Experimental Capability" and "Technical Integration Center") have been reallocated based upon a more detailed identification matrix of licensee groups.

b. *Florida Power Corporation* commented that Agency and industry research supports exclusion of reactors east of the Rockies from the list of reactors benefitting from special seismic studies.

**Response.** Although its service area lies within a region of low seismicity, the Florida Power Corporation, as explained below, benefits substantially from NRC seismic research, including maintenance of the NRC-funded seismograph networks east of the Rocky Mountains. Seismic research through the years has shown that Florida is less prone to earthquakes than a large part of the eastern and central U.S., and thus allows for less stringent seismic design bases for critical facilities. Ongoing seismic monitoring will continue to confirm that conclusion or identify possible errors of judgment.

Recent experience (1982 New Brunswick and New Hampshire earthquakes, the 1987 southern Illinois earthquake and the reservoir induced seismicity at Monticello Reservoir, South Carolina) indicates that high accelerations at relatively high frequencies can be generated locally by moderate to small magnitude earthquakes, usually at relatively shallow depths (several kilometers). It is possible that earthquakes of these sizes could occur in Florida (although the probability is low). Accelerations can result that exceed OBE or SSE design bases for critical facilities. We do not believe that these ground motions (short duration, high accelerations at high frequencies) are the kind that result in damage to seismically designed critical facilities, but research in this area is ongoing. The occurrences are extremely difficult to handle even with no evidence of damage. The seismic networks are the main sources of data that are basic to resolving this issue.

Another major issue regarding eastern U.S. seismicity is the nature of the tectonic structures that are currently responsible for the earthquakes. Suspect structures include faults in rocks ranging in age from Paleozoic through Triassic and into Tertiary (several hundred million years old to several million years old). These faults are widely distributed in rocks throughout the east, including rocks beneath Florida. Much of current seismic and geologic research funded by the NRC is focused on identifying and defining the tectonic structures that are causing the earthquakes. The most definitive information about seismic sources, which are deeply buried, is obtained from the analysis of recordings of earthquake ground motions. Builders and operators of critical facilities in low seismic areas derive as much benefit from this type of research as those in more seismic areas in view of the relatively short historic seismic record.

c. **Level of budget detail.** Several utilities' overall criticism of the proposed rule concerns their perception of the need to breakout budgeted obligations to a level lower than the Program—Program Element—Activity structure used in the NRC planning process in the area of research. These utilities further comment on the fact that the budget detail, maintained at the activity level and provided to the Public Document Room (PDR) does not allow them access to greater detail (to see if the NRC developed its budget, thus its user charges, accurately).

**Response.** This suggestion has been adopted. We have gone one level below the activity level to the project level (FIN) in developing fees for research activities. Using the FIN level permits a more detailed breakout of fee categories. However, FIN information used in developing these fees cannot be placed in the PDR now because it contains predecisional contracting information—amounts set aside for specific procurements that have not yet been awarded. To release this information before contracts are awarded would be in violation of the Federal Procurement Law. Accordingly, we do not envision placing the FIN data used in developing this fee schedule in the PDR until sometime during the following fiscal year.

d. **MIST program costs.** Several commenters stated that the Commission agreed to share in the funding of Multi-Loop Integral System Test (MIST), the program with the B&W Owners Group (OG). However, it is in the research costs set forth in Table IV of the proposed rule. It is inappropriate for NRC to pass its share of the MIST costs on to B&W Owners through license fees.

**Response.** The NRC does provide funding for the MIST program as well as other cooperative programs. Being an agency cost item, the MIST program as well as the costs for all other current and future cooperative programs should be used in the cost allocation data base. Moreover, we do not view this as a breach of the co-funding agreement by NRC with the OG because the current agreement is about to expire and a new agreement is being negotiated. All of the \$2.7 million included in the user fee base is for activities that would be funded by the new agreement rather than the existing one. Before entering the new agreement, this final rule will have been promulgated putting the OG on notice of the agency's revised user fee policies.

It should also be pointed out that in the past two phases of MIST co-op research (Phase 3 and Phase 4), the owners group paid only about one-half

of the NRC contributions for Phase 3 and did not contribute any funds for Phase 4. Because almost 90 percent of all funds budgeted in areas subject to fee recovery under Part 171 will be collected through user fees, if co-op research programs were exempt from the fee base, the co-op groups would receive fee exemptions not available for other research—inequitably shifting the fee burden to other licensees.

e. **Comments on specific changes to Part 171.** Comments on the proposed changes to Part 171 fall into three primary groups: (1) The Commission is in error in considering the 45 percent collection target as a floor, and not as a ceiling, (2) the Commission is in error in eliminating the provision for refunds for excess annual fee collections (§ 171.21), and (3) the Commission should adopt option 2 identified in the notice of proposed rulemaking. Under that option, the previously adopted method for calculating annual fees would be retained. The only significant change would be raising the annual fee to collect 45 percent of the NRC budget. Other commenters suggested that Option 2 not be adopted.

**Response.** The Commission addressed all three of these issues in its notice of interim rule published August 12, 1988, in the *Federal Register* (53 FR 30423). There the Commission stated its view that reading the 45 percent in Omnibus Budget Reconciliation Act (OBRA) (amending COBRA) as a ceiling would be contrary to the language and plain meaning of the statute, quoting, "... in no event shall such percentage be less than a total of 45 percent of such costs in each such fiscal year." (Section 5601, Omnibus Budget Reconciliation Act of 1987.) The Commission adheres to that view again emphasizing that fees will exceed the 45 percent target by a trivial amount.

The elimination of the provision for refunds results from the Commission's view of the operative effect of the 45 percent constituting a floor for collections. In presenting the 45 percent as a floor, and not a ceiling, OBRA removed the necessity to make refunds which was implicit in COBRA when the latter imposed a 33 percent ceiling prior to its amendment. In short, the change in the law from a 33 percent ceiling to a 45 percent floor for collections eliminates the need to make a refund of amounts collected in excess of 45 percent. Accordingly, consistent with its view of Congressional intent, the Commission is permanently removing § 171.21 from its regulations.

With respect to the suggestion that option 2 be adopted and the fee



collection methodology remain unchanged, the Commission does not support this approach. The Commission is firmly committed to assessing fees based on the principle that those licensees requiring the greatest expenditure of NRC resources pay the greatest fees. Option 2 is contrary to this policy.

f. One commenter requested that consideration of the utility's rate base be included among the exemption criteria in 10 CFR 171.11.

*Response.* This comment is also outside the scope of the rulemaking because the rulemaking does not propose any change to the exemption criteria in Part 171. Nonetheless, the Commission believes that factors related to a utility's rate base may be considered in passing on requests for exemptions in § 171.11 Rate base matters may be considered under § 171.11(c) and under § 171.11(e). In the Commission's view, the commenter's request is already accommodated in Part 171 as initially codified.

### III. Changes Included in the Final Rules

The changes included in the final rule are as follows and permit the NRC to recover approximately, but not less than, 45 percent of its budgeted costs for fiscal years 1988 and 1989, respectively. These changes were set forth in the proposed rule published on June 27, 1988 (53 FR 24077). Any differences between the final rule and the proposed rule are explained in the following discussion.

1. Changing the hourly rates under 10 CFR 170.20 which range from \$53 to \$62 for the various program offices to \$86 for all program offices based on the FY 1989 budget and providing for an annual adjustment if there is a need for increase or decrease. The \$86 hourly rate is an increase from the proposed \$80 hourly rate. This increase is as a result of using the FY 1989 budget in lieu of the FY 1988 budget. The method used for calculating the hourly rate is exactly the same as that used in the proposed rule. An analysis of the budget which generated this rate is provided in the Part 171 Section-by-Section Analysis.

2. Removing the 10 CFR Part 170 fee ceilings for application reviews, services, and inspections for reactors; fuel cycle facilities; transportation cask packages and shipping containers.

3. Amending 10 CFR 170.31 to charge for each routine inspection conducted by the NRC and to delete the maximum billing frequency. For user convenience, the fee schedule previously included in 10 CFR 170.32 has been incorporated in 10 CFR 170.31.

4. In 10 CFR Part 170, removing the application fee and deferring the

payment of costs for the review of applications for standardized reactor design reviews and certifications until a standardized design is referenced.

5. In 10 CFR Part 170, removing application filing fees for reactor applications and for reactor related topical reports.

6. Increasing the annual fees assessed under 10 CFR Part 171 and charging based on the principle that licensees requiring the greatest expenditure of NRC resources shall pay the greatest fee. Again, as in the development of the hourly rate, the method used for determining the annual fee is the same as that described in the proposed rule except that budget obligations have been identified one level below the detail shown in the proposed rule based on the comments received, and FY 1989 budget data have been used in lieu of the FY 1988 data used in the proposed rule.

7. Including in the NRC collection, moneys recovered from the Nuclear Waste Fund, as managed by the Department of Energy under the Nuclear Waste Policy Act, as amended, for costs incurred by the NRC in preparing for licensing a high-level waste repository.

The agency workpapers which support the changes to 10 CFR Parts 170 and 171 are available in the Public Document Room, at 2120 L Street, NW., Washington, DC, in the lower level of the Gelman Building.

### IV. Section-by-Section Analysis

The following section-by-section analysis of the affected sections provides additional explanatory information. All references are to Title 10, Chapter I, Code of Federal Regulations.

#### Part 170

##### Section 170.12 Payment of fees.

Paragraphs (c), (d), (e), and (f) are changed to remove the \$150 application fee for reactor license amendments and other approvals.

Within paragraph (e), Approval fees, the current reference to facility standard reference design approvals is changed to remove the application fee and to permit deferral of review and certification fees until the design is referenced, payable thereafter in 20 percent increments as the design is referenced. However, regardless of whether the design is referenced, the full costs of a preliminary design approval (PDA)/final design approval (FDA) will be recovered by the NRC from the holder of the design approval within 5 years from the date of approval. If the design is certified, the five-year period is

extended to 10 years from the date of the design certification with the same proviso that 20 percent of the costs will be payable each time the design is referenced. In the event the standardized design approval application is denied, withdrawn, suspended, or action on the application is postponed, fees will be collected when the review, to that point, is completed and the five (5) installment payment procedure will not apply.

##### Section 170.20 Average cost per professional staff-hour.

This section is modified to reflect an agency-wide professional staff-hour rate based on the FY 1989 budget. The section is also modified to reflect that the hourly rate will be adjusted each fiscal year, with notice of the new rate published in the Federal Register if the hourly rate increases or decreases. Accordingly, the professional staff rate for the NRC for FY 1989 is \$86 per hour, or \$150.9 thousand per FTE (professional staff year) rather than \$80 per hour as set forth in the proposed rule. An analysis of the budget which generated this rate is provided in the Part 171 section-by-section analysis. In each subsequent year, the hourly rate will be adjusted to reflect current cost per direct staff FTE.

On August 19, 1987, Part 170 and other regulations under Title 10 of the Code of Federal Regulations were amended to reflect NRC organizational changes. These revisions as published August 21, 1987 (52 FR 31601), in final form, inadvertently changed 10 CFR 170.20 to delete the \$53 hourly rate for regional staff inspection and other identifiable services. In computing costs for invoices, the \$53 hourly rate will continue to be used for regional review staff time until the effective date of this final rule at which time the \$86 hourly rate will be used.

##### Section 170.21 Schedule of fees for production and utilization facilities, review of standard reference design approvals, special projects, and inspections.

Within the schedule of fees, all services (other than most application filing fees) will be changed from the current specified cost to "Full Cost." The schedule for Standard Reference Design Review is modified to reflect the amendment of § 170.12 addressed above.

With the removal of ceilings for certain services, the costs for those reviews for which a ceiling previously established has been reached will not be billed if prior to the effective date of this

rule the review of the application is completed. For administrative reasons, where the review has not yet been completed, NRC will not seek to recover those costs which it incurred after the current ceiling was reached and before this revised rule becomes effective. Costs incurred after the effective date of this final rule will be billed. The professional staff-hours expended up to the effective date of this rule will be at the professional rates established for the June 20, 1984 rule. Any professional hours expended after the effective date of this rule will be assessed at the FY 1989 rates reflected in this final rule. The same applies to the removal of ceilings under the revisions of § 170.31 below. The footnotes to this schedule also are modified to bring them into conformity with the amendments to this schedule.

##### Section 170.31 Schedule of fees for materials licenses and other regulatory services.

Like § 170.21, this section is modified to (a) reflect the removal of ceilings on certain categories of fees, (b) charge full costs for those services, and (c) incorporate the inspection fee schedule previously set forth in § 170.32.

Inspection fee ceilings for selected services are also removed and the remaining fixed fees are retained since the ratio of NRC costs to fees collected is approximately equivalent to the percentage of the budget to be collected into the General Treasury. Currently if the frequency of inspection, for example, for a category is 2 years and an inspection is next conducted 1 year and 11 months after the previous inspection, no fee is assessed. Often times inspections of different licensees are scheduled because of their close proximity. This scheduling represents a more efficient use of resources. Accordingly, § 170.31 and the footnotes are being revised to indicate that fees will be assessed for each inspection conducted by the NRC. Footnotes to the schedule that are affected by this action are revised to be consistent with this revision. Previous inspection footnotes 1 through 4 are now being combined as one footnote and will become 1(e) and footnote 5 remains as 5.

##### Section 170.32 Schedule of fees for health, safety, and safeguards inspections for materials licenses.

Under the proposed rule, § 170.32 was published as a separate schedule to cover inspection fees for materials licensees. The reformatting to include materials inspection fees under § 170.31 is for user convenience and to shorten the rule. By doing this, as in § 170.21, all fees for each license category are now

together rather than in two different schedules. The rule has not been changed from its proposed form. Footnotes have been consolidated and renumbered as specified above.

#### Part 171

The following is a section-by-section analysis of those areas affected by this final rule. All references are to Title 10, Chapter I, Code of Federal Regulations.

##### Section 171.5 Definitions.

The following definitions are being added.

The term "Budgeted obligations" is defined to be the projected obligations of the NRC that likely will result in payments by the NRC during the same or a future fiscal year to provide regulatory services to licensees. Budgeted obligations include, but are not limited to amounts of orders to be placed, contracts to be awarded, and services to be provided to licensees. Fees billed to licensees are based on budgeted obligations because the NRC's annual budget is prepared on an obligation basis.

The term "Overhead costs" is defined to include three components: (1) Government benefits for each employee such as leave and holidays, retirement and disability costs, health and life insurance costs, and social security costs; (2) Travel costs; (3) Direct overhead, e.g., supervision, program support staff, etc.; and (4) Indirect costs, e.g., funding and staff for administrative support activities. Factors have been developed for these overhead costs which are applied to hourly rates developed for employees providing the regulatory services within the categories and activities applicable to specified types or classes of reactors. The Commission views these costs as being reasonably related to the regulatory services provided to the licensees and, therefore, within the meaning of section 7601, COBRA.

##### Section 171.13 Notice.

Under the current rule, one fee is applicable to all licensed reactors. Under this final rule, each reactor will be assessed fees based on those NRC activities from which it benefits as a type or within a class of reactors. Accordingly, annual fees are expected to be different for each of the various types or classes of reactor operating licenses. Each bill will reflect those specific activities applicable to each operating license as required by the revised § 171.15 discussed below.

##### Section 171.15 Annual Fee: Power reactor operating licenses.

Paragraph (c) is modified to reflect a minimum target percentage of 45 percent rather than a maximum percentage of 33 percent. The formula used to calculate the annual fee is modified to reflect the inclusion of moneys expected to be collected from the Nuclear High Level Waste (HLW) Fund administered by the Department of Energy and the estimated collections under Part 170 for each fiscal year. Funds will be collected from the Nuclear HLW fund beginning in FY 1989. The sum of these funds will be subtracted from the amount reflecting 45 percent of the NRC budget prior to determining the annual fee for each licensed power reactor.

In FY 1989, the Commission must recover not less than 45 percent of its congressionally enacted budget of \$420,000,000. Applying the fee rates set out in this rule, the NRC estimates that it will collect in FY 1989 \$50 million pursuant to Part 170 and \$15 million from the Nuclear Waste Fund. In accordance with the formula provided in § 171.15, for FY 1989: \$189 million minus approximately \$50 million for Part 170 plus \$15 million for Nuclear Waste Fund equals approximately \$124 million to be recovered through annual fees. Because at least 45 percent is to be collected, the amount charged under Part 171 will also be dependent on the number of exemptions granted pursuant to § 171.11 and the number of new power reactor licenses issued during the fiscal year.

The following areas are those NRC programs which comprise the annual fee. They have been expressed in terms of the NRC's FY 1989 budget program elements and associated activities in lieu of the FY 1988 activities used in the proposed rule.

Program element	Activity
—Reactor Performance Evaluation.	—Generic Communications. —Engineering/Safety Assessments.
—Reactor Maintenance and Surveillance.	—Maintenance and Surveillance.
—License Performance Evaluation.	—Quality Assurance.
—License and Examine Reactor Operators.	—Program Development and Assessment/Regional Oversight. —Generic Activities.
—Region-Based Inspections.	—Lab and Technical Support. —Regional Assessment.
—Specialized Inspections	—Vendor Inspections.



Program element	Activity	Program element	Activity
—Regulatory Improvements.	—Technical Specifications. —Safety Goal Implementation. —Inspection/Licensing Integration and Research and Standards Coordination.	—Reactor Accident Risk Analysis.	—Integrated Codes and Applications. —Hydrogen Transport and Combustion. —Severe Accident Management. —Risk model development. —Risk Uncertainty Methodology. —Risk Rebaseline Analyses. —Risk-Based Management Methodology.
—Licensee Reactor Accident Management Evaluation.	—Concept of Operations and Implementing Technical Procedures. —Regional Assistance Committees.	—Severe Accident Program Implementation.	—Severe Accident Policy Implementation. —Regulatory Application of New Source Terms. —Reduce Uncertainty in Health Risk Estimates. —Health Physics Technology Improvements. —Dose reduction. —Engineering Issues. —Reactor System Issues. —Human Factors Issues. —Severe Accident Issues. —Management of Safety Issue Resolution.
—Safeguards Licensing and Inspection.	—Regulatory Effectiveness Reviews.	—Radiation Protection and Health Effects.	—Regulation Development or Modification. —Independent Review and Control of Rulemaking. —Regulatory Analysis of Regulation. —Rules for License Renewal. —Safety Guide Implementation.
—Reactor Vessel and Piping Integrity.	—Pressure Vessel Safety. —Piping Integrity. —Inspection Procedures and Techniques. —Chemical Effects. —Aging Research.	—Generic and Unresolved Safety Issues.	—Manage Performance Indicator Program. —Conduct Diagnostic Evaluations of Licensee Performance. —Management Incident Investigation Program. —Emergency Response Data System. —Develop and Maintain Response Center Equipment, Procedures and Analytical Tools. —Program Coordination and Development. —Operations Officers. —PWR/BWR Technology Training. —Analysis of Operational Experience. —Analysis of Operational Trends and Patterns. —Collect, Screen and Feed Back Operational Data. —Operational and Reliability Data Systems. —Section Supervision.
—Aging of Reactor Components.	—Equipment Qualification Methods. —Earth Sciences. —Component Response to Earthquakes. —Validation of Seismic Analysis. —Seismic Design Margin Methods.	—Developing and Improving Regulations.	
—Reactor Equipment Qualification.	—Individual Plant Examinations. —Ex-Vessel Accident Management. —In-Vessel Accident Management. —External Event Safety Margins.	—Performance Indicators.	
—Seismic and Fire Protection Research	—Containment/Balance of Plant. —Technical Support Center. —Nuclear Plant Analyzer/Database/Simulator. —B&W Testing. —PWR Large Break LOCA Testing. —PWR Small Break LOCA Testing. —Other Experimental Programs. —Modeling.	—Diagnostic Evaluations.	
—Accident Management	—Human Factors Research. —Human Error Data Collection and Analysis.	—Incident Investigation	
—Reactor Applications	—Performance Indicators. —Plant and Systems Risk and Reliability. —Dependent Failure Analysis. —Fission Product Behavior and Chemical Form. —Natural Circulation in the Reactor Coolant System. —Core Melt Progression and Hydrogen Generation. —Steam Explosion. —Core/Concrete Interactions. —Direct Containment Heating.	—NRC Incident Response.	
—Plant Performance		—Technical Training Center. —Operational Data Analysis.	
—Human Performance		—Operational Data Collection and Dissemination.	
—Reliability of Reactor Systems.		—Section Supervision	
—Core Melt and Reactor Coolant System Failure.			
—Reactor Containment Safety.			

Each of these activities is related to providing services to operating nuclear power plants. NRC's efforts in each of these areas contribute to the licensees' continued safe operation of their facilities and therefore are of benefit to them. A broader description of these programs is contained in the NRC's annual budget submission to Congress. See NUREG-1100, Volume 4, "Budget Estimates Fiscal Year 1989" (February 1988).<sup>1</sup> While these activities also provide benefits to the public, because they benefit our licensees, these are not "independent public benefits" as that term is used in user fee case law. Accordingly, it is legally permissible to charge licensees for these services.

Paragraph (c) is being revised to reflect that the basis for each annual fee will be the budgeted obligations for activities (regulatory services) applicable to each nuclear power reactor as one of a type or class of reactors, e.g., boiling water reactors or pressurized water reactors. Using this approach, the Commission will, each year, establish the budgeted obligations (including overhead costs) for each activity on a per reactor unit basis, and establish the total costs for those regulatory services provided to each reactor licensed to operate. NRC labor costs attributable to these activities will be determined using the hourly rates established on the basis of an analysis of direct and indirect (overhead as defined herein) staffing costs attributable to the regulatory services provided.

Paragraphs (d) and (e) of the current rule are being deleted as superfluous to the proposed approach to annual fees.

#### Supplemental Analysis on Annual Fee Determination Under § 171.15

Under current legislation, the NRC is to collect and deposit to the General Fund of the Treasury, an amount to approximate but not be less than 45 percent of its budget. In fiscal year 1989 the President's budget for the NRC is \$420.0 million. Thus, in FY 1989 the NRC should collect at least \$189 million. In FY 1989, it is estimated that approximately \$50 million will be collected from specific licensees under Part 170, and \$15 million from the

<sup>1</sup> Copies of NUREG-1100, Vol. 4 may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies are also available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. A copy is also available for public inspection and/or copying at the NRC Public Document Room, 2120 L Street NW., Lower Level of the Gelman Building, Washington, DC.

Department of Energy High-Level Waste Fund. Thus, the remaining funds, at least \$124 million (\$189 million less \$65 million), will have to be collected under Part 171. A multiplier will be used such that the amount to be collected will be equal to Part 170 collections, plus High-Level Waste Fund collections, plus Part 171 potential collections multiplied by a factor "M," which in FY 1989, will probably be less than one. Thus "M" equals

$$\frac{124}{148}$$

or .84 of the budget base.

For FY 1989, the budgeted obligations by direct program are: (1) Salaries and Benefits, \$184.0 million; (2) Administrative Support, \$70.0 million; (3) Travel, \$12.0 million, and (4) Program Support, \$154.0 million. In FY 1989, 1603.4 FTEs are considered to be in direct support of NRC programs applicable to fees (See Table I). About 337 FTEs are utilized in efforts associated with Part 171, with the remainder being utilized in efforts associated with Part 170, or to be recovered from the DOE Nuclear Waste Fund or other efforts. Of the total 3,180 FTEs, 1,577 FTEs will be considered overhead (supervisory and support) or exempted (due to their program function). Of the 3,180 FTEs, a total of 291 FTEs and the resulting \$23.9 million in support are exempted from the fee base due to the nature of their functions (i.e., enforcement activities and other NRC functions currently exempted by Commission policy).

TABLE I.—ALLOCATION OF DIRECT FTEs BY OFFICE

Office	Number of direct FTEs <sup>1</sup>
NRR/SP	968.0
Research	155.0
NMSS	307.2
AEOD	93.0
ASLAP	5.2
ASLBP	17.0
ACRS	25.0
OGC	33.0
	1603.4

Table III.—With Minor Adjustments for Plants West of Rockies or Westinghouse Plants With Ice Condensers the Following Apply to Plant/Containment

Type	No.	Budget base X.84	Fee	Total collection
Part 171 Fees By Reactor Category—Summary				
GE Mark I	(24)	\$1.348	\$1.133	\$27.19
GE Mark II	(7)	1.443	1.212	8.48

<sup>1</sup> Regional employees are counted in the office of the program each supports.

In determining the cost for each direct labor FTE (an FTE whose position/function is such that it can be identified to a specific licensee or class of licensees) whose function, in the NRC's judgment, is necessary to the regulatory process, the following rationale is used:

1. All such direct FTEs are identified by office.
2. NRC plans, budgets, and controls on the following four major categories (see Table II):
  - a. Salaries and Benefits.
  - b. Administrative Support.
  - c. Travel.
  - d. Program Support.

3. Program Support, the use of contract or other services for which the NRC pays for support from outside the Commission, is charged to various categories as used.

4. All other costs (i.e., Salaries and Benefits, Travel, and Administrative Support) represent "in-house" costs and are to be collected by allocating them uniformly over the total number of direct FTEs.

Although this method differs from previous methods for recovery of costs, it is equally as accurate because it allocates all "in-house" resource requirements over the universe of direct FTEs (those staff members who would be billed to licensees based upon work performed either directly for a specific licensee or a specific group of licensees). Using this method which was described in the proposed rule and the FY 1989 budget, and excluding budgeted Program Support obligations, the remaining \$242 million allocated uniformly to the direct FTEs (1603.4) results in a calculation of \$150.9 thousand per FTE for FY 1989 (an hourly rate of \$86).

TABLE II.—FY 1989 BUDGET BY MAJOR CATEGORY

Category	[\$ in Millions]
Salaries and benefits	\$184
Administrative support	70

TABLE II.—FY 1989 BUDGET BY MAJOR CATEGORY—Continued

Category	[\$ in Millions]
Travel	12
Total nonprogram support obligations	266
Program support	154
Total budget	420

The Direct FTE Productive Hourly Rate (\$86/hour rounded down) is calculated by dividing the annual nonprogram support costs (\$266 million) less the amount applicable to exempted functions (\$23.9 million) by the product of the direct FTE (1,603.4 FTE) and the number of productive hours in one year (1,744 hours) as indicated in OBM Circular A-76, "Performance of Commercial Activities."

Because Part 171 is designed to collect fees for NRC efforts of a generic or multi-license nature concerning licensees with power reactor operating licenses, the most feasible method to accomplish this is to develop fees based on NRC budgeted obligations for each NRC generic or multi-licensee program concerning plants with operating licenses. Additionally, because many of the research programs expend effort for specific types of reactors (i.e., Westinghouse, CE, B&W, and GE), containment types (i.e., Mark I, II, III, etc.), or plants in a specific geographic location (e.g., reactors east of the Rockies), these parameters were also used in refining NRC cost by reactor/operating license. Table III presents a summary of Part 171 fees, by reactor category, using the FY 1989 budget for Program Support costs and FTEs.

As can be seen from Table III, a reactor which is a B&W reactor, east of the Rockies would have a fee (\$1,592) imposed which is higher than the fee (\$1,121) imposed on a GE Mark I reactor west of the Rockies. This example also represents the normal range of fees to be charged under Part 171 of \$1,121 thousand to \$1,592 thousand. Table IV provides a detailed presentation of the budgeted obligations by budget program element and activity and shows how the annual fees were determined for the various types of reactors. Table V is a specific listing of the annual fee to be assessed for each reactor in FY 1989.



TABLE III.—WITH MINOR ADJUSTMENTS FOR PLANTS WEST OF ROCKIES OR WESTINGHOUSE PLANTS WITH ICE CONDENSERS THE FOLLOWING APPLY TO PLANT/CONTAINMENT—Continued  
[Fees in millions]

Type	No.	Budget base X.84	Fee	Total collection
GE Mark III	(4)	1.373	1.153	4.61
B&W	(8)	1.896	1.592	12.74
CE	(15)	1.391	1.168	17.52
Westinghouse	(48)	1.352	1.135	54.48
	106			125.0

Fee Basis by Vendor/Containment Type—Summary (\$000)

All GE Mark I's	<sup>1</sup> (24)	\$1,219 98 18 14	(All). (All BWR). (Mark I). (East of Rockies).
All GE Mark II's	<sup>1</sup> (7)	1,349 1,219 98 70 42 14	(All). (All BWRs). (Mark II). (Mark II/III). (East of Rockies).
All Mark III's	<sup>1</sup> (4)	1,443 1,219 98 42 14	(All). (All BWR). (Mark II/III). (East of Rockies).
All B&Ws	<sup>1</sup> (8)	1,373 1,219 112 7 544 14	(All). (All PWR). (All PWR-LDC). (All B&W). (East of Rockies).
All CE's	<sup>1</sup> (15)	1,896 1,219 112 7 39 14	(All). (All PWR). (All PWR-LDC). (All CE). (East of Rockies).
All Westinghouse	<sup>1</sup> (48)	1,391 1,219 112 * 7 14	(All). (All PWR). (All PWR-LDC). (East of Rockies).
		1,352	

Fee Basis by Category—Summary (\$000)

All Plants	(106)	\$1,219
All PWRs		112
Plus PWRs with LDC		7
Plus All B&Ws or		544
All CE's		39
All BWRs		98
Plus All Mark I's		18
Plus All Mark II's		70
Plus All Mark II's & III's		42
All Plants East of Rockies (SEISMIC)		14

<sup>1</sup> All except plants west of Rockies which pay \$14,000 less.  
<sup>2</sup> 8 Westinghouse plants with ice condenser are not charged this \$7,000 fee.

TABLE IV.—FEE BASIS FOR ALL REACTORS—DETAIL (\$000)

	PT\$	FTE\$
Generic (All Reactors) (106):		
NRR/SP	\$4,092	\$19,949
AEOD	9,255	13,355
RES (All)	29,251	8,149
RES (PWRs & BWRs)	36,212	5,915
RES SEISMIC (All)	2,603	438
	81,413	47,806
Total		\$129,219
Total	\$129,219	1,219
Number Reactors	106	Per Reactor

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FEE BASIS FOR ADDITIONAL  
CHARGES BY NUCLEAR STEAM SUPPLY SYSTEM  
VENDOR AND CONTAINMENT TYPE - DETAIL

PRESSURIZED WATER REACTORS		PT\$ (\$000)	FTE\$ (\$000)
NSSS, ALL PWRs (71)		\$6,200	\$1,720
TOTAL - PWRs	=	\$7,920	
TOTAL	=	\$7,920 71	= \$111.55 Per Reactor
NSSS (ALL LARGE DRY CONTAINMENT [LDC] PWRs) (63)		\$335	\$105
TOTAL PWR LDCs	=	\$ 440	
TOTAL PWR LDCs NUMBER OF REACTORS	=	\$ 440 63	= \$6.98 Per Reactor
NSSS LDC B&W ONLY (8)		\$3,975	\$ 377
TOTAL LDC - B&Ws		\$4,352	
TOTAL LDC - B&Ws NUMBER OF REACTORS	=	\$4,352 8	= \$544.00 Per Reactor
NSSS, LDC - CE ONLY (15)		\$475	\$105
TOTAL LDC - CEs		\$ 580	
TOTAL LDC - CEs	=	\$ 580 15	= \$ 38.67 Per Reactor
BOILING WATER REACTORS			
NSSS, ALL BWRs (35)		\$3,048	\$377
TOTAL - BWRs	=	\$3,425	
TOTAL BWRs NUMBER OF REACTORS	=	\$3,425 35	= \$97.86 Per Reactor

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	PT\$ (\$000)	FTE\$ (\$000)
NSSS, BWRs (Mark I) (24)	\$ 400	\$30
TOTAL MARK I		\$ 430
TOTAL MARK Is NUMBER OF REACTORS	= \$430 24	= \$17.92 Per Reactor
NSSS, BWRs (MARK II) (7)	\$400	\$ 90
TOTAL MARK II		\$490
TOTAL MARK IIIs NUMBER OF REACTORS	= \$ 490 7	= \$70.00 Per Reactor
NSSS, BWRs (TOTAL MARK II/MARK III) (7/4)	\$325	\$135
TOTAL MARK II/MARK III S		\$460
TOTAL MARK II/MARK IIIIs NUMBER OF REACTORS	= \$460 11	= \$41.82 Per Reactor
SEISMIC WORK - ALL PLANTS	\$2,603	\$438
TOTAL SEISMIC - ALL PLANTS		\$3,041
TOTAL SEISMIC ALL PLANTS NUMBER OF REACTORS	= \$3,041 106	= \$28.69 Per Reactor
SEISMIC WORK (APPLICABLE PLANTS EAST OF ROCKIES)	\$1,220	\$151
TOTAL EAST OF ROCKIES		\$1,371
TOTAL EAST OF ROCKIES NUMBER OF PLANTS	= \$1,371 95	= \$14.43 Per Reactor

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	FY 1989	
	Program support \$	FTE
<b>Part 171 Work by NRR</b>		
Generic Effort—All Plants		
1. Reactor Performance Evaluation:		
a. Generic Communications.....	\$0	10.5
b. Engineering/Safety Assessments.....	387	6.4
2. Reactor Maintenance and Surveillance.....	175	2.2
3. Licensee Performance Evaluation Quality Assurance Program.....	0	4.5
4. License and Examine Reactor Operators:		
a. Program Development and Assessment/Regional Oversight.....	0	8.1
5. Region-Based Inspections:		
a. Lab and Technical Support.....	670	10.6
b. Regional Assessment.....	0	0
6. Specialized Inspections, Vendor Inspections.....	815	15.1
7. Section Supervision.....	0	37.3
8. Regulatory Improvements:		
a. Technical Specifications.....	345	11.9
b. Safety Goal Implementation.....	0	.6
c. Generic Issues/Rules/Reg. Guides/Policy.....	150	11.4
9. Licensee Reactor Accident Management Evaluation:		
a. Emergency Procedures.....	1,115	5.2
b. Regional Assistance Committees.....	0	2.0
10. Safeguards Licensing and Inspection Regulatory Effectiveness Reviews.....	435	6.4
<b>Total Part 171.....</b>	<b>\$4,092</b>	<b>132.2</b>

FTE = 132.2X\$150.9 = \$19,949  
 PTS = 4,092  
 Total—NRR—(All Plants) = \$24,041

	FY 1989	
	Program support \$	FTE
<b>Part 171 Work by AEOD</b>		
Generic Effort—All Plants		
1. Diagnostic Evaluations.....	\$0	2.0
2. Incident Investigation.....	50	2.5
3. NRC Incident Response.....	2,635	27.0
4. Technical Training Center.....	2,650	22.0
5. Operational Data Analysis.....	2,020	25.0
6. Performance Indicators.....	150	4.0
7. Operational Data Collection and Dissemination.....	1,750	6.0
<b>Total Part 171 Work by AEOD.....</b>	<b>\$9,255</b>	<b>88.5</b>

FTE = 88.5X\$150.9 = \$13,355  
 PTS = 9,255  
 Total—AEOD—(All Plants) = \$22,610

	FY 1989	
	Program support \$	FTE
<b>Part 171 Work by Research</b>		
A. Generic Efforts—All Plants		
Aging of Reactor Components Aging Research.....	6,246	6.7
Reactor Equipment Qualifications—Equipment Qualification Methods.....	400	.3
Component Response to Earthquakes.....	2,460	2.6
Validation of Seismic Analysis.....	1,200	1.0
Seismic Design Margin Methods.....	350	.7
Prevent Reactor Core Damage.....	200	.3
• Other Experimental Programs.....		
• Modeling.....	50	0
Human Performance.....		
• Human Factors Research.....	3,020	3.8
• Human Error Data Collections and Analysis.....	936	1.2
Reliability of Reactor System—Performance Indicators.....	800	1.5
Plant & System Risk & Reliability.....	1,411	2.4
Dependent Failure Analysis.....	225	.2

	PTS \$ (\$000)	FTE
Individual Plant Exams.....	1,490	1.1
Reactor Containment Structural Integrity.....	2,970	2.3
Regulatory Application of New Source Terms.....	25	1.0
Radiation Protection of Health Effects—Reduce Uncertainty in Health Risk Estimates.....	835	1.8
Health Physics Technology Improvements.....	415	1.5
Dose Reduction.....	825	1.5
Generic and Unresolved Safety Issues.....	790	6.2
Reactor System Issues.....	150	1.2
Human Factors Issues.....	1,000	1.3
Severe Accident Issues.....	370	1.0
Management of Safety Issues Resolution.....	300	6.5
Regulation Development and Modification.....	350	2.9
Regulatory Analysis of Regulations.....	1,044	3.0
Rule for License Renewal.....	1,190	1.0
Safety Goal Implementation.....	200	1.0
<b>Generic Efforts—All Reactors—Total =</b>	<b>\$29,251</b>	<b>54.0</b>
<b>B. Generic Efforts—All Plants Except HTGR</b>		
Integrity of Reactor Component—Reactor Vessel & Piping Integrity—Pressure Vessel Safety.....	6,195	2.6
Piping Integrity.....	1,385	.5
Inspection Procedures and Techniques.....	1,280	.9
Chemical Effects.....	2,050	4.0
Aging of Reactor Components—Aging Research.....	950	1.1
Reactor Equipment Qualification—Standards Development.....	455	.4
Prevent Reactor Core Damage—Modeling.....	450	.4
Reactor Applications—Containment/Balance of Plant.....	460	1.0
Technical Support Center.....	1,050	1.2
NPA/Database/Simulator.....	400	.8
Accident Management—Vessel Accident Management.....	1,050	1.5
In-Vessel Accident Management.....	1,400	1.5
External Events Safety Margins.....	325	.4
Core Melt Progression and H2 Generation.....	3,820	1.8
Natural Circulation in the RCS.....	690	1.0
Steam Explosions.....	185	0
Fission Product Behavior and Chemical Form.....	990	.8
Reactor Containment Safety—Core Concrete Interaction.....	1,750	.8
Hydrogen Transport and Combustion.....	650	1.0
Integrated Codes and Applications.....	2,762	2.1
Reactor Accident Risk Analysis—Assessment of Plant Risks.....	300	.5
Risk Model Development, QA and Maintenance.....	2,025	3.0
Risk Model Applications.....	2,690	2.0
Severe Accident Policy Implementation.....	200	.6
Regulatory Application of New Source Term.....	125	5.0
Generic and Unresolved Safety Issues—Engineering Issues.....	75	.6
Reactor System Issues.....	500	3.7
<b>Total (PWRs &amp; BWRs).....</b>	<b>\$36,212</b>	<b>39.2</b>
<b>C. Seismic—All Plants</b>		
Seismic and Fire Protection—Earth Sciences.....	2,270	1.8
Reactor Accident Risk Analysis—Assessment of Plant Risks.....	273	.5
Resolve Safety Issues and Developing Regulations—Engineering Issues.....	60	.6
<b>Total \$3,041k.....</b>	<b>2,603</b>	<b>2.9</b>
<b>D. Seismic—Plants East of Rockies</b>		
Seismic and Fire Protection—Earth Sciences.....	1,220	1.0
<b>total = \$0.....</b>	<b>0</b>	<b>0</b>
<b>E. Seismic—Plants West of Rockies</b>		
<b>total = \$0.....</b>	<b>0</b>	<b>0</b>
<b>F. Nuclear Steam Supply System</b>		
(PWR only).....		
Integrity of Reactor Component:		
Piping Integrity.....	100	0
Inspection Procedures and Techniques.....	170	.1
Prevent Reactor Core Damage—PWR Large Break LOCA Testing.....	1,000	.9
PWR Small Break LOCA Testing.....	300	.4
Modeling.....	1,700	1.5
Core Melt Progression and H2 Generation.....	300	.2
Fission Product Behavior and Chemical Form.....	300	.2
Direct Containment Heating.....	1,620	1.0
Resolving Safety Issues and Developing Regulations—Engineering Issues.....	235	2.4
Reactor System Issues.....	475	4.7
<b>Total NSSS—PWR Only.....</b>	<b>\$6,200</b>	<b>11.4</b>
<b>G. NSSS—All Large Dry Containments—(PWRs Only)</b>		
Severe Accident Implementation—Severe Accident Policy Implementation.....	225	.8
Resolving Safety Issues and Developing Regulations—Reactor.....	110	.1
System Issues.....	335	.7



	PTS \$ (\$000)	FTE
H. NSSS PWR LDC—(Westinghouse only)	0	0
I. NSSS LDC (B&W Only)		
Prevent Reactor Core Damage—Plant Performance—B&W Testing	3,500	1.8
Reactor Accident Risk Analysis—Assessment of Plant Risks	475	.7
J. NSSS CCE—Large Dry Containments	475	2.5
Reactor Accident Risk Analysis—assessment Plant Risks	475	.7
K. NSSS—(BWR Only)		
Integrity of Reactor Component Piping Integrity	1,080	.5
Prevent Reactor Core Damage—Modeling	800	.7
Reactor Containment Safety—Integrated Codes and Applications	1,128	.8
Resolve Safety Issues	40	.4
L. GE—Mark I	\$3,048	2.5
Reactor Containment Safety—Core/Concrete Interactions	400	.2
M. GE—Mark II		
Reactor Accident Risk Analysis—Assessment of Plant Risks	400	.8
N. GE—Mark II & III		
Severe Accident Implementation—Severe Accident Policy Implementation	325	.9

The costs to NRC for these programs should be paid for on a prorata basis, by all plants included in the specified categories. By adding the program support costs to the NRC staff cost for each category of effort and prorating these costs over the population (plants) of that category, a fee is established which requires those licensees who require the greatest expenditure of NRC resources to pay the largest annual fee.

TABLE V.—ANNUAL FEES FOR OPERATING POWER REACTORS, FY 1989

	Containment type	Annual fee
Westinghouse reactors:		
1. Beaver Valley 1	PWR—Large dry containment.	\$1,135,000
2. Beaver Valley 2	do	1,135,000
3. Braidwood 1	do	1,135,000
4. Braidwood 2	do	1,135,000
5. Byron 1	do	1,135,000
6. Byron 2	do	1,135,000
7. Callaway 1	do	1,135,000
8. Diablo Canyon 1	do	1,124,000
9. Diablo Canyon 2	do	1,124,000
10. Farley 1	do	1,135,000
11. Farley 2	do	1,135,000
12. Ginna	do	1,135,000
13. Haddam Neck	do	1,135,000
14. Harris 1	do	1,135,000
15. Indian Point 2	do	1,135,000
16. Indian Point 3	do	1,135,000
17. Kewaunee	do	1,135,000
18. Millstone 3	do	1,135,000
19. North Anna 1	do	1,135,000
20. North Anna 2	do	1,135,000
21. Point Beach 1	do	1,135,000

TABLE V.—ANNUAL FEES FOR OPERATING POWER REACTORS, FY 1989—Continued

	Containment type	Annual fee
22. Point Beach 2	do	1,135,000
23. Prairie Island 1	do	1,135,000
24. Prairie Island 2	do	1,135,000
25. Robinson 2	do	1,135,000
26. Salem 1	do	1,135,000
27. Salem 2	do	1,135,000
28. San Onofre 1	do	1,124,000
29. Seabrook 1	do	1,135,000
30. South Texas 1	do	1,135,000
31. Summer 1	do	1,135,000
32. Surry 1	do	1,135,000
33. Surry 2	do	1,135,000
34. Trojan	do	1,124,000
35. Turkey Point 3	do	1,135,000
36. Turkey Point 4	do	1,135,000
37. Vogtle 1	do	1,135,000
38. Wolf Creek 1	do	1,135,000
39. Zion 1	do	1,135,000
40. Zion 2	do	1,135,000
41. Catawba 1	PWR—Ice condenser.	1,130,000
42. Catawba 2	do	1,130,000
43. Cook 1	do	1,130,000
44. Cook 2	do	1,130,000
45. McGuire 1	do	1,130,000
46. McGuire 2	do	1,130,000
47. Sequoyah 1	do	1,130,000
48. Sequoyah 2	do	1,130,000
Combustion engineering reactors:		
1. Arkansas 2	PWR—Large dry containment.	1,168,000
2. Calvert Cliffs 1	do	1,168,000
3. Calvert Cliffs 2	do	1,168,000
4. Ft. Calhoun 1	do	1,168,000
5. Maine Yankee	do	1,168,000

TABLE V.—ANNUAL FEES FOR OPERATING POWER REACTORS, FY 1989—Continued

	Containment type	Annual fee
6. Millstone 2	do	1,168,000
7. Palisades	do	1,168,000
8. Palo Verde 1	do	1,157,000
9. Palo Verde 2	do	1,157,000
10. Palo Verde 3	do	1,157,000
11. San Onofre 2	do	1,157,000
12. San Onofre 3	do	1,157,000
13. St. Lucie 1	do	1,168,000
14. St. Lucie 2	do	1,168,000
15. Waterford 3	do	1,168,000
Babcock & Wilcox reactors:		
1. Arkansas 1	PWR—Large dry containment.	1,592,000
2. Crystal River 3	do	1,592,000
3. Davis Besse 1	do	1,592,000
4. Oconee 1	do	1,592,000
5. Oconee 2	do	1,592,000
6. Oconee 3	do	1,592,000
7. Rancho Seco 1	do	1,581,000
8. Three Mile Island 1	do	1,592,000
General Electric plants:		
1. Browns Ferry 1	Mark I	1,133,000
2. Browns Ferry 2	do	1,133,000
3. Browns Ferry 3	do	1,133,000
4. Brunswick 1	do	1,133,000
5. Brunswick 2	do	1,133,000
6. Clinton 1	Mark III	1,153,000
7. Cooper	Mark I	1,133,000
8. Dresden 2	do	1,133,000
9. Dresden 3	do	1,133,000
10. Duane Arnold	do	1,133,000
11. Fermi 2	do	1,133,000
12. Fitzpatrick	do	1,133,000

TABLE V.—ANNUAL FEES FOR OPERATING POWER REACTORS, FY 1989—Continued

	Containment type	Annual fee
13. Grand Gulf 1	Mark III	1,153,000
14. Hatch 1	Mark I	1,133,000
15. Hatch 2	do	1,133,000
16. Hope Creek 1	do	1,133,000
17. LaSalle 1	Mark II	1,212,000
18. LaSalle 2	Mark II	1,212,000
19. Limerick 1	do	1,212,000
20. Millstone 1	Mark I	1,133,000
21. Monticello	do	1,133,000
22. Nine Mile Point 1	do	1,133,000
23. Nine Mile Point 2	Mark II	1,212,000
24. Oyster Creek	Mark I	1,133,000
25. Peach Bottom 2	do	1,133,000
26. Peach Bottom 3	do	1,133,000
27. Perry 1	Mark III	1,153,000
28. Pilgrim 1	Mark I	1,133,000
29. Quad Cities 1	do	1,133,000
30. Quad Cities 2	do	1,133,000
31. River Bend 1	Mark III	1,153,000
32. Susquehanna 1	Mark II	1,212,000
33. Susquehanna 2	do	1,212,000
34. Vermont Yankee	Mark I	1,133,000
35. Washington Nuclear 2	Mark II	1,200,000
Other Reactors:		
1. Three Mile Island 2	B&W—PWR—Dry containment.	1,592,000
2. Shoreham	GE—Mark II	1,212,000
3. Big Rock Point	GE—Dry containment.	1,118,000
4. Yankee Rowe	Westinghouse—PWR—Dry containment.	1,135,000
5. Ft. St. Vrain	High temperature gas cooled.	822,000

<sup>1</sup> These licensed reactors have not been included in the fee base since historically they have been granted either full or partial exemptions from the annual fees. The fees shown for these reactors are those fees for the particular type of reactor, no adjustments have been made based on size or particular circumstance of the reactor. Nonetheless, unless full waivers are granted, these licensees will pay at least a portion of the amount specified above.

## Section 171.21 Refunds.

This section is being eliminated. Under current legislation, at least 45 percent should be collected. No refunds will be provided, although the fees will be calculated in such a manner as to not greatly exceed the 45 percent floor imposed by the legislation.

## V. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described

in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

## VI. Paperwork Reduction Act Statement

This final rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

## VII. Regulatory Analysis

Section 7601 of COBRA required the NRC, by rule, to establish an annual charge for regulatory services provided to its applicants and licensees, that when added to other amounts collected, equaled up to 33 percent of Commission costs in providing those services. Section 5601 of the Omnibus Budget Reconciliation Act of 1987 requires that the NRC, for the fiscal years 1988 and 1989, increase the moneys collected pursuant to section 7601 and other authority to at least 45 percent of the Commission's costs. For FY 1988, the NRC issued an interim rule which raised the collection of annual fees to be at least 45 percent of its budget and accordingly raised the annual fee for operating power reactors. For FY 1989 the NRC is revising its fee schedules in 10 CFR Part 170 to remove the fee ceilings on certain categories, to revise its professional hourly rate to reflect inflationary and other increases since FY 1981, to revise the ceiling of 33 percent contained in 10 CFR Part 171 to a target which approximates but will be at least 45 percent, and to include the collection of moneys from the High Level Waste Fund administered by the Department of Energy.

This final rule will not have significant impacts on state and local governments and geographical regions; on health, safety, and the environment; or, create substantial costs to licensees, the NRC, or other Federal agencies. The foregoing discussion constitutes the regulatory analysis for this final rule.

## VIII. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that this rule does not have a significant economic impact on a substantial number of small entities. In the notice of proposed rulemaking published on June 27, 1988 (53 FR 24085), the NRC invited any licensee who considered itself to be a small entity subject to this regulation who determines that, because of its size, it is likely to bear a disproportionate

adverse economic impact to notify the Commission by providing responses to four general questions. The proposed rule was mailed to approximately 10,000 licensees under 10 CFR Parts 30 through 35, 39, 40, 50, 60, 61 and 70 through 73. About 9,000 of the licensees could be considered small entities, particularly in the area of materials licensing under 10 CFR Parts 30 through 35 and 39. Of the 32 letters of comments received, only twelve were from licensees in the materials category and interest area. Of the twelve, only one licensee addressed the four questions on the impact as a small entity. This commenter was concerned that the removal of ceilings for topical reports, dry storage systems, and transport packages would have a much greater impact on that company than it would on a larger company and place an unfair competitive burden on small entities. It is readily recognized that this final rule will cause some licensees to pay more fees for topical report reviews and other services. However, the financial impact is related to the services provided by the NRC. The size of the licensee is not a factor in the costs imposed. Based upon the number of comments received on the proposed rule and on analysis of these comments, the NRC believes that this rule will not have a significant economic impact upon a substantial number of small entities.

## IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule, and therefore, that a backfit analysis is not required for it because the final rule does not impose any new, more stringent safety requirements on Part 50 licensees.

## List of Subjects

## 10 CFR Part 170

Byproduct material, Nuclear materials, Nuclear power plants and reactors, Penalty, Source material, Special nuclear material.

## 10 CFR Part 171

Annual charges, Nuclear power plants and reactors, Penalty.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Parts 170 and 171.



# **PART 170—FEES FOR FACILITIES AND MATERIALS LICENSES AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED**

1. The authority citation for Part 170 continues to read as follows:

Authority: 31 U.S.C. 9701, 96 Stat. 1051; sec. 301, Pub. L. 92-314, 86 Stat. 222 (42 U.S.C. 2201w); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

2. In § 170.12, paragraphs (b) through (g) are revised to read as follows:

## **§ 170.12 Payment of fees.**

(b) *License fees.* Fees for applications for permits and licenses that are subject to fees based on the full cost of the reviews are payable upon notification by the Commission. Each applicant will be billed at six-month intervals for all accumulated costs for each application the applicant has on file for review by the Commission until the review is completed. Each bill will identify the applications and costs related to each. Fees for applications for materials licenses not subject to full cost recovery must accompany the application when it is filed.

(c) *Amendment fees and other required approvals.* Fees for applications for license amendments, other required approvals and requests for dismantling, decommissioning and termination of licensed activities that are subject to full cost recovery are payable upon notification by the Commission. Each applicant will be billed at six-month intervals for all accumulated costs for each application the applicant has on file for review by the Commission, until the review is completed. Each bill will identify the applications and costs related to each. Amendment fees for materials licenses and approvals not subject to full cost recovery must accompany the application when it is filed.

(d) *Renewal fees.* Fees for applications for renewals that are subject to full cost of the review are payable upon notification by the Commission. Each applicant will be billed at six-month intervals for all accumulated costs on each application that the applicant has on file for review by the Commission until the review is completed. Each bill will identify the applications and the costs related to each. Renewal fees for materials licenses and approvals not subject to full cost recovery must accompany the application when it is filed.

(e) *Approval fees.* (1) Applications for transportation casks, packages, and shipping container approvals, spent fuel

storage facility design approvals, and construction approvals for plutonium fuel processing and fabrication plants must be accompanied by an application fee of \$150.

(2) There is no application fee for standardized design approvals. The review fees for facility reference standardized design approvals and certifications will be paid by the holder of the design approval or certification in five (5) installments based on payment of 20 percent of the application and approval/certification fee (see footnote 4 to § 170.21) as each of the first five units of the approved/certified design is referenced in an application(s) filed by a utility or utilities. If the design(s) is not referenced or if all costs are not recovered within 5 years after the preliminary design approval (PDA) or the final design approval (FDA), the vendor applicant will pay the costs, or remainder of those costs, at that time. If the design is certified, the five-year deferral period is extended to ten years from the certification with the same proviso that 20 percent of the costs will be payable each time the design is referenced.

(3) Fees for other applications that are subject to full cost reviews are payable upon notification by the Commission. Each applicant will be billed at six-month intervals until the review is completed. Each bill will identify the applications and the costs related to each. Fees for applications for materials approvals that are not subject to full cost recovery must accompany the application when it is filed.

(f) *Special project fees.* Fees for applications for special projects such as topical reports, are based on full cost of the reviews and are payable upon notification by the Commission. Each applicant will be billed at six-month intervals until the review is completed. Each bill will identify the applications and the costs related to each. All applications filed pursuant to § 170.31 must be accompanied by the \$150 application fee.

(g) *Inspection fees.* Fees for all routine and non-routine inspections will be assessed on a per inspection basis, and will be billed quarterly if they are based on full cost recovery. Inspection fees for small materials programs are billed upon completion of the inspection. Inspection fees are payable upon notification by the Commission. Inspection costs include preparation time, time on site and documentation time and any associated contractual service costs but exclude the time

involved in the processing and issuance of a notice of violation or civil penalty.

3. Section 170.20 is revised to read as follows:

## **§ 170.20 Average cost per professional staff-hour.**

Fees for permits, licenses, amendments, renewals, special projects, Part 55 requalification and replacement examinations and tests, other required approvals and inspections under §§ 170.21, 170.31 and 170.32 will be calculated based upon the full costs for the review using a professional staff rate per hour equivalent to the sum of the average cost to the agency for a professional staff member, including salary and benefits, administrative support and travel. The professional staff rate will be revised on a fiscal year basis using the most current fiscal data available and the revised hourly rate will be published in the Federal Register for each fiscal year if the rate increases or decreases. The professional staff rate for the NRC for FY 89 is \$86 per hour.

4. Section 170.21 is revised to read as follows:

## **§ 170.21 Schedule of fees for production and utilization facilities, review of standard reference design approvals, special projects, and inspections.**

Applicants for construction permits, manufacturing licenses, operating licenses, approvals of facility standard reference designs, requalification and replacement examinations for reactor operators, and special projects and holders of construction permits, licenses, and other approvals shall pay fees for the following categories of services.

### **SCHEDULE OF FACILITY FEES**

[See footnotes at end of table]

Facility categories and type of fees	Fees <sup>1,2</sup>
<b>A. Nuclear Power Reactors</b>	
Application for Construction Permit.....	\$125,000.
Construction Permit, Operating License.	Full cost.
Amendment, Renewal, Dismantling-Decommissioning and Termination, Other Approvals.	Full cost.
Inspections <sup>3</sup> .....	Full cost.
<b>B. Standard Reference Design Review <sup>4</sup></b>	
Preliminary Design Approvals, Final Design Approvals, Certification.	Full cost.
Amendment, Renewal, Other Approvals.	Full cost.
<b>C. Test Facility/Research Reactor/Critical Facility</b>	
Application for Construction Permit.....	\$5,000.
Construction Permit, Operating License.	Full cost.

### **SCHEDULE OF FACILITY FEES—Continued**

[See footnotes at end of table]

Facility categories and type of fees	Fees <sup>1,2</sup>
Amendment, Renewal, Dismantling-Decommissioning and Termination, Other Approvals.	Full cost.
Inspections <sup>3</sup> .....	Full cost.
<b>D. Manufacturing Licensee</b>	
Application.....	\$125,000.
Preliminary Design Approval, Final Design Approval.	Full cost.
Amendment, Renewal, Other Approvals.	Full cost.
Inspections <sup>3</sup> .....	Full cost.
<b>E. Uranium Enrichment Plant</b>	
Application for Construction Permit.....	\$125,000.
Construction Permit, Operating License.	Full cost.
Amendment, Renewal, Other Approvals.	Full cost.
Inspections <sup>3</sup> .....	Full cost.
<b>F. Advanced Reactors</b>	
Application for Construction Permit.....	\$125,000.
Construction Permit, Operating License.	Full cost.
Amendment, Renewal, Other Approvals.	Full cost.
Inspections <sup>3</sup> .....	Full cost.
<b>G. Other Production and Utilization Facility</b>	
Application for Construction Permit.....	\$125,000.
Construction Permit, Operating License.	Full cost.
Amendment, Renewal, Other Approvals.	Full cost.
Inspections <sup>3</sup> .....	Full cost.
<b>H. Production or Utilization Facility Permanently Closed Down</b>	
Inspections <sup>3</sup> .....	Full cost.
<b>I. Part 55 Reviews</b>	
Requalification and Replacement Examinations for Reactor Operators.	Full cost.
<b>J. Special Projects</b>	
Approvals.....	Full cost.

<sup>1</sup> Fees will not be charged for orders issued by the Commission pursuant to § 2.204 of this chapter nor for amendments resulting specifically from such Commission orders. Fees will be charged for approvals issued pursuant to a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., §§ 50.12, 73.5), and any other sections now or hereafter in effect regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. Fees for licenses in this schedule that are initially issued for less than full power are based on review through the issuance of a full power license (generally full power is considered 100% of the facility's full rated power). Thus, if a licensee received a low power license or a temporary license for less than full power and subsequently receives full power authority (by way of license amendment or otherwise), the total costs for the license will be determined through that period when authority is granted for full power operation. If a situation arises in which the Commission determines that full operating power for a particular facility should be less than 100% of full rated power, the total costs for the license will be at that decided lower operating power level and not at the 100% capacity.

<sup>2</sup> All charges will be based on expenditures for professional staff time and appropriate contractual support services. However, in no event will the charges be less than the application fee or, where no application fee is specified, will charges be less than \$150. For those applications currently in file, the professional staff hours expended for the review of the application up to the effective date of this rule will be determined at the professional rates estab-

lished for the June 20, 1984 rule. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984 rule, but are still pending completion of the review, the costs incurred after the ceiling was reached up to the effective date of this rule will not be billed to the applicant. Any professional hours expended on or after the effective date of this rule will be assessed at the rate established by § 170.20. This rate will be reviewed and adjusted annually as necessary to take into consideration increased or decreased costs to the Commission. If such rate increases or decreases in a given fiscal year, the new rate will be published in the Federal Register. In the event a review covers a combination of licensing actions in a one-step licensing process such as a combined construction permit and operating license review (interim, temporary, or other), the fees charged will be the total of the costs for the licensing action.

<sup>3</sup> Inspections covered by this schedule are both routine and non-routine safety and safeguards inspections performed by NRC for the purpose of review or followup of a licensed program. Inspections are performed throughout the full term of the license to ensure that the authorized activities are being conducted in accordance with the Atomic Energy Act of 1954, as amended, other legislation, Commission regulations or orders, and the terms and conditions of the license. Non-routine inspections that result from third-party allegations will not be subject to fees.

<sup>4</sup> Collection of the review costs for a preliminary design approval (PDA) and final design approval (FDA) are deferred, respectively, for a period of five years from the approval; except that, if the design is referenced during that period, 20 percent of the total costs will be payable by the holder of the design approval or certificate as each reference is made until the full costs are paid. If the design is certified, the five year deferral period is extended to 10 years from the certification, with the same proviso that 20 percent of the costs will be payable each time the design is referenced. In the event the full costs are not recovered by the end of the applicable deferral period, the holder of the design approval or certificate must pay the remainder of any costs not previously recovered by the NRC. Applications for amendments to PDAs, FDAs and certifications are subject to full costs and will be billed upon completion of the review.

5. Section 170.31 is revised to read as follows:

## **§ 170.31 Schedule of fees for materials licenses and other regulatory services, including inspections.**

Applicants for materials licenses and other regulatory services and holders of materials licenses shall pay fees for the following categories of services. This schedule includes fees for health and safety, and safeguards inspections, where applicable.

### **SCHEDULE OF MATERIALS FEES**

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2,3</sup>
<b>1. Special nuclear material:</b>	
<b>A. Licenses for possession and use of 200 grams or more of plutonium in unsealed form or 350 grams or more of contained U-235 in unsealed form or 200 grams or more of U-233 in unsealed form. This includes applications to terminate licenses and to authorize decommissioning, decontamination, reclamation, or site restoration activities as well as licenses authorizing possession only:</b>	
Application.....	\$150.
License, Renewal, Amendment.	Full cost.
Inspections:	
Routine.....	Full cost.
Nonroutine.....	Full cost.

### **SCHEDULE OF MATERIALS FEES—Continued**

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2,3</sup>
Application.....	\$150.
License, Renewal, Amendment.	Full cost.
Inspections:	
Routine.....	Full cost.
Nonroutine.....	Full cost.
<b>B. Licenses for receipt and storage of spent fuel at an independent spent fuel storage installation (ISFSI):</b>	
Application.....	\$150.
License, Renewal, Amendment.	Full cost.
Inspections:	
Routine.....	Full cost.
Nonroutine.....	Full cost.
<b>C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems: <sup>4</sup></b>	
Application—New license.....	\$230.
Renewal.....	\$120.
Amendment.....	\$60.
Inspections:	
Routine.....	\$210.
Nonroutine.....	\$640.
<b>D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those for Category 1A: <sup>4</sup></b>	
Application—New license.....	\$350.
Renewal.....	\$350.
Amendment.....	\$120.
Inspections:	
Routine.....	\$320.
Nonroutine.....	\$370.

#### **2. Source material:**

A. Licenses for possession and use of source material in recovery operations such as milling, in-situ leaching, heap-leaching, refining uranium mill concentrates to uranium hexafluoride, ore buying stations, ion exchange facilities and in processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, and licenses authorizing decommissioning, reclamation or restoration activities as well as licenses authorizing the possession and maintenance of a facility in a standby mode:

Application.....	\$150.
License, Renewal, Amendment.	Full cost.
Inspections:	
Routine.....	Full cost.
Nonroutine.....	Full cost.



SCHEDULE OF MATERIALS FEES—  
Continued

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2</sup>
B. Licenses for possession and use of source material for shielding, except as provided for in § 170.11(a)(8):	
Application—New license	\$60.
Renewal	\$60.
Amendment	\$60.
Inspections:	
Routine	\$130.
Nonroutine	\$160.
C. All other source material licenses:	
Application—New license	\$350.
Renewal	\$230.
Amendment	\$120.
Inspections:	
Routine	\$370.
Nonroutine	\$690.
3. By product material:	
A. Licenses of broad scope for possession and use of byproduct material issued pursuant to Parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution to licensees:	
Application—New license	\$1,200.
Renewal	\$700.
Amendment	\$120.
Inspections:	
Routine	\$950.
Nonroutine	\$1,000.
B. Other licenses for possession and use of byproduct material issued pursuant to Part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution to licensees:	
Application—New license	\$460.
Renewal	\$460.
Amendment	\$120.
Inspections:	
Routine	\$480.
Nonroutine	\$900.
C. Licenses issued pursuant to §§ 32.72, 32.73, and/or 32.74 of Part 32 of this chapter authorizing the processing or manufacturing and distribution of radiopharmaceuticals, generators, reagent kits and/or sources and devices containing byproduct material:	
Application—New License	\$1,400.
Renewal	\$1,400.
Amendment	\$230.
Inspections:	
Routine	\$640.
Nonroutine	\$850.
D. Licenses and approvals issued pursuant to §§ 32.72, 32.73, and/or 32.74 of Part 32 of this chapter authorizing distribution of radiopharmaceuticals, generators, reagent kits and/or sources or devices not involving processing of byproduct material:	
Application—New license	\$700.
Renewal	\$700.
Amendment	\$120.

SCHEDULE OF MATERIALS FEES—  
Continued

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2</sup>
Inspections:	
Routine	\$370.
Nonroutine	\$530.
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units):	
Application—New license	\$230.
Renewal	\$170.
Amendment	\$120.
Inspections:	
Routine	\$210.
Nonroutine	\$320.
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes:	
Application—New license	\$580.
Renewal	\$350.
Amendment	\$230.
Inspections:	
Routine	\$270.
Nonroutine	\$580.
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes:	
Application—New license	\$2,300.
Renewal	\$930.
Amendment	\$230.
Inspections:	
Routine	\$480.
Nonroutine	\$640.
H. Licenses issued pursuant to Subpart A of Part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of Part 30 of this chapter:	
Application—New license	\$580.
Renewal	\$230.
Amendment	\$120.
Inspections:	
Routine	\$320.
Nonroutine	\$320.

SCHEDULE OF MATERIALS FEES—  
Continued

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2</sup>
I. Licenses issued pursuant to Subpart A of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of Part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of Part 30 of this chapter:	
Application—New license	\$290.
Renewal	\$230.
Amendment	\$60.
Inspections:	
Routine	\$210.
Nonroutine	\$320.
J. Licenses issued pursuant to Subpart B of Part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under Part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under Part 31 of this chapter:	
Application—New license	\$1,200.
Renewal	\$700.
Amendment	\$230.
Inspections:	
Routine	\$320.
Nonroutine	\$320.
K. Licenses issued pursuant to Subpart B of Part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under Part 31 of this chapter:	
Application—New license	\$290.
Renewal	\$230.
Amendment	\$60.
Inspections:	
Routine	\$320.
Nonroutine	\$320.
L. Licenses of broad scope for possession and use of byproduct material issued pursuant to Parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution:	
Application—New license	\$1,200.
Renewal	\$700.
Amendment	\$120.
Inspections:	
Routine	\$420.
Nonroutine	\$530.

SCHEDULE OF MATERIALS FEES—  
Continued

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2</sup>
M. Other licenses for possession and use of byproduct material issued pursuant to Part 30 of this chapter for research and development that do not authorize commercial distribution:	
Application—New license	\$700.
Renewal	\$460.
Amendment	\$120.
Inspections:	
Routine	\$370.
Nonroutine	\$420.
N. Licenses that authorize services for other licensees, except for leak testing and waste disposal pickup services:	
Application—New license	\$930.
Renewal	\$930.
Amendment	\$120.
Inspections:	
Routine	\$320.
Nonroutine	\$320.
O. Licenses for possession and use of byproduct material issued pursuant to Part 34 of this chapter for industrial radiography operations:	
Application—New License	\$700.
Renewal	\$700.
Amendment	\$230.
Inspections:	
Routine	\$530.
Nonroutine	\$1,200.
P. All other specific byproduct material licenses, except those in Categories 4A through 9D:	
Application—New license	\$230.
Renewal	\$120.
Amendment	\$60.
Inspections:	
Routine	\$530.
Nonroutine	\$530.
4. Waste disposal:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material or special nuclear material from other persons for the purpose of commercial disposal by land burial by the licensee; or licenses authorizing contingency storage of low level radioactive waste at the site of nuclear power reactors; or licenses for treatment or disposal by incineration, packaging of residues resulting from incineration and transfer of packages to another person authorized to receive or dispose of waste material:	
Application	\$150.
License, renewal, amendment	Full cost.
Inspections:	
Routine	Full cost.
Nonroutine	Full cost.

SCHEDULE OF MATERIALS FEES—  
Continued

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2</sup>
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material:	
Application—New License	\$1,400.
Renewal	\$930.
Amendment	\$350.
Inspections:	
Routine	\$1,000.
Nonroutine	\$740.
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material:	
Application—New license	\$930.
Renewal	\$460.
Amendment	\$120.
Inspections:	
Routine	\$740.
Nonroutine	\$950.
5. Well logging:	
A. Licenses specifically authorizing use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies:	
Application—New license	\$700.
Renewal	\$700.
Amendment	\$170.
Inspections:	
Routine	\$370.
Nonroutine	\$370.
B. Licenses specifically authorizing use of byproduct material for field flooding tracer studies:	
Application	\$150.
License, renewal, amendment	Full cost.
Inspections:	
Routine	\$320.
Nonroutine	\$480.
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material:	
Application—New license	\$700.
Renewal	\$700.
Amendment	\$170.
Inspections:	
Routine	\$530.
Nonroutine	\$850.

SCHEDULE OF MATERIALS FEES—  
Continued

[See footnotes at end of table]

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2</sup>
7. Human use of byproduct, source, or special nuclear material:	
A. Licenses issued pursuant to Parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:	
Application—New license	\$580.
Renewal	\$350.
Amendment	\$230.
Inspections:	
Routine	\$530.
Nonroutine	\$850.
B. Licenses of broad scope issued to medical institutions or two or more physicians pursuant to Parts 30, 33, 35, 40 and 70 of this chapter authorizing research and development, including human use of byproduct material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:	
Application—New license	\$1,200.
Renewal	\$700.
Amendment	\$120.
Inspections:	
Routine	\$740.
Nonroutine	\$800.
C. Other licenses issued pursuant to Parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices:	
Application—New license	\$580.
Renewal	\$580.
Amendment	\$120.
Inspections:	
Routine	\$480.
Nonroutine	\$690.
8. Civil defense:	
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities:	
Application—New license	\$290.
Renewal	\$230.
Amendment	\$60.
Inspections:	
Routine	\$320.
Nonroutine	\$320.
9. Device, product or sealed source safety evaluation:	
A. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution:	
Application—each device	\$1,600.
Amendment—each device	\$580.
Inspections	None.



SCHEDULE OF MATERIALS FEES—  
Continued

(See footnotes at end of table.)

Category of materials licenses and type of fees <sup>1</sup>	Fee <sup>2,3</sup>
<b>B. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by a single applicant, except reactor fuel devices:</b>	
Application—each device	\$800.
Amendment—each device	\$290.
Inspections	None.
<b>C. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution:</b>	
Application—each source	\$350.
Amendment—each source	\$120.
Inspections	None.
<b>D. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by a single applicant, except reactor fuel:</b>	
Application—each source	\$175.
Amendment—each source	\$60.
Inspections	None.
<b>10. Transportation of radioactive material:</b>	
<b>A. Evaluation of casks, packages, and shipping containers:</b>	
Application	\$150.
Approval, Renewal, Amendment	Full cost.
Inspections	None.
<b>B. Evaluation of Part 71 quality assurance programs:</b>	
Application	\$150.
Approval, Renewal, Amendment	Full cost.
Inspections	None.
<b>11. Review of standardized spent fuel facilities:</b>	
Application	\$150.
Approval, Amendment, Renewal	Full cost.
Inspections	None.
<b>12. Special projects:</b>	
Application	\$150.
Approval	Full cost.
Inspections	None.

<sup>1</sup> Types of fees—Separate charges as shown in the schedule will be assessed for applications for new licenses and approvals, issuance of new licenses and approvals, and amendments and renewals to existing licenses and approvals and inspections. The following guidelines apply to these charges:

(a) *Application fees*—Applications for new material licenses and approvals of those applications filed in support of expired licenses and approvals must be accompanied by the prescribed application fee for each category, except that applications for licenses covering more than one fee category of special nuclear material or source material must be accompanied by the prescribed application fee for the highest fee category.

(b) *License/approval fees*—For new licenses and approvals issued in fee Categories 1A and 1B, 2A, 4A, 5B, 10A, 10B, 11 and 12, the recipient shall pay the license or approval fee as determined by the Commission in accordance with § 170.12 (b), (e), and (f).

(c) *Renewal fees*—Applications for renewal of materials licenses and approvals must be accompanied by the prescribed renewal fee for each category, except that applications for renewal of licenses and approvals in fee Categories 1A and 1B, 2A, 4A, 5B, 10A, 10B, and 11 must be accompanied by an application fee of \$150, with the balance due upon notification by the Commission in accordance with the procedures specified in § 170.12(d).

(d) *Amendment fees*—Applications for amendments must be accompanied by the prescribed amendment fee. An application for an amendment to a license or approval classified in more than one category must be accompanied by the prescribed amendment fee for the highest fee category would apply, except that applications for amendment of licenses in fee Categories 1A and 1B, 2A, 4A, 5B, 10A, 10B, 11, and 12 must be accompanied by an application fee of \$150 with the balance due upon notification by the Commission in accordance with § 170.12(e).

An application for amendment to a materials license or approval that would place the license or approval in a higher fee category or add a new fee category must be accompanied by the prescribed application fee for the new category.

An application for amendment to a license or approval that would reduce the scope of a licensee's program to a lower fee category must be accompanied by the prescribed amendment fee for the lower fee category.

Applications to terminate licenses authorizing small materials programs, when no dismantling or decontamination procedure is required, shall not be subject to fees.

(e) *Inspection fees*—Separate charges will be assessed for each routine and nonroutine inspection performed, except that inspections resulting from investigations conducted by the Office of Investigations and nonroutine inspections that result from third-party allegations will not be subject to fees. If a licensee holds more than one materials license at a single location, a fee equal to the highest fee category covered by the licenses will be assessed if the inspections are conducted at the same time, except in cases when the inspection fees are based on the full cost to conduct the inspection. The fees assessed at full cost will be determined based on the professional staff time required to conduct the inspection multiplied by the rate established under § 170.20 of this part, to which any applicable contractual support service costs incurred will be added. See Footnote 5 for other inspection notes. Inspection fees are due upon notification by the Commission in accordance with § 170.12(g).

\* Fees will not be charged for orders issued by the Commission pursuant to § 2.204 of Part 2 nor for amendments resulting specifically from such Commission orders. However, fees will be charged for approvals issued pursuant to a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., §§ 30.11, 40.14, 70.14, 73.5, and any other such sections now or hereafter in effect) regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. In addition to the fee shown, an applicant may be assessed an additional fee for sealed source and device evaluations as shown in Categories 9A through 9D.

\* Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended for review of the application or to conduct the inspection. For those applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of this rule will be determined at the professional rate established for the June 20, 1984 rule. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984 rule, but are still pending completion of the review, the cost incurred after the ceiling was reached up to the effective date of this rule will not be billed to the applicant. Any professional hours expended on or after the effective date of this rule will be assessed at the rate established by § 170.20 of this part. In no event will the total review costs be less than the application fee.

\* Licensees paying fees under Categories 1A and 1B are not subject to fees under Categories 1C and 1D for sealed sources authorized in the same license except in those instances in which an applica-

tion deals only with the sealed sources authorized by the license. Applicants for new licenses or renewal of existing licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the applicable application or renewal fee for fee Category 1C only.

\* For a license authorizing shielded radiographic installations or manufacturing installations at more than one address, a separate fee will be assessed for inspection of each location, except that if the multiple installations are inspected during a single visit, a single inspection fee will be assessed.

6. Section 170.32 is revised to read as follows:

**§ 170.32 Schedule of fees for health and safety, and safeguards inspections for materials licenses.**

Materials licensees shall pay inspection fees as set forth in § 170.31.

**PART 171—ANNUAL FEE FOR POWER REACTOR OPERATING LICENSES**

7. The authority citation for Part 171 is revised to read as follows:

Authority: Section 7801, Pub. L. 90-272, 100 Stat. 146, as amended by sec. 5601, Pub. L. 100-203, 101 Stat. 1330-275 (42 U.S.C. 2213); sec. 301, Pub. L. 92-314, 86 Stat. 222, (42 U.S.C. 2201(w)); sec. 201, 82 Stat. 1242, as amended (42 U.S.C. 5841).

8. In § 171.5, the following definitions "Budgeted obligations" and "Overhead costs" are added:

**§ 171.5 Definitions.**

"Budgeted obligations" means the projected obligations of the NRC that likely will result in payments by the NRC during the same or a future fiscal year in providing regulatory services to licensees. For this purpose budgeted obligations include, but are not limited to, amounts of orders to be placed, contracts to be awarded, and services to be provided to licensees. Fees billed to licensees are based on budgeted obligations because the NRC's annual budget is prepared on an obligation basis.

"Overhead costs" means (1) the Government benefits for each employee such as leave and holidays, retirement and disability costs, health and life insurance costs, and social security costs; (2) Travel Costs; (3) direct overhead, e.g., supervision, program support staff, etc.; and (4) indirect costs, e.g., funding and staff for administrative support activities. Factors have been developed for these overhead costs which are applied to hourly rates developed for employees providing the regulatory services within the categories and activities applicable to specified types or classes of reactors. The Commission views these costs as being reasonably related to the regulatory

services provided to the licensees and, therefore, within the meaning of section 7601, COBRA.

9. In § 171.15 paragraphs (d) and (e) are removed and paragraph (c) is revised to read as follows:

**§ 171.15 Annual fee; Power reactor operating licenses.**

(c) If the basis for the annual fee is greater than 45 percent of the NRC budget, less the sum of moneys estimated to be collected from the High Level Waste (HLW) fund administered by the Department of Energy and the total estimated fees chargeable under Part 170 of this chapter, then the maximum annual fee for each nuclear power reactor that is licensed to operate shall be calculated as follows:

(NRC FY Budget × .45) minus Sum of HLW moneys and estimated Part 170 fees equals fees to be collected under Part 171.

Part 171 fees to be collected on a schedule based on the total from categories shown in the following table:

**PART 171 FEES BY REACTOR CATEGORY—SUMMARY: WITH MINOR ADJUSTMENTS FOR PLANTS WEST OF ROCKIES OR WESTINGHOUSE PLANTS WITH ICE CONDENSERS THE FOLLOWING APPLY TO PLANT/CONTAINMENT:**

(Fees in Millions)				
Type	Number	Budget base × .84	Fee	Total collected
GE Mark I	(24)	\$1.349	\$1.133	\$27.19
GE Mark II	(7)	1.443	1.212	8.48
GE Mark III	(4)	1.373	1.153	4.61
B&W	(8)	1.896	1.592	12.74
CE	(15)	1.391	1.168	17.52
Westinghouse	(48)	1.352	1.135	54.48
	106			\$125.02

**§ 171.21 [Removed]**

10. Part 171 is amended by removing § 171.21.

Dated at Rockville, Maryland this 22nd day of December, 1988.

For the Nuclear Regulatory Commission.

John C. Hoyle,  
Assistant Secretary of the Commission.

[FR Doc. 88-29767 Filed 12-28-88; 8:45 am]

BILLING CODE 7590-01-M

**FEDERAL RESERVE SYSTEM****12 CFR Part 205**

(Reg. E; Docket No. R-0224)

**Electronic Fund Transfers; Technical Amendment to Regulation E**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board is making a technical amendment to Regulation E (Electronic Fund Transfers), to reflect properly an amendment that was incorrectly incorporated into the Code of Federal Regulations.

**EFFECTIVE DATE:** December 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Dolores S. Smith, Assistant Director, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at 202-452-2412 or 202-452-3887; for the hearing impaired only, contact Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf, at 202-452-3544.

**SUPPLEMENTARY INFORMATION:** On August 8, 1979, the Board published an amendment to the provisions of Regulation E that govern notice to financial institutions of unauthorized transfers (44 FR 46432). It involved the deletion of one sentence and its replacement with another sentence. Inadvertently, the amendment was not incorporated correctly into the Code of Federal Regulations for the year 1980 and years thereafter. Accordingly, the Board is republishing 12 CFR 205.6(c) to correct the text of this provision in the CFR. Because this action merely corrects an improperly codified provision, the Board finds that advance notice, public comment and a delay in the effective date are unnecessary.

**List of Subjects in 12 CFR Part 205**

Banks, Banking, Consumer protection, Electronic fund transfers, Federal Reserve System, Penalties.

For the reasons set forth in this notice, 12 CFR Part 205 is amended as follows:

**PART 205—[AMENDED]**

1. The authority citation for 12 CFR Part 205 continues to read as follows:

Authority: Pub. L. 95-630, 92 Stat. 3730 (15 U.S.C. 1693b).

2. Section 205.6(c) is revised in its entirety to read as follows:

**§ 205.6 Liability of consumer for unauthorized transfers.**

(c) *Notice to financial institution.* For purposes of this section, notice to a financial institution is given when a consumer takes such steps as are reasonably necessary to provide the financial institution with the pertinent information, whether or not any particular officer, employee, or agent of the financial institution does in fact receive the information. Notice may be given to the financial institution, at the consumer's option, in person, by telephone, or in writing. Notice in writing is considered given at the time the consumer deposits the notice in the mail or delivers the notice for transmission by any other usual means to the financial institution. Notice is also considered given when the financial institution becomes aware of circumstances that lead to the reasonable belief that an unauthorized electronic fund transfer involving the consumer's account has been or may be made.

Board of Governors of the Federal Reserve System, December 23, 1988.

William W. Wiles,  
Secretary of the Board.

[FR Doc. 88-29929 Filed 12-28-88; 8:45 am]  
BILLING CODE 6210-01-M

**FEDERAL HOME LOAN BANK BOARD****12 CFR Part 522**

(No. 88-1357)

**Indemnification of Directors, Officers and Employees of the Federal Home Loan Bank System**

Date: December 19, 1988.

**AGENCY:** Federal Home Loan Bank Board.

**ACTION:** Final rule.

**SUMMARY:** The Federal Home Loan Bank Board ("Board") is amending 12 CFR 522.72, its regulation governing the indemnification of directors, officers, and employees of the Federal Home Loan Bank Banks ("FHLBanks" or "Banks"). The amendments clarify the scope of the indemnification rule and modify certain procedures under which personnel serving the Federal Home Loan Bank System ("Bank System") can recover legal expenses, costs, and judgment liabilities incurred as a consequence of service to the Bank System.

**EFFECTIVE DATE:** December 29, 1988.

**FOR FURTHER INFORMATION CONTACT:** Andrew Gilbert, Attorney, (202) 377-6441, Office of General Counsel; or



William Carey, (202) 377-6656, Director, Bank Liaison Division, and Patrick G. Berbakos, Director (202) 377-6720, Office of District Banks, Federal Home Loan Bank Board, 1700 G Street NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:** The Federal Home Loan Bank Board is amending its indemnification rule, 12 CFR 522.72, to clarify the scope of the regulation and to modify certain procedures under which directors, officers, and employees of the Federal Home Loan Bank System may obtain indemnification of legal expenses, costs, and judgment liabilities incurred as a consequence of service rendered by such persons to the Bank System. The amendment clarifies that indemnification is available not only to the directors, officers, and employees of each individual FHLBank, but also to personnel of certain offices within the Bank System that jointly serve and are jointly financed by the entire System; namely, the Office of Regulatory Activities, the Office of Finance, and the Office of Education. The amendment also provides for indemnification relating to services performed on behalf of the Financing Corporation ("FICO") by employees of a FHLBank or joint Bank System office. Furthermore, the amendment modifies certain procedures under which indemnification is provided in particular cases, including, among other revisions discussed below, the provision for the advance payment of legal expenses and attorney fees.

First, the Board is amending § 522.72 to clarify that indemnification coverage shall extend to all directors, officers, and employees of the joint offices within the Bank System, as well as employees of each individual FHLBank. A new paragraph (a)(1)(v) defines a new term "Bank System Office" to include the Office of Regulatory Activities, the Office of Finance, and the Office of Education, while a new paragraph (d) extends indemnification coverage to the personnel of these Bank System Offices. Moreover, a new paragraph (g) clarifies that personnel of either a Bank or a Bank System Office who also perform services on behalf of the FICO shall be indemnified in connection with such services on the same basis under the amended regulation as they are covered by their Bank or Bank System Office for any of their other official duties and activities.<sup>1</sup>

<sup>1</sup> Although the FICO cannot have paid employees, the officers and employees of the FHLBanks and the Office of Finance can be called upon to act on behalf of FICO as part of their ongoing responsibilities to the Bank System. See 12 U.S.C. 1441(b).

This issue of coverage for personnel of Bank System Offices has been of concern to the Board for some time. In fact, most recently, as part of the many steps taken in recapitalizing the FSLIC fund, the Board adopted a special resolution, Board Res. No. 88-312, dated May 11, 1988, authorizing the Banks to enter into an agreement among themselves and with the Financing Corporation to provide an indemnification agreement for certain persons serving FICO. The Board believes that the provision of reasonable indemnification to personnel of the Bank System Offices, as well as Bank employees, is necessary to the continued high performance of these crucial Bank System functions. Absent reasonable indemnification protections, the exposure to vexatious litigation presenting the risk of significant personal loss would make it difficult for the Bank System to attract and retain qualified personnel for numerous key positions.

Therefore, new paragraph (d) in amended § 522.72 will provide indemnification for personnel of Bank System Offices on the same basis on which Bank personnel are covered under paragraph (c); that is, payment of judgment amount and reasonable expenses (including attorney fees) will be provided in all cases where there has been a favorable judgment on the merits as well as in any other case where the applicant "was acting in good faith within the scope of his employment or authority as he could reasonably have perceived it under the circumstances and for a purpose he could reasonably have believed under the circumstances was in the best interests of the Bank System Office or the Board or the Federal Home Loan Bank System." This standard for such cases of so-called permissive indemnification is identical to that applied for Bank personnel under paragraph (c), except that slight procedural modifications have been incorporated into new paragraph (d) which reflect the fact of employment by a joint office instead of a single Bank.

In particular, whereas applications of Bank personnel for permissive indemnification are granted by a majority of the Bank's board of directors, subject to veto by the Federal Home Loan Bank Board, the necessary finding under the same standard in new paragraph (d) will be made in the first instance by the Board. This difference reflects the fact that the indemnification is being paid by a Bank System Office and for purposes serving the consolidated Bank System at large (as opposed to the exclusive interests of any

individual Bank). See 12 CFR 522.80-82, 522.90 (1988). However, recognizing that the individual Banks may wish to take an interest in any particular application for indemnification of a joint office employee, the Board is providing a procedure under paragraph (d) for Board receipt and consideration of any comments and advice of the Banks on any specific matter. Moreover, the rule allows that any application before the Board may be delegated for consideration by the Board's designee. For example, the Board contemplates that such designee will consist, as appropriate in any particular case, of a committee organized from Principal Supervisory Agents from the Banks as well as senior personnel from the Board, such as the Board's General Counsel. The Board believes that the new rule implements a logical and efficient procedure for the provision of indemnification protection of personnel serving these Bank System Offices.

In connection with the extension of coverage to personnel of the Bank System Offices, the Board is adding a clarifying statement at the end of former paragraph (f) (new paragraph (h)) regarding the exclusivity of the indemnification provisions in § 522.72. This statement affirms the continued effectiveness of any indemnification agreements that are made pursuant to, and in accordance with, any duly delegated authority of the Board authorizing such indemnification agreements.<sup>2</sup> These agreements typically are complementary to, and not inconsistent with, the provisions of § 522.72. The administration of those arrangements in particular cases, consistent with the regulatory provisions, is expressly left by the Board to be worked out among the authorized parties to such agreements. It should of course be understood that no double coverage is intended in any particular case and that any specific justified cost item can be recovered only once, without regard to the procedural mechanism through which that cost item ultimately is reimbursed.

In addition, the Board is adopting procedural clarifications and modifications to the existing provisions for indemnification of Bank personnel. These amendments arise from Board consideration of issues raised in a proposal published last year. See 52 FR 12425 (April 16, 1987). In the context of that proposal, some Banks had

<sup>2</sup> An example of such specific indemnification agreements is the joint contract of the Banks (referenced above) which covers certain FICO personnel.

expressed concern that unnecessary delay and uncertainty may result from the requirement that the Banks give 60-days notice to the Board to allow the Board to exercise its power to veto a Bank's grant of permissive indemnification. Some Banks had suggested that this provision be eliminated to order to avoid any possible prejudice to the Banks' ability to obtain director and officer liability insurance, as well as the ability to attract the most qualified personnel. In response to these comments, the Board has decided to shorten to 30 days the prior 60-day notice to the Board for exercise of its authority to review a grant of permissive indemnification by a Bank to its directors, officers, and employees. Moreover, language has been added to the rule to clarify the Board's commitment to apply in any decisionmaking the standard for permissive indemnification that is stated in the regulation. This should dispel any past misunderstanding that the Board could arbitrarily veto a Bank's grant of indemnification.

Furthermore, at the request of the Banks, a procedure has been added to regulation whereby the Banks can seek reconsideration of an adverse decision by the Board that vetos a Bank's grant of indemnification. As a final procedural clarification, the new rule expressly states that a disinterested majority of a quorum of a Bank's directors is necessary for any duly adopted resolution granting indemnification.<sup>3</sup> If no such disinterested majority can exist, then the determination to indemnify under paragraph (c) will be made by independent counsel appointed by the Bank, selected in consultation with the Board's General Counsel. The Board believes that these modifications, based upon internal review and experience in these areas, will adequately address any concerns over the prior rule's potential for unnecessary delay and uncertainty.<sup>4</sup>

The Board is also amending the provision regarding the payment of reasonable expenses and costs as they are incurred in advance of any final resolution of the legal action. Old § 522.72(e) had authorized a majority of a Bank's directors to pay such expenses

<sup>3</sup> This clarification is consistent with the general modern trend in corporate law.

<sup>4</sup> The Board is also amending the provision allowing the purchase of indemnification insurance by deleting the old prohibition against the purchase of coverage for losses from "willful or criminal misconduct." New paragraph (e) allows the Banks and Bank System Offices to purchase insurance to the extent permitted by applicable state law. The old prohibition was an unnecessary statement of the limitations already imposed by law and sound business judgment.

in connection with an action concluding that the person "ultimately may become entitled to indemnification" under the regulation, subject to any conditions that were deemed warranted (such as a requirement that payments be reimbursed should the indemnitee ultimately turn out not to be entitled to payment under the rule). The amended provision (which now appears in paragraph (f)) clarifies that such expenses are to be paid as they are incurred. The amendment also strengthens these protections by providing for essentially automatic reimbursement of such advance expenses as they are incurred where the applicant certifies and supports his right to payment as one who ultimately may become entitled to indemnification under the regulation.

However, in order to protect the Bank System against unreasonable or fraudulent claims, such advance payments would not commence until 30 days following notice to the Bank (or in the case of a Bank System Office, the Board). At any time following notice, the Bank (or the Board) can prevent any advanced payments under new paragraph (f) if it finds that the applicant is not entitled to them under the regulation. Again, any reasonable conditions may be attached to such payments in the particular case, including a reimbursement requirement.<sup>5</sup> The Board concurs with the Banks' recommendation that this provision is necessary in order to protect Bank System personnel against the ongoing depletion of their own resources even though they might finally obtain an indemnification payment at the ultimate conclusion of the case. The Board recognizes that the risk of personal financial exposure can be enormous even in defending against the preliminary stages of a legal action.

Finally, since these amendments solely affect the internal operations of the Federal Home Loan Bank System, the Board finds that a notice and comment procedure is not necessary under the Administrative Procedures

<sup>5</sup> Of course, sound business procedure would generally dictate that a written agreement be obtained from any indemnified party for repayment of all reimbursed expenses that the person is not ultimately entitled to receive. Funds disbursed under paragraph (f) would be reimbursed to the Bank or the Bank System Office after it is determined that the employee was not entitled to these payments under the regulation. Although an affirmative or negative finding may be adopted by the Bank or Board at any time following an application for advance payments of expenses, paragraph (f)(3) requires in every case in which advance payments have been made that a finding as to entitlement be made following completion and termination of the action giving rise to the payments.

Act. Moreover, the Board finds that good cause exists for suspension of the usual thirty-day delayed effective date since these amendments do not result in any additional burdens on third parties, but simply clarify existing provisions or confer additional benefits. See 5 U.S.C. 553.

#### List of Subjects in 12 CFR Part 522

Conflicts of interest, Federal home loan banks.

Accordingly, the Board hereby amends Part 522, Subchapter B, Chapter V of Title 12, Code of Federal Regulations as set forth below.

#### SUBCHAPTER B—FEDERAL HOME LOAN BANK SYSTEM

#### PART 522—ORGANIZATION OF THE BANKS

1. The authority citation for Part 522 continues to read as follows:

Authority: Sec. 5B, 47 Stat. 727, as added by sec. 4, 80 Stat. 824, as amended (12 U.S.C. 1425b); secs. 6-7, 47 Stat. 727, 730, as amended (12 U.S.C. 1426-1427); sec. 17, 47 Stat. 736, as amended (12 U.S.C. 1437); sec. 5, 48 Stat. 132, as amended (12 U.S.C. 1464); secs. 402-403, 407, 48 Stat. 1256-1257, 1280, as amended (12 U.S.C. 1725-1726, 1730); sec. 207, 62 Stat. 692, as added by sec. 1a, 76 Stat. 1123, as amended (18 U.S.C. 207); sec. 602, 92 Stat. 2115, as amended (42 U.S.C. 8101 et seq.); Reorg. Plan No. 6 of 1961, reprinted in 12 U.S.C.A. 1437 App. (West Supp. 1986).

2. Section 522.72 is revised to read as follows:

#### § 522.72 Indemnification.

(a) *Definitions and rules of construction.* (1) Definitions for purposes of this section.

(i) *Action.* Any judicial or administrative proceeding, or threatened proceeding, whether civil, criminal, or otherwise, including any appeal or other proceeding for review;

(ii) *Court.* Includes, without limitation, any court to which or in which any appeal or any proceeding for review is brought.

(iii) *Final Judgment.* A judgment, decree, or order which is not appealable or as to which the period for appeal has expired with no appeal taken.

(iv) *Settlement.* Includes entry of a judgment by consent or confession or plea of guilty or nolo contendere.

(v) *Bank System Office.* Means the following offices within the Federal Home Loan Bank System: the Office of Regulatory Activities, the Office of Finance, and the Office of Education.

(2) References in this section to any individual or other person, including any Bank or Bank System Office, shall include any legal representatives.

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successors, assigns, executors and administrators thereof. The provisions of this section shall apply to any application for indemnification of Bank or Bank System Office personnel that is pending on, or filed after the effective date of this section, without regard to whether the application for indemnification concerns actions taken prior to the effective date of this section.

(b) *General.* Subject to paragraph (c) of this section, a Bank shall indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of the Bank; and subject to paragraph (d) of this section, a Bank System Office shall indemnify any person against whom an action is brought or threatened because that person is or was a director, officer, or employee of that Bank System Office, for:

(1) Any amount for which that person becomes liable under a judgment or settlement in such action; and

(2) Reasonable costs and expenses, including reasonable attorney's fees, actually paid or incurred by that person in defending or settling such action, or in enforcing his rights under this section if he attains a favorable judgment in such enforcement action.

(c) *Requirements for indemnification of a director, officer, or employee of a Bank.* (1) Indemnification shall be made to such person under paragraph (b) of this section only if:

(i) Final judgment on the merits is in his favor; or

(ii) In case of: (A) Settlement, (B) judgment against him, or (C) final judgment in his favor, other than on the merits, if a majority of a quorum of disinterested directors of the Bank duly adopts a resolution determining that he was acting in good faith within the scope of his employment or authority as he could reasonably have perceived it under the circumstances and for a purpose he could reasonably have believed under the circumstances was in the best interest of the Bank or its members or the Federal Home Loan Bank System.

(2) *Provided, however,* that no indemnification shall be made unless the Bank gives the Board at least 30 days' notice of its intention to make such indemnification. Such notice shall state the facts on which the action arose, the terms of any settlement, and any disposition of the action by a court. Such notice, a copy thereof, and a certified copy of the resolution containing the required determination by the board of directors shall be sent to the Secretary to the Board, who shall promptly acknowledge receipt thereof.

The notice period shall run from the date of such receipt. No such indemnification shall be made if the Board advises the Bank in writing, within such notice period of its objection thereto, based upon the Board's reasonable determination that indemnification is not warranted under the standards set forth in this section. As part of its notification to the Bank, the Board will provide a written statement detailing the reasons for its objections, and, if the Bank believes there are any material misstatements of law or fact, the Bank may, within ten days from receipt of notice from the Board, request the Board to reconsider its objection. The Board will review the request for reconsideration within ten days of receipt of such request.

(3) Any director of the Bank having a personal interest in the application for indemnification shall be disqualified from voting on the resolution required under this section. In the event that the necessary resolution cannot be duly adopted by a majority of a quorum of the Bank's disinterested directors, then the determination to indemnify under this section shall be made by independent legal counsel pursuant to the standard set forth in paragraph (c)(1) of this section.

(d) *Requirements for indemnification of a director, officer, or employee of a Bank System Office.* (1) Indemnification shall be made to such person under paragraph (b) of this section only if:

(i) Final judgment on the merits is in his favor; or

(ii) In case of: (A) Settlement, (B) final judgment against him, or (C) final judgment in his favor, other than on the merits, if the Board or its designee determines that he was acting in good faith within the scope of his employment or authority as he could reasonably have perceived it under the circumstances and for a purpose he could reasonably have believed under the circumstances was in the best interests of the Bank System Office or the Board or the Federal Home Loan Bank System.

(2) A person covered by this paragraph against whom a judicial or administrative proceeding is threatened or initiated shall give notice as soon as practicable to the Board, the Bank System Office, and each of the Banks. Such notice shall state the facts on which the action arose, the terms of any settlement, and any disposition of the action by a court, as well as a certification and supporting statement as to the person's belief that he is entitled to indemnification under this section. Within 30 days from receipt of such notice, the Board or its designee

shall make a determination under the standards set forth in this section after giving due consideration to any comment or advice received from any of the Banks.

(e) *Insurance.* To the extent permitted under applicable law of the state in which its principal office is located, a Bank and a Bank System Office may obtain insurance to protect it and its directors, officers, and employees from potential losses arising from claims against any of them for alleged wrongful acts committed in their capacity as directors, officers or employees.

(f) *Advance Payment of Expenses.* (1) Payments of reasonable costs and expenses (including reasonable attorney fees) shall be paid by the appropriate Bank or Bank System Office as they are incurred in defending against any action, and in advance of any settlement or resolution of the action, beginning 30 days from the date of receipt by the Bank and its General Counsel (or, in the case of a Bank System Office matter, the Board and its General Counsel) of any person's written application for indemnification, including a certification and supporting statement of that person's belief that he ultimately may become entitled to indemnification under this section; *provided, however,* that no such advance payment of incurred costs and expenses shall be made, or continued to be made, if a disinterested majority of a quorum of the Bank's directors (or, in the case of a Bank System Office matter, the Board or its designee) reasonably concludes that the director, officer, or employee ultimately would not likely become entitled to indemnification under this section. In the case of such a finding, advanced payments to which the director, officer, or employee is not entitled under this paragraph shall be reimbursed to the Bank or Bank System Office.

(2) Nothing in this paragraph shall prevent the directors of a Bank (or, in the case of a Bank System Office matter, the Board or its designee) from imposing such contractual conditions on the advance payment of costs and expenses as they deem warranted to protect the interests of a Bank or Bank System Office.

(3) In any action in which advance payments have been made under this paragraph, and following termination of the action, whether by final judgment, settlement, or otherwise, the Bank (or, in the case of a Bank System Office matter, the Board or its designee) shall make a finding under this paragraph as to whether or not reimbursement should be made of the advance payments. Nothing

in this paragraph shall prevent the due adoption of a resolution at any time prior to the termination of the action as to whether advance payment of expenses should or should not be made under this paragraph.

(g) *Indemnification Relating to Services Performed on Behalf of the Financing Corporation.* For the purposes of paragraph (b) of this section, if an action is brought or threatened against a director, officer, or employee of either a Bank or a Bank System Office because of that person's service to or on behalf of the Financing Corporation ("FICO"), as defined in Part 592 of this Chapter, then the action shall be deemed to be brought or threatened because that person is or was a director, officer, or employee of the Bank or Bank System Office then employing that person at the time the service to FICO was performed, and indemnification may accordingly be sought under the appropriate provisions of this section.

(h) *Exclusiveness of provisions.* No Bank or Bank System Office shall indemnify any person referred to in paragraph (b) of this section or obtain insurance referred to in paragraph (e) of this section other than in accordance with this section; except that indemnification may be paid in accordance with any indemnification commitment that has been, or is hereafter made by a Bank(s) or Bank System Office pursuant to and in accordance with duly delegated authority from the Board authorizing any such indemnification commitment.

By the Federal Home Loan Bank Board  
John F. Ghizzoni,  
Assistant Secretary.  
[FR Doc. 88-29978 Filed 12-28-88; 8:45 am]  
BILLING CODE 6720-01-M

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 203

[Regulation C; Docket No. R-0635]

#### Home Mortgage Disclosure; Technical Amendment to Regulation C

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

**SUMMARY:** On August 19, 1988, the Board published a revised Regulation C (Home Mortgage Disclosure) (53 FR 31683). The Board is now republishing the reporting forms and instructions (contained in Appendix A of the regulation) to incorporate minor technical revisions. These revisions clarify the forms and instructions but do not modify any reporting requirements.

**EFFECTIVE DATE:** December 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Noto or Linda Vespereny, Staff Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at 202-452-2412 or 202-452-3667; for the hearing impaired only, contact Earnestine Hill or Dorothea Thompson, Telecommunications Device for the Deaf, at 202-452-3544.

**SUPPLEMENTARY INFORMATION:** Appendix A of the Board's Regulation C (Home Mortgage Disclosure) (12 CFR Part 203) contains the reporting forms and instructions that are to be used by financial institutions in filing their reports of mortgage loan data under the Home Mortgage Disclosure Act. On August 19, 1988, the Board published a revised Regulation C (53 FR 31683). Among other things, the revisions simplified and clarified the text of the

regulation and the reporting forms and instructions.

The Board is now republishing Appendix A of the regulation to incorporate technical changes; no substantive changes are involved. The revisions to the reporting forms involve a minor word change in part of the title to the HMDA-1 form and changed wording of the census-tract column, for greater clarity. Changes to the instructions reflect the deletion of duplicated material and conform the language used in the different forms. A list of the federal supervisory agencies to which HMDA statements must be submitted has been added for the convenience of reporting institutions.

Because this action involves only minor technical changes to the text of the reporting forms and instructions, the Board finds that advance notice and public comment on the revisions is unnecessary. Similarly, because institutions must use the revised forms to report loan data in March of 1989, the revisions are effective December 30, 1988.

#### List of Subjects in 12 CFR Part 203

Banks, Banking, Consumer protection, Federal Reserve System, Home mortgage disclosure, Mortgages, Reporting and recordkeeping requirements.

For the reasons set forth in this notice, 12 CFR 203 is amended as follows:

#### PART 203—[AMENDED]

1. The authority citation for 12 CFR 203 continues to read as follows:

Authority: 12 U.S.C. 2801-2810.

2. Appendix A to 12 CFR 203 is revised in its entirety to read as follows:

#### Appendix A—Forms and Instructions

BILLING CODE 6210-01-M



## MORTGAGE LOAN DISCLOSURE STATEMENT FORM HMDA-1

Public reporting burden for this collection of information is estimated to vary from 2 to 50 hours per response, with an average of 30 hours per response, including time to gather and maintain the data needed and to review instructions and complete the information collection. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Secretary, Board of Governors of the Federal Reserve System, Washington, D. C. 20551; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

### Instructions to Commercial Banks, Savings Banks, Savings and Loan Associations, Credit Unions and Other Depository Institutions

#### A. WHO MUST USE THIS FORM

1. A commercial bank, savings bank, savings and loan association, building and loan association, homestead association (including a cooperative bank) or credit union must complete this HMDA-1 form to disclose loan data for a given calendar year if on the preceding December 31 the institution:

- a. had assets of more than \$10 million, and
- b. had a home or a branch office in a metropolitan statistical area (MSA) or a primary metropolitan statistical area (PMSA).

*Example: If on December 31, 1987, your home office was located in an MSA and your assets exceeded \$10 million, you must compile data and complete a disclosure statement for all home purchase and home improvement loans that you originate or purchase during calendar year 1988.*

2. However, your institution need not complete a disclosure statement—even though it meets the tests for asset size and location—if it makes no first-lien mortgage loans on 1-to-4 family dwellings in the calendar year for which the data are compiled.
3. Any majority-owned subsidiary is deemed to be part of the parent institution. Consequently, you should consolidate into your disclosure statement loan data relating to originations and purchases by all of your institution's majority-owned subsidiaries

(including a majority-owned service corporation, in the case of a savings and loan association). To comply with the requirements described under section G (Geographic Itemization) below, itemize loan data for MSAs or PMSAs where the parent institution has a home or branch offices.

*Example: If you have home and branch offices in New York City, and your subsidiary's loan offices are in Philadelphia, itemize data by census tract in Section 1 only for the New York PMSA. Report loan data on loans relating to property located anywhere outside the New York PMSA—including loans in Philadelphia—as an aggregate sum in Section 2 (Loans on property not located in MSAs/PMSAs where institution has home or branch offices).*

#### B. WHO MUST USE OTHER FORMS

1. Mortgage banking subsidiaries of bank holding companies, mortgage banking subsidiaries of savings and loan holding companies, and savings and loan service corporations that originate or purchase mortgage loans (other than service corporations that are majority-owned by a single savings and loan association) must use the HMDA-2 form instead of the HMDA-1.
2. Institutions that have been exempted by the Federal Reserve Board from complying with federal law because they are covered by a similar state law on mortgage loan disclosures must use the disclosure form required by their state law.

#### C. FORMAT

1. You must use the format of the HMDA-1 form, but you are not required to use the form itself. For example, you may produce a computer printout of your disclosure statement instead. But you must give all the identifying information asked for at the top of the form, use the prescribed column headings, provide the signature of a certifying officer, etc.
2. If your report on loan originations or purchases consists of more than one page, number the pages and include the name of your institution and the MSA/PMSA number at the top of

each page. Enter the totals for the MSA/PMSA on the final page; do not give subtotals on earlier pages. Report the Section 2 data (Loans on property not located in MSAs/PMSAs) on the final page. If your report itemizes data for more than one MSA/PMSA, report the Section 2 data only once for Part A and once for Part B—not with each MSA/PMSA.

#### D. WHEN AND WHERE STATEMENT IS DUE

1. You must send two copies of your disclosure statement to the office specified by your federal supervisory agency no later than March 31 following the calendar year for which the loan data are compiled. A list of the agencies appears at the end of these instructions.
2. The completed disclosure statement must be signed by an officer of your institution (both Part A and Part B, on the final page of each) certifying to the accuracy of the data and indicating whether the statement includes data of a majority-owned subsidiary. (See paragraph 3 of section A above.)
3. You also must make your disclosure statement available no later than March 31 for inspection by the public at your home office and, if you have branch offices in other MSAs/PMSAs, at one branch office in each of these MSAs/PMSAs.

#### E. DATA TO BE SHOWN

1. **Originations and purchases.** Show the data on home purchase and home improvement loans that you originated or purchased during the calendar year covered by the disclosure statement. (Certain refinancings are to be included; for example, see paragraph 3 of the instructions for column A, under section H below.) Report the data on loan originations on Part A of the form and the data on loan purchases on Part B of the form even if the loans were subsequently sold. If you have no loans to report in one of the two parts, enter "none" in the column provided for census tract numbers and enter zeros in Columns A through E; this helps to show that no part of an institution's report has been lost.
2. **Number and total dollar amount.** Show the number of loans and the total dollar amount of loans for each category on the



statement. For home purchase loans that you originate, "total dollar amount" means the original principal amount of the loans. For home purchase loans that you purchase, "total dollar amount" means the unpaid principal balance of the loans at time of purchase. For home improvement loans (both originations and purchases), you may include unpaid finance charges in the "total dollar amount" if that is how you record such loans on your books.

3. **Rounding.** Round all dollar amounts to the nearest thousand (\$500 should be rounded up), and show in terms of thousands.

#### F. DATA TO BE EXCLUDED

Do not report the following types of loans:

1. loans that, although secured by real estate, are made for purposes other than for home purchase or home improvement (for example, do not report a loan secured by residential real property if the proceeds are to be used for financing education, a vacation, or business operations);
2. loans made or purchased in a fiduciary capacity (for example, by your trust department);
3. loans on unimproved land;
4. refinancing of a loan that you originated, if the refinancing involves no increase in the outstanding principal, aside from closing costs and unpaid finance charges;
5. construction loans and other temporary financing;
6. purchase of an interest in a pool of mortgage loans such as mortgage participation certificates; or
7. purchases solely of the right to service loans.

- G. **GEOGRAPHIC ITEMIZATION** (breakdown of loan data for each MSA or PMSA by census tract or county and listing of loan data in the outside-MSA/PMSA category).

1. **MSA/PMSA.** You must compile loan data geographically for each MSA or PMSA in which you have a home or branch office. (See Item 6 below for treatment of loans on property outside MSAs/PMSAs.) Start a new page for each MSA or PMSA. If you itemize data for more than one MSA/PMSA. Use the MSA/PMSA boundaries (defined by the U.S. Office of Management and Budget) that were in effect on January 1 of the calendar year for which the loan data are compiled.

2. **Census tract or county.** For loans on property located within one of these MSAs/PMSAs, itemize the data by the census tract in which the property is located, except that you must itemize the data by county *instead* of census tract when the property:
  - a. is located in an area that is not divided into census tracts on the U. S. Census Bureau's census tract outline maps (see item 3 below); or
  - b. is located in a county with a population of 30,000 or less.

To determine population, use the Census Bureau's PC80-1-A population series even if the population has increased above 30,000 since 1980.

3. **Census tract maps.** To determine census tract numbers, consult the Census Bureau's census tract outline maps. You may use the maps of the appropriate MSAs/PMSAs in the Census Bureau's PHC80-2 series for the 1980 census, or equivalent census data from the Census Bureau (such as GBF/DIME files) or from a private publisher. Use the maps in the 1980 series of equivalent data even if more current maps or data are available.
4. **Compilation.** Enter the data for all loans made in a given census tract on the same line, listing the number and total dollar amount in the appropriate columns (as described below in section H) and listing the census tracts in numerical sequence. Do the same for loans made in a given county.
5. **Duplicate census tract numbers.** There are duplicate census tract numbers in certain MSAs/PMSAs. In such cases, you must indicate the county (by name or number) in addition to the tract number. Your supervisory agency will provide a list of the MSAs/PMSAs with duplicate census tract numbers.

6. **Outside-MSA/PMSA.** For loans on property located outside the MSAs/PMSAs in which you have a home or branch office (or outside any MSA/PMSA), report the loan data as an aggregate sum in Section 2 of the form. You do not have to itemize these loans by census tract or county. (But you will have to itemize the data by type of loan, as described in section H below.)

#### H. TYPE-OF-LOAN ITEMIZATION (Breakdown of each geographic grouping into loan categories—Columns A–E).

##### Column A: FHA, FmHA, and VA loans on 1-to-4 family dwellings.

1. Report in Column A loans made for the purpose of purchasing a residential dwelling for 1 to 4 families if the loan is secured by a lien and if it is insured or guaranteed by FHA, FmHA, or VA.
2. At your option, you may include loans that are made for home improvement purposes but are secured by a first lien, if you normally classify first-lien loans as purchase loans.
3. Include refinancings if there is an increase in the outstanding principal aside from any increase related to closing costs or unpaid finance charges, or the original loan was made by another lender.
4. Include any nonoccupant FHA, FmHA, or VA loans in this column as well as in Column E.

##### Column B: Conventional home purchase loans on 1-to-4 family dwellings.

1. Report in Column B conventional loans (all loans other than FHA, FmHA, and VA loans) made for the purpose of purchasing a residential dwelling for 1 to 4 families if the loans are secured by a lien.
2. Include refinancings if there is an increase in the outstanding principal aside from any increase related to closing costs or unpaid finance charges, or if the original loan was made by another lender.
3. Include any nonoccupant conventional loans in this column as well as in Column E.



- 4 At your option, you may include loans that are made for home improvement purposes but that are secured by a first lien, if you normally classify first-lien loans as purchase loans.

**Column C: Home Improvement loans on 1-to-4 family dwellings.**

1. Report in Column C only loans that:
  - a. the borrowers have said are to be used for repairing, rehabilitating, or remodeling residential dwellings, and
  - b. are recorded on your books as home improvement loans.
2. Include both secured and unsecured loans.
3. At your option, you may include home equity lines of credit in Column C; include the portion of the line of credit that the

borrower indicates will be used for home improvement purposes, at the time the account is opened. Report only for the year the line is established.

4. You may include unpaid finance charges in the "total dollar amount" if that is how you record such loans on your books.
5. Include any nonoccupant home improvement loans in this column as well as in Column E.

**Column D: Loans on multifamily dwellings (5 or more families).**

1. Report in Column D loans on dwellings for 5 or more families, including both loans for home purchase and loans for home improvement.
2. Do not report loans on individual condominium or cooperative units in Column D; report such loans in Columns A, B, or C.

**Column E: Nonoccupant loans on 1-to-4 family dwellings.**

1. Report in Column E any home purchase and home improvement loans on 1-to-4 family dwellings (listed in Columns A, B, and C) made to borrowers who indicated at the time of the loan application that they did not intend to use the property as a principal dwelling.
2. In completing Column E of Part B, you may assume that a purchased loan does not fall in the "nonoccupant" category unless your documents contain information to the contrary.
3. Do not complete Column E for loans that you report under Section 2 (Loans on property not located in MSAs/PMSAs) in either Part A (Originations) or Part B (Purchases).

**Federal Supervisory Agencies**

Disclosure statements should be sent to your federal supervisory agency office as specified below. Any questions may also be directed to your agency.

**National Banks**

Comptroller of the Currency regional office serving the district in which the national bank is located.

**State Member Banks**

Federal Reserve Bank serving the district in which the state member bank is located.

**Nonmember Insured Banks (except for Federal Savings Banks)**

Federal Deposit Insurance Corporation Regional Director for the region in which the bank is located.

**Savings Institutions Insured by FSLIC and Members of the FHLB System (except for State Savings Banks insured by FDIC)**

Federal Home Loan Bank Board Supervisory Agent in the district in which the institution is located.

**Credit Unions**

National Credit Union Administration  
Office of Examination and Insurance  
1776 G Street, N.W.  
Washington, D.C. 20456

**All Other Financial Institutions**

Federal Deposit Insurance Corporation Regional Director for the region in which the institution is located.



## Part A—Originations Report for loans made in 19\_\_

Control number (agency use only)

\_\_\_\_\_.

Name of MSA/PMSA \_\_\_\_\_

[illegible]

I hereby certify to the accuracy of this report.

Telephone Number (include Area Code and Extension)



**MORTGAGE LOAN DISCLOSURE STATEMENT, FORM HMDA-1**  
**FOR USE BY COMMERCIAL BANKS AND OTHER DEPOSITORY INSTITUTIONS**

Control number (agency use only)

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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## Part B—Purchases Report for loans made in 19\_\_\_\_

Reporting institution

Enforcement agency for reporting institution

Name \_\_\_\_\_

Name

**Address**

### Address

MSA/PMSA number for data reported in Section 1 \_\_\_\_\_

Name of MSA/PMSA

## Section 1—Loans on property located in MSA/PMSA where institution has a home or branch office

[illegible]

MSA/PM\$A TOTAL

## Section 2—Loans on property not located in MSAs/PMSAs where institution has home or branch offices

I hereby certify to the accuracy of this report.  
The report includes ☒ does not include ☐ loan data for majority-owned subsidiaries

Signature of Certifying Officer

Print Name of Person Completing Form

Telephone Number (include Area Code and Extension)



## MORTGAGE LOAN DISCLOSURE STATEMENT FORM HMDA-2

Public reporting burden for this collection of information is estimated to vary from 30 to 100 hours per response, with an average of 60 hours per response, including time to gather and maintain the data needed and to review instructions and complete the information collection. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Secretary, Board of Governors of the Federal Reserve System, Washington, D. C. 20551; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D. C. 20503.

### Instructions to Mortgage Banking Subsidiaries of Holding Companies and to Certain Savings and Loan Service Corporations

#### A. WHO MUST USE THIS FORM

1. A mortgage banking subsidiary of a bank holding company, a mortgage banking subsidiary of a savings and loan holding company, or a savings and loan service corporation that originates or purchases mortgage loans (other than a service corporation that is majority-owned by a single savings and loan association) must complete this HMDA-2 form to disclose loan data for the current calendar year if on the preceding December 31 the subsidiary or service corporation:

a. had assets of more than \$10 million, and

b. had a home or branch office in a metropolitan statistical area (MSA) or a primary metropolitan statistical area (PMSA).

*Example: If on December 31, 1987, your home office was in an MSA and your assets exceeded \$10 million, you must compile data and complete a disclosure statement for all home purchase and home improvement loans that you originate or purchase during calendar year 1988.*

2. For purposes of loan disclosure requirements (including geographic itemization under section G below), a branch office means any office of your institution (not of an affiliate) that takes applications from the public.

#### B. WHO MUST USE OTHER FORMS

1. Commercial banks, savings banks, savings and loan associations, building and loan associations, homestead associations (including cooperative banks) and credit unions must use the HMDA-1 form, instead of the HMDA-2.
2. A service corporation that is majority-owned by a single savings and loan association is deemed to be part of the parent institution, and its loan data will be reported on a consolidated basis with the parent's data on the HMDA-1.
3. Institutions that have been exempted by the Federal Reserve Board from complying with the federal law because they are covered by a similar state law on mortgage loan disclosures must use the disclosure form required by their state law.

#### C. FORMAT

1. You must use the format of the HMDA-2 form, but you are not required to use the form itself. For example, you may produce a computer printout of your disclosure statement instead. But you must give all the identifying information asked for at the top of the form, use the prescribed column headings, provide the signature of a certifying officer, etc.
2. If your report on loan originations or purchases consists of more than one page, number the pages and include the name of your institution and the MSA/PMSA number at the top of each page. Enter the totals for the MSA/PMSA on the final page; do not give subtotals on earlier pages. Report the Section 2 data (Loans on property not located in MSAs/PMSAs) on the final page. If your report itemizes data for more than one MSA/PMSA, report the Section 2 data only once for Part A and once for Part B—not with each MSA/PMSA.

#### D. WHEN AND WHERE STATEMENT IS DUE

1. You must send two copies of your disclosure statement to the office specified by your federal supervisory agency no later than March 31 following the calendar year for which the loan data are compiled. A list of the agencies appears at the end of these instructions.

2. The completed disclosure statement must be signed by an officer of your institution (both Part A and Part B on the final page of each), certifying to the accuracy of the data.
3. You also must make your disclosure statement available no later than March 31 for inspection by the public at your home office and, if you have branch offices in other MSAs/PMSAs, at one branch office in each of these MSAs/PMSAs.

#### E. DATA TO BE SHOWN

1. **Originations and purchases.** Show the data on home purchase and home improvement loans that you originated or purchased during the calendar year covered by the disclosure statement. (Certain refinancings are to be included; for example, see paragraph 3 of the instructions for column A, under Section H below.) Report the data on loan originations on Part A of the form and the data on purchases on Part B of the form even if the loans were subsequently sold. If you have no loans to report in one of the two parts, enter "none" in the column provided for census tract numbers and enter zeros in Columns A through E; this helps to show that no part of an institution's report has been lost.
2. **Number and total dollar amount.** Show both the number of loans and the total dollar amount of loans for each category on the statement. For home purchase loans that you originate, "total dollar amount" means the original principal amount of the loans. For home purchase loans that you purchase, "total dollar amount" means the unpaid principal balance of the loans at time of purchase. For home improvement loans (both originations and purchases), you may include unpaid finance charges in the "total dollar amount" if that is how you record such loans on your books.
3. **Rounding.** Round all dollar amounts to the nearest thousand (\$500 should be rounded up), and show in terms of thousands.

#### F. DATA TO BE EXCLUDED

Do not report the following types of loans:

1. loans that, although secured by real estate, are made for purposes other than for home purchase or home improvement (for



example, do not report a loan secured by residential real property if the proceeds are to be used for financing education, a vacation, or business operations);

2. loans made or purchased in a fiduciary capacity;
3. loans on unimproved land;
4. refinancing of a loan that you originated, if the refinancing involves no increase in the outstanding principal, aside from closing costs and unpaid finance charges;
5. construction loans and other temporary financing;
6. purchase of an interest in a pool of mortgage loans such as mortgage participation certificates;
7. purchases solely of the right to service loans; or
8. FHA home purchase and home improvement loans (at your option, you may record FHA Loans on form HMDA-2A, "Mortgage Loan Statement for Optional Disclosure of FHA Loans").

**G. GEOGRAPHIC ITEMIZATION** (breakdown of loan data for each MSA/PMSA by census tract or county, and listing of loan data for the outside-MSA/PMSA category).

1. **MSA/PMSA.** You must compile loan data geographically for each MSA/PMSA in which you have a home or branch office. (See Item 6 below for treatment of loans on property outside such MSAs/PMSAs.) Start a new page for each MSA/PMSA if you itemize data for more than one MSA/PMSA. Use the MSA/PMSA boundaries (defined by the U.S. Office of Management and Budget) that were in effect on January 1 of the calendar year for which the loan data are compiled.
2. **Census tract or county.** For loans on property that is located within one of these MSAs/PMSAs, itemize the data by the census tract in which the property is located, except that you must itemize the data by county instead of census tract when the property

a. is located in an area that is not divided into census tracts on the U.S. Census Bureau's census tract outline maps (see Item 3 below); or

b. is located in a county with a population of 30,000 or less.

To determine population, use the Census Bureau's PC80-1-A population series even if the population has increased above 30,000 since 1980.

3. **Census tract maps.** To determine census tract numbers, consult the Census Bureau's census tract outline maps. You may use the maps of the appropriate MSAs/PMSAs in the Census Bureau's PHC80-2 series for the 1980 census, or equivalent census data from the Census Bureau (such as GBF/DIME files) or from a private publisher. Use the maps in the 1980 series or equivalent data even if more current maps or data are available.

4. **Completion.** Enter the data for all loans made in a given census tract on the same line, listing the number and total dollar amount in the appropriate columns (as described below in section H) and listing the census tracts in numerical sequence. Do the same for loans made in a given county.

5. **Duplicate census tract numbers.** There are duplicate census tract numbers in certain MSAs/PMSAs. In such cases, you must indicate the county (by name or number) in addition to the tract number. Your supervisory agency will provide a list of the MSAs/PMSAs with duplicate census tract numbers.

6. **Outside-MSA/PMSA.** For loans on property located outside the MSAs/PMSAs in which you have a home or branch office (or outside any MSA/PMSA), report the loan data as an aggregate sum in Section 2 of the form. You do not have to itemize the loans by census tract or county. (But you will have to itemize the data by type of loan, as described in section H below.)

**H. TYPE-OF-LOAN ITEMIZATION** (breakdown of each geographic grouping into loan categories — Columns A-E).

**Column A: FmHA and VA loans on 1-to-4 family dwellings.**

1. Report in Column A loans made for the purpose of purchasing a residential dwelling for 1 to 4 families if the loan is secured by a lien and if it is insured or guaranteed by FmHA or VA.
2. At your option, you may include loans that are made for home improvement purposes but are secured by a first lien, if you normally classify first-lien loans as purchase loans.
3. Include refinancings if there is an increase in the outstanding principal aside from any increase related to closing costs or unpaid finance charges, or if the original loan was made by another lender.
4. Include any nonoccupant loans in this column as well as in Column E.
5. Do not include FHA loans in Column A. At your option, you may record FHA loans on form HMDA-2A, "Mortgage Loan Statement for Optional Disclosure of FHA Loans."

**Column B: Conventional home purchase loans on 1-to-4 family dwellings.**

1. Report in Column B conventional loans (all loans other than FmHA and VA loans) made for the purpose of purchasing a residential dwelling for 1 to 4 families if the loans are secured by a lien.
2. Include refinancings if there is an increase in the outstanding principal aside from any increase related to closing costs or unpaid finance charges, or if the original loan was made by another lender.
3. Include any nonoccupant conventional loans in this column as well as in Column E.
4. At your option, you may include loans that are made for home improvement purposes but that are secured by a first lien, if you normally classify first-lien loans as purchase loans.



**Column C: Home Improvement loans on 1-to-4 family dwellings.**

**1. Report in Column C only loans that:**

- a. the borrowers have said are to be used for repairing, rehabilitating, or remodeling residential dwellings, and
- b. are recorded on your books as home improvement loans.

**2. Include both secured and unsecured loans.**

3. At your option, you may include home equity lines of credit in Column C; include the portion of the line of credit that the borrower indicates will be used for home improvement purposes, at the time the account is opened. Report only for the year in which the line is established.

4. You may include unpaid finance charges in the "total dollar amount" if that is how you record such loans on your books.

5. Include any nonoccupant home improvement loans in this column as well as in Column E.

6. Do not report FHA loans in Column C. At your option, you may report FHA loans on form HMDA-2A, "Mortgage Loan Statement for Optional Disclosure of FHA Loans."

**Column D: Loans on multifamily dwellings (5 or more families).**

1. Report in Column D all loans on dwellings for 5 or more families, including both loans for home purchase and loans for home improvement.

2. Do not report loans on individual condominium or cooperative units; report such loans in Columns A, B, or C.

3. Do not report FHA loans in Column D. At your option, you may report FHA loans on form HMDA-2A, "Mortgage Loan Statement for Optional Disclosure of FHA Loans."

**Column E: Nonoccupant loans on 1-to-4 family dwellings.**

1. Report in Column E any home purchase and home improvement loans on 1-to-4 family dwellings (listed in Columns A, B, and C) made to borrowers who indicated at the time of the loan application that they did not intend to use the property as a principal dwelling.

2. In completing Column E of Part B, you may assume that a purchased loan does not fall in the "nonoccupant" category unless your documents contain information to the contrary.

3. Do not complete Column E for loans that you report under Section 2 (Loans on property not located in MSAs/PMSAs), in either Part A (Originations) or Part B (Purchases).

**Federal Supervisory Agencies**

Disclosure statements should be sent to your federal supervisory agency office as specified below. Any questions may also be directed to your agency.

**Mortgage Banking Subsidiaries of Bank Holding Companies**

Federal Reserve Bank serving the district in which the mortgage banking subsidiary is located.

**Mortgage Banking Subsidiaries of Savings and Loan Holding Companies and Savings and Loan Service Corporations**

Federal Home Loan Bank Board Supervisory Agent in the district in which the institution is located.



FOR USE BY: • MORTGAGE BANKING SUBSIDIARIES OF HOLDING COMPANIES  
• CERTAIN SAVINGS AND LOAN SERVICE CORPORATIONS

Control number (agency use only)

## Reporting Institution

Enforcement agency for reporting institution

MSA/PMSA number for data reported in Section 1 \_\_\_\_\_

Name \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_

Address \_\_\_\_\_

Name of MSA/PMSA \_\_\_\_\_

Name of Parent Company

## Section 1—Loans on property located in MSA/PMMA where institution has a home or branch office

[illegible]

MSA/PMSA TOTAL.

## Section 2—Loans on property not located in MSAs/PMSAs where institution has home or branch offices

I hereby certify to the accuracy of this report.

**Signature of Certifying Officer**

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**Print Name of Person Completing Form**

Telephone Number (Include Area Code and Extension)







**MORTGAGE LOAN STATEMENT FOR  
OPTIONAL DISCLOSURE OF FHA LOANS  
FORM HMDA-2A**

This collection of information is not required. Mortgage banking subsidiaries of holding companies and certain savings and loan associations may record their FHA loans on this form if they wish to make that data available to the public. Public reporting burden for this collection of information is estimated to vary from 10 to 50 hours per response, with an average of 20 hours per response, including time to gather and maintain the data needed and to review instructions and complete the information collection. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Secretary, Board of Governors of the Federal Reserve System, Washington, D. C. 20551; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D. C. 20503.

**Instructions to Mortgage Banking Subsidiaries  
of Holding Companies and to Certain Savings  
and Loan Service Corporations**

**A. WHO MAY USE THIS FORM**

If you are the mortgage banking subsidiary of a bank holding company or of a saving and loan holding company, or if you are a savings and loan service corporation that files the HMDA-2 form, you are required to exclude data on FHA home improvement and FHA home purchase loans from your form HMDA-2. At your option, however, you may record FHA loans on form HMDA-2A and make the form available to the public along with your HMDA-2 disclosure statement.

**B. DATA TO BE SHOWN**

1. For loans that you originate, see the instructions that are provided for the HMDA-2 form under section G (Geographic Itemization). Report the number and total dollar amount of FHA home purchase loans in Column 1 and FHA home improvement loans in Column 2. Include loans on both 1-to-4 family dwellings and multifamily dwellings for 5 or more families.
2. For loans that you purchase, see the instructions that are provided for the HMDA-2 form under section G (Geographic Itemization). Report the number and total dollar amount of FHA home purchase loans in Column 3 and FHA home improvement loans in Column 4. Include loans on both 1-to-4 family dwellings and multifamily dwellings for 5 or more families.



FOR USE BY: • MORTGAGE BANKING SUBSIDIARIES OF HOLDING COMPANIES  
• CERTAIN SAVINGS AND LOAN SERVICE CORPORATIONS

OMB No. 7100-0090 Approval expires June 1990.  
This report authorized by law (12 USC 2801-2810 and 12 CFR 203).

Institution

Enforcement agency for this institution

Name \_\_\_\_\_

Name \_\_\_\_\_

MSA/PMSA number for data reported in Section 1 \_\_\_\_\_

Address

Address

Name of MSA/PMSA

Name of Parent Company

[illegible][illegible]

**Billing Code 6210-01-C**



Board of Governors of the Federal Reserve System, December 23, 1988.  
 William W. Wiles,  
*Secretary of the Board.*  
 [FR Doc. 88-29977 Filed 12-29-88; 8:45 am]  
 BILLING CODE 6210-01-M

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

[Docket No. 88-CE-20-AD; Amdt. 39-6096]

**Airworthiness Directive; Mitsubishi Models MU-2B, MU-2B-10, -15, -20, -25, -26, -26A, -30, -35, -36, -36A, -40, and -60 Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.  
**ACTION:** Final rule.

**SUMMARY:** This amendment revises Airworthiness Directive (AD) 88-21-01, Amendment 39-6040, applicable to Mitsubishi Model MU-2B, MU-2B-10, -15, -20, -25, -26, -26A, -30, -35, -36, -36A, -40, and -60 airplanes, by providing specific functional ground tests for verification of several means of disconnecting the Sperry SPZ-500 autopilot and associated trim. This amendment, applicable to those MU-2B airplanes equipped with any manual electric pitch trim system and/or any autopilot other than Bendix, requires: (a) The standardization of the operation, location and color of the autopilot/manual electric pitch trim system disconnect/interrupt push button; (b) verification that the system can be disconnected, interrupted or shut off by at least three independent methods; and (c) a "one time" autopilot/manual electric pitch trim switch location and operational check on all MU-2B Series airplanes except those which have complied with AD 88-13-01, effective July 11, 1988. This amendment continues this process of preventing pilot confusion by providing uniformity in the method of autopilot/manual electric pitch trim disconnection in all Mitsubishi MU-2B Series airplanes. Compliance with this AD will preclude pilot confusion and resultant possible loss of the airplane.

**DATES:**

**Effective Date:** January 28, 1989.  
**Compliance:** As prescribed in the body of the AD.

**ADDRESSES:** Bendix/King Certification Bulletin No. CB10, KPN 008-0712-00, or Mitsubishi Kit—Sperry SPZ-200AP Disengagement Drawing, 035A-985006, no revision, applicable to this AD may be obtained from Beech Aircraft

Corporation (Licensee for Mitsubishi), Commercial Service, Department 52, P.O. Box 85, Wichita, Kansas 67201-0085; Telephone (316) 881-7279. The information may be examined at the Rules Docket, Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64108.

**FOR FURTHER INFORMATION CONTACT:** For Mitsubishi Aircraft International, Inc. (MAI) Type Certificate (TC) A10SW series airplanes manufactured in the U.S.: Robert R. Jackson, Aerospace Engineer, Wichita Aircraft Certification Office, ACE-130W, FAA, Central Region, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; Telephone (316) 946-4419. For Mitsubishi Heavy Industries, Inc. (MHI) TC A2PC series airplanes manufactured in Japan: Herbert Peters, Aerospace Engineer, Los Angeles Aircraft Certification Office, ANM-130L, FAA, 3229 East Spring Street, Long Beach, California 90806-2425; Telephone (213) 988-5353.

**SUPPLEMENTARY INFORMATION:** Final Rule AD 88-21-01 (Docket No. 88-CE-20-AD, Amendment 39-6040), issued in response to an NTSB recommendation that the FAA conduct an investigation of the Bendix M-4 Series autopilot systems as installed on the MU-2B Series airplanes and take such appropriate action as deemed necessary to correct any deficiencies identified, was published in the *Federal Register* on September 29, 1988 (53 FR 379961). The result of this investigation, with cooperation between MHI, MAI, Beech Aircraft Corporation (licensee for MHI), Bendix Corporation, and the FAA, revealed that there are at least seven different configurations of the disconnect/interrupt switches for the autopilot and electric pitch trim systems. A pilot's familiarity with the autopilot disconnect/interrupt procedures in one MU-2B Model airplane does not guarantee the same familiarity with another MU-2B Model airplane even if owned by the same operator. This situation could lead to pilot confusion and affect his ability to safely operate an MU-2B Series airplane. To eliminate this possible confusion, Bendix/King has issued Certification Bulletin No. CB10, KPN 008-0712-00, no revision, and MHI has issued Kit—Sperry SPZ-200AP Disengagement Drawing 035A-985006, no revision, providing one combination autopilot/electric pitch trim disconnect switch with configuration. This disconnect switch is a red bi-level momentary push-button device with a partial depression which disconnects the autopilot.

Continued further depression of the switch will disarm or interrupt the electric pitch trim system. This switch is located below and outboard of the electric pitch trim switch on the outboard horn of the control yoke.

To verify that all MU-2B Series airplanes equipped with King or Sperry systems or any other autopilot/manual electric pitch trim systems are uniform in configuration and function, a "one time" visual check and functional ground test of the autopilot/manual electric pitch trim is also required, except on those MU-2B Series airplanes which have complied with AD 88-13-01, effective July 11, 1988. This visual check will verify that the disconnect switch is red in color and that this switch is located on the outboard horn of the control yoke, and further verifies that the autopilot circuit breaker is properly labeled.

Subsequently, the FAA became aware of nuances in the Sperry SPZ-500 autopilot installation on MU-2B Series airplanes, which prevent strict compliance with AD 88-21-01 as published. Therefore, AD 88-21-01, applicable to Mitsubishi Model MU-2B, MU-2B-10, -15, -20, -25, -26, -26A, -30, -35, -36, -36A, -40, and -60 airplanes is being revised to clarify the required actions for a Sperry SPZ-500 Autopilot and the associated trim "One Time" visual configuration check and the system functional ground test for verification of several means of autopilot/trim disconnection. Although the Sperry SPZ-500 autopilot was not a subject of the National Transportation Safety Board Recommendations A-86-132 through A-86-134, this autopilot was included in the "One Time Check" to assure standardization of the configuration, function, and disconnect/interrupt procedures similar to all other autopilot/trim systems installed in any MU-2B Series airplanes.

The Sperry SPZ-500 autopilot and trim functions, by design, may be disconnected as follows: (1) By depressing the single "Red" push button autopilot disengage/trim interrupt switch located on the outboard horn of the control yoke which disengages the autopilot and stops both trim functions (manual electric and autopilot trim); (2) By pulling the autopilot circuit breaker; (3) By positioning the airplane master electric power switch to "OFF"; and (4) By depressing the "GA" go-around switch on the left power lever.

Therefore, the FAA is revising AD 88-21-01 to specifically clarify the required actions for a Sperry SPZ-500 autopilot and the associated trim visual

configuration check and the system functional ground test.

This amendment revises the AD by clarifying that paragraph (b)(2)(i)(C) of the AD is not applicable to the Sperry SPZ-500 trim system and also by revising paragraph (b)(2)(ii)(B)(II) of the AD to show the appropriate autopilot disconnect procedures for the Sperry SPZ-500. This revision to the AD continues the original intent of assuring standardization of disconnect/interrupt switch color, function and location on control wheel, and the autopilot-electric/manual pitch trim disconnect/interrupt procedures on all MU-2B Series airplanes. It imposes no additional burden on any person. Therefore, notice and public procedure hereon are unnecessary, contrary to the public interest, and good cause exists for making this amendment effective in less than 30 days.

The FAA has determined that this regulation is not major under Section 6 of Executive Order 12291. It is impracticable for the agency to follow the procedure of Order 12291 with respect to this rule since the rule must be issued immediately to prevent an unnecessary burden on some operators which could be created by including the Sperry SPZ-500 autopilot in the original AD.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

It has been further determined that this document is not a significant regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation is not required). A copy of it, when filed, may be obtained by contacting the Rules Docket under the caption "ADDRESSES" at the location identified.

**List of Subjects in 14 CFR 39**

Air transportation, Aircraft, Aviation safety, Safety.

**Adoption of the Amendment**

Accordingly, pursuant to the authority delegated to me by the Administrator,

the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

**PART 39—[AMENDED]**

1. The authority citation for Part 39 continues to read as follows:

**Authority:** 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.09.

**§ 39.13 [Amended]**

2. By revising AD 88-21-01, Amendment 39-6040, to read as follows:

**Mitsubishi:** Applies to Model MU-2B, MU-2B-10, -15, -20, -25, -26, -26A, -30, -35, -36, -36A, -40, and -60 (all serial numbers, with or without the SA suffix) airplanes certificated in any category, equipped with any manual electric pitch trim system and/or any autopilot other than Bendix.

**Note 1:** The serial number of airplanes assembled in the United States by Mitsubishi Aircraft Industries (MAI) under Type Certificate (TC) A10SW are suffixed by "SA." The serial numbers of airplanes manufactured in Japan by Mitsubishi Heavy Industries, Inc. (MHI) under TC A2PC have no suffix.

**Compliance:** Within the next 200 flight hours or five (5) calendar months, whichever occurs first, unless already accomplished per the original version of this AD.

To minimize the possibility of confusion in autopilot/manual electric pitch trim disconnect/interrupt switch location and function, accomplish the following:

(a) Modify the control yoke in the affected model airplanes as follows:

(1) For MU-2B-35 Model airplanes equipped with a King KFC 300 Automatic Flight Control System (AFCS) and a Sperry Manual/Electric Pitch Trim System, in accordance with Bendix/King Certification Bulletin No. CB10, KPN 008-0712-00, no revision, or

(2) For MU-2B-36 Model airplanes equipped with a Sperry SPZ-200 AFCS and a MAI Manual/Electric Pitch Trim System, in accordance with MHI Kit—Sperry SPZ-200AP Disengagement Drawing, 035A-985006, no revision.

(b) Prior to returning the airplane to service, accomplish a visual configuration check and a system functional ground test on all MU-2B, MU-2B-10, -15, -20, -25, -26, -26A, -30, -35, -36, -36A, -40, and -60 airplanes, except those airplanes which have complied with AD 88-13-01, dated June 8, 1988, as follows:

(1) Visually verify that:

(i) The autopilot disconnect and trim disconnect/interrupt functions are combined on one button mounted on the outboard control wheel grip, and is so oriented that it is easily activated by the pilot/copilot.

(ii) The autopilot disconnect and trim disconnect/interrupt button is properly and legibly labeled to indicate functions.

(iii) The button is red in color.

(iv) There are not other red buttons nearby that could be mistaken for the autopilot disconnect.

(v) The autopilot circuit breaker is properly labeled.

(2) Perform an operational check of the autopilot disconnect and trim disconnect/interrupt button to conform its correct functioning by disconnecting/interrupting the autopilot and the trim systems, as follows:

(i) With the manual electric pitch trim system armed, press the trim button to cause the manual pitch trim wheel to rotate, then verify that after each of the following operations is performed, the manual pitch trim wheel stops moving when:

(A) The disconnect/interrupt switch is fully depressed;

(B) The master electric power switch is positioned to "OFF";

(C) The radio master switch is positioned to "OFF" (if installed and so configured); (not applicable to MU-2B airplane equipped with Sperry SPZ-500 autopilots);

(D) The electric trim circuit breaker is pulled. (On some MU-2B airplanes without an electric trim circuit breaker, the autopilot circuit breaker/switch is used to disconnect the system in lieu of the electric trim circuit breaker.)

**Note 2:** It is very important to verify that the manual pitch trim wheel stops moving after each of the above operations of paragraph (b)(2)(i).

(ii) With the autopilot system engaged, verify:

(A) That the autopilot system can be overpowered by pushing or pulling on the control yoke; and,

(B) That, while overpowering the autopilot, the manual pitch trim wheel stops moving and the autopilot disconnects when each of the following operations is performed:

(I) The disconnect/interrupt switch is depressed;

(II) The autopilot master switch or the radio master switch or the engage/disengage switch on the autopilot controller (as appropriate), is positioned to "OFF" (On some MU-2B airplanes not equipped with an autopilot master switch beside the controller, the radio master switch must be used to disconnect the system in lieu of the autopilot master switch.); On MU-2B airplanes equipped with Sperry SPZ-500 autopilot.

(aa) The master electric power switch is positioned to "OFF";

(bb) The "GA" go around switch on the left power lever is depressed;

(III) The autopilot circuit breaker is pulled.

**Note 3:** It is very important that the manual pitch trim wheel stops moving after each of these operations.

(3) If the result of any one of the above visual verifications or operational checks are not as specified, prior to further flight, contact the Manager, Wichita Aircraft Certification Office, ACE-115W, FAA, 1801 Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209; telephone (316) 946-4400, for disposition of the discrepancy.

(c) In addition to the maintenance record entry required by FAR 91.173, enter a statement showing successful completion of paragraph (b) of this AD listing the autopilot and/or manual electric trim system installed.



(d) Airplanes may be flown in accordance with FAR 21.197 to a location where this AD may be accomplished.

(e) An equivalent method of compliance with this AD may be used if approved by the Manager, Wichita Aircraft Certification Office, ACE-115W, FAA, Airport Road, Room 100, Mid-Continent Airport, Wichita, Kansas 67209.

All persons affected by this directive may obtain copies of the documents referred to herein upon request to Beech Aircraft Corporation (Licensee to Mitsubishi), P.O. Box 85, Wichita, Kansas 67201; Telephone (316) 681-7279; or may examine the documents at the FAA, Office of the Assistant Chief Counsel, Room 1558, 601 East 12th Street, Kansas City, Missouri 64106.

This amendment revises AD 88-21-01, Amendment 39-6040.

This amendment becomes effective on January 28, 1989.

Issued in Kansas City, Missouri, on December 13, 1988.

Barry D. Clements,  
Manager, Small Airplane Directorate,  
Aircraft Certification Service.

[FR Doc. 88-29896 Filed 12-28-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 87-ASW-62; Amdt. 39-6052]

**Airworthiness Directives; Societe Nationale Industrielle Aerospatiale (SNIAS) Model AS 355E, AS 355F, and AS 355F1 Helicopters**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts an airworthiness directive (AD) that requires installation of an automatic reignition system for the Allison 250C-20F engine on Societe Nationale Industrielle Aerospatiale (SNIAS) Model AS 355E, AS 355F, and AS 355F1 helicopters. The AD is needed to prevent engine flameout (power loss) due to engine inlet icing associated with flight into certain ambient atmospheric conditions. Engine flameout could result in a subsequent emergency landing which could be hazardous.

**EFFECTIVE DATE:** January 28, 1989.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 28, 1989.

Compliance: As indicated in the body of the AD.

**ADDRESSES:** The applicable service information may be obtained from

Aerospatiale Helicopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053-4005.

A copy of the service information is contained in the Rules Docket, Office of the Regional Counsel, FAA, Southwest Region, 4400 Blue Mound Road, Fort Worth, Texas.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Mathias, FAA, Southwest Region, Rotorcraft Standards Staff, Fort Worth, Texas 76183-0111, telephone (817) 624-5123.

**SUPPLEMENTARY INFORMATION:** A proposal to amend Part 39 of the Federal Aviation Regulations (FAR) to include an airworthiness directive requiring installation of an autorelight system on SNIAS Model AS 355E, AS 355F, and AS 355F1 helicopters was published in the Federal Register on April 8, 1988 (53 FR 11875).

The proposal was prompted by Priority Letter AD 86-24-02, issued on November 21, 1986, which originally required, in part, instrument panel placard operating limitations to advise the flightcrew to avoid operating conditions where visible atmospheric moisture ingestion into the engines could result in ice formations which cause engine flameout. This priority letter was subsequently published as a final rule in the Federal Register on December 11, 1987 (52 FR 48985). The final rule recognizes the eligibility of the Aerospatiale-developed automatic engine reignition system, included in the proposal, as an equivalent means of compliance and, accordingly, omits helicopters so configured by serial number limitation in the applicability statement.

Certain other continuous ignition systems have been approved as equivalent means of compliance with AD 86-24-02. These approvals are accepted as equivalent means of compliance with this AD.

The SNIAS Model AS 355E, AS 355F, and AS 355F1 helicopters not equipped with automatic or FAA-approved continuous engine reignition systems are susceptible to moisture-induced engine flameout which could result in a hazardous emergency landing. Since this condition is likely to exist or develop on other helicopters of the same design, this AD requires installation of an automatic engine reignition system per SNIAS modification AMS 350A07-1823, AMS 350A07-1858, AMS 350A07-1905, AMS 350A07-1910, or AMS 350A07-1920 in conjunction with corresponding SNIAS Service Bulletins No. 01.18 and No. 80.02 along with the incorporation of the associated flight manual changes on SNIAS Model AS 355E, AS 355F, and AS

355F1 helicopters, as listed in the applicability section of this AD.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received. Accordingly, the proposal is adopted without change.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation only involves 155 rotorcraft which are estimated to be operated by a total of 100 operators. Certain operators may already be in compliance with the AD by previously incorporating the SNIAS autoignition system or by installing a specifically approved continuous ignition equivalent method of compliance. It is estimated that the remaining operators will incur a total cost of only \$1,376 per aircraft. Therefore, I certify this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is minimal; and (4) will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Regional Rules Docket.

#### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety, Incorporation by reference.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the FAR as follows:

#### PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding the following new AD:

**Societe Nationale Industrielle Aerospatiale (SNIAS):** Applies to all SNIAS Model AS 355E, AS 355F, and AS 355F1 helicopters (serial numbers before 5362) fitted with debris guards, Part Numbers (P/N) 355A58-0519-0201 and 355A58-0519-0391, certificated in any category, except those helicopters previously equipped with this identical modification. (Docket No. 87-ASW-62)

Compliance is required within the next 200 hours' time in service, unless already accomplished.

To prevent engine failure (flameout) resulting from ingestion of atmospheric moisture in engine inlets, accomplish the following:

(a) Install an engine automatic relight system in accordance with SNIAS Service Bulletin AS 355 No. 80.02, Revision 2, approved July 8, 1987 (SB No. 80.02 corresponds to SNIAS Modification AMS 350A07-1823, IFR-VFR versions; AMS 350A07-1858, IFR versions; AMS 350A07-1905, IFR-VFR versions; AMS 350A07-1910, IFR-VFR versions; AMS 350A07-1920, IFR-VFR versions). Installation of the SNIAS relighting kit requires exclusive utilization of Champion or Auburn igniter P/N 6877518 or Champion igniter P/N 23006286 and limits the service life of each newly installed igniter to 1,200 hours' time in service. Any of the required Champion or Auburn igniters already installed and having 1,000 or more hours' time in service must be replaced with new Champion or Auburn P/N 6877518 igniters or Champion P/N 23006286 igniters. NOTE: SNIAS Service Bulletin AS 355 No. 01.18, Revision 2, approved October 5, 1987, also pertains to this engine automatic relight system installation.

(b) Incorporate into the applicable RFM the basic flight manual revisions and instrument flight rules (IFR) flight manual supplements (if IFR equipped), or later FAA-approved flight manual revisions, as follows:

(1) For the Model AS 355E, basic rotorcraft flight manual, Revision 4, Code Date 87-10.  
(2) For the Model AS 355F, basic rotorcraft flight manual, Revision 3, Code Date 87-10 and IFR rotorcraft flight manual supplement 11.4, Revision 3, Code Date 87-12.  
(3) For the Model AS 355F1, basic rotorcraft flight manual, Revision 2, Code Date 87-10, and IFR rotorcraft flight manual supplement 11.4, Revision 1, Code Date 87-12.

(c) To insure that the limited service life of the igniters defined in paragraph (a) above is properly identified and adhered to, the following updates (or future revisions thereto) must be incorporated in the Master Servicing Recommendations—Chapter 5-99 (Airworthiness Limitations):

(1) AS 355E, Revision 15, Page 21.  
(2) AS 355F, Revision 15, Page 23.  
(3) AS 355F1, Revision 15, Page 23.

(d) Upon accomplishing the requirements of paragraphs (a), (b), and (c) above, the placard required by paragraph (a) of AD 86-24-02 may be removed.

(e) Upon request, an alternate means of compliance which provides an equivalent level of safety with the requirements of this

AD may be used when approved by the Manager, Rotorcraft Standards, ASW-110, FAA, Fort Worth, Texas 76183-0110.

(f) Continuous ignition systems previously found to be equivalent methods of compliance with priority letter AD 86-24-02, dated November 21, 1986; or with Amdt. 39-5798 (52 FR 48985; December 11, 1987) effective January 27, 1988, are approved as equivalent methods of compliance to this AD.

The procedure shall be done in accordance with SNIAS Service Bulletin AS 355 No. 80.02, Revision 2, approved July 8, 1987. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a)(1) and 1 CFR Part 51. Copies may be obtained from Aerospatiale Helicopter Corporation, 2701 Forum Drive, Grand Prairie, Texas 75053-4005. Copies may be inspected at the Office of the Regional Counsel, FAA, Southwest Region, 4400 Blue Mound Road, Fort Worth, Texas, or at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC.

This amendment becomes effective January 28, 1989.

Issued in Fort Worth, Texas, on November 23, 1988.

James D. Erickson,  
Acting Manager, Rotorcraft Directorate,  
Aircraft Certification Service.

[FR Doc. 88-29895 Filed 12-28-88; 8:45 am]  
BILLING CODE 4910-13-M

#### 14 CFR Part 39

[Docket No. 88-ANE-31; Amdt. 39-6062]

**Airworthiness Directives; General Electric (GE) CF6-50 Series Turbofan Engines**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule, request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) which establishes a rework and inspection program for certain high pressure turbine (HPT) stage 2 disks installed in CF6-50 series turbofan engines. This AD is needed to prevent rupture of the disk, and possible uncontained engine failure.

**DATES:** Effective—December 29, 1988

**Compliance Schedule:** As required in the body of the AD.

Comments for inclusion in the docket must be received on or before January 29, 1989.

**Incorporation by Reference:** Approved by the Director of the Federal Register as of December 29, 1988.

**ADDRESSES:** Comments on this amendment may be mailed in duplicate

to: Federal Aviation Administration, New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket Number 88-ANE-31, 12 New England Executive Park, Burlington, Massachusetts 01803.

or delivered in duplicate to Room 311 at the above address.

Comments delivered must be marked: "Docket No. 88-ANE-31".

Comments may be inspected at the New England Region, Office of the Assistant Chief Counsel, Room 311, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays.

The applicable engine manufacturer's service bulletin (SB) may be obtained from General Electric Company, Technical Publications Department, 1 Neumann Way, Cincinnati, Ohio 45215.

A copy of the SB is contained in Rules Docket No. 88-ANE-31, in the Office of the Assistant Chief Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803.

**FOR FURTHER INFORMATION CONTACT:** Marc J. Bouthillier, Engine Certification Branch, ANE-142, Engine Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7085.

**SUPPLEMENTARY INFORMATION:** The Federal Aviation Administration (FAA) has determined that certain HPT stage 2 disks installed in GE CF6-50 model engines may have an under minimum radius and/or tool mark(s) in the forward embossment inner diameter (ID) fillet. Three disks from a suspect group have been found to be cracked in the forward embossment area. Analysis shows that an under minimum radius and/or tool mark(s) in this area can increase stresses beyond material capability. This situation could lead to disk rupture and a possible uncontained engine failure. The AD requires affected disks to be reworked to remove an undersize radius and/or tool mark condition from the forward embossment ID fillet, and also defines an interim inspection which allows continued use of a disk until such time as the disk is reworked. The interim inspection allows only a limited period of operation before rework is required.

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and public procedure hereon are impractical, and good cause exists for making this



amendment effective in less than 30 days.

Although this action is in the form of a final rule which involves requirements affecting immediate flight safety and, thus, was not preceded by notice and public procedure, comments are invited on the rule.

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the FAA. This rule may be amended in light of comments received. Comments that provide a factual basis supporting the views and suggestions presented are particularly helpful in evaluating the effectiveness of the AD, and determining whether additional rulemaking is needed.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available for examination in the Rules Docket at the address given above. A report summarizing each FAA-public contact, concerned with the substance of this AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this amendment, must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 88-ANE-31". The postcard will be date/time stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12812, it is determined that this final rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Conclusion

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this action

involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). If this action is subsequently determined to involve a significant/major regulation, a final regulatory evaluation or analysis, as appropriate, will be prepared and placed in the regulatory docket (otherwise, an evaluation or analysis is not required). A copy of the final evaluation if filed, may be obtained by contacting the person identified under the caption "FOR FURTHER INFORMATION CONTACT".

#### List of Subjects in 14 CFR Part 39

Engines, Air transportation, Aircraft, Aviation safety, Incorporation by reference.

#### Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration (FAA) amends Part 39 of the Federal Aviation Regulations (FAR) as follows:

#### PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By adding to Section 39.13 the following new airworthiness directive (AD):

General Electric: Applies to General Electric (GE) CF6-50 series turbofan engines.

Compliance is required as indicated, unless already accomplished.

To prevent failure of high pressure turbine (HPT) stage 2 disks, Part Numbers (P/N) 9045M35P15, 9045M35P17, and 9045M35P18, Serial Numbers MTU00001 through MTU00973 inclusive, except the following serial numbers (listed in alphanumeric order): MTU00541, MTU00582, MTU00583, MTU00634, MTU00646, MTU00652, MTU00654, MTU00668, MTU00671, MTU00672, MTU00675, MTU00756, MTU00777, MTU00778, MTU00782, MTU00783, MTU00808, MTU00820, MTU00827, MTU00828, MTU00846, MTU00847, MTU00849, MTU00857, MTU00875, MTU00877, MTU00881, MTU00884, MTU00885, MTU00887, MTU00888, MTU00893, MTU00896, MTU00899, MTU00905, MTU00906, MTU00908, MTU00909, MTU00910, MTU00911, MTU00912, MTU00914, MTU00916, MTU00917, MTU00918, MTU00919, MTU00920, MTU00921, MTU00933, MTU00935, MTU00953, MTU00959, MTU00960, MTU00961, accomplish either (a) or (b) below:

(a) Rework the forward embossment in accordance with GE Service Bulletin (SB) 72-947, dated August 17, 1988, at the next HPT module exposure, not to exceed 3,600 cycles

since last installation in an engine. However, for disks which have accumulated 3,500 or more cycles since last installation in an engine on the effective date of this AD, comply with the provisions of this paragraph at the next HPT module exposure, or within the next 300 cycles from the effective date of this AD, whichever occurs first.

(b)(1) Perform double fluorescent penetrant inspection (FPI) in accordance with GE SB 72-947, dated August 17, 1988, at the next HPT module exposure, not to exceed 3,600 cycles since last installation in an engine. However, for disks which have accumulated 3,500 or more cycles since last installation in an engine on the effective date of this AD, comply with the provisions of this paragraph at the next HPT module exposure, or within the next 300 cycles from the effective date of this AD, whichever occurs first.

(2) Rework the forward embossment in accordance with the above noted SB, at or prior to accumulating 2,500 cycles since passing the double FPI noted in this paragraph.

Note: HPT module exposure is defined as any removal of the HPT rotor and HPT stage 2 nozzle assembly from the engine core (high pressure compressor and compressor rear frame).

(c) In complying with either paragraph (a) or (b) above, do not exceed already published life limits.

(d) Disks found cracked while complying with either paragraph (a) or (b) above, are not eligible for either rework, or reinstallation or operation in an engine.

(e) Upon request, an equivalent means of compliance with the requirements of the AD may be approved by the Manager, Engine Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803.

(f) Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD may be accomplished.

(g) Upon submission of substantiating data by an owner or operator through an FAA Airworthiness Inspector, the Manager, Engine Certification Office, Engine and Propeller Directorate, Aircraft Certification Service, may adjust the compliance schedules specified in this AD.

GE SB 72-947, dated August 17, 1988, identified and described in this document is incorporated herein and made a part hereof pursuant to 5 U.S.C. 552(a)(1). All persons affected by this directive who have not already received the engine manufacturer's SB may obtain copies upon request to General Electric Company, Technical Publications Department, 1 Neumann Way, Cincinnati, Ohio 45215. This document may also be examined in the Office of the Assistant Chief Counsel, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803, Room 311, Rules Docket No. 88-ANE-31, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays.

The amendment becomes effective on December 29, 1988.

Issued in Burlington, Massachusetts, on November 16, 1988.

Jack A. Sain,  
Manager, Engine and Propeller Directorate,  
Aircraft Certification Service.

[FR Doc. 88-29893 Filed 12-28-88; 8:45 am]

BILLING CODE 4810-13-M

#### Office of the Secretary

#### 14 CFR Part 221

[Docket 45705; Amdt. 221-67]

RIN 2105-AB38

#### Posting of Tariffs; Contract of Carriage

AGENCY: Office of the Secretary,  
Department of Transportation.

ACTION: Final rule.

**SUMMARY:** This rule will allow airlines to make tariff information available in an electronic medium rather than in a paper medium. Currently, airlines are required to post their entire tariffs for passenger and cargo foreign air transportation in hard copy at each ticket sales location. Carriers will now be able to provide more useful information to consumers using summaries, computer terminals, and printed copies of tariff information. **DATE:** This regulation is effective January 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Thomas G. Moore, Chief, Tariffs Division, P-44, Department of Transportation, 400 7th Street, SW., Washington, DC 20590. Telephone: (202) 366-2414.

#### SUPPLEMENTARY INFORMATION:

##### Background

An airline ticket or airwaybill specifies the essential features of the contract of carriage between an airline and the consumer. However, due to size restrictions, it is impractical to include in these documents all the legally enforceable terms and conditions which govern the relationship between these parties. As examples, tickets do not usually indicate the details of the limitations on an airline's liability for loss or damage of goods, the deadlines for filing of claims against the airline, or the rights of passengers with respect to schedule changes and aircraft substitutions.

The Department, as did the Civil Aeronautics Board (CAB) before it, maintains the view that all terms of any contract for air transportation should be routinely available to the consumer. The CAB had found a solution to the ticket size problem in the fact that all contract terms, including fares, rates, other

charges, and rules applying to air transportation, had to be filed with it in formal tariffs. Thus, through the early 1980's, Federal regulations required that the airlines (1) make copies of these tariffs available for inspection at all airline sales locations, and (2) post, in a conspicuous place at such sites, a notice which advised the public that the tariffs were so available.

Effective January 1, 1983, the Airline Deregulation Act of 1978 (ADA) eliminated domestic tariff requirements. With formal tariffs no longer available for posting, the CAB recognized that a workable means had to be found to ensure that the public was adequately informed of applicable contract terms for domestic carriage through the ticketing process.

The CAB adopted a new regulatory approach regarding domestic air transportation, embodied in 14 CFR Part 253 (47 FR 52128, November 19, 1982).<sup>1</sup> In general, Part 253 provides that a domestic airline ticket may incorporate contract terms by reference, i.e., without stating their full text, provided that the ticket so notifies the passenger. It further requires the carrier to make available for inspection at its airport and other ticket offices the full text of all incorporated terms and conditions (fare and non-fare). However, the medium by which the carrier must make this information available is left to the carrier's discretion. Carriers must also provide a copy of any term or condition, free of charge, by mail or other delivery service, to any person requesting it.

Part 253 has worked well. Not only has it accomplished the transition from a tariff to a non-tariff environment, but perhaps even more important, it has enabled the industry to mesh its consumer information obligations with the efficiencies of an electronic age. Under Part 253, the airlines furnish information on fares and on rules subject to frequent change through the use of electronic transmissions to display terminals at their sales locations. This process also allows airlines to provide consumers with printed copies of this information upon request. Only those rules subject to infrequent changes are maintained in printed form. However, Part 253 provided no relief from the posting requirements associated with international tariffs.

This gain in efficiency has been achieved at no apparent loss in availability of information to the public.

<sup>1</sup> Since the ADA did not relieve airlines of the duty to file international tariffs, there was no impetus to alter the regulatory requirements on the posting of international tariffs.

During the five years that Part 253 has been in effect, we have received an average of just four complaints a year concerning information on domestic contracts of carriage. Given the total number of enplaned passengers in domestic air transportation for this period, this translates to only one complaint to us per 88.5 million enplaned passengers.<sup>2</sup>

By the Notice of Proposed Rulemaking issued July 20, 1988 (53 FR 27351) (NPRM), we announced a proposal designed to permit carriers filing international tariffs an alternative to the paper tariff-posting requirements. Our proposal would authorize them to use advanced computer technology to make their cargo and passenger tariff information available to the public through an electronic medium. We fully discussed the reasons for our proposal in the NPRM. See 53 FR at 27352. We said, in essence, that the proposal recognizes current industry business practices, as well as the need to revise governmental requirements that impose unnecessary costs on airlines and, ultimately, the consumer. *Id.* In approach, the proposed rule is, for the most part, similar to the notice scheme currently in effect for domestic air transportation, i.e., 14 CFR Part 253. The NPRM notes the few areas of divergence, *id.* at 27353 and 27354.

#### Comments

We received comments on our proposal from the Air Transport Association of America (ATA), American Airlines, Inc. (American), Eastern Air Lines, Inc. (Eastern), and The Flying Tiger Line Inc. (Flying Tiger).

All of the commenters support the adoption of the proposed rule. ATA, Eastern, and American simply state and explain their support. Flying Tiger, after stating its support, goes on to offer several technical drafting suggestions designed to remedy what it regards as inconsistent or misleading provisions.

#### Discussion and Disposition of Comments

We shall finalize our proposed rule with one minor change noted below. We agree with ATA that the new Section 221.177 "would provide carriers with an efficient alternative to the current cumbersome posting requirement and promises to inform consumers concisely of the key provisions of their foreign air transportation provisions of contract."

<sup>2</sup> Source: Domestic Monthly Air Carrier Traffic Statistics and consumer complaint records of the Civil Aeronautics Board and the Department of Transportation.

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Regarding the inconsistencies that Flying Tiger perceives with the rule, we believe that some clarification should serve to alleviate the carrier's concerns. Flying Tiger is concerned that the rule puts a greater dissemination burden at sales locations staffed by agents, i.e., cargo or retail travel agents, than at sales locations staffed by a carrier's own employees, and that the agent-staffed locations are not in a position to meet the greater burden. In fact, while both a carrier's own employees and the carrier's agents must provide direct notice of certain specified terms, and while both must also be able to obtain for the consumer a concise and immediate explanation of certain specified "key" terms, the rule does not require that they do so in identical ways.

Our rule provides that agents are only required to have sufficient information available for the consumer to obtain copies of the tariffs or incorporated terms from the underlying carrier. With regard to furnishing the explanation of "key" terms by an agent at a sales location we said that "This requirement may be met in any manner that the carriers and their agents and ticket outlets consider practical and reasonable." 53 FR 27353. For example, we indicated that this could consist of a telephone number, where informed carrier personnel will give immediate answers to agents' questions, for the agents to then relay to consumers. *Id.* In the NPRM, we said expressly that "we propose to give the same increased posting flexibility to the airlines for cargo services as we are proposing for passenger services." *Id.* Against this background, and taking into account this flexibility, we believe that cargo carrier agents should be able to meet the terms of the new rule without suffering the burdens to which Flying Tiger alludes.

Flying Tiger also requests that the term "Ticket Office" be redesignated as either "Carrier Sales Office" or "Sales Office" since the term "Ticket Office" is misleading when applied to cargo carriers. We will adopt the suggestion by changing our terminology to "Ticket/Cargo Sales Office" in all those places in the rule where the term "Ticket Office" had appeared.

#### Executive Order 12291, Regulatory Flexibility Act, Paperwork Reduction Act, and Federalism Assessment

This action has been reviewed under Executive Order 12291, and it has been determined that this is not a major rule. It will not result in an annual effect on the economy of \$100 million or more. There will be no increase in production costs or prices for consumers, individual

industries, Federal, State or local governments, agencies, or geographic regions. Furthermore, this rule would not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The regulation is significant under the Department's Regulatory Policies and Procedures, dated February 28, 1979, because it involves important Departmental policies and substantial industry interests.

I certify that this rule will not have a significant economic impact on a substantial number of small entities. Few, if any, air carriers or foreign air carriers would be considered small entities. In any event, since the rule simply presents an alternative, rather than mandates a change, the ability of such entities to engage in operations essentially will be unaffected by the regulation. This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the concepts discussed therein do not have sufficient federalism implications to warrant the preparation of a federalism assessment.

With respect to the Paperwork Reduction Act of 1980, Pub. L. 96-511, this rule should lessen substantially the paperwork burden on the airlines. Carriers will no longer be required to post the paper tariff at all of their offices and stations. This means that the hundreds, even thousands, of pages of tariff revisions that carriers are now required to circulate worldwide, could be largely eliminated.

In 1987, the international airlines filed with the Department 241,230 tariff pages applicable to international air transportation. Of this total 219,503 applied to passenger service and 21,727 applied to cargo service. Each of these tariff pages was required to be posted at each carrier sales location worldwide. Taking into consideration only the passenger sales locations in the 48 contiguous states of the United States and District of Columbia, we estimate that this necessitated the printing and distribution of approximately 535 million tariff pages. To arrive at our estimate, we checked our tariff files and the January, 1988 *Official Airline Guide (Worldwide Edition)* to determine the cities in the 48 contiguous states with airports at which international journeys might originate or terminate. Our analysis indicated that there are 364 airports for which international tariff posting would be required. Based on the

number of airlines serving these airports, this calculated out to 1,787 airport sales locations. To this total we added 654 of the ticket offices in 24 selected international gateways. The other ticket offices were determined from the latest telephone directories available in the Department's library. Combining the airport and other ticket locations, we arrived at a total of 2,441 airline sales locations. We multiplied this figure by the total number of applicable passenger tariff pages, 219,503, to reach the final figure of 535 million pages. Addition of cargo service pages, which are somewhat more difficult to compute, would bring the final figure higher still.

We solicited comments on our assumptions and estimates. None were received. Therefore we assume that our assumptions and estimates are reasonable ones. Accordingly, if the carriers had been able to use this alternative tariff posting method in 1987, they could have reduced by 90% or 482 million the number of passenger tariff pages that had to be printed and distributed just within the 48 contiguous states of the United States and the District of Columbia for tariff posting purposes.<sup>8</sup>

#### Economic Analysis

We believe the rule will have a beneficial impact on the industry and the public, while imposing few new costs. In addition, we expect the rule to achieve substantial cost savings for the industry and ultimately for the consumer.

The public, for its part, under our final rule will have ready access to the basic information it needs through carried-prepared brochures or booklets containing many incorporated tariff terms, and that all other tariff information will be made available by the carrier to consumers through either electronic or other mediums. With respect to tariff information stored electronically, consumers will be able to view such information on a computer display screen at carrier sales locations and obtain printed copies from the computer display screen upon request, if feasible. Consumers will also be able to obtain information on certain "key terms" from cargo and retail travel agents. This is not required under our current posting requirements.

<sup>8</sup> Our Regulatory Evaluation, which is included in this docket, indicates that about 90% of the tariff information is currently available in the electronic medium. See *Preliminary Electronic Tariff ADP Requirements Study*, March 1987, at 2-28.

Our final rule should enable the public to be better informed and able to make wiser economic choices. Due to simple practicalities, the tariff information available on the computer promises to be more up to date and readily available than the information currently being provided under the paper-based system.

In our NPRM we estimated that the carriers spent approximately \$7,500 per sales location in direct labor costs just to maintain the current tariffs. The estimated cost of \$7,500 was determined as follows. We drew an analogy between the work performed by the Department's senior tariff filing clerk and the same type of work, i.e., filing current tariff pages, that would have to be performed by an airline employee at each airline sales location. We determined that our tariff filing clerk spent one-third of his/her time performing this function. The direct labor costs for this senior tariff filing clerk is approximately \$22,500 annually.

We then applied these estimates of time and cost to each airline sales location with the assumption there is a correlation between the Department's costs and the airline's costs. See also, *Bulletin 2241, Industry Wage Survey: Certificated Air Carriers, June 1984*, issued by the U.S. Department of Labor, Bureau of Labor Statistics (August 1985), Table 6, Page 9.

We solicited comments on our estimated costs. None were received. Accordingly, we assume that our estimates are reasonable ones. Therefore, based on our estimates the carriers should be able to achieve a cost saving of approximately 18.3 million dollars annually just within the 48 contiguous states of the United States and the District of Columbia if they choose to use this alternative posting rule.

We have also prepared and placed in Docket 45705 a comprehensive Regulatory Evaluation Analysis. (A copy may be obtained by contacting Thomas G. Moore, Chief, Tariffs Division, P-44, Department of Transportation, 400 7th Street, SW., Washington, DC 20590, Telephone: (202) 366-2414).

We also take this opportunity to remind the carriers that should they opt to use the alternative posting rule we are adopting here, it will not relieve them from their statutory obligation to file and observe their tariffs file with the Department. This rule merely responds to the need to give the carriers greater flexibility in the marketplace to disseminate their tariff information to the public in a more meaningful and timely fashion.

The electronic posting of tariffs by carriers under this rule is strictly

optional. The paper posting system remains available to those carriers still wishing to use it.

#### List of Subjects in 14 CFR 221

Air fares and rates; Explosives; Freight; Handicapped; Contracts; Claims; Consumer Protection; Travel.

This rule is being issued under the authority delegated to the Assistant Secretary for Policy and International Affairs contained in 49 CFR 1.56(j)(2)(ii). For the reasons set forth herein, the Department of Transportation amends 14 CFR 221 as follows:

#### PART 221—TARIFFS

1. The authority citation for Part 221 continues to read as follows:

Authority: Secs. 102, 204, 401, 402, 403, 404, 411, 416, 1001, 1002, Pub. L. 85-728, as amended, 72 Stat. 740, 743, 754, 757, 758, 760, 769, 771, 788; 49 U.S.C. 1302, 1324, 1371, 1372, 1373, 1374, 1381, 1386, 1481, 1482.

2. Section 221.4 is amended by adding the following definitions in alphabetical order:

#### § 221.4 Definitions.

"Consignee" means the person whose name appears on the airwaybill as the party to whom the shipment is to be delivered by the carrier.

"Contract of carriage" means those fares, rates, rules, and other provisions applicable to the foreign air transportation of passengers, baggage, or property, as defined in the Federal Aviation Act.

"Passenger" means any person who purchases, or who contacts a ticket office or travel agent for the purpose of purchasing, or considering the purchase of, air transportation.

"Shipper" means the person whose name appears on the airwaybill as the party contracting with, or a person who contacts a carrier, a cargo sales office or agent of a carrier for the purpose of contracting with the carrier for carriage of a shipment.

"Ticket/Cargo Sales Office" means a station, office, or other location where tickets are sold, or airwaybills or other similar documents are issued, that is under the charge of a person employed exclusively by the carrier, or by it jointly with another person.

3. Section 221.170 is added to read as follows:

#### § 221.170 Public notice of tariff information.

Carriers must make tariff information available to the general public, and in so doing must comply with either:

- (a) Sections 221.171, 221.172, 221.173, 221.174, 221.175, and 221.176 or
- (b) Sections 221.175, 221.176 and 221.177 of this subpart.

#### § 221.173 [Amended]

4. Section 221.173 is amended by deleting the phrase "including canceled tariffs" from paragraph two of the Notice reading "PUBLIC INSPECTION OF TARIFFS".

5. Section 221.174 is revised to read as follows:

#### § 221.174 Notification to the passenger of status of fare, rule, charge or practice.

A carrier or ticket agent shall print, stamp upon, or affix to every purchased passenger ticket a notice stating that the terms and conditions of the contract of carriage including the price of the ticket are subject to adjustment prior to the commencement of transportation, except that such notice is not required where a passenger ticket is sold pursuant to an effective tariff rule which provides that the terms and conditions of the contract of carriage, including the price of the ticket, are not subject to any future adjustment during the validity of the ticket, or the ticket is sold for transportation commencing on the same day.

6. A new § 221.177 is added to read as follows:

#### § 221.177 Alternative notice of tariff terms.

(a) *Terms incorporated in the contract of carriage.* (1) A ticket, airwaybill, or other written instrument that embodies the contract of carriage for foreign air transportation shall contain or be accompanied by notice to the passenger, shipper, or consignee as required in paragraphs (b) and (d) of this section.

(2) Each carrier shall make the full text of all terms that are incorporated in a contract of carriage readily available for public inspection at each airport or other ticket/cargo sales office of the carrier: *Provided*, That the medium, i.e., printed or electronic, in which the incorporated terms and conditions are made available to the consumer shall be at the discretion of the carrier.

(3) Each carrier shall display continuously in a conspicuous public place at each airport or other ticket/cargo sales office of the carrier a notice printed in large type reading as follows:



**Explanation of Contract Terms**

All passenger (and/or cargo as applicable) contract terms incorporated by law to which this company is a party are available in this office. These provisions may be inspected by any person upon request and for any reason. The employees of this office will lend assistance in securing information, and explaining any terms.

In addition, a file of all tariffs of this company, with indexes thereof, from which the incorporated contract terms are obtained is maintained and kept available for public inspection at \_\_\_\_\_. (Here indicate the place or places where tariff files are maintained, including the street address and, where appropriate, the room number.)

(4) Each carrier shall provide to the passenger, shipper or consignee a complete copy of the text of any/all terms and conditions applicable to the contract of carriage, free of charge, immediately, if feasible, or otherwise promptly by mail or other delivery service, upon request at any airport or other ticket/cargo sales office of the carrier. In addition, all other locations where the carrier's tickets or airwaybills may be issued shall have available at all times, free of charge, information sufficient to enable the passenger, shipper or consignee to request a copy of such term(s).

(b) *Notice of incorporated terms.* Each carrier and ticket agent shall include on or with a ticket, airwaybill or other written instrument given to the passenger, shipper, or consignee, that embodies the contract of carriage, a conspicuous notice that:

(1) The contract of carriage may incorporate by law terms and conditions filed in public tariffs with U.S. authorities; passengers, shippers and consignees may inspect the full text of each applicable incorporated term at any of the carrier's airport locations or other ticket/cargo sales offices of the carrier; and passengers, shippers and consignees have the right to receive, upon request at any airport or other ticket/cargo sales office of the carrier, a free copy of the full text of any/all such terms by mail or other delivery service;

(2) The incorporated terms may include, among others, the terms shown in paragraphs (b)(2) (i) through (v) of this section. Passengers may obtain a concise and immediate explanation of the terms shown in paragraphs (b)(2) (i) through (v) of this section from any location where the carrier's tickets are sold, and a shipper or consignee may obtain the same information at any location where an airwaybill or any similar document may be issued:

(i) Limits on the carrier's liability for personal injury or death of passengers (subject to § 221.175), and for loss,

damage, or delay of goods and baggage, including fragile or perishable goods.

(ii) Claim restrictions, including time periods within which passengers, shippers, or consignees must file a claim or bring an action against the carrier for its acts or omissions or those of its agents.

(iii) Rights of the carrier to change the terms of the contract. (Rights to change the price, however, are governed by paragraph (d) of this section).

(iv) Rules about re-confirmations or reservations, check-in times, and refusal to carry.

(v) Rights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate carrier or aircraft, and rerouting.

(3) The salient features of any applicable terms that restrict refunds of the transportation price, impose monetary penalties on passengers, shippers or consignees, or permit a carrier to raise the price, are also being provided on or with the ticket.

(c) *Explanation of incorporated terms.* Each carrier shall ensure that any passenger, shipper, or consignee can obtain from any location where its tickets are sold, or airwaybills or any similar documents are issued, a concise and immediate explanation of any term incorporated concerning the subjects listed in paragraph (b)(2) or identified in paragraph (d) of this section.

(d) *Direct notice of certain terms.* A passenger, shipper or consignee must receive conspicuous written notice, on or with the ticket, airwaybill, or other similar document, of the salient features of any terms that (1) restrict refunds of the price of the transportation, (2) impose monetary penalties on passengers, shippers, or consignees, or (3) permit a carrier to raise the price: *Provided*, That the notice specified in paragraph (d)(3) of this section is not required where a passenger ticket is sold pursuant to an effective tariff rule which provides that the terms and conditions of the contract of carriage, including the price of the ticket, are not subject to any future adjustment during the validity of the ticket, or the ticket is sold for transportation commencing on the same day.

**§ 221.240 (Amended)**

7. Section 221.240(a)(4) is amended by changing that part of the *Letter of tariff transmittal* which now reads:

Sufficient copies of the above-named publication for posting in accordance with Subpart N of your Economic Regulations, have been sent to each carrier participating in the above publication.

**To read:**

Sufficient copies of the above-named publication have been sent to each carrier participating in the above-named publication for posting purposes in accordance with Subpart N of your Economic Regulations, where required.

Issued in Washington, DC on December 22, 1988.

Gregory S. Dole,  
Assistant Secretary for Policy and  
International Affairs.

[FR Doc. 88-29970 Filed 12-28-88; 8:45 am]  
BILLING CODE 4910-02-M

**DEPARTMENT OF COMMERCE****International Trade Administration****DEPARTMENT OF THE INTERIOR****Office of Territorial and International Affairs****15 CFR Part 303**

[Docket No. 80998-8243]

**Limit on Duty-Free Insular Watches in Calendar Year 1989**

**AGENCIES:** Import Administration, International Trade Administration, Department of Commerce; Office of Territorial and International Affairs, Department of the Interior.

**ACTION:** Final rule.

**SUMMARY:** Pursuant to Pub. L. 97-446, the Departments of the Interior and Commerce (the Departments) share responsibility for establishing a limit on the quantity of watches and watch movements which may be entered free of duty during each calendar year. The law also requires the Departments to establish the shares of this limited quantity which may be entered from the three insular possessions of the U.S. and the Northern Mariana Islands (NMI). This action maintains during 1989 the existing limit and territorial shares while changing the set aside for new entrant invitations in the Virgin Islands and Guam to 200,000 units each. We have done this by amending 15 CFR 303.14(d)(2) and (3).

**EFFECTIVE DATE:** January 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Faye Robinson, (202) 377-1660.

**SUPPLEMENTARY INFORMATION:** We published these revisions in proposed form on October 11, 1988 (53 FR 39612) and invited comments. We received no comments.

Accordingly, the Departments are establishing for calendar year 1989 a

total quantity and respective territorial shares as shown in the following table:

Virgin Islands.....	4,700,000
Guam.....	1,000,000
American Samoa.....	500,000
Northern Mariana Islands.....	500,000
Total.....	6,700,000

**Classification:** Executive Order 12291. In accordance with Executive Order 12291 (46 FR 13193, February 19, 1981), the Departments of Commerce and the Interior have determined that this rule does not constitute a "major rule" as defined by Section 1(b) of the Order. It is not likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Therefore, preparation of a Regulatory Impact Analysis is not required.

This regulation was submitted to the Office of Management and Budget for review, as required by Executive Order 12291.

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

**Regulatory Flexibility Act.** In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the General Counsel of the Department of Commerce has certified that this action will not have a significant economic impact on a substantial number of small entities. Fewer than ten entities are directly affected by this action. The commercial benefits of the program governed by these regulations, for entities both directly and indirectly affected, are less than \$10 million per year.

**Paperwork Reduction Act.** This rule does not contain information collection requirements subject to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

**List of Subjects in 15 CFR Part 303**

Imports, Customs duties and inspection, Watches and jewelry, Marketing quotas, Administrative practice and procedure, Reporting and recordkeeping requirements, American

Samoa, Guam, Virgin Islands, Northern Mariana Islands.

For reasons set forth above, we amend Part 303 as follows:

**PART 303—[AMENDED]**

1. The authority citation for Part 303 continues to read as follows:

Authority: Pub. L. 97-446, 96 Stat. 2329, 2331 (19 U.S.C. 1202 note); Pub. L. 94-241, 90 Stat. 263 (48 U.S.C. 1681, note)

**§ 303.14 [Amended]**

2. Section 303.14 is amended by changing "500,000 to 200,000" in § 303.14(d) (2) and (3).

Timothy N. Bergan,  
Deputy Assistant Secretary for Import  
Administration.

David Heggstad,  
Acting Assistant Secretary for Territorial and  
International Affairs.

[FR Doc. 88-29909 Filed 12-28-88; 8:45 am]  
BILLING CODES 4310-93-M and 3510-05-M

**FEDERAL TRADE COMMISSION****16 CFR Part 13**

[Docket No. C-3243]

**Eugene M. Addison, M.D., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions**

**AGENCY:** Federal Trade Commission.  
**ACTION:** Consent order.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, certain physicians in Huntsville, Texas from engaging in anticompetitive activities to prevent or impair the operation of health maintenance organizations (HMOs).

**DATE:** Complaint and Order issued November 15, 1988.<sup>1</sup>

**FOR FURTHER INFORMATION CONTACT:** Raymond L. Randall, FTC/S-3115, Washington, DC 20580. (202) 326-2768.

**SUPPLEMENTARY INFORMATION:** On Tuesday, September 6, 1988, there was published in the *Federal Register*, 53 FR 34307, a proposed consent agreement with analysis in the Matter of Eugene M. Addison, M.D. et al./Huntsville Physicians, for the purpose of soliciting public comment. Interested parties were

<sup>1</sup> Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580.

given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission ordered the issuance of a complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Boycotting Seller-Suppliers: § 13.302 Boycotting sellers-suppliers. Subpart—Coercing And Intimidating: § 13.345 Competitors. Subpart—Combining Or Conspiring: § 13.384 Combining or conspiring; § 13.385 To boycott seller-suppliers; § 13.470 To restrain and monopolize trade; § 13.497 To terminate or threaten to terminate contracts, dealings, franchises, etc. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-45 Maintain records; § 13.533-45(k) Records, in general; § 13.533-50 Maintain means of communication; § 13.533-60 Release of general, specific, or contractual restrictions, requirements, or restraints.

**List of Subjects in 16 CFR Part 13**

Physicians, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Donald S. Clark,  
Secretary.

[FR Doc. 88-29939 Filed 12-28-88; 8:45 am]  
BILLING CODE 8750-01-M

**16 CFR Part 13**

[Dkt. C-3242]

**Iowa Chapter of the American Physical Therapy Association; Prohibited Trade Practices, and Affirmative Corrective Actions**

**AGENCY:** Federal Trade Commission.

**ACTION:** Consent order.

**SUMMARY:** In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order prohibits, among other things, the Iowa Chapter of the American Physical Therapy Association (ICAPTA), a professional association representing physical therapists in Iowa, from restricting any physical therapist from accepting or continuing employment



with any physician, or from declaring such employment illegal or unethical.

**DATE:** Complaint and Order issued November 4, 1988.<sup>1</sup>

**FOR FURTHER INFORMATION CONTACT:** Erika R. Wodinsky, FTC, San Francisco Regional Office, 901 Market Street, Suite 570, San Francisco, CA. 94103. (415) 995-5220.

**SUPPLEMENTARY INFORMATION:** On Tuesday, August 30, 1988, there was published in the *Federal Register*, 53 FR 33144, a proposed consent agreement with analysis in the Matter of Iowa Chapter of the American Physical Therapy Association, for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered an order to cease and desist in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Coercing And Intimidating: § 13.345 Competitors; § 13.367 Members. Subpart—Combining Or Conspiring: § 13.384 Combining or conspiring; § 13.390 To control employment practice; § 13.470 To restrain and monopolize trade; § 13.497 To terminate or threaten to terminate contracts, dealings, franchises, etc. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-20 Disclosures; § 13.533-45 Maintain records; § 13.533-45(k) Records, in general; § 13.533-50 Maintain means of communication; § 13.533-60 Release of general, specific, or contractual restrictions, requirements, or restraints.

#### List of Subjects in 16 CFR Part 13

Physical therapists, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Donald S. Clark,

Secretary.

[FR Doc. 88-29938 Filed 12-28-88; 8:45 am]

BILLING CODE 6750-01-M

<sup>1</sup> Copies of the Complaint and the Decision and Order are available from the Commission's Public Reference Branch, H-130, 6th Street & Pennsylvania Avenue, NW., Washington, DC 20580

#### 16 CFR Part 13

[Dkt. 9126]

#### National Tea Co.; Prohibited Trade Practices and Affirmative Corrective Actions

**AGENCY:** Federal Trade Commission.

**ACTION:** Set aside order.

**SUMMARY:** The Federal Trade Commission has set aside a 1980 order with National Tea Co. (45 FR 53455) so that the company is no longer required to get the Commission's approval before acquiring grocery stores in certain geographic areas. Since the company exited the Minneapolis/St. Paul area in 1983, the Commission determined that public interest considerations warranted setting the order aside.

**DATES:** Consent Order issued July 23, 1980. Set Aside Order issued September 23, 1988.

**FOR FURTHER INFORMATION CONTACT:** Daniel P. Ducore or Joseph Eckhaus, FTC/S-2115, Washington, DC 20580. (202) 326-2687.

**SUPPLEMENTARY INFORMATION:** In the Matter of National Tea Company, a corporation. The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, as set forth at 45 FR 53455, are deleted.

#### List of Subjects in 16 CFR Part 13

Grocery stores, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 7, 38 Stat. 731, as amended; 15 U.S.C. 45, 18)

Commissioners: Daniel Oliver, Chairman, Terry Calvani, Mary L. Azcuenaga, Andrew J. Strenio, Jr.

#### Order Reopening and Setting Aside Order Issued on July 23, 1980

On May 27, 1988, National Tea Company ("National") filed a "Petition To Reopen And Set Aside Consent Order" ("Petition"), pursuant to section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and § 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 (1986). The Petition asked the Commission to reopen the proceeding in Docket No. 9126 and set aside the consent order issued by the Commission on July 23, 1980 ("the order"). National's Petition was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under section 7 of the Clayton Act, 15 U.S.C. 18, and section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from National's acquisition of

Applebaums' Food Markets, Inc., in February 1979. 96 F.T.C. 42 (1980). According to the complaint, the relevant line of commerce in which to assess the acquisition was sales by retail grocery stores; the relevant geographic market was the Metropolitan Minneapolis/St. Paul, Minnesota area ("Twin Cities"). The order, which was issued by the Commission on July 23, 1980, prohibits National, for a ten year period ending on July 28, 1990, from acquiring without the prior approval of the Commission, five or more retail grocery stores in seven designated states, or within 500 miles of any National warehouse, or 300 miles of any National retail grocery store. 96 F.T.C. at 49.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified or set aside, in whole or in part, if the respondent makes a satisfactory showing that changed conditions of law or fact require the order to be modified or set aside. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2958, Letter to John C. Hart (June 5, 1986), at 4.

Section 5(b) also provides that the Commission may modify an order when the Commission determines that the public interest so requires. Therefore, the Commission has invited respondents to show in petitions to reopen how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, 101 F.T.C. 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *Damon Letter* at 2.

After reviewing National's Petition, the Commission has concluded that it is in the public interest to reopen the proceeding and set aside the order in Docket No. 9126. Although National remains in the retail grocery store business, it has been out of the Twin

Cities market for five years. National has shown that the prior approval requirements of the order impose substantial compliance costs on National and put it at a disadvantage with respect to its competitors who are not under similar restraints. These costs were foreseeable at the time National agreed to the order and would not provide a sufficient basis to justify termination of the order if it were serving a procompetitive purpose. However, in light of National's exit from the Twin Cities market, any need for the order in the Twin Cities market that was the focus of the Commission's complaint is outweighed by the costs of the prior approval provision.

The Commission has also concluded that it is in the public interest to set aside the prior approval requirements of the order with respect to any other geographic areas designated in the order. The allegations of the complaint relate primarily to the Twin Cities market and with the setting aside of the primary relief, the ancillary relief should also be set aside.

Accordingly, *It Is Ordered* that this matter be, and it hereby is reopened and that the Commission's order issued on July 23, 1980, shall be set aside as of the effective date of this order.

By the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 88-29941 Filed 12-28-88; 8:45 am]

BILLING CODE 6750-01-M

#### 16 CFR Part 13

[Dkt. 9209]

#### North American Philips Corporation; Prohibited Trade Practices and Affirmative Corrective Actions

**AGENCY:** Federal Trade Commission.

**ACTION:** Final order.

**SUMMARY:** This Final Order prohibits, among other things, the North American Philips Corp., Norelco's parent company, from misrepresenting the performance of the Clean Water Machine or any other product that treats water, and from also misrepresenting any test or study of its products. The order requires respondent to have substantiation for any performance claims it makes for any electric-powered consumer appliance, including hair dryers, makeup mirrors, coffee makers, and razors.

**DATES:** Complaint issued August 3, 1987. Final Order issued October 24, 1988.<sup>1</sup>

<sup>1</sup> Copies of the Complaint, Initial Decision, Opinion of the Commission, etc. are available from

**FOR FURTHER INFORMATION CONTACT:** Joel C. Winston, FTC/S-4002, Washington, DC 20580. (202) 326-3153.

**SUPPLEMENTARY INFORMATION:** In the Matter of North American Philips Corporation, a corporation. The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Advertising Falsely Or Misleadingly: § 13.10 Advertising falsely or misleadingly; § 13.170 Qualities or properties of product or service; § 13.170-16 Cleansing, purifying; § 13.170-70 Preventive or protective; § 13.190 Results; § 13.205 Scientific or other relevant facts; § 13.210 Scientific tests. Subpart—Corrective Actions And/Or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-45 Maintain records; § 13.533-45(a) Advertising substantiation. Subpart—Misrepresenting Oneself And Goods—Goods: § 13.1590-20 Federal Trade Commission Act; § 13.1730 Results; § 13.1740 Scientific or other relevant facts; § 13.1762 Tests, purported. Subpart—Neglecting, Unfairly Or Deceptively, To Make Material Disclosure: § 13.1895 Scientific or other relevant facts.

#### List of Subjects in 16 CFR Part 13

Water cleaners, Water filters, Trade practices.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Commissioners: Daniel Oliver, Chairman, Terry Calvani, Mary L. Azcuenaga, Andrew J. Strenio, Jr.

#### Final Order

The Administrative Law Judge filed his Initial Decision in this matter on August 29, 1988, finding that the respondent engaged in unfair and deceptive acts or practices in or affecting commerce in violation of section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45. An appropriate Order to remedy the violations was appended to the Initial Decision.

Service of the Initial Decision was completed on September 22, 1988. Neither respondent nor complaint counsel filed an appeal.

The Commission having determined that this matter should not be placed on its docket for review, and that the Initial Decision and the Order therein shall become effective as provided in § 3.51(a) of the Commission's Rules of Practice, 16 CFR 3.51(a),

the Commission's Public Reference Branch, H-130, 6th Street and Pennsylvania Avenue, NW., Washington, DC 20580.

It is ordered that the Initial Decision and the Order therein shall become the Final Order and Opinion of the Commission on the date of issuance of this order.

By the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 88-29940 Filed 12-28-88; 8:45 am]

BILLING CODE 6750-01-M

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

##### Food and Drug Administration

#### 21 CFR Part 184

[Docket Nos. 82G-0207, 86P-0506, and 87P-0199]

#### Rapeseed Oil; Revision of Common or Usual Name

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is revising its regulations (21 CFR 184.1555(c)) to recognize "canola oil" as the alternate common or usual name of low erucic acid rapeseed oil. This action responds to a citizen petition submitted by the Canola Council of Canada (CCC) requesting approval of the alternate name. This action renders moot a request for an advisory opinion submitted by the Canadian government. In addition, FDA is denying a citizen petition from the American Soybean Association (ASA) that objected to use of the term "canola oil."

**EFFECTIVE DATE:** December 29, 1988.

**FOR FURTHER INFORMATION CONTACT:** Kennon M. Smith, Center for Food Safety and Applied Nutrition (HFF-302), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-485-0162.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In the *Federal Register* of September 16, 1988 (53 FR 36067), FDA proposed to adopt "canola oil" as an alternate common or usual name for low erucic acid rapeseed oil. The proposal was issued in response to a citizen petition submitted by CCC and a request for an advisory opinion from Agriculture Canada. At that time, FDA tentatively concluded that a petition submitted by ASA that opposed the use of the term "canola oil" on any food labels should be denied.



## II. Discussion of Comments

All comments received by the agency supported the proposed action as favorable to industry and consumers alike. Most notable among the comments in support of the agency's proposal was that submitted by ASA, which stated that because the erucic acid specification for canola oil was officially lowered to 2 percent by Canada, ASA has no objection to the proposed rule.

## III. Conclusion

The agency received no comments opposed to its proposed rule. Thus, the agency concludes that, for the reasons set forth in its proposal, it is appropriate to adopt "canola oil" as an alternate common or usual name for low erucic acid rapeseed oil. The agency also concludes that there has been sufficient exposure to the term "canola oil" to allow the American consumer to recognize and understand the term. FDA believes that the term "canola oil" is acceptable and favorable to both industry and the consumer and, therefore, should be allowed to be used interchangeably with the term "low erucic acid rapeseed oil." The agency also believes that consistency in nomenclature will promote free trade in products containing this ingredient between the neighboring markets of Canada and the United States.

Agriculture Canada's request for advisory opinion is, in effect, rendered moot by this action and, therefore, will be deemed to have been withdrawn.

Finally, because ASA supports this action, its citizen petition is hereby denied.

## IV. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(11) that this action is of a type that does not result in the production or distribution of any substance and, thus, will not result in the introduction of any substance into the environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## V. Economic Impact

In accordance with Executive Order 12291, FDA has analyzed the economic effects of this final rule and has determined that it will not be a major rule under the order. In accordance with the Regulatory Flexibility Act (Pub. L. 96-354), FDA has determined that this final rule will not have a significant economic impact on a substantial number of small entities. FDA has not

received any additional information that would cause the agency to alter these determinations.

## List of Subjects in 21 CFR Part 184

Food ingredients, Generally recognized as safe (GRAS) food ingredients.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 184 is amended as follows:

## PART 184—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

1. The authority citation for 21 CFR Part 184 continues to read as follows:

Authority: Secs. 201(s), 402, 409, 701, 52 Stat. 1048-1047 as amended, 1055-1056 as amended, 72 Stat. 1784-1788 as amended (21 U.S.C. 321(s), 342, 348, 371); 21 CFR 5.10, 5.61.

2. Section 184.1555 is amended by revising the first sentence in paragraph (c)(1) to read as follows:

## § 184.1555 Rapeseed oil.

(c) *Low erucic acid rapeseed oil.* (1) Low erucic acid rapeseed oil, also known as canola oil, is the fully refined, bleached, and deodorized edible oil obtained from certain varieties of *Brassica Napus* or *B. Campestris* of the family *Cruciferae*.

Dated: December 23, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-29888 Filed 12-28-88; 8:45 am]

BILLING CODE 4160-01-M

## 21 CFR Parts 510 and 544

## Animal Drugs, Feeds, and Related Products; Change of Sponsor

AGENCY: Food and Drug Administration.  
ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor for a new animal drug application (NADA) from Merck Sharp & Dohme Research Laboratories to Veterinary Service, Inc.

EFFECTIVE DATE: December 29, 1988.

FOR FURTHER INFORMATION CONTACT: Benjamin A. Puyot, Center for Veterinary Medicine (HFV-130), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1415.

## SUPPLEMENTARY INFORMATION:

Veterinary Service, Inc., 416 North Jefferson St., P.O. Box 2467, Modesto, CA 95354, has informed FDA that it is now the sponsor of NADA 65-252 (Vetstrep 25 percent—Streptomycin sulfate oral solution, veterinary) formerly held by Merck Sharp & Dohme Research Laboratories. Merck Sharp & Dohme Research Laboratories has informed FDA of the change of sponsor. The agency is amending 21 CFR 510.600(c) (1) and (2) and 21 CFR 544.170b(c) (2) to reflect the change in sponsor.

## List of Subjects

## 21 CFR Part 510

Administrative practice and procedure, animal drugs, labeling, reporting and recordkeeping requirements.

## 21 CFR Part 544

Animal drugs, antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Parts 510 and 544 are amended as follows:

## PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR Part 510 continues to read as follows:

Authority: Secs. 512, 701(a) (21 U.S.C. 360b, 371(a)); 21 CFR 5.10 and 5.83.

2. Section 510.600 is amended in the table in paragraph (c)(1) by alphabetically adding an entry for "Veterinary Service, Inc.," and in paragraph (c)(2) by numerically adding an entry in the table for "033008" to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

(c) \* \* \*

(1) \* \* \*

Firm name and address	Drug labeler code
Veterinary Service, Inc., 416 North Jefferson St., P.O. Box 2467, Modesto, CA 95354	033008

(2) \* \* \*

Drug labeler code	Firm name and address
033008	Veterinary Service, Inc., 416 North Jefferson St., P.O. Box 2467, Modesto, CA 95354

## PART 544—OLIGOSACCHARIDE CERTIFIABLE ANTIBIOTIC DRUGS FOR ANIMAL USE

3. The authority citation for 21 CFR Part 544 continues to read as follows:

Authority: Secs. 512, 82 Stat. 343-351 (21 U.S.C. 360b); 21 CFR 5.10, 5.83.

## § 544.170b [Amended]

4. Section 544.170b *Streptomycin hydrochloride/streptomycin sulfate oral solution* is amended in paragraph (c)(2) by removing "[Reserved]" and replacing it with "See 033008 in § 510.600(c) of this chapter."

Dated: December 19, 1988.

Robert C. Livingston,

Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 88-29889 Filed 12-28-88; 8:45 am]

BILLING CODE 4160-01-M

## 21 CFR Part 1010

[Docket No. 86N-0211]

## Performance Standards for Electronic Products; General; Variances From Performance Standards

AGENCY: Food and Drug Administration.  
ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is making minor clarifying changes in its variance regulations. FDA is also discontinuing its procedure of publishing in the Federal Register notices of the availability of approved variances from performance standards for electronic products. FDA believes there is minimal public interest in the variance procedure, as evidenced by the fact that no one has ever responded to published notices of availability of approved variances. Issuance of this final rule will help conserve FDA's resources.

EFFECTIVE DATE: This final rule will become effective January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Arlene Underdonk, Center for Devices and Radiological Health (HFZ-83), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3426.

SUPPLEMENTARY INFORMATION: In the Federal Register of July 14, 1981 (46 FR 36333), FDA announced the agency's plan for conducting a systematic review of its rules and asked the public to comment on those FDA regulations that are perceived to be the most burdensome. The purpose of the review was to identify regulations that impose unnecessary burdens on the public generally or on specific segments of the public such as small business and, for such regulations, to explore alternative measures for protecting the public health. Subsequently, as a result of the assessment of public comments received in response to FDA's notice and of other available information, the agency published a notice in the Federal Register of July 2, 1982 (47 FR 29004), that identified the rules initially selected for highest priority review. The July 2, 1982, notice also advised that FDA intended to select other rules for review.

Although the July 2, 1982, notice did not identify the regulation concerning the procedure used to grant variances from performance standards for electronic products, FDA's experience in implementing the regulation since 1974 indicated a need for its review. Therefore, FDA conducted a comprehensive review of this regulation in light of the Regulatory Flexibility Act (Pub. L. 96-354), Executive Order 12291, and FDA's experience in implementing the regulation for the past 14 years.

On June 2, 1988 (53 FR 20137), FDA proposed to revise its variance regulations. Based upon review of correspondence and applications for variances received from manufacturers of electronic products, FDA proposed to make minor clarifying changes to help applicants more readily understand FDA's requirements and thus to expend fewer resources in the submission of applications. Also, the agency proposed to remove the requirement in the variance procedure (21 CFR 1010.4(c)(2)) that a notice of availability of the approved variance be published in the Federal Register. The agency believes that publication of the notice of approval is not necessary because there is a lack of public interest in the variance procedure as evidenced by a complete absence of responses to published notices of availability of approved variances.

Interested persons were given until August 1, 1988, to submit comments, but no comments were received. Accordingly, FDA is adopting the amendments as proposed.

FDA will continue to maintain the administrative record of each variance action, which record will include the applications for variances and for any

amendments and extensions of variances as well as all correspondence on the applications. The administrative record will be on file at FDA's Dockets Management Branch, and all nonconfidential documents in it will be available under the Freedom of Information Act (5 U.S.C. 552). Removing the requirement for announcement of the approval of a variance in the Federal Register will not speed up approval of a variance, because approval of a variance takes place before FDA's publication of a notice of availability of a variance. Issuance of this final rule will, however, help conserve FDA's resources by eliminating unnecessary Federal Register documents.

## Environmental Impact

The agency has determined under 21 CFR 25.24(a)(8) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## Economic Impact

FDA has carefully analyzed the economic effects of this final rule and has determined that the rule would not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act. In accordance with section 3(g)(1) of Executive Order 12291, the impact of this final rule has been carefully analyzed, and it has been determined that the final rule does not constitute a major rule as defined in section 1(b) of the Order.

## List of Subjects in 21 CFR Part 1010

Administrative practice and procedure, Electronic products, Exports, Radiation protection.

Therefore, under the Public Health Service Act, as amended by the Radiation Control for Health and Safety Act, and under authority delegated to the Commissioner of Food and Drugs, Part 1010 is amended as follows:

## PART 1010—PERFORMANCE STANDARDS FOR ELECTRONIC PRODUCTS; GENERAL

1. The authority citation for 21 CFR Part 1010 is revised to read as follows:

Authority: Sec. 358, 82 Stat. 1177; 42 U.S.C. 263f; 21 CFR 5.10.

2. Section 1010.4 is amended by revising paragraph (a), by removing paragraph (c)(2), and by redesignating paragraphs (c) (3) and (4) as paragraphs



(c) (2) and (3), respectively, to read as follows:

#### § 1010.4 Variances.

(a) *Criteria for variances.* (1) Upon application by a manufacturer (including an assembler), the Director, Center for Devices and Radiological Health, Food and Drug Administration, may grant a variance from one or more provisions of any performance standard under Subchapter J of this chapter for an electronic product subject to such standard when the Director determines that granting such a variance is in keeping with the purposes of the Radiation Control for Health and Safety Act of 1968, and:

(i) The scope of the requested variance is so limited in its applicability as not to justify an amendment to the standard, or

(ii) There is not sufficient time for the promulgation of an amendment to the standard.

(2) The issuance of the variance shall be based upon a determination that:

(i) The product utilizes an alternate means for providing radiation safety or protection equal to or greater than that provided by products meeting all requirements of the applicable standard, or

(ii) The product performs a function or is intended for a purpose which could not be performed or accomplished if required to meet the applicable standards, and suitable means for assuring radiation safety or protection are provided, or

(iii) One or more requirements of the applicable standard are not appropriate, and suitable means for assuring radiation safety or protection are provided.

Dated: December 8, 1988.

John M. Taylor,  
Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-29887 Filed 12-28-88; 8:45 am]  
BILLING CODE 4160-01-M

#### DEPARTMENT OF LABOR

##### Pension and Welfare Benefits Administration

##### 29 CFR Part 2584

##### Allocation of Fiduciary Responsibility, Federal Retirement Thrift Investment Board

AGENCY: Department of Labor.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation under section

8477(e)(1)(E) of the Federal Employees' Retirement System Act of 1986 (FERSA or the Act). That section provides that any fiduciary with respect to the Thrift Savings Fund<sup>1</sup> who, pursuant to procedures prescribed by the Secretary of Labor, allocates a fiduciary responsibility to another fiduciary shall not be liable for any act or omission of such fiduciary except in specified circumstances. Section 8477(e)(1)(E) specifically contemplates the issuance of regulations by the Department of Labor. This regulation describes the procedures which a fiduciary with respect to the Thrift Savings Fund must follow in order to allocate fiduciary responsibility to another fiduciary.

DATE: This regulation is effective December 29, 1988. The final regulation will apply to transactions occurring on or after December 29, 1988.

FOR FURTHER INFORMATION CONTACT: Shelby J. Hoover, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, telephone (202) 523-9590; or Debra Silver, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, telephone (202) 523-8671.

SUPPLEMENTARY INFORMATION: Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Director, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue NW., Room N-1301, Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

This document contains a final regulation under section 8477(e)(1)(E) of FERSA.<sup>2</sup> That section provides that any

<sup>1</sup> The Thrift Savings Fund is established and defined at 5 U.S.C. 8437.

<sup>2</sup> Section 8401 through 8479 of Title 5, United States Code (U.S.C.) were enacted by Congress at section 101(a) of FERSA. The Act itself provides no independent numbering system for these provisions, but directly assigns the chapter and section numbers under which those provisions are to be codified in Title 5 of the U.S.C. For purposes of clarity and convenience, therefore, this preamble references the provisions of FERSA by using the U.S.C. section numbers which Congress assigned to them in the Act. Thus, for example, the above reference to "section 8477(e)(1)(E) of FERSA" is to Title 5 U.S.C. 8477(e)(1)(E).

fiduciary with respect to the Thrift Savings Fund who, pursuant to procedures prescribed by the Secretary of Labor, allocates a fiduciary responsibility to another fiduciary shall not be liable for an act or omission of such fiduciary except in specified circumstances. This regulation supersedes the interim regulations promulgated by the Executive Director of the Federal Retirement Thrift Investment Board which appear at Title 5, Code of Federal Regulations, Chapter IV, Section 1660.1-1660.5 (52 FR 38221, October 15, 1987).

On July 22, 1988, the Department of Labor (the Department) published for notice and comment a proposed regulation outlining procedures for fiduciary allocation under FERSA section 8477(e)(1)(E). The Department received comments only from the Executive Director of the Federal Retirement Thrift Investment Board concerning this proposal. The following discussion summarizes the proposed regulation and the issues raised by that commentator, and explains the Department's reasons for adopting the final regulation.

#### Discussion

##### A. General Considerations

Subchapter III of FERSA provides for the creation of a retirement savings plan for federal employees to be known as the Thrift Savings Plan. As provided at section 8437 of FERSA, the plan is to be funded by the Thrift Savings Fund (Fund). The Fund consists of all employee and government contributions, increased by the total net earnings of the Fund or reduced by the total net losses of the Fund, and reduced by the total amount of payments made from the Fund.

Under the system of plan management prescribed at Subchapter VII of the Act, the authority and responsibility for the management and administration of the Fund is apportioned between the Federal Retirement Thrift Investment Board (the Board) and its Executive Director. Section 8472 of the Act charges the Board with broad responsibility to establish policies for the investment and management of the Thrift Savings Fund and the administration of Subchapter III of FERSA. Section 8474 assigns the Executive Director the responsibility to implement the policies established by the Board and to invest and manage the Fund assets in accordance with those policies and the provisions of the Act.

Pursuant to section 8474 (b)(5) and (c)(1) of the Act, the Executive Director is also granted authority to prescribe

such regulations as may be necessary for the administration of the Fund. However, these statutory provisions expressly prohibit the Executive Director from prescribing any regulations relating to fiduciary responsibilities with respect to the Fund. Instead, at section 8477 of the Act, that regulatory authority is assigned to the Secretary of Labor. At section 8477(e)(1)(E), the Secretary is directed to prescribe, in regulations, procedures by which fiduciary responsibilities may be allocated among fiduciaries, including investment managers. An exception to the limitation on the Executive Director's rulemaking authority, however, was included at section 114 of the Federal Employees' Retirement System Technical Corrections Act of 1986 (Pub. L. 99-556). That section authorizes the Board to establish interim procedures concerning the allocation of fiduciary responsibilities. The Executive Director published such procedures in the Federal Register at 52 FR 38221 on October 15, 1987. According to the Act, those procedures are to be effective only with respect to transactions which occur prior to the effective date of the final regulations prescribed by the Secretary of Labor under subparagraph (E) of section 8477(e)(1) of the Act; moreover, the authority to make allocations using the interim procedures must expire no later than December 31, 1988.

##### B. The Final Regulation

In summary, the proposal was divided into seven sections which basically describe the fiduciary duties which may be allocated, and to whom, the procedures for allocating those duties, the procedures for revoking such allocations, and the effect of an allocation made pursuant to these procedures. Only two areas of concern were raised by the commentator, and they are discussed in the following first two subsections.

##### 1. Allocation Among Board Members

The Act initially vests all fiduciary responsibility for the Thrift Savings Fund with either the members of the Board or the Executive Director. Sections 2584.8477(e)-2 and 3 of the proposal provided a procedure by which the Board members could allocate among themselves those responsibilities which had been charged to them collectively as members of the Board. This would permit the Board to adopt, if it chose, an arrangement whereby a collective fiduciary responsibility could be assigned to and discharged by one or a subgroup of the members, provided such allocation would not violate an express policy of the Board or constitute

an invalid delegation according to the Act or any other law. See § 2584.8477(e)-2(d) of the proposal.

In this regard, the Executive Director of the Federal Retirement Thrift Investment Board submitted a comment stating the conclusion that an allocation of fiduciary responsibilities among Board members would be an invalid delegation under the provisions of FERSA. In support of this conclusion, the Executive Director cited 5 U.S.C. 8476(b)(1), which requires the Board to perform its functions and exercise its powers on a majority vote of a quorum of the Board, and 5 U.S.C. 8474(c)(8) and 8472. Section 8474(c)(8) of FERSA specifically provides for the Executive Director to delegate his functions while section 8472, which delineates the powers and responsibilities of the Board, contains no express authority to delegate.

The Department proposed these allocation procedures pursuant to the authority provided in 5 U.S.C. 8477(e)(1)(E), which contains no limitation concerning permissible delegations. This procedural regulation is not intended to define what constitutes a permissible delegation. Thus, the Department has determined to adopt the procedures as proposed, retaining the procedural flexibility for allocations among Board members, if such allocation would not result in an invalid or impermissible delegation as described in § 2584.8477(e)-2(d) of the regulation. The Department notes in this regard that while nothing in these procedures restricts the ability of a Fund fiduciary to assign any task or function to another person, such Fund fiduciary will continue to bear fiduciary responsibility for the acts and omissions of such other persons unless such responsibility of such other person has been allocated pursuant to these procedures. Also, in those instances where the delegation by a Fund fiduciary of a particular task or function would violate an express Board policy or a provision of law, that Fund fiduciary may not allocate the fiduciary responsibility for such task or function to another so as to relieve himself of his related fiduciary liability.

##### 2. Allocation of the Responsibilities of the Executive Director

In addition to the allocation procedure for Board members described above, section 2584.8477(e)-2 of the proposal provided a procedure by which the Executive Director could allocate certain fiduciary responsibilities in connection with the management and investment of the assets of the Thrift Savings Fund. With respect to assets

held in the Fixed Income Investment Fund (F Fund), it was proposed that such allocations be made only to a qualified professional asset manager or managers (QPAMs). The proposal incorporated by reference the definition of "qualified professional asset manager or manager" which appears at section 8438(a)(7) of the Act. With respect to assets held in the Government Securities Investment Fund or the Common Stock Index Investment Fund,<sup>3</sup> it was proposed that such allocation may be made only to an investment manager. The proposal incorporated the definition of "investment manager" which appears at section 3(38) of the Employee Retirement Income Security Act of 1974 (ERISA). No other allocations, whether by a Board member, the Executive Director, or any other person who has or may acquire fiduciary responsibility in connection with the Thrift Savings Fund, were authorized. Thus, as proposed, an investment manager to whom fiduciary responsibility had been allocated could not in turn allocate any part of that responsibility to a second investment manager. However, allocation to the second investment manager could be achieved by action of the Executive Director, who, under the proposed regulation, was provided the authority to revoke an allocation and then reallocate that fiduciary responsibility to another fiduciary.

In this regard, the Executive Director of the Board expressed concern that section 8477(e)-2(b) of the proposal, which provided that the Executive Director could allocate authority and responsibility for investment and management of the F Fund only to a QPAM, is more restrictive than 5 U.S.C. 8438(b)(1). Section 8438(b)(1) of FERSA requires that the selection of assets to be held by the Fixed Income Investment Fund (other than certificates of deposit and insurance contracts) be made by a qualified professional asset manager. The commentator argued that if the Executive Director so desired, he should have the ability to separate the investment selection function from other aspects of asset management and allocate such aspects of fiduciary asset management.

It is the opinion of the Department that the authority to select includes the actual selection as well as the decision to retain or sell any assets previously

<sup>3</sup> Section 8438(b) provides that the Board is to establish three funds within the Thrift Savings Fund into which sums available for investment are to be invested. They are the Government Securities Investment Fund, the Fixed Income Investment Fund and the Common Stock Index Investment Fund.



selected. Thus, the Department proposed that, with respect to this fund, all allocations of management and investment authority must be made to QPAMs. After due consideration of the commentator's concerns, the Department is not convinced that there are any fiduciary asset management functions not encompassed by the statutory selection requirement which should be allocated to someone other than a QPAM. Thus, the Department adopts § 2584.8477(e)-2 of the regulation as proposed.

### 3. Procedures for Allocation

Section 2584.8477(e)-3 of the proposal imposed specific procedural requirements to assure that, as to any allocation: (1) Both the allocating fiduciary and the receiving fiduciary are expressly and clearly informed of the fact of any allocation and the pertinent terms thereof; and (2) the participants and the beneficiaries of the Thrift Savings Funds are informed of the identity of any person or persons to whom fiduciary responsibility has been allocated, and the nature of that responsibility. Also, the proposal required that any allocation made by the Board must be authorized by majority vote of the Board.

In order to avoid confusion, the Department has made an amendment to the language of § 2584.8477(e)-3(a)(1) and section 2584.8477(e)-4(c)(1) clarifying that any allocation made by the Board or revocation of such allocation must be authorized by the concurring vote of a majority of the total membership of the Board. If such a vote is taken and authorization is given, the Chairman of the Board will evidence such authorization by signing on behalf of the Board the written authorization which, in turn, must be acknowledged in writing by the receiving Board member or members.

As in the proposal, the final regulation states that all allocations, whether by the Board or the Executive Director, must identify in writing the responsibilities to be allocated and must be signed by both the allocating and the receiving fiduciaries. The signature of the receiving fiduciary represents his acknowledgment that, in accepting the allocated responsibilities, he becomes a fiduciary with respect to the Fund as to those responsibilities. The final regulation also requires that all allocations must be communicated in a written form to the participants and beneficiaries of the Fund.

### 4. Revocation and Termination of Allocations

To assure that the Board and the Executive Director may retain the necessary control over the management of the Fund which is consistent with their responsibilities under the Act, section 2584.8477(e)-4 of the proposal set forth procedures for expeditious revocations and terminations of allocations. Thus, the proposed regulation required that any allocation of fiduciary responsibility must be revocable at will by the allocating fiduciary. The proposal did not mandate a minimum notice period in order that a revocation may be effected quickly where circumstances reasonably require prompt action. In all cases, a revocation must set forth in writing the responsibilities which are the subject of the revocation and must be signed by the revoking fiduciary (in the case of the Board, by its Chairman).

As proposed, the termination of an allocation by a person to whom responsibility has been allocated must follow similar procedures. In addition to setting forth the pertinent facts in writing, a termination must be acknowledged in writing by the fiduciary to whom the subject duties are being restored.

The proposed regulation assigned to the Executive Director the responsibility to communicate to the Fund participants and beneficiaries the occurrence of any revocation or termination. This communication must include information which identifies the fiduciaries who are to assume the responsibilities which were the subject of the revocation or termination.

The Department received no comments on this section and, thus, adopts it as proposed, modified, as previously described, only to the extent necessary to clarify the voting requirement of a revocation of a Board function.

### 5. Effect of Allocation

In general, section 2584.8477(e)-5 of the proposal stated that where fiduciary responsibility has been allocated to another person pursuant to these procedures, the allocating fiduciary will be relieved of any fiduciary liability for any act of that person. However, the proposed regulation incorporated the provisions on fiduciary liability which are set forth at section 8477(e)(1)(E) of the Act so that an allocating fiduciary would retain liability for an allocated responsibility where he or she has violated the prudence standard set forth

at section 8477(b)\* of the Act with respect to: (a) the allocation or the continuation of the allocation; or (b) the implementation of the procedures set forth in the final version of this regulation. The duty to monitor the performance of a person to whom fiduciary responsibility has been allocated, which is implicit in the duty to discontinue any allocation where prudence so dictates, was explicitly imposed by the proposal, and the allocating fiduciary must prudently monitor.

FERSA section 8477(e)(1)(E) also imposes liability on an allocating fiduciary where such fiduciary would otherwise be liable under FERSA section 8477(e)(1)(D). FERSA section 8477(e)(1)(D) imposes joint and several liability upon a fiduciary with respect to the Fund who: (1) Participates knowingly in, or knowingly attempts to conceal, conduct which the fiduciary knows to be a breach of fiduciary duty by another Fund fiduciary; (2) by failing to comply with the prudence standard of FERSA section 8477(b) in the performance of his fiduciary duties, enables another Fund fiduciary to commit a breach; or (3) has knowledge of a breach by another Fund fiduciary and fails to make reasonable efforts to remedy that breach. Thus, the proposal provided that an allocating fiduciary would retain the co-fiduciary liability described in section 8477(c)(1)(D) of the Act. The Department adopts section 2584.8477(e)-5 as proposed.

### 6. Effective Date

Pursuant to § 2584.8477(e)-7 of the proposal, the regulation would be effective thirty days after publication in final form. Fiduciary liability for transactions occurring after that date would be determined by reference to this regulation regardless of whether any associated allocation may have been made before or after this effective date. As stated in the preamble to the proposal, liability for transactions occurring before the effective date of this regulation would continue to be governed by the interim regulation which appears at title 5, CFR, Chapter

\* Section 8477(b)(1) of the Act provides in relevant part: "(b)(1) To the extent not inconsistent with the provisions of this chapter and the policies prescribed by the Board, a fiduciary shall discharge his responsibilities with respect to the Thrift Savings Fund or applicable portion thereof solely in the interest of participants and beneficiaries and—  
 \* \* \* (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent individual acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like objectives \* \* \*."

IV, Sections 1660.1 through 1660.5. Thus, the Department stated its intent to recognize as valid, until the effective date of the Department's allocation regulation, any allocation made both in accordance with the requirements of the interim regulation (5 CFR 1660.1-1660.5) and during the statutorily defined effective period of that interim procedural regulation.\* In order to better effectuate this expressed intent, the Department has amended the last sentence of § 2584.8477(e)-7. The Department has also amended § 2584.8477(e)-7 in general to make the procedure effective upon the date of publication. The Department believes the immediate effective date meets the requirements of 5 U.S.C. 553(d) because: this procedure relieves a restriction on the ability to allocate fiduciary responsibility under FERSA; by publishing this procedure for notice and comment the Department put all interested persons on notice of the contents of this regulation and it received comments only from the Executive Director of the Board which were addressed earlier; and to delay unnecessarily the effective date of this regulation beyond the effective period of the interim procedures would only serve to create unnecessary administrative disruptions of the ability to allocate fiduciary responsibility under FERSA.

**Executive Order 12291 Statement.** The Department has determined that this final regulation is not a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. The action will impose no additional costs on the Thrift Savings Fund.

**Regulatory Flexibility Act Statement.** The Department has determined that this regulation would have no significant economic impact on small entities. In conducting the analysis required under the Regulatory Flexibility Act, it was estimated that the implementation of this regulation would pose no additional

\* Neither this statement nor the corresponding operative language of the regulation should be read as relieving the allocating fiduciary of responsibility ascribed to him pursuant to FERSA sections 8477(b), (e)(1)(D), or (e)(1)(E) with regard to the continuation of any such allocation.

costs to the Thrift Savings Fund. The only burden attributable to this regulation is the burden of written communication of an allocation by the Board or Executive Director to plan participants and beneficiaries, which may be incorporated in other disclosure documents already required under current law. The regulation does not otherwise affect any small entities.

**Paperwork Reduction Act Statement.** Sections 2584.8477(e)-3(a)(4), 3(b)(3) and 4(e) of the final regulation contain paperwork requirements. Pursuant to the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the Office of Management and Budget has assigned this regulation control number 1210-0071.

**Statutory Authority.** The final regulation set forth herein is issued pursuant to section 8477(e)(1)(E) (Pub. L. 99-335, 100 Stat. 585, 5 U.S.C. 8477(e)(1)(E)) of the Act and under Secretary of Labor's Order No. 1-87.

### List of Subjects in 29 CFR Part 2584

Employee benefit plans, Fiduciary, Government employees, Retirement, Pensions.

In view of the foregoing the Department amends Chapter XXV of Title 29 as follows:

By adding in the appropriate place, the following new Part 2584 to Subchapter J:

### SUBCHAPTER J—FIDUCIARY RESPONSIBILITY UNDER THE FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

#### PART 2584—RULES AND REGULATIONS FOR THE ALLOCATION OF FIDUCIARY RESPONSIBILITY

Sec.	
2584.8477(e)-1	General.
2584.8477(e)-2	Allocation of fiduciary duties.
2584.8477(e)-3	Procedures for allocation.
2584.8477(e)-4	Revocation and termination of allocation.
2584.8477(e)-5	Effect of allocation.
2584.8477(e)-6	Definitions.
2584.8477(e)-7	Effective date.

Authority: 5 U.S.C. 8477(e)(1)(E) and Secretary's Order 1-87, 52 FR 13139 (April 21, 1987).

#### § 2584.8477(e)-1 General.

5 U.S.C. 8477(e)(1)(E) provides that any fiduciary with respect to the Thrift Savings Fund of the Federal Employees Retirement System who allocates a fiduciary responsibility to another person pursuant to procedures prescribed by the Secretary of Labor shall not be liable for an act or omission of such person except in specified circumstances. This Part sets forth the procedures which have been prescribed

by the Secretary of Labor for the allocation of fiduciary responsibilities.

#### § 2584.8477(e)-2 Allocation of Fiduciary Duties.

(a) The fiduciary duties of the Board as set forth at 5 U.S.C. 8472 may not be allocated to any person other than a member or members of the Board.

(b) The Executive Director may allocate authority and responsibility for the investment and management of the Fixed Income Investment Fund to a qualified professional asset manager(s).

(c) The Executive Director may allocate authority and responsibility for the investment and management of the Government Securities Investment Fund and the Common Stock Index Investment to an investment manager(s).

(d) Notwithstanding any other provision of this part, no allocation may be made which would constitute:

(1) A violation of an express policy of the Board; or

(2) An invalid delegation according to the Act or any other law.

(e) Except as provided in this part, no person who has or may acquire fiduciary responsibility in connection with the Thrift Savings Fund may allocate such responsibility to another person.

#### § 2584.8477(e)-3 Procedures for Allocation.

(a) Any allocation made by the Board must—

(1) Be authorized by the concurring vote of a majority of the total membership of the Board;

(2) Be made in writing, signed by the Chairman of the Board and acknowledged in writing by the receiving Board member or members;

(3) Set forth the duties and responsibilities allocated, either in the body of the document or by reference to another document existing at the time of the allocation; and

(4) Be communicated in an appropriate written form to the Executive Director, the participants and the beneficiaries of the Thrift Savings Fund.

(b) Any allocation made by the Executive Director must—

(1) Be made in writing, signed by the Executive Director and acknowledged in writing by the receiving fiduciary;

(2) Set forth the duties and responsibilities allocated, either in the body of the document or by reference to another document existing at the time of the allocation; and

(3) Be communicated in an appropriate written form to the



participants and beneficiaries of the Thrift Savings Fund.

**§ 2584.8477(e)-4 Revocation and termination of allocation.**

(a) Any allocation made pursuant to this part must be revocable at will by the allocating fiduciary, subject only to notice which is reasonable under the circumstances.

(b) Any revocation by the allocating fiduciary or termination of an allocation by the fiduciary to whom duties have been allocated must set forth in writing the duties and responsibilities as to which the revocation or termination is effective, either in the body of the document or by reference to another document existing at the time of the revocation or termination.

(c) Any revocation of an allocation must—

(1) In the case of an allocation which was made by the Board, be authorized by the concurring vote of a majority of the total membership of the Board and be signed by the Chairman of the Board, or

(2) In the case of an allocation which was made by the Executive Director, be signed by the Executive Director.

(d) Any termination of an allocation, to be effective, must—

(1) In the case of an allocation which was made by the Board, be signed by the terminating fiduciary and acknowledged in writing by the Chairman of the Board, or

(2) In the case of an allocation which was made by the Executive Director, be signed by the terminating fiduciary and acknowledged in writing by the Executive Director.

(e) Any revocation or termination of an allocation must be communicated by the Executive Director in an appropriate written form to the participants and beneficiaries of the Thrift Savings Fund in a manner which identifies the person(s) assuming the responsibilities which were the subject of the revocation or termination.

**§ 2584.8477(e)-5 Effect of allocation.**

Where fiduciary responsibility has been allocated to another person or persons pursuant to the procedures contained in this part, the allocating fiduciary shall not be liable for any act or omission of such person or persons unless:

(a) The allocating fiduciary has violated 5 U.S.C. 8477(b) with respect to—

(1) The allocation or the continuation of the allocation,

(2) The implementation of these procedures, or

(3) The duty to monitor the performance of such person or persons in a reasonable manner during the life of the allocation, or

(b) The allocating fiduciary would otherwise be liable in accordance with 5 U.S.C. 8477(e)(1)(D).

**§ 2584.8477(e)-6 Definitions.**

As used in this Part:

(a) "Act" means the Federal Employees' Retirement System Act of 1986, 5 U.S.C. § 8401 *et seq.* (Supp. IV 1986);

(b) "Board" means the Federal Retirement Thrift Investment Board established pursuant to 5 U.S.C. 8472;

(c) "Common Stock Index Investment Fund" means the fund established under 5 U.S.C. 8438(b)(1)(C);

(d) "Executive Director" means the executive director of the Federal Retirement Thrift Investment Board as appointed pursuant to 5 U.S.C. 8474;

(e) "Fiduciary duty" and "fiduciary responsibility" mean any duty or responsibility which involves the exercise of discretionary authority or discretionary control over—

(1) The management or disposition of the assets of the Thrift Savings Fund, or

(2) The administration of the Thrift Savings Fund.

(f) "Fixed Income Investment Fund" means the fund established under 5 U.S.C. 8438(b)(1)(B);

(g) "Government Securities Investment Fund" means the fund established under 5 U.S.C. 8438(b)(1)(A);

(h) "Investment manager" means any fiduciary who—

(1) Has the power to manage, acquire or dispose of any asset of the plan,

(2) Is (i) registered as an investment adviser under the Investment Advisers Act of 1940, (ii) a bank, as defined in that Act, or (iii) an insurance company qualified to perform services described in paragraph (h)(1) of this section under the laws of more than one state, and

(3) Has acknowledged in writing that he or she is a fiduciary with respect to the Thrift Savings Fund;

(i) "Qualified professional asset manager" has the meaning which is prescribed at 5 U.S.C. 8438(a)(7).

(j) "Thrift Savings Fund" means the fund established under 5 U.S.C. 8437.

**§ 2584.8477(e)-7 Effective Date.**

This section is effective December 29, 1988, and liability for any transaction which occurs on or after this date will be governed by this section only. In accordance with section 114(a) of Pub. L. 99-556, the interim regulations promulgated by the Board appearing at Title 5, CFR, Chapter VI, § 1660.1 through 1660.5 will no longer be effective

as of December 29, 1988.

Liability for transactions which occur before the effective date of this regulation, however, will continue to be governed by allocations made both during the statutorily defined effective period of the previously cited interim regulations and pursuant to the requirements of those regulations.

Signed at Washington, DC this 23rd day of December, 1988.

David M. Walker,

Assistant Secretary for Pension and Welfare Benefits.

[FR Doc. 88-29955 Filed 12-28-88; 8:45 am]

BILLING CODE 4510-29-M

**29 CFR Part 2585**

**Final Interim Rule Relating to the Prohibited Transaction Exemption Procedures Under the Federal Employee's Retirement System Act**

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Interim final regulation.

**SUMMARY:** This document contains a final interim regulation that describes the procedures for filing and processing applications for exemptions from the prohibited transaction provisions of The Federal Employees' Retirement System Act of 1986 (FERSA). The Secretary of Labor is authorized to grant exemptions from these restrictions and to establish a procedure to process such exemptions. For applications for exemptions filed under FERSA, this interim final regulation adopts the procedures currently followed by applicants for exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code).

**DATES:** *Effective Date:* This regulation is effective December 29, 1988. The interim regulation would be effective with respect to all applications for exemptions filed with the Department under 5 U.S.C. 8477(c)(3) at any time after December 29, 1988.

Applications for exemptions filed before that date would be governed by ERISA Procedure 75-1.

*Expiration Date:* This Interim Final Rule shall expire on the effective date of the revised Prohibited Transaction Procedure Regulation, published in proposed form for comment on June 28, 1988. See 53 FR 24422. The Department will publish a document removing these interim regulations when it adopts final

regulations based on the published proposal at 53 FR 24422 (June 28, 1988).

**FOR FURTHER INFORMATION CONTACT:** Linda N. Winter, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210, (202) 523-8586, or Miriam Freund, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 523-8194.

**SUPPLEMENTARY INFORMATION:** Public reporting burden for this collection of information is estimated to average 35 hours per response, including the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This is the same hour burden approved and applicable to previous ERISA exemption application procedures, which are herein being adopted for FERSA purposes. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Director, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-1301, Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

Sections 8477(c)(2) of FERSA<sup>1</sup> prohibits a fiduciary with respect to the Thrift Savings Fund from (1) dealing with any assets of the Thrift Savings Fund in his own interest or for his own account; (2) acting in an individual capacity or any other capacity, in any transaction involving the Thrift Savings Fund on behalf of a party, or representing a party, whose interests are adverse to the interests of the Thrift Savings Fund or the interests of its participants or beneficiaries; or (3) receiving any consideration for his own personal account from any party dealing with sums credited to the Thrift Savings Fund in connection with a transaction involving assets of the Thrift Savings Fund. These restrictions are derived from the provisions of section 406(b) of

<sup>1</sup> Sections 8401 through 8479 of Title 5, United States Code, [U.S.C.] were enacted by Congress at section 101(a) of FERSA. The Act itself provides no independent numbering system for these provisions, but directly assigns the chapter and section numbers under which those provisions are to be codified in Title 5 of the U.S.C. For purposes of clarity and convenience, therefore, this preamble references the provisions of FERSA by using the U.S.C. section numbers which Congress assigned to them in the Act. Thus, for example, the above reference to "section 8477(e)(1)(E) of FERSA" is to Title 5 U.S.C. 8477(e)(1)(E).

ERISA. Section 8477(c)(3) of FERSA authorizes the Secretary of Labor to grant administrative exemptions from the restrictions of FERSA Section 8477(c)(2). The Secretary of Labor also has authority under 408(a) of ERISA to grant fiduciaries administrative exemptions for identical activities prohibited by ERISA section 406(b). Pursuant to this authority under ERISA, the Secretary issued (jointly with the Secretary of the Treasury) an exemption application procedure on April 28, 1975, (ERISA Proc. 75-1, 40 FR 18471, also issued as Rev. Proc. 75-26, 1975-1 G.B. 722). Under section 111 of the FERSA Technical Corrections Act of 1986 (Pub. L. 99-556, October 27, 1986), the Department's existing exemption procedures are made applicable to exemption applications under FERSA until the earlier of the date of publication of final regulations adopting an exemption procedure or December 31, 1988. Thus, prior to the effective date of this interim final regulation, persons applying for exemptions from FERSA prohibited transaction rules should have been following the requirements of ERISA Proc. 75-1.

On June 28, 1988, the Department proposed for comment a new exemption application procedure, to be used by applicants for exemptions under ERISA section 408(a), Code section 4975(c)(2) and FERSA section 8477(c)(3). See 53 FR 24422 (June 28, 1988). The Department is currently considering the comments received on the proposed exemption procedure. To ensure the uninterrupted processing of exemption applications under FERSA after December 31, 1988, the Department shall adopt, for applications for exemptions from transactions prohibited under FERSA section 8477(c)(2), this Interim Final Rule which contains the procedures provided in ERISA Proc. 75-1 which are set out below in full, modified only to the extent necessary to remove references or requirements not applicable to FERSA. This prohibited transaction exemption procedure consists of rules of agency procedure and practice, and is therefore exempted under the Federal Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A), from the ordinary notice and comment provisions for agency rule making. This Interim Final Rule shall expire upon the effective date of the final revised exemption application procedure.

**Executive Order 12291 Statement**

The Department has determined that the interim regulatory action would not constitute a "major rule" as that term is used in Executive Order 12291 because

the action would not result in: An annual effect on the economy of \$100 million; a major increase in costs or prices for consumers, individual industries, government agencies, or geographical regions; or significant adverse effects on competition, employment, investment productivity, innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets.

**Regulatory Flexibility Act**

The Department has determined that this regulation would not have a significant economic impact on small plans or other small entities. As stated previously, this regulation would do little more than describe procedures that reflect practices already in place for filing and processing applications for exemptions from the prohibited transaction provisions of the Federal Employee Retirement Systems Act of 1986.

**Paperwork Reduction Act**

This Final Interim Regulation adopts for applications for exemptions from the prohibited transaction sections of FERSA those procedures presently used for identical applications under ERISA. Furthermore, applications for exemptions currently being processed under FERSA already follow this procedure by operation of law. Accordingly, this regulation will not increase the paperwork burden for applicants. The regulation has been forwarded for approval to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and has been assigned control number 1210-0070.

**Statutory Authority**

The interim regulation is issued pursuant to authority granted under 5 U.S.C. 8477(c)(3) and under Secretary of Labor's Order No. 1-87 (52 FR 13139 April 21, 1987).

**List of Subjects in 29 CFR Part 2585**

Administrative practice and procedure, Employee benefit plans, Federal Employees' Retirement System Act, Fiduciary, Government employees, Party in interest, Prohibited transactions, Pensions.

For the foregoing reasons set out in the preamble, Title 29, Chapter XXV, Part 2585 of the Code of Federal Regulations is added as follows:

1. By adding in the appropriate place the following new Part 2585 to Subchapter J:



# **PART 25885—INTERIM PROCEDURES FOR FILING AND PROCESSING PROHIBITED TRANSACTION EXEMPTION APPLICATIONS UNDER FERSA**

Sec.  
2585.1. Purpose.  
2585.2. Background and definitions.  
2585.3. Persons who may apply for exemptions.  
2585.4. Instructions to applicants.  
2585.5. Conferences.  
2585.6. Publication of notice in the Federal Register.  
2585.7. Notification of interested persons.  
2585.8. Inaccuracies, changes of fact, and documentation.  
2585.9. Effect of exemptions.  
2585.10. Public inspection.  
2585.11. Effective date.  
2585.12. Expiration date.

Authority: 5 U.S.C. 8477(c)(3); Secretary of Labor's Order No. 1-87.

## **§ 2585.1 Purpose.**

The purpose of this interim rule is to set forth the general procedures of the Department of Labor for the processing of applications for exemption under 5 U.S.C. 8477(c)(3) until such time as the Department publishes in final the Prohibited Transaction Application Procedure proposed for comment on June 28, 1988. (53 FR 24422.) This Interim Rule is identical to Employee Retirement Income Security Act of 1974 (ERISA) Proc. 75-1, the procedure followed by the Department in processing exemption applications under ERISA and the Internal Revenue Code of 1986 (the CODE), except to the extent modification was necessary to remove references and requirements not applicable to the Federal Employees' Retirement Systems Act of 1986.

## **§ 2585.2 Background and definitions.**

(a) Section 5 U.S.C. § 8477(c)(3) provides that the Secretary of Labor may grant a conditional or unconditional exemption respecting any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by 5 U.S.C. 8477(c)(2).

(b) The Secretary of Labor has delegated his functions under 5 U.S.C. 8477(c)(3) to the Assistant Secretary of Labor for Pension and Welfare Benefits Administration.

(c) Unless otherwise provided in this procedure, the term "Secretary" shall mean the Assistant Secretary of Labor for Pension and Welfare Benefits Administration.

(d) The term "party in interest" includes a fiduciary.

(e) Each application considered by the Secretary will be assigned an identifying number. Such number may be referred

to in lieu of the description required by § 2585.4(c)(4).

## **§ 2585.3 Persons who may apply for exemptions.**

(a) An exemption proceeding under this procedure may be initiated by the Secretary on his own motion.

(b) An exemption proceeding under this procedure shall be initiated by the Secretary upon the application of:

(1) Any party in interest with respect to the Thrift Savings Fund who is or may be a party to the prohibited transaction or transactions for which an exemption is sought; or

(2) In the case of an application for exemption with respect to a class of fiduciaries, or class of transactions, in addition to any person described in paragraph (b)(1) of this section, an association or organization representing parties in interest who may be parties to such prohibited transaction or transactions.

(c) An application by or for a person described in § 2585.3(a) or § 2585.3(b) must be signed by the applicant or by his authorized representative. If the application is signed by a representative of the applicant, he must be:

(1) An attorney who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia, and who files with the Secretary a written declaration that he is currently qualified as an attorney and he is authorized to represent the principal;

(2) A certified public accountant who is duly qualified to practice in any State, possession, territory, Commonwealth, or the District of Columbia, and who files with the Secretary a written declaration that he is currently qualified as a certified public accountant and he is authorized to represent the principal;

(3) A person, other than an attorney or certified public accountant, enrolled to practice before the Internal Revenue Service, and who files with the Secretary a written declaration that he is currently enrolled (including in the declaration either his enrollment number or the expiration date of his enrollment card) and that he is authorized to represent the principal. (See Treasury Department Circular No. 230. Revised C.B. 1968-2, 1171, as amended, C.B. 1967-1,433 and C.B. 1970-2, 644, for the rules on who may practice before the Internal Revenue Service.)

The requirements of this section do not apply to an individual representing his full-time employer, or to a bona fide officer, administrator, trustee, etc., representing a corporation, trust, estate,

association, or organized group, including a labor organization.

(d) An application for exemption relating to an individual transaction will not ordinarily be considered separately if a class exemption which would encompass the individual transaction either (1) has been the subject of an exemption proceeding or (2) is under consideration by the Secretary.

## **§ 2585.4 Instructions to applicants.**

(a) The application shall be filed with: Exemption Application [Office of Regulations and Interpretations, Division of Exemptions, Pension and Welfare Benefits Administration, Room N-5671, U.S. Department of Labor, Washington, DC 20210.

(b) An application submitted under this procedure shall contain all of the information specified in paragraph (c) of this section if such application is for an exemption other than for a class of transactions or class of fiduciaries. If the application is for a class of transactions or class of fiduciaries, the application need contain only the information required under paragraphs (4) through (10), (14), and (15) of paragraph (c) of this section. If any of the information specified in paragraph (c) of this section cannot be furnished, an explanation of why it cannot be furnished shall be provided.

(c) Information to be submitted with application for exemption:

(1) The name and type of plan or plans;

(2) The Employer Identification Number (EIN);

(3) The estimated number of plan participants;

(4) A detailed description of the transaction and the fiduciary, or class thereof, for which an exemption is requested;

(5) The possible violation or violations of the prohibited transaction provisions for which exemptions are requested;

(6) Whether such transaction or transactions have been already entered into or are transactions which the parties intend to enter into if the exemption is granted;

(7) Whether the transaction or transactions are customary for the industry or class involved;

(8) The hardship or economic loss, if any, which would result to the person or persons on whose behalf the exemption is sought, to the plan, and to its participants and beneficiaries from denial of the application;

(9) At the option of the applicant, a draft setting forth the exemption proposed by the applicant;

(10) A statement explaining why such exemption would be:

(i) Administratively feasible;

(ii) In the interest of the plan or plans which would be affected if the exemption were granted and of their participants and beneficiaries; and

(iii) Protective of the rights of the participants and beneficiaries of the affected plan or plans;

(11) Whether, to the best knowledge of the applicant, the plan or trust has ever been found by the Secretary or by a court to have violated the provisions of 5 U.S.C. 8477 (b) or (c);

(12) Whether, to the best knowledge of the applicant, any relief under 5 U.S.C. 8477(c)(3), section 408(a) of ERISA, or section 4975(c)(2) of the Code has been requested by, or provided to, the applicant or any of the parties on behalf of whom the exemption is sought and, if so, a description of such relief (see § 2585.2(e));

(13) Whether, to the best knowledge of the applicant, the applicant or any of the parties to the transaction sought to be exempted is currently, or has been within the last 5 years, a defendant in any lawsuit concerning such person's conduct as a fiduciary, party in interest, or disqualified person with respect to any plan;

(14) With respect to the notification of interested persons in accordance with § 2585.7, the applicant shall include the following:

(i) A description of the interested persons to whom notice will be provided;

(ii) The manner by which such notice will be provided; and

(iii) The time period within which such notice will be given (see § 2585.7(c));

(15) A certification by the applicant that, to the best of the applicant's knowledge, the application is accurate and complete.

## **§ 2585.5 Conferences.**

(a) The applicant shall indicate whether a conference is desired in the event the Secretary contemplates not granting the requested exemption. Any such conference shall be held in Washington, DC.

(b) If more than one applicant has requested an exemption with respect to the same or similar class of transactions, and the Secretary contemplates not granting the exemption, and if more than one applicant has requested a conference, such conferences will be scheduled, insofar as possible, as a joint conference with all such applicant's present.

(c) An applicant is entitled to only one conference.

(d) In any case in which a hearing is held, an applicant shall not be entitled to a conference.

## **§ 2585.6 Publication of notice in the Federal Register.**

(a) Before granting an exemption under this procedure, the Secretary shall publish notice of the pendency of such exemption in the Federal Register, stating the earliest date upon which a decision may be entered.

(b) The notice shall provide that any interested person may, within the period of time specified therein, submit to the Secretary in writing any comments relating to the proposed exemption, including a statement of the nature of the person's interest in the matter.

(c) Where the exemption involves one or more transactions described in 5 U.S.C. 8477(c)(2), between the Thrift Savings Fund and a fiduciary, the notice shall also provide that any interested person may, within the period of time specified therein, request that a hearing be held, stating the reasons for requesting such a hearing and the nature of the person's interest in the matter.

## **§ 2585.7 Notification of interested persons.**

(a) If a notice is published in the Federal Register in accordance with § 2585.6, the applicant shall give adequate notice to interested persons of the pendency of the exemption. If the Secretary deems the notice that the applicant proposes to give to interested persons pursuant to § 2585.4(c)(14) to be inadequate, the Secretary shall, prior to the publication of the pendency of the exemption, specify in writing to the applicant the notice that would be considered to be adequate, and shall secure the applicant's written confirmation that such notice will be provided.

(b) The notice specified in § 2585.4(c)(14) shall not be considered adequate unless:

(1) It contains a copy of the notice of pendency of such exemption published in the Federal Register in accordance with § 2585.6(a);

(2) It timely informs interested persons of their right to comment and of their right to request a hearing, within the period set forth in the notice of the pendency of the exemption.

(c) No exemption will be granted unless the applicant provides evidence satisfactory to the Secretary that adequate notice was timely provided to interested persons.

## **§ 2585.8 Inaccuracies, changes of fact, and documentation.**

(a) If any material facts contained in the application or any documents or

testimony adduced by the applicant in support thereof is discovered by the applicant to be inaccurate, or if any such fact substantially changes, the applicant shall promptly notify the Secretary in writing and, in the case of an inaccuracy, shall include a statement of the reasons for such inaccuracy.

(b) The Secretary may require the applicant to provide such documentation as is considered necessary to verify the statements contained in the application.

## **§ 2585.9 Effect of exemptions.**

(a) An exemption which is granted shall be effective to the extent and under the conditions described in such exemption. Except in the case of an exemption granted with respect to a class of fiduciaries or class of transactions, an exemption may be relied upon only by the parties so exempted or the parties to the transaction so exempted.

(b) The Secretary may at any time revoke or limit an exemption. Before ordering any such revocation or limitation, the Secretary shall give the applicant and any persons who filed comments or testified at a hearing with respect to the application for exemption at least 30 days' notice of the proposed revocation or limitation, including the reasons therefor, and an opportunity to comment with respect to such revocation or limitation.

(c) Except in rare or unusual circumstances, any revocation or limitation of an exemption will not be given retroactive effect, if the party or parties covered by the exemption have relied in good faith upon the exemption, and such retroactive revocation or limitation would result in significant injury to them. Retroactive revocation or limitation may be ordered, however, with respect to one or more parties covered by the exemption where there has been a misstatement or omission of a material fact with respect to the exemption. In addition, retroactive revocation or limitation may be ordered where there has been a substantial change in a material fact with respect to the exemption and such change has not been reported as required by § 2585.8(a); but such revocation or limitation will not be made retroactive prior to the time of such substantial change of material fact.

## **§ 2585.10 Public inspection.**

Applications for exemptions (including documents submitted in support of such applications) and all comments and records of hearings and conferences (if any) pertaining thereto



shall be open to public inspection at the Public Disclosure Room, Room N-5507, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

#### § 2585.11 Effective date.

This interim procedure is effective with respect to all applications for exemptions filed with the Department under 5 U.S.C. 8477(c)(3) at any time after December 29, 1988. Applications for exemptions filed before that date will be governed by ERISA Procedure 75-1.

#### § 2585.12 Expiration date.

This Interim Regulation shall expire on the effective date of the revised Prohibited Transaction Exemption Procedure, published in proposed form on June 28, 1988, 53 FR 24422. The Department will publish a document removing these interim regulations when it adopts final regulations based on the published proposal at 53 FR 24422 (June 28, 1988).

Signed at Washington, DC, this 23rd day of December 1988.

David M. Walker,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 88-30011 Filed 12-28-88; 8:45 am]

BILLING CODE 4510-29-M

### DEPARTMENT OF THE INTERIOR

#### Office of Surface Mining Reclamation and Enforcement

#### 30 CFR Part 906

#### Removal of Condition From the Colorado Permanent Regulatory Program Under Surface Mining Control and Reclamation Act of 1977

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

**ACTION:** Final rule.

**SUMMARY:** OSMRE is announcing the removal of the condition at 30 CFR 906.11(ee) which the Secretary placed on the approval of the Colorado permanent regulatory program (hereinafter referred to as the Colorado program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The condition of approval pertains to citizen suits. Colorado satisfied the condition of approval by amending its program to require a showing that a violation or order would immediately affect a legal interest of the plaintiff as a condition precedent to commencement of a citizen

suit without 60 days prior notice. The amendment revises the State program to be consistent with the corresponding SMCRA requirement.

**EFFECTIVE DATE:** December 29, 1988.

**FOR FURTHER INFORMATION CONTACT:** Robert H. Hagen, Director, Albuquerque Field Office, Office of Surface Mining Reclamation and Enforcement, 625 Silver Avenue SW., Suite 310, Albuquerque, NM 87102; Telephone (505) 766-1486.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On December 15, 1980, the Secretary of the Interior conditionally approved the Colorado program. Information regarding the general background for the Colorado program, including the Secretary's findings, the disposition of comments, and detailed explanation of the conditions of approval can be found in the December 15, 1980, *Federal Register* (45 FR 82173). The remaining condition of approval is identified at 30 CFR 906.11; decisions concerning conditions of approval are discussed in detail in *Federal Register* notices published on December 16, 1982 (47 FR 56342); May 1, 1984 (49 FR 18475); November 15, 1985 (50 FR 47215); December 6, 1985 (50 FR 49924); February 5, 1986 (51 FR 4485); May 30, 1986 (51 FR 19547); July 1, 1986 (51 FR 23750); February 5, 1987 (52 FR 3632); May 7, 1987 (52 FR 17291); and September 25, 1987 (52 FR 36026).

##### II. Discussion of the Condition

As discussed in finding 4(h)(v) of the December 15, 1980, *Federal Register* notice conditionally approving the Colorado program (45 FR 82173), the Secretary found that Colorado must amend its program to allow plaintiffs whose legal interests would be immediately affected by a violation or order to immediately commence a lawsuit without 60 days prior notice of the regulatory authority. The Colorado Surface Coal Mining Reclamation Act at CRS 34-33-135(2) (a) and (b) required a plaintiff to show irreparable damage before being able to immediately commence a citizen suit. The State argued that the existing provision was intended for emergency situations and that, to obtain temporary relief, a plaintiff would need to show irreparable damage to obtain such relief under either the Federal or State statutes. The Secretary of the Interior did not agree.

The applicable Federal statute, Section 520(b)(2) of SMCRA, allows a citizen or operator to immediately file a citizen suit, without 60 days prior notice after written notice is provided to the

regulatory authority showing that the offending violation or order constitutes an imminent threat to the plaintiff's health or safety, or would immediately affect a legal interest of the plaintiff. Therefore, under Federal statute, a complainant would obtain final relief as much as 60 days earlier if the violation would immediately affect a legal interest of the plaintiff. Whereas, under the State statute the plaintiff would be subject to a higher threshold of showing irreparable damage to a legal interest, potentially delaying the granting of a hearing and any subsequent final relief.

On February 23, 1982, Colorado submitted material (Administrative Record No. CO-197) to OSMRE intended to satisfy condition (ee) and other conditions. In the December 16, 1982, *Federal Register* notice (47 FR 56342), the Secretary indicated that review had not been completed on condition (ee), so a decision was deferred. Colorado then submitted additional information (Administrative Record No. CO-207) intended to satisfy condition (ee) on May 26, 1983. In the May 1, 1984 *Federal Register* notice (49 FR 18475), the Secretary found the Colorado provisions in the May 26, 1983, submittal still inconsistent with SMCRA.

In a letter dated May 20, 1986 (Administrative Record No. CO-290), Colorado maintained that the State statute at CRS 34-33-135(2)(b) was consistent with SMCRA and requested that OSMRE reconsider the need for condition (ee). By letter dated August 14, 1986 (Administrative Record No. CO-299), OSMRE informed Colorado that, after reviewing the issue, OSMRE found no legal basis for removing the condition.

On July 22, 1987, Colorado submitted a proposed State program amendment (Administrative Record No. CO-354) to OSMRE. The proposed State program amendment is a fully enacted State statute revision signed by the Governor on May 13, 1987. The revision is intended to satisfy condition (ee) by changing the words "irreparable damage" to "immediately affect" in CRS 34-33-135(2)(b). OSMRE announced receipt of the proposed State program amendment in the July 23, 1988, *Federal Register* (53 FR 23660). No substantive comments were received, and no public hearing was requested or held.

##### III. Secretary's Finding and Decision

As discussed above, Colorado revised the State statute, CRS 34-33-135(2)(b), to provide a threshold, identical to that in section 520(b)(2) of SMCRA, for allowing expedited hearings and relief for plaintiffs whose legal interests are

immediately affected by a violation or order of the regulatory authority.

The Secretary finds, in accordance with SMCRA, 30 CFR 732.13, 30 CFR 732.15, and 30 CFR 732.17, that the fully enacted statute submitted by Colorado on July 22, 1987, meets the requirements of 30 CFR 906.11(ee) and is consistent with SMCRA. Therefore, 30 CFR 906.11 is being amended to remove and reserve paragraph (ee).

#### IV. Public Comments

Acknowledgements were received from the following Federal agencies: Bureau of Mines, U.S. Fish and Wildlife, Bureau of Land Management, and the Environmental Protection Agency. This disclosure of Federal agency comments is made pursuant to Section 503(b)(1) of SMCRA and 30 CFR 732.17(h)(11). No other public comments were received and no hearing was requested.

#### VI. Procedural Matters

##### 1. Compliance with the National Environmental Policy Act

The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C. 1292(d), no environmental impact statement need be prepared on this rulemaking.

##### 2. Executive Order No. 12291 and the Regulatory Flexibility Act

On July 12, 1984, the Office of Management and Budget (OMB) granted OSMRE an exemption from sections 3, 4, 7, and 8 of Executive Order 12291 for action directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any new requirements; rather, it will ensure that existing requirements established by SMCRA and the Federal rules will be met by the State.

##### 3. Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by OMB under 44 U.S.C. 3507.

#### List of Subjects in 30 CFR Part 906

Coal mining, Intergovernmental

relations, Surface mining, Underground mining.

James E. Cason,  
Deputy Assistant Secretary, Land and Minerals Management.

Date: December 20, 1988.

For the reasons set out in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below.

#### PART 906—COLORADO

1. The authority citation for Part 906 is amended to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

#### § 906.11 [Amended]

2. Section 906.11 is amended by removing and reserving paragraph (ee).

[FR Doc. 88-29901 Filed 12-28-88; 8:45 am]

BILLING CODE 4310-05-M

### DEPARTMENT OF DEFENSE

#### Office of the Secretary

#### 32 CFR Part 58

[DoD Instruction 1438.4]

#### Compliance With Host Nation Human Immunodeficiency Virus (HIV) Screening Requirements for DoD Civilian Employees

**AGENCY:** Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** Some countries require that DoD civilian employees be screened for the Human Immunodeficiency Virus (HIV) before they may enter or continue their assignment, in the country. DoD is obligated to comply with such requirements. HIV is the virus associated with the Acquired Immune Deficiency Syndrome (AIDS). To assure the consistent observance of these requirements and the proper treatment of its employees, the Department of Defense issues this Part. It establishes a single approval authority and uniform policies and procedures. It also provides guidance for personnel administration and protection of employees' rights. This part would not apply to employees of organizations or business concerns under contract to DoD, nor dependents or family members of DoD military and civilian personnel. The policy would apply to those members of the general public who apply for and have been tentatively selected for DoD civilian

employment in a host nation that requires HIV screening.

**EFFECTIVE DATE:** December 5, 1988.

**FOR FURTHER INFORMATION CONTACT:** Thomas W. Hatheway, telephone 202-695-2012.

**SUPPLEMENTARY INFORMATION:** The proposed rule for screening job applicant and employees for the HIV was published in the *Federal Register* on August 30, 1988. We received no comments from interested parties as a result of that publication. During official coordination with DoD, several comments were received to clarify application of the policy to employees who are currently assigned to a host nation that may institute HIV screening requirements. Appropriate clarification was made in the final rule.

#### List of Subjects in 32 CFR Part 58

Civilian employees, Foreign relations.

32 CFR is amended by adding Part 58 to read as follows:

#### PART 58—COMPLIANCE WITH HOST NATION HUMAN IMMUNODEFICIENCY VIRUS (HIV) SCREENING REQUIREMENTS FOR DOD CIVILIAN EMPLOYEES

Sec.

- 58.1 Purpose.
- 58.2 Applicability.
- 58.3 Definitions.
- 58.4 Policy.
- 58.5 Responsibilities.
- 58.6 Procedures.
- 58.7 Information requirements.

Authority: 10 U.S.C. 113 and 5 U.S.C. 301.

##### § 58.1 Purpose.

This Part establishes policy and procedures for screening DoD civilian employees in compliance with host nation HIV screening requirements and for the use of screening results. It is issued under the authority contained in DoD Directive 5124.2<sup>1</sup>, and as directed by Secretary of Defense Memorandum dated August 4, 1988.

##### § 58.2 Applicability.

This Part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Joint Chiefs of Staff (JCS), the Inspector General of the Department of Defense (IG, DoD), and the Defense Agencies (hereinafter referred to collectively as the "DoD Components").

<sup>1</sup> Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 301, 5801 Tabor Avenue, Philadelphia, PA 19120.



**§ 58.3 Definitions.**

(a) *Human Immunodeficiency Virus (HIV)*. The virus associated with the Acquired Immune Deficiency Syndrome (AIDS).

(b) *Host Nation*. A foreign nation to which DoD U.S. civilian employees are assigned to perform their official duties.

(c) *DoD Civilian Employees*. Current and prospective DoD U.S. civilian employees, including appropriated and nonappropriated fund personnel. It does not include members of the family of DoD civilian employees, employees of or applicants for positions with contractors performing work for the Department of Defense, or their families.

**§ 58.4 Policy.**

It is DoD policy to comply with host nation requirements for HIV screening of DoD civilian employees.

**§ 58.5 Responsibilities.**

(a) The Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)) shall establish policies governing HIV screening of DoD civilian employees assigned to, performing official travel in, or deployed on ships with ports of call at host nations, in coordination with the Assistant Secretary of Defense (Health Affairs) (ASD(HA)), the Assistant Secretary of Defense (International Security Affairs) (ASD(ISA)), and the DoD General Counsel.

(b) The Assistant Secretary of Defense (International Security Affairs) (ASD(ISA)) shall identify or confirm host nation HIV screening requirements for DoD civilian employees, and coordinate requests for screening with the Department of State.

(c) The Heads of DoD Components shall implement HIV screening policies and procedures for DoD civilian employees identified in § 58.5(a) and shall take the following actions:

- (1) Report newly established host nation HIV screening requirements to the ASD(FM&P) and provide sufficient background information to support a decision.
- (2) Develop and distribute policy implementing instructions.
- (3) Establish procedures to notify individuals who are evaluated as HIV seropositive and provide initial counseling to them.

**§ 58.6 Procedures.**

(a) Requests for authority to screen DoD civilian employees for HIV shall be directed to the ASD(FM&P). Only requests that are based on host nation HIV screening requirement shall be accepted. Requests based on other

concerns, such as sensitive foreign policy or medical health care issues, shall not be considered under this policy. Approvals shall be provided in writing by the ASD(FM&P). Approvals shall apply to all DoD Components that may have activities located in the host nation.

(b) Specific HIV screening requirements may apply to DoD civilian employees currently assigned to positions in the host nation, and to prospective employees. When applied to prospective employees, HIV screening shall be considered as a requirement imposed by another nation that must be met before the final decision to select the individual for a position or before approving temporary duty or detail to the host nation. Thus, the Department of Defense has made no official commitment concerning positions located in host nations with HIV screening requirements to those individuals who refuse to cooperate with the screening requirement or those who cooperate and are diagnosed as HIV seropositive.

(c) DoD civilian employees who refuse to cooperate with the screening requirement shall be treated as follows:

- (1) Those who volunteered for the assignment, whether permanent or temporary in nature, shall be retained in their official position without further action and without prejudice with respect to employee benefits, career progression opportunities, or other personnel actions to which entitled under applicable law or regulation.

(2) Those who are obligated to accept assignment to the host nation under the terms of an employment agreement, regularly scheduled tour of duty, or similar, prior obligation, may be subjected to an appropriate adverse personnel action under the specific terms of the employment agreement or other authorities that may apply.

(3) Host nation screening requirements that apply to DoD civilian employees presently located in the country also must be observed. Appropriate personnel actions may be taken, without prejudice to employee rights and privileges, to comply with the requirement.

(d) Individuals who are not employed in the host nation, who accept the screening and are evaluated as HIV seropositive will be denied the assignment on the basis that evidence of seronegativity is required by the host nation. If denied the assignment, such DoD employees shall be retained in their current positions without prejudice. Appropriate personnel actions may be taken, without prejudice to employee

rights and privileges, with respect to DoD civilian employees currently located in the host nation. In all cases, employees shall be given proper counseling and shall retain all the rights and benefits to which they are entitled including accommodations for the handicapped as provided in ASD(FM&P) Memorandum, FPM Bulletin 792-42, and 24 U.S.C. 784. Non-DoD employees should be referred to appropriate support service organizations.

(e) Some host nations may not bar entry to HIV seropositive DoD civilian employees but may require reporting of such individuals to host nation authorities. In such cases DoD civilian employees who are evaluated as HIV seropositive shall be informed of the reporting requirement. They shall be counseled and given the option of declining the assignment and being retained in their official positions without prejudice or notification to the host nation. If assignment is accepted, the requesting authority shall release the HIV seropositive result as required. Employees presently located in the host nation may also decline to have seropositive results released. In such cases, they may request and be granted early return at Government expense or other appropriate personnel action without prejudice to employee rights and privileges.

(f) A positive confirmatory test by Western blot must be accomplished on an individual if the screening test (ELISA) is positive. A civilian employee shall not be identified as HIV antibody positive unless the confirmatory test (Western blot) is positive. The clinical standards contained in ASD(HA) Memorandum shall be observed during initial and confirmatory testing.

(g) Procedures shall be established by DoD Components to protect the confidentiality of test results for all individuals, consistent with ASD(FM&P) Memorandum dated January 22, 1988 and DoD Directive 5400.11. \*

(h) Tests shall be provided by the DoD Components at no cost to the DoD civilian employees (including applicants).

(i) DoD civilian employees infected with HIV shall be counseled in accordance with Secretary of Defense Memorandum.

**§ 58.7 Information requirements.**

The reporting requirement in § 58.5 is exempt from licensing in accordance

\* See footnote 1 to § 58.1.

with subparagraph E.4.b. of DoD 7750.5-M.

Linda M. Bynum,  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

December 23, 1988.  
[FR Doc. 88-29947 Filed 12-28-88; 8:45 am]  
BILLING CODE 3810-01-M

**32 CFR Part 199**

[DoD 6010.8-R; Amdt. No. 18]

**Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Application of the Medicare Economic Index**

**AGENCY:** Office of the Secretary, DoD.  
**ACTION:** Final rule.

**SUMMARY:** This final rule amends 32 CFR Part 199, the regulation which governs CHAMPUS, by implementing section 8019 of the Department of Defense Appropriation Act for 1989, Pub. L. 100-463. This section limits increases in the CHAMPUS prevailing charges for physician and other authorized individual providers of medical care to the extent justified by economic changes as reflected in appropriate economic index data similar to that used under Medicare. The amended 32 CFR Part 199 will employ the Medicare Economic Index to limit the increases in prevailing charges.

**EFFECTIVE DATE:** February 1, 1989.

**ADDRESS:** Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS), Office of Program Development, Aurora, CO 80045-6900.

For copies of the Federal Register containing this notice, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

The charge for the Federal Register is \$1.50 for each issue payable by check or money order to the Superintendent of Documents.

**FOR FURTHER INFORMATION CONTACT:** Tariq S. Shahid, Office of Program Development, OCHAMPUS, telephone (303) 361-3587.

To obtain copies of this document, see the "ADDRESS" section above.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 77-7834, appearing in the Federal Register on April 4, 1977 (42 FR 17972), the Office of the Secretary of Defense published its regulation, DoD 6010.8-R, "Implementation of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)," as Part 199 of this title. The 32 CFR Part 199 (Dod

6010.8-R) was reissued in the Federal Register on July 1, 1988 (51 FR 24008).

**I. Background**

For the services of physicians and other authorized individual professional providers, the regulation provided that the allowable charge for covered care shall be the lower of: (1) The billed charge for the service; or (2) the prevailing charge level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period. Section 8019 of the Department of Defense Appropriation Act for Fiscal Year 1989, Pub. L. 100-462, requires that—

None of the funds contained in this Act available for the Civilian Health and Medical Program of the Uniformed Services under the provisions for section 1079(a) of title 10, United States Code, shall be available for reimbursement of any physician or other authorized individual provider of medical care in excess of the lower of: (a) The eightieth percentile of the customary charges made for similar services in the same locality where the medical care was furnished, as determined for physicians in accordance with section 1079(h) of title 10, United States Code; or (b) the allowable amounts in effect during fiscal year 1988 increased to the extent justified by economic changes as reflected in appropriate economic index data similar to that used pursuant to title XVIII of the Social Security Act.

Accordingly, beginning February 1, 1989, increases in the CHAMPUS prevailing charges in effect during fiscal year 1988 for physicians and other authorized individual providers will be limited based on application of the Medicare Economic Index (MEI).

On September 29, 1988, we published in the Federal Register (53 FR 38050) a notice to defer update of CHAMPUS prevailing charge levels for professional services originally to be effective October 1, 1988. This notice specified that the deferral of the update will last for 12 months unless CHAMPUS implements the MEI method to limit growth in prevailing charges.

Effective February 1, 1989, this final rule will implement the provisions of Pub. L. 100-463, adopting the MEI under CHAMPUS and lifting the freeze on prevailing charge levels.

**II. Medicare Economic Index (MEI)**

In 1972, in response to concerns about rising physician fees reimbursed under Part 8 of the Medicare program, Congress mandated that an additional fee limit be included in the calculation of "reasonable" charges. Under section 224 of the Social Security Amendments of 1972 (Pub. L. 92-603), the prevailing charge—an amount equal to the

maximum reasonable charge allowed physicians for a specific procedure in a specific locality—could exceed the July 1972-June 1973 prevailing charge only by an amount reflected by an index of changes in physicians' operating expenses and earnings levels. This index is known as the Medicare Economic Index (MEI). Under Medicare, in the case of physicians' services only, annual increases in prevailing charges are provided to account for inflation, but only to the extent that there are updates in the MEI. The MEI updates have progressively increased the initial prevailing charge level that was established for the (then) fiscal year ending June 30, 1973.

The Omnibus Budget Reconciliation Act of 1987 established the MEI for 1989 at 3.0 percent for primary care services and 1.0 percent for other services. Primary care services were defined in the accompanying Conference Report to be office medical visits, home medical visits, emergency department services, and skilled nursing, intermediate care, long-term care facility, nursing home, boarding home, domiciliary or custodial care visits.

CHAMPUS will be following the Medicare procedure in this regard, subject to changes based on differences in the CHAMPUS and Medicare programs. Under CHAMPUS, the primary care MEI will be applied to all maternity care and delivery procedure codes (CPT-4 codes 59000-59899) and well-baby care (CPT-4 codes 90753-90757, 90763-90764, 54150, and 54160). This limited deviation from Medicare's procedure is based on the idea that maternity care and delivery services and well baby care services, which are of little relevance to Medicare, are analogous to the Medicare concept of primary care services.

Medicare makes a variety of adjustments to the MEI in order to accommodate various payment policies not relevant for CHAMPUS. For example, physicians who agree to accept assignment on all Medicare claims for the forthcoming year are known as participating physicians. The prevailing charge limit for nonparticipating physicians is set at a portion of that for participating physicians. Nonparticipating physicians are also subject to a limit on their actual charges. CHAMPUS does not distinguish between participating and nonparticipating physicians for payment amount purposes.

Medicare also provides incentive payments for primary care physicians in underserved rural areas, reduces payments for specified procedures, and

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makes other adjustments as well. These do not apply to CHAMPUS.

### III. Application of the MEI under CHAMPUS

The CHAMPUS annual base collection period covers the July 1 through June 30 period as does the Medicare period. However, the CHAMPUS fee screen year (the 12 month period beginning on the date the profiles are updated) begins on October 1 while the Medicare fee screen year starts on January 1. With the application of the MEI beginning February 1, 1989, the base collection period will remain the same. However, the CHAMPUS fee screen year will be changed from a fiscal year to a calendar year. This will provide conformity with the Medicare procedures and assurance that future year MEI amounts will be available when needed for the CHAMPUS update. It should be noted that since the MEI is being implemented effective February 1, 1989, the CHAMPUS fee screen year for calendar year 1989 will consist of only 11 months. The February 1 effective date has been chosen to provide adequate notice of the MEI implementation to the public.

Consistent with Medicare, CHAMPUS will allow accumulation of the annual MEI increases. If the actual increase in a prevailing charge is less than the indexed amount for that charge, the portion of the indexed amount not used will be carried forward as the basis for justifying increases in that charge in future years. For example, if the indexed amount for a given procedure is \$100 but the actual prevailing charge calculated for that procedure is \$95, the lower amount (\$95) shall be used for payment during that fee screen year. The calculated indexed amount (\$100) will be retained by the CHAMPUS fiscal intermediary (FI), however, and the following year, the new MEI percentage would be applied to the previous year's indexed amount (\$100) even though it was not used for payment purposes. In essence, this will allow the full advantage of the MEI increases to accumulate yearly. Medicare has been doing this since inception of the MEI.

Essentially, CHAMPUS is modifying its method of annually updating prevailing charges for individual professional provider services. In addition to its present method of developing prevailing charges from all charges made by providers during a 12-month base period, CHAMPUS will determine what the prevailing charge would be using the MEI. The CHAMPUS allowable charge would then be the lowest of: (1) The billed charge for the service; (2) the prevailing charge level

that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services in the same locality during the base period; or (3) the fiscal year 1988 prevailing charge adjusted by the MEI.

### IV. Proposed Rule and Comments

On November 7, 1988, a proposed rule was published in the Federal Register (53 FR 44909) which offered the opportunity for public comment on the CHAMPUS application of the MEI. We received only one substantive comment, which was from a national association.

This commenter raised several concerns regarding the CHAMPUS use of the MEI. The commenter stated that such use of the MEI is inappropriate and pointed out that there are deficiencies in the calculation methodology of the MEI used by the Health Care Financing Administration (HCFA), noting that HCFA currently is studying ways to reformulate it. The commenter further noted that the MEI updates allowed by Congress over the past several years have been less than the updates that would have resulted had HCFA calculated the MEI formula, and suggested that if the MEI is to be applied under CHAMPUS, the full calculated index should be used. The commenter also noted that the Pub. L. 100-463, which this rule implements, calls for the CHAMPUS use of "appropriate economic index data similar to" the MEI; it does not explicitly require adoption of the MEI. The commenter raised concern that excessive constraints on increases in prevailing charge levels have the potential to limit access to medical care that CHAMPUS beneficiaries now enjoy.

We express our appreciation for the time the commenter took in providing the comments. First, we must point out that CHAMPUS is applying the MEI based on the statutory requirement. The intent of Pub. L. 100-463 for CHAMPUS adoption of MEI is considering the fact that CHAMPUS allowable amounts for most professional fees have continued to be higher than those established under Medicare, we believe the CHAMPUS use of the MEI, including the use of legislated MEI amounts when in effect under Medicare, is reasonable. Regarding concerns related to the MEI calculation methodology, we suggest these be provided to HCFA. With respect to the matter of beneficiary impact, we agree that beneficiary access to care is an important issue in relation to establishment of payment levels. In view of the generous allowable charge levels that will continue to exist, even with the use of a legislated MEI, we do not believe it likely that there will be an

appreciable increase in physician "balance billing" to beneficiaries of any charge amounts in excess of CHAMPUS allowables. Currently, only about four percent of all dollars billed for CHAMPUS covered care is subject to balance billing. This very low rate of balance billing is a direct result of the high CHAMPUS allowable amounts. We intend to monitor carefully any change in the low levels of balance billing. Should application of the MEI cause an appreciable increase in balance billing, we would take appropriate action, within legislative authority, to assure broad beneficiary access to physicians who will not balance bill.

### V. Regulatory Procedures

Executive Order 12291 requires that a regulatory impact analysis be performed on any major rule. A "major rule" is defined as one which would result in annual effect on the national economy of \$100 million or more or have other significant economic impacts.

The Regulatory Flexibility Act requires that each federal agency, prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues regulations which would have significant impact on a substantial number of small entities.

Under both the Executive Order and the Regulatory Flexibility Act, such analyses must, when prepared, examine regulatory alternatives which minimize unnecessary burden or otherwise assure that regulations are cost-effective.

The changes set forth in this final rule, taken as a whole, would have an annual impact on the professional provider community of substantially less than \$100 million. The modification in the professional provider payment mechanism is expected to result in government cost saving of about \$25 million in 1989.

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. Also, it is not a "major rule" under Executive Order 12291.

### List of Subjects in 32 CFR Part 199

Claims, Handicapped, Health Insurance, Military personnel.

Accordingly, 32 CFR Part 199 is amended as follows:

### PART 199—[AMENDED]

1. The authority citation for Part 199 continues to read as follows:

Authority: 10 U.S.C. 1079, 1086, 5 U.S.C. 301.

2. Section 199.14 is amended by revising paragraph (g)(1)(i) introductory text and paragraph (g)(1)(i)(A), and adding paragraph (g)(1)(i)(C) to read as follows:

### § 199.14 Provider reimbursement methods.

(g) \* \* \*  
(1) \* \* \*  
(i) The allowable charge for authorized care shall be the lowest of the amounts identified in paragraph (g)(1)(i)(A), paragraph (g)(1)(i)(B), and paragraph (g)(1)(i)(C) of this section.

(A) The billed charge for the service.

(C) For charges from physicians and other individual professional providers, the fiscal year 1988 prevailing charges adjusted by the Medicare Economic Index (MEI), as the MEI is applied to Medicare prevailing charge levels.

(2) In any year in which the Medicare program applies a different MEI to primary care services, CHAMPUS will include maternity care and delivery services and well baby care services as primary care for the purposes of applying the MEI.

(2) The Director, OCHAMPUS, shall issue procedural instructions to apply the MEI under CHAMPUS.

Linda Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

December 23, 1988.

[FR Doc. 88-29950 Filed 12-28-88; 8:45 am]

BILLING CODE 3810-01-M

### POSTAL SERVICE

### 39 CFR Parts 20, 111

### International Mail Manual, Interim regulations; Domestic Mail Manual, Miscellaneous Changes

AGENCY: Postal Service.

ACTION: Final rule.

**SUMMARY:** The Postal Service is amending its description of the procedures for amending the International Mail Manual, a publication incorporated by reference in the Code of Federal Regulations. The amended description adds a reference to interim regulations. The purpose of this change is to make the description reflect existing practice and to be consistent with a similar description of the procedures for amending the Domestic Mail Manual. In addition, the Postal Service is making certain minor changes and corrections in its description of the Domestic Mail Manual, a publication

which is also incorporated by reference in the Code of Federal Regulations.

**EFFECTIVE DATE:** December 29, 1988.

**FOR FURTHER INFORMATION CONTACT:** Paul J. Kemp, (202) 268-2960.

**SUPPLEMENTARY INFORMATION:** Section 20.3 of title 39, Code of Federal Regulations, describes the procedures for amending the International Mail Manual. It does not, however, refer to adopting international mail regulations on an interim basis, a procedure which the Postal Service has used. See, for example, 53 FR 10007 (March 28, 1988). The description of the procedure for amending the Domestic Mail Manual specifically refers to interim rules. See 39 CFR 111.3. The Postal Service is changing § 20.3 to make it consistent with § 111.3. Minor, updating amendments are also made to §§ 20.1 and 20.2.

The Postal Service is also changing § 111.3(c) to reflect the fact that, except in special circumstances, only summaries of interim or final changes to the Domestic Mail Manual are published in the Postal Bulletin, not the full text, as was formerly the case. This change is appropriate because ordinarily when changes are made to the Domestic Mail Manual the complete Manual is now republished. Publication is done quarterly, on a definite schedule, and copies are distributed to subscribers before the effective date of the changes. Accordingly, postal employees and mailers ordinarily need no longer rely on the Postal Bulletin for the text of the most recent changes, since they now appear in the Domestic Mail Manual on a current basis. Section 111.2(c) is also being amended to reflect the manner of publication and the publication schedule of the Domestic Mail Manual. Minor, updating amendments are also made to §§ 111.2 and 111.3.

List of Subjects in 39 CFR Parts 20 and 111

Foreign relations, Postal Service.

### PART 20—[AMENDED]

1. The authority citation for Part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 401, 404, 407, 408.

### § 20.1 [Amended]

2. In § 20.1, in the second sentence, remove "20260" and add, in its place, "20260-5365".

### § 20.2 [Amended]

3. In § 20.2, remove the last sentence of paragraph (a) and add, in its place, the following: "Regional offices are located in Philadelphia, Memphis,

Chicago, San Bruno, and Windsor, CT."; paragraph (b) is revised, and the first two sentences of paragraph (c) are revised to read as follows:

(b) A copy of the International Mail Manual, together with each amendment of it, is on file with the Director, Office of the Federal Register, National Archives and Records Administration, at 1100 "L" Street, NW., Room 8301, Washington, DC.

(c) Copies of the International Mail Manual may be purchased from the Superintendent of Documents, Washington, DC 20402-9371 for \$14.00. This price covers two complete issues of the International Mail Manual.

4. In § 30.2, the heading is republished, paragraphs (a), (b), and (c) are revised, paragraph (d) is redesignated as (e), and new paragraph (d) is added to read as follows:

### § 20.3 Amendments to the International Mail Manual.

(a) Except for interim or final regulations published as provided in paragraph (b) of this section, notices of changes made in the International Mail Manual will periodically be published in the Federal Register. A complete issue of the International Mail Manual, including the text of all changes published to date, will be filed with the Director, Office of the Federal Register. Subscribers to the International Mail Manual will automatically receive the latest issue of the International Mail Manual from the Government Printing Office.

(b) When the Postal Service invites comment from the general public on a proposed change to the International Mail Manual, the proposed change and, if adopted, the interim or final regulation will be published in the Federal Register.

(c) Interim or final regulations published as provided in paragraph (b) of this section, and other changes to the International Mail Manual, adopted subsequent to the notices published under paragraph (a) of this section (except for corrections of minor errors or other nonsubstantive changes), are published in the Postal Bulletin, a weekly postal publication that may be purchased from the Superintendent of Documents, Washington, DC 20402-9371.

(d) Interim regulations will be published in full text or referenced, as appropriate, in the International Mail Manual at the place where they would appear if they become final regulations.



**PART 111—[AMENDED]**

5. The authority citation for Part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3408, 3621, 5001.

**§ 111.1 [Amended]**

6. In § 111.1, the second sentence is revised to read as follows: "In conformity with that provision, and with 39 U.S.C. section 410(b)(1), and as provided in this part, the U.S. Postal Service hereby incorporates by reference in this part, the Domestic Mail Manual, a looseleaf publication published quarterly, March, June, September, and December, and maintained by the U.S. Postal Service, Washington, DC 20260–5365."

**§ 111.2 [Amended]**

7. In § 111.2, in paragraph (a), the second sentence is revised to read as follows: "Regional offices are located in Philadelphia, Memphis, Chicago, San Bruno, and Windsor, CT."

8. In § 111.2, paragraphs (b) and (c) are revised to read as follows:

(b) A copy of the Domestic Mail Manual, together with each amendment of it, is on file with the Director, Office of the Federal Register, National Archives and Records Administration, at 1100 "L" Street, NW., Room 8401, Washington, DC 20408.

(c) The Domestic Mail Manual may be purchased from the Superintendent of Documents, Washington, DC 20402–9371 for \$17.00. This price covers four complete issues of the Domestic Mail Manual.

9. The heading of § 111.3 is republished and paragraphs (a) and (c) are revised to read as follows:

**§ 111.3 Amendments to the Domestic Mail Manual.**

(a) Except for interim or final regulations published as provided in paragraph (b) of this section, notices of changes made in the Domestic Mail Manual will periodically be published in the Federal Register. A complete issue of the Domestic Mail Manual, including the text of all changes published to date, will be filed with the Director, Office of the Federal Register. Subscribers to the Domestic Mail Manual will automatically receive the latest issue of the Domestic Mail Manual from the Government Printing Office.

(c) Except in emergency or other special circumstances when publication of the full text of interim or final regulations is warranted, summaries of

interim or final regulations published as provided in paragraph (b) of this section, and summaries of other changes to the Domestic Mail Manual adopted subsequent to the notices published under paragraph (a) of this section (except for corrections of minor errors or other nonsubstantive changes), are published in the Postal Bulletin, a weekly publication that may be purchased from the Superintendent of Documents, 20402–9371.

Fred Eggleston,

Assistant General Counsel, Legislative Division.

[FR Doc. 88–29903 Filed 12–28–88; 8:45 am]

BILLING CODE 7710–12–M

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 50**

[FRL–3499–4]

**National Ambient Air Quality Standards for Particulate Matter**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Denial of petition for reconsideration and other relief.

**SUMMARY:** The American Iron and Steel Institute ("AISI") has petitioned the U.S. Environmental Protection Agency ("EPA" or "the Agency") for reconsideration of the national ambient air quality standards for particulate matter promulgated on July 1, 1987 (52 FR 24634). The AISI petition also requests that the Agency issue additional information on control techniques for particulate matter, and that it stay implementation of the standards pending reconsideration of the standards and issuance of new control techniques information or, in the alternative, pending judicial review.

EPA has reviewed AISI's petition and finds that it should be denied in full. The issues AISI raises in support of reconsideration are either not new or not of central relevance to the outcome of the rulemaking. In addition, EPA provided comprehensive information on control techniques for particulate matter in 1984 and, since then, has provided and will continue to provide updated information as it becomes available. Finally, EPA has decided not to stay implementation of the standards because such a stay would be contrary to the public interest.

**ADDRESSES:** Material relevant to EPA's review and revision of the particulate matter standards can be found in Public

Docket No. A–82–37, and material relevant to the promulgation of the regulations for implementing the standards can be found in Public Docket A–82–38. The dockets are available for public inspection between 8:00 a.m. and 3:00 p.m. on weekdays at EPA's Central Docket Section, South Conference Center, Room 4, 401 M St., SW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Mr. John H. Haines, Ambient Standards Branch (Mail Code 12), Air Quality Management Division, Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–5533.

**SUPPLEMENTARY INFORMATION:****Background**

On July 1, 1987 (52 FR 24634), EPA published final revisions to the national ambient air quality standards (NAAQS) for particulate matter, originally adopted in 1971 under section 109 of the Clean Air Act (42 U.S.C. 7409). The 1971 standards included a 24-hour primary standard, an annual primary standard, and a 24-hour secondary standard,<sup>1</sup> each tied to measurement of "total suspended particulate matter" ("TSP").<sup>2</sup> The principal revisions in 1987 included (1) replacing TSP as the indicator for the ambient standards with a new indicator that includes only particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers ("PM<sub>10</sub>"), (2) replacing the 24-hour primary TSP standard with a 24-hour PM<sub>10</sub> standard of 150 µg/m<sup>3</sup>, (3) replacing the annual primary TSP standard with an annual PM<sub>10</sub> standard of 50 µg/m<sup>3</sup>, and (4) replacing the secondary TSP standard with 24-hour and annual PM<sub>10</sub> standards identical in all respects to the primary standards.

As discussed below, the 1987 revisions were the product of a lengthy and exhaustive administrative process, formally commenced in 1979 when EPA announced that it was (1) revising the air quality criteria underlying the 1971 standards and (2) reviewing those standards for possible revisions (44 FR 56731, Oct. 1, 1979).<sup>3</sup>

<sup>1</sup> Under section 109(b) of the Clean Air Act, primary standards are intended to protect public health; secondary standards are intended to protect public welfare. See also section 302(h) of the Act, 42 U.S.C. 7602(g) (effects on public welfare).

<sup>2</sup> See 52 FR at 24635, col. 3.

<sup>3</sup> A more detailed description of the process EPA followed in revising the criteria document and standards for particulate matter appears in the preamble to the revised standards (52 FR 24636–37).

**1. Development of Revised Air Quality Criteria for Particulate Matter**

With the endorsement of the Clean Air Scientific Advisory Committee ("CASAC")<sup>4</sup> of EPA's Science Advisory Board, EPA decided to review and revise the criteria document for particulate matter concurrently with that for sulfur oxides and to produce a combined particulate matter/sulfur oxides (PM/SO<sub>x</sub>) criteria document. Three successive drafts of the revised PM/SO<sub>x</sub> criteria document, prepared by EPA's Environmental Criteria and Assessment Office ("ECAO"), were made available for external review in 1980–81. EPA received numerous and often very extensive comments on each of the drafts from a variety of individuals and organizations, including AISI. During the same period, CASAC met to review the successive drafts in three public sessions attended by a large number of individuals and representatives of organizations, including AISI, many of whom provided critical reviews and new information for consideration. Between the first and second CASAC meetings, ECAO also held five other public meetings at which EPA, its consulting authors and reviewers, and other scientific and technical experts discussed ways of resolving outstanding issues in various chapters of the draft document.

Comments received on the successive drafts of the revised criteria document were considered in the final document, which was issued simultaneously with the proposal of revisions to the standards. A summary of the comments and EPA's responses was also prepared and placed in the public docket. CASAC also prepared a "closure" memorandum indicating its satisfaction with the final draft of the revised criteria document and outlining key issues and recommendations. The closure memorandum stated CASAC's conclusion that the revised document met the statutory requirement that it "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health and welfare" from particulate matter and sulfur oxides in the ambient air (52 FR 24655, col. 3). It also stated that the staff responsible for preparing the document had "proven responsive to Committee advice as well as to comments provided by the general public, and deserve[d] to be commended

<sup>4</sup> CASAC is a standing committee of scientists and engineers external to the Federal government, established under section 109(d) of the Clean Air Act to advise the Administrator on the scientific basis for ambient air quality standards.

for the high quality of the document" (*id.*).

**2. Review of the Standards: Development of Staff Paper**

In the spring of 1981, EPA's Office of Air Quality Planning and Standards prepared the first draft of a "staff paper," a document not required by statute but an important element in the standards review process. Staff papers are written to help bridge the gap between the scientific review of health and welfare effects contained in criteria documents and the judgments required of the Administrator, in setting new or revised ambient standards. Thus, the draft staff paper for particulate matter, based on the then-existent draft of the revised criteria document, evaluated and interpreted the available scientific and technical information most relevant to the review of the existing standards and presented staff recommendations on revision of the standards. This and a second draft of the staff paper were reviewed at two CASAC meetings, and numerous written and oral comments were received from CASAC, representatives of AISI and other organizations, individual scientists, and other interested members of the public. The final staff paper, released in 1982, reflected the various suggestions made by CASAC and the public.

CASAC also prepared a closure memorandum on the staff paper, stating that it had been modified in accordance with CASAC's recommendations and was "consistent in all significant respects with the scientific evidence" in the revised criteria document. (52 FR 24658, col. 3). CASAC also commended the treatment of key scientific studies in the staff paper and the inclusion of numerical "ranges" identifying pollutant levels of interest for decisionmaking, stating that the latter decision "led to a marked improvement in the quality of the public dialogue" on the scientific basis for revising the standards (52 FR 24660, col. 1). For reasons stated in the closure memorandum, CASAC also recommended a "wider margin of safety" than those EPA had set for such pollutants as ozone and carbon monoxide (*id.* at 24659, col. 2).

**3. Proposed Revisions to the Standards**

In March 1984, EPA proposed a number of revisions to the standards for particulate matter (49 FR 10408, March 20, 1984). For reasons discussed in the proposal notice, "ranges" of alternative standards were included for both the primary (health-based) and secondary (welfare-based) standards (*id.* at 10415, col. 2, 10416, cols. 2–3, 10417, col. 2). The Administrator expressed an inclination

to select the primary standards from the lower portions of the proposed ranges but solicited "the possible participation and comment" on the question of which standard levels should be adopted (*id.*).

**4. Post-Proposal Events**

More than 300, often very extensive, written comments were received on the proposed revisions. EPA also held a public meeting to provide an additional opportunity for public comment, and a number of EPA officials, including the Administrator, met at various times with representatives of AISI and other organizations to discuss the proposal. CASAC also held a public meeting to review the proposals and to discuss the relevance of new health studies that had emerged since the Committee had completed its review of the revised criteria document. Based on its preliminary review of the new studies, CASAC recommended that EPA prepare separate addenda to the criteria document and staff paper to evaluate the studies and their potential implications for standard-setting.

EPA subsequently prepared draft addenda to both the criteria document and the staff paper, and it announced a supplementary period for public comment on the implications of the new studies and the two draft addenda for standard-setting. CASAC held another public meeting to review the draft addenda, and each was then revised to reflect CASAC and public comments. CASAC prepared closure memoranda on the two addenda, indicating that the criteria document addendum, together with the 1982 criteria document, represented a "scientifically balanced and defensible summary of the extensive scientific literature \* \* \*" and that the staff paper addendum was "consistent in all significant respects with the scientific evidence \* \* \*" and provided "the kind and amount of technical guidance that will be needed to make appropriate revisions to the standards" (52 FR 24658, col. 1, 24660, col. 1).

**5. Final Standards and Subsequent Events**

The final standards were published on July 1, 1987 (52 FR 24634), together with revisions of various related regulations. The preamble to the revised standards responded to the most important comments received on the proposals, and a more comprehensive compilation of comments and EPA responses to them (hereafter "Response to Comments" or



"RTC") was placed in the docket for the rulemaking.<sup>5</sup>

AISI and other interested parties filed a total of five petitions for judicial review of the revised standards and related regulations. AISI then filed the petition for reconsideration and related relief (hereafter "Pet.") to which this notice responds. The American Mining Congress later filed another petition for reconsideration, to which EPA is responding separately. The five petitions for judicial review have been consolidated into one case, *Natural Resources Defense Council v. Thomas*, DC Circuit Nos. 87-1437 et al., which has been held in abeyance pending EPA's response to AISI's petition for reconsideration.

#### Criteria for Reconsideration

AISI seeks both "mandatory" reconsideration under section 307(d)(7)(B) of the Clean Air Act and what it terms "prudential" reconsideration under section 4(d) of the Administrative Procedure Act (APA). Section 307(d)(7)(B) of the Clean Air Act limits petitions for reconsideration both in time and scope.<sup>6</sup> Specifically, it provides that EPA shall convene a proceeding to reconsider a rule if a person raising an objection can demonstrate (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (i.e., within 60 days after publication of the final rulemaking notice in the *Federal Register*, see section 307(b)(1), 42 U.S.C. 7607(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule. In EPA's view an objection is of central relevance only if it provides

<sup>5</sup> Docket A-82-37, Item V-C-1.

<sup>6</sup> Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. 7607(d)(7)(B), states:

Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

substantial support for the argument that the standards should be revised. See Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54 (December 11, 1980), and decisions cited therein.

Although section 4(d) of the Administrative Procedure Act (APA) also establishes a right to petition for issuance, amendment, or repeal of a rule,<sup>7</sup> that provision almost certainly does not apply to petitions for reconsideration of actions to which the rulemaking provisions of section 307(d) of the Clean Air Act apply.<sup>8</sup> In any event, the criteria for evaluating such petitions under the APA are essentially the same as those for section 307(d)(7)(B) petitions. See Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54, and decisions cited therein.

#### Discussion

##### 1. Petition for Reconsideration

Most of the arguments set forth by AISI in its petition for reconsideration simply are not based on new information. As such, they do not justify administrative reconsideration. The only arguments that might conceivably be considered new are not of central relevance to the outcome of the rulemaking. Thus, none of the issues raised in AISI's petition meet the criteria for reconsideration under section 307(d)(7)(B) of the Clean Air Act. In addition, I have concluded that none of AISI's arguments warrants reopening of the rulemaking as a discretionary matter.

##### A. Vinyl Chloride Decision

AISI argues that I must reconsider the primary standards for PM<sub>10</sub> in view of a recent decision of the United States Court of Appeals for the district of Columbia Circuit that concerns the setting of national emission standards for hazardous air pollutants ("NESHAPs") under section 112 of the Act, 42 U.S.C. 7412. In *Natural Resources Defense Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) ("Vinyl Chloride"), the court held that in considering costs and feasibility EPA must ordinarily follow a two-step process in setting NESHAPs. Under such approach, the Agency would first

<sup>7</sup> Section 4(d) of the APA, 5 U.S.C. 553(e).

<sup>8</sup> Section 307(d)(1)(N), 42 U.S.C. 7607(d)(1)(N) states: "The provisions of section 555 through 557 . . . of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to action to which this subsection applies." Actions to which subsection 307(d) applies include promulgation or revision of NAAQS. Section 307(d)(1)(A).

determine a "safe" level of exposure and then consider costs and feasibility in providing for the "ample margin of safety" required by section 112. 824 F.2d at 1164-66. The court also indicated that EPA could use a one-step process, provided that cost and feasibility are not considered in setting the standard. 824 F.2d at 1165, n. 11.

AISI contends that "[a]fter *Vinyl Chloride*, section 109 . . . must be construed as contemplating a two-stage analysis—first, a preliminary safety determination . . . and second, a separate determination as to the appropriate 'margin of safety.'" Pet. at 13. AISI acknowledges that the decision "dealt with section 112 of the Act" (*id.* at 12), but fails to note that the decision is clearly inapplicable to the Agency's setting of national ambient air quality standards ("NAAQS") under section 109 of the Act. 824 F.2d at 1158-59. It is therefore not of central relevance to the outcome of the rulemaking and does not require reconsideration of the PM<sub>10</sub> NAAQS.

Indeed, the D.C. Circuit has already explicitly held that the Agency need not adopt a two-step process in setting a NAAQS under section 109. *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), cert. denied, 449 U.S. 1042 (1980). There, one of the petitioners argued that EPA should have separately determined (1) the maximum level of a pollutant that is protective of human health, and (2) the reduction in that level needed to provide an adequate margin of safety. *Lead Industries*, 647 F.2d at 1161. Then-Administrator Costle explained that he had actually made allowances for margins of safety at several points in his analysis, rather than at the end of the analysis; that is, he had used a one-step process to arrive at a final decision, rather than trying first to identify a "safe" level and then adding a margin of safety. *Id.* The D.C. Circuit upheld the Administrator's approach, stating:

Adding the margin of safety at the end of the analysis is one approach, but it is not the only possible method. Indeed, the Administrator considered this approach but decided against it . . . . The choice between these possible approaches is a policy choice of the type that Congress specifically left to the Administrator's judgment. The court must allow him the discretion to determine which approach will best fulfill the goals of the Act.

*Id.* at 1161-62. Thus, the D.C. Circuit has already decided that EPA need not employ a two-step process in setting a NAAQS, as long as the standard provides an adequate margin of safety.

Moreover, the *Vinyl Chloride* court distinguished the operation of section 112 from its earlier analysis of section 109 in the *Lead Industries* case. In *Lead Industries*, the court noted that the statute does not specify economic and technological feasibility considerations as among the criteria on which ambient air quality standards are to be based. 647 F.2d at 1149 n. 37. The *Vinyl Chloride* court noted that "[t]he substantive standard imposed under the hazardous air pollutants provisions of section 112, in contrast with sections 109 and 110, is not based on criteria that enumerate specific factors to consider and pointedly exclude feasibility." 824 F.2d at 1158-59. Given the structural differences between sections 109 and 112, it follows that *Vinyl Chloride* does not require me to follow a two-step analysis in setting ambient air quality standards under section 109.

##### B. Unemployment Health Effects

AISI also contends that I must reconsider the primary standards to account for allegedly new evidence suggesting that setting the standard at higher levels would actually decrease the adverse health effects caused by exposure to PM<sub>10</sub>. In essence, AISI argues that one effect of the primary standards will be increased unemployment in various industries. This increased unemployment, it contends, will lead to an increase in illness and death among workers (and their families) in these industries.

AISI initially made this argument during the comment period. Shortly after the close of the comment period, however, it submitted a report allegedly quantifying these adverse health effects. It submitted a second such report with its petition for reconsideration.<sup>9</sup>

<sup>9</sup> AISI has not adequately explained why it could not have submitted its "unemployment health effects" reports during the comment period. AISI argues that such a submission was "impracticable" because EPA allegedly provided AISI certain information only two weeks prior to the end of the period. Pet. at 4 n. 3. This contention ignores the fact that EPA published on April 2, 1985 (over 19 months prior to the close of the comment period) a draft document that contained the information that AISI desired, a methodology to determine the probability that various areas would not attain the PM<sub>10</sub> NAAQS. This methodology was used in the staff paper addendum to estimate the number of counties that would exceed particular PM<sub>10</sub> values. The later information, provided to AISI on November 3, 1986, was merely EPA's latest estimates of areas with a 50% probability of exceeding specified PM<sub>10</sub> values. See November 3, 1986 letter from John Bachmann of EPA to Earl F. Young, Jr. of AISI. Thus, AISI had available to it well in advance of the close of the comment period sufficient information to prepare its "unemployment health effects" reports, and it was not "impracticable" to submit them during the period for public comment. See 42 U.S.C. 3607(d)(7)(B) (setting out criteria for petition for reconsideration).

AISI seems to ignore the fact that the Agency fully responded to its arguments on this issue, which were raised during the comment period. See, e.g., Docket A-82-37, IV-D-341. The later submissions of quantitative information added nothing to what is, and always was, a legal issue. As discussed below, the information they contained was legally irrelevant for standard-setting under section 109. Accordingly, those submissions did not amount to new information centrally relevant to the outcome of the standard.

As the Agency made clear in its response to comments, any potential health consequences of compliance with the primary standards for PM<sub>10</sub> are indirect costs of implementation, and thus cannot be considered in determining the appropriate levels of the standards. *Lead Industries*, 647 F.2d at 1148-51. See also Docket A-82-37, responses to comments IV-D-341, IV-D-346 and IV-J-12 (all citing section 108(a)(2) of the Act and *Lead Industries*).<sup>10</sup> The Act does not allow me to consider health effects that are not caused by the pollutant itself, when promulgating a primary NAAQS. A primary standard is to be based upon air quality criteria for the pollutant that are published by the Agency. Section 109, 42 U.S.C. 7409. Section 108 of the Act clearly states that "[a]ir quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. 7408(a)(2) (emphasis added). The statute makes no mention of measuring or taking account of health effects that might be caused by implementing controls necessary to meet the standards as opposed to the effects of the pollutant itself. AISI's argument on this issue therefore has no basis in the Clean Air Act, its legislative history or the relevant case law.<sup>11</sup>

<sup>10</sup> The legislative history of the Clean Air Act also fully supports this view. Congress was aware that actions necessary to protect public health from ambient air pollution might lead to factory closings and determined that health protection was to take first priority. See *Lead Industries*, 647 F.2d at 1149.

<sup>11</sup> AISI also alleges in its petition that more lenient PM<sub>10</sub> standards will not result in a lessening of air quality in most areas of the country, which already meet the standards and thus must comply with the Prevention of Significant Deterioration ("PSD") requirements in Part C of Title I of the Act. This contention seems to ignore EPA's projections that PM<sub>10</sub> concentrations in many areas do currently exceed the PM<sub>10</sub> NAAQS, and the health of people living in these areas therefore is at risk.

The rulemakings and case law relied upon by AISI in support of its position are not relevant here. Neither involved the setting of a NAAQS under section 109 of the Act. *National Ass'n of Demolition Contractors v. Costle*, 565 F.2d 748, 753 (DC Cir. 1977), involved the review of a non-numerical, work-practice standard promulgated by EPA under section 112 of the Act, requiring the wetting of asbestos prior to the demolition of buildings. The Agency decided that asbestos need not be wetted during subfreezing temperatures because the workers would be endangered by ice formed during the process. But this work-practice standard under section 112 is inapposite to the setting of a numerical ambient air quality standard.<sup>12</sup> In the second work-practice NESHAP rulemaking cited by the petitioner, the risk posed to workers was from the pollutant itself, a radionuclide. Adverse health effects to mineworkers posed by Radon-222 simply were considered along with adverse health effects posed to the general public. See Standard for Radon-222 Emissions from Underground Mines, 50 FR 15386 (April 17, 1985).

##### C. EPA's Treatment of Health Evidence

AISI also argues that I should reconsider the standards on the ground that the pertinent health evidence was given "imbalanced treatment" in the preamble to the final rule (Pet. at 23-25). It argues that EPA gave undue weight to certain health studies, that the EPA staff has consistently "overinterpreted" such studies in an effort to justify overly

<sup>12</sup> Rulemaking under section 112 involves an integrated decision on both the health effects of a pollutant, and the measures needed to control source emissions to provide "an ample margin of safety." Further, the standards in the two cited examples, the asbestos and radionuclides NESHAPs, are both work-practice standards established because of the infeasibility of prescribing a numerical emissions standard in each case. See section 112(e)(1). In contrast, a section 109 standard simply sets a limit on the concentration of specified pollutants in the ambient air, as one part of a three-part criteria, standard-setting, and implementation plan process. See sections 108-110. To attain the NAAQS, the states must develop state implementation plans ("SIPs") which, among other things, provide emission limitations and control measures for individual sources. Section 110(a). While EPA may not consider direct or indirect costs in criteria issuance or standard setting under sections 108 and 109, states may weigh costs (including the impact of possible plant closures and layoffs) in crafting particular implementation measures to attain the standards. Beyond these considerations, the health impacts on workers considered in the section 112 rulemakings involved direct effects of the pollutant, or the specific work practices, and not, as urged by AISI, indirect effects on the health of workers that might result from the effects of control measures adopted by states under section 110, subsequent to promulgation of the NAAQS by EPA.



stringent standards, and that on reconsideration I should give much greater weight to "interpretations and studies that have been accepted throughout the scientific community" (*id.* at 25, 18).

AISI appears to concede that its arguments in support of these points are not new and thus do not meet the test for mandatory reconsideration under section 307(d)(7)(B) of the Act (Pet. at 22-23). AISI, however, argues that I should exercise my inherent discretion to reconsider, "even on the basis of arguments previously raised" (*id.*), because those arguments are evidence that the EPA staff has "strained to justify the adoption of PM10 standards at the extreme lower bounds of the proposed ranges" (*id.* at 25). This line of argument seems to assume that my predecessor and I were unwittingly misled by the staff, and that simply reiterating points raised previously will persuade me that this is so. That AISI and its consultants continue to disagree with EPA's conclusions on points raised at various stages of the rulemaking, however, hardly establishes that my decision was in error or tainted by staff bias.

As to the correctness of my decision, AISI indeed presents no new information bearing on the health basis for the standards. Instead, it offers a sampling of arguments it and its consultants have presented before, in comments on the proposed standards and at various other stages in the review process since 1979.<sup>12</sup> EPA has already considered and responded to each of these arguments, by making revisions as appropriate in successive drafts of the 1982 criteria document, the 1982 staff paper, and the 1988 addenda to these documents;<sup>13</sup> by taking public comments into account in the final decision and responding to major comments in the preamble accompanying the revised standards (52 FR at 24648-53); and by responding in detail to all objections raised by AISI, its consultants, and other commenters in EPA's extensive Summary of and Response to Public Comments (Docket A-82-37, V-C-1 (June 2, 1987)) (hereafter "Response to Comments" or "RTC").<sup>14</sup>

<sup>12</sup> See, e.g., Pet. at 25-26 n. 23 (objections of Professor Lawther dated to 1982).

<sup>13</sup> For convenience of reference, the 1988 addenda to the criteria document and staff paper are cited hereafter as "CDA" and "SPA," respectively.

<sup>14</sup> The only points AISI raises that might conceivably be considered new are (1) a consultant's comments on the Schwartz and Marcus reanalysis of the London mortality data (Pet. at 30 n. 31) and (2) an argument that EPA relied inappropriately on a "conservative assessment of lung function/particle relationship" from the

Given this background, I find it striking that AISI has chosen to focus almost exclusively on the preamble to the final rule, as if the preamble were the only document in which the pertinent health evidence was considered. In doing so, AISI has largely ignored the detailed discussions of health studies in the criteria document, in the staff paper, and in the addenda to these documents, as well as the CASAC closure letters on these documents and CASAC's various recommendations to me.<sup>15</sup> Even more remarkably, AISI has ignored the detailed responses to its own and others' comments in EPA's Response to Comments and has made no attempt whatsoever to rebut these responses or otherwise show how they might be in error.<sup>17</sup> AISI's silence in this regard is telling.

Dockery study (*id.* at 33-36). The consultant's comments on the Schwartz and Marcus paper, however, essentially repeat arguments that were raised previously by AISI and its consultants, taken into account in the preamble to the final rule (52 FR 24650, col. 1), and discussed in detail in the Response to Comments (see, e.g., RTC IV-J-6 #4-5). Moreover, the Schwartz and Marcus paper itself was a staff analysis responding to points raised previously by AISI and others during the original comment period on the proposed standards (52 FR 24650, col. 1; CDA at A-2, A-14; SPA at 20-21); as such, it was consistent with previous analyses and served largely to confirm conclusions reached in published reports (see, e.g., SPA at 21-22, 40-41; CDA at 3-6; RTC IV-J-19 #4). The process of taking comments, responding to them, taking further comments on the responses, responding to the further comments, and so forth must come to an end at some point. In the circumstances, I would give the consultant's comments relatively little weight even if they had presented new information.

As to the "conservative assessment of lung function/particle relationship" AISI cites, that particular element of the analysis was not used to justify setting the 24-hour standard at the lower bound of the proposed range as opposed to a higher level (which I chose to do for other reasons, as discussed in the preamble and related documents); rather, it was used to help assess whether an even more stringent standard (*i.e.*, one below the lower bound of the proposed range) might be necessary to protect against lung-function changes in children (see 52 FR 24643, cols. 2-3). For that purpose, a "conservative" (precautionary) approach to estimating the health risks was appropriate. My conclusion was that even this conservative analysis suggested that a more stringent standard was unnecessary (*id.*). Had I adopted AISI's less-conservative interpretation of the data, my conclusion would have been the same.

<sup>15</sup> This omission is especially noteworthy because the preamble to the final rule cited these documents repeatedly; indicated that I had "adopted" the recommendations and supporting reasons contained in the staff paper and addendum and the CASAC closure statements; and noted that, rather than repeat those discussions at length, the preamble discussion would focus primarily on considerations that most influenced my selection of particular options or that differed in some respect from those that influenced the staff's or CASAC's recommendations (52 FR at 24638, col. 3; emphasis added).

<sup>17</sup> One example of this is particularly striking. AISI asserts that comments on the Schwartz and Marcus reanalysis of the London mortality data

None of the points AISI raises persuades me either that I have been misled or that there is any other reason to reopen the rulemaking. Accordingly, I am denying AISI's petition as it relates to EPA's consideration of the health evidence for the standards.

However, I believe the allegation that my decision was tainted by staff bias warrants a further response. As noted previously, the administrative process that culminated in my decision to revise the particulate standards was unusually lengthy and exhaustive. In reaching my final decision on the standards, I spent a great deal of time reviewing staff documents and discussing them with my staff. I also met with representatives of AISI to hear their views directly. Based on my own personal experience in the process, I believe the staff work on the standards was objective and unbiased.<sup>16</sup> Furthermore, an examination of the criteria document, the staff paper, and the addenda to these documents reveals that the staff's assessments of health studies, especially those that were thought to be potentially significant for standard-setting, typically identified both limitations and strengths associated with the use of them. See, e.g., SPA at 16-17 (epidemiological studies generally), 17-23 (analyses of London data), 24-27 (Dockery and Dassen studies); CDA at 3-2 to 3-10 (analyses of London data), 3-15 to 3-17 (Dockery and Dassen studies). In the relatively few cases where authors objected to staff interpretations of their studies, the objections were typically noted or otherwise brought to the attention of Agency decision makers. See, e.g., SPA at 44 (Lawther study); letter from William D. Ruckelshaus to Rep. Lyle Williams, Nov. 29, 1983, at 2 (Docket A-79-29, II-C-13). See also 52 FR at 24642, col. 3 (Lawther), 24649, col. 3 (Holland et al.), 24650, col. 2 (Lawther).

Moreover, the process EPA followed in preparing these documents assured ample opportunity for scrutiny by qualified experts and interested parties. As previously noted, a number of drafts of the criteria document, the staff paper, and the addenda to these documents were distributed for public comment and CASAC review and were revised in

were not "reflected, much less rebutted, in the preamble" (Pet. at 30 n. 31). Nowhere does AISI acknowledge that EPA responded to the comments in detail in its Response to Comments (see, e.g., RTC IV-J-6 #4) or attempt to rebut EPA's responses.

<sup>16</sup> My predecessor, having himself met with Professor Lawther and representatives of the steel industry, reached a similar conclusion in response to allegations of bias in the staff work on which the proposed revisions were based. See Letter from William D. Ruckelshaus to Rep. Lyle Williams, Nov. 29, 1983, at 2 (Docket A-79-29, II-C-13).

response to public and CASAC comments. The CASAC meetings, in particular, provided an opportunity for intensive discussions of pertinent health studies, including discussions with Professor Lawther and other authors of key studies.

CASAC also rendered its independent opinion on the quality and objectivity of the various staff documents. It concluded, unanimously, that the criteria document addendum, together with the 1982 criteria document, represented a "scientifically balanced and defensible summary of the extensive scientific literature . . ." (52 FR 24658, col. 1) and that the staff paper addendum was "consistent in all significant respects with the scientific evidence . . ." and provided "the kind and amount of technical guidance that will be needed to make appropriate revisions to the standards" (52 FR 24660, col. 1).<sup>18</sup>

The several opportunities for public comment on the proposed rule, of course, provided a further check against error in EPA's treatment of the health evidence. Indeed, then-Administrator Ruckelshaus chose to propose "ranges" of possible standard levels precisely "to air the issues and uncertainties fully and to encourage broad public participation and comment . . ." (49 FR 10416, cols. 2-3, 10417, col. 2).

Finally, CASAC's views on the key health studies, the staff assessments, and the implications of both for standard-setting were transmitted directly to me, so that I had the benefit of this independent advice in resolving matters that involved conflicting opinions. As discussed in the preamble to the final rule and in the Response to Comments, my decision was fully consistent with CASAC's advice.

At bottom, AISI's assertion that my decision gave "undue weight" to certain studies means simply that it and its consultants disagree with my conclusions as to which studies are key and how they should be interpreted. AISI in effect urges me to disregard studies suggesting the possibility of health risks at pollution levels below those at which there is a virtually unanimous consensus that effects are likely to occur. See, e.g., Pet. at 31-32 (reanalyses of London mortality data). Given the precautionary nature of EPA's task under the statute, however, I cannot ignore studies suggesting the real possibility of health effects below those levels, particularly where the affected population is large and the health effect in question involves death or serious

<sup>18</sup> See also 52 FR at 24655, 24658 (quality of 1982 criteria document and 1982 staff paper).

illness. Such studies may well be suggestive rather than conclusive, flawed rather than perfect, and susceptible to more than one interpretation. Thus, there will ordinarily be a degree of uncertainty about their significance and a range of scientific opinion about the conclusions that may be drawn from them. See *Lead Industries*, 647 F.2d at 1154-55 nn. 48-50, 1160.

In this case, AISI and others argued against reliance on such studies; CASAC advised reliance on them and recommended standards at the lower ends of the proposed ranges; and environmental groups and others argued that the studies required standards below the proposed ranges. Under the statute, I must act even where there is no consensus on such matters and, in doing so, err on the side of caution. *Lead Industries*, 647 F.2d at 1154-55. Consistent with CASAC's advice and the precautionary nature of my task, I took the studies into account and set standards which, in my judgment, allow an adequate margin of safety against the risks they suggest.

None of the points AISI raises concerning EPA's treatment of the health evidence leads me to believe that the rulemaking should be reopened to reconsider those decisions.

#### D. Failure to Consider Intermediate Levels

AISI further argues that I should exercise my discretion to reconsider because EPA failed to consider the option of setting primary standards at intermediate levels within the proposed ranges, focusing again on the preamble to the final rule and asserting that it contains "not one word" about the acceptability of levels between the lower and upper bounds of the ranges (Pet. at 37-39).

This argument is factually incorrect; as discussed below, EPA did consider the possibility of setting standards at intermediate levels. More broadly, the argument misconceives the nature of my statutory task. Section 109(b) of the Act requires me to set primary standards which, in my judgment, are requisite to protect the public health with an adequate margin of safety. If I find, based on my assessment of the pertinent health evidence, that a 24-hour standard of 150  $\mu\text{g}/\text{m}^3$  is necessary for that purpose, no elaborate analysis is needed to conclude that standards set at higher levels would provide less protection than I had found to be necessary. It is enough if EPA has aired the issue fully and I have taken into account any information and arguments purporting to

how that the standard I believe to be necessary is not, in fact, necessary.

There can be no doubt that the question of intermediate levels was fully aired in the rulemaking. As noted previously, EPA's proposal to revise the particulate standards identified "ranges" of alternative standard levels from which final standards would be selected. Although then-Administrator Ruckelshaus stated his inclination (in the case of primary standards) to select standards from the lower portions of these ranges, he specifically solicited public comment on the issue of what standard level within each of the ranges would provide an adequate margin of safety given the health risks suggested by the available scientific information (49 FR 10416, cols. 2-3, 10417, col. 2).<sup>19</sup> In other words, he sought comment on all levels in the proposed ranges, including the lower and upper bounds and all intermediate levels. A number of commenters responded by arguing for standards at levels between the lower and upper bounds.<sup>21</sup>

In reaching my final decision, I considered the possibility of setting standards at intermediate levels and concluded that the standards should be set at the lower bounds of the proposed ranges to provide adequate margins of safety against serious health effects. With regard to the 24-hour standard, for example, the preamble to the final rule unequivocally states my conclusions (1) that a standard set at the lower bound of the proposed range (150  $\mu\text{g}/\text{m}^3$ ) is "necessary" to provide an adequate

<sup>19</sup> In this regard, AISI seems to misconceive the significance of the proposed ranges. The most recent staff and CASAC assessments of the health evidence did not necessarily leave me free to select standards from any portion of the ranges, as AISI seems to imply (Pet. at 37). Though it can be said that all levels within the ranges would have provided "some" margin of safety against the pertinent health risks (see 49 FR 10415, cols. 1-2), my task under the statute was to select levels that would provide an "adequate" margin of safety, considering such factors as the nature and severity of the health effects involved the size of the sensitive population(s) at risk, and the kind and degree of the uncertainties that must be addressed (*id.* at 10410, col. 1). Neither the staff nor CASAC ever indicated that all levels included in the ranges would satisfy the statutory requirement. Indeed, CASAC indicated that the more recent health data suggested the need to focus attention on primary standards "at or perhaps below" the lower ends of the proposed ranges and ultimately recommended that I consider setting the revised standards at the lower ends of those ranges (52 FR 24660-61).

<sup>21</sup> See, e.g., comments of San Antonio Manufacturers Association, Docket A-82-37, IV-D-33 (recommending 24-hour standard of 200  $\mu\text{g}/\text{m}^3$ , annual standard of 55  $\mu\text{g}/\text{m}^3$ ); comments of Noranda Aluminum, Inc., Docket A-82-37, IV-D-69 (24-hour standard of 200  $\mu\text{g}/\text{m}^3$ , annual standard of 60  $\mu\text{g}/\text{m}^3$ ); comments of Shell Oil Company, Docket A-82-37, IV-D-230 (24-hour standard of 175  $\mu\text{g}/\text{m}^3$ , annual standard of 55  $\mu\text{g}/\text{m}^3$ ).



margin of safety against premature mortality and aggravation of bronchitis; (2) that such a standard would appear to provide adequate protection against other less-certain risks, including lung-function degradation in children; and (3) that "standards set at a somewhat higher level would . . . present an unacceptable risk of premature mortality and allow the possibility of more significant [lung function] changes." 52 FR 24643 (col. 3). See also 52 FR 24464-45 (annual standard). EPA also considered and responded to the various public comments suggesting that either or both of the primary standards be set at various levels between the lower and upper bounds of the proposed ranges. See, e.g., RTC IV-D-33 §§ 2a, 3a; RTC IV-D-99 § 5; RTC IV-D-230 §§ 2, 4.

In short, EPA aired the possibility of setting standards at intermediate levels fully in the rulemaking, and I gave appropriate consideration to that possibility before reaching any final decision. Although AISI disagrees with the decision, it has presented no new, relevant information suggesting that I should have selected higher levels for the 24-hour and annual standards. Accordingly, I see no reason to reopen the rulemaking to reconsider this point.<sup>22</sup>

## II. Issuance of Control Techniques Information

In addition to petitioning for reconsideration of the PM<sub>10</sub> standards, AISI alleges that "EPA has not fulfilled its obligation to provide the States with up-to-date information on air pollution control techniques" (Pet. at 39).<sup>23</sup> This argument is simply wrong.

<sup>22</sup> AISI also suggests that the staff may not have provided me a thorough analysis of alternatives, citing and comparing "excerpts" from briefing papers prepared for my predecessor and me at different stages of the rulemaking process (Pet. at 37-38). The single document AISI cites of those used to brief me was prepared more than a year before my final decision, and AISI offers no support for its apparent assumption that the document is representative of the various briefing papers and other information presented to me in the overall course of my decision-making on the standards. More fundamentally, the means by which my staff and I communicated with each other in our internal deliberations are both privileged and irrelevant. What matters is whether my decision was soundly based and adequately explained. I believe it was.

<sup>23</sup> AISI does not suggest that this serves as adequate grounds to reconsider the standards or implementing regulations. Rather, it appears to ask the Agency to make available additional information on PM<sub>10</sub> control techniques. EPA has provided such information in the past and will continue to do so in the future.

AISI apparently contends that a revised control techniques document must be issued each time a criteria document is revised. See Pet. at 40 n. 52. Section 108(b)(1) states that "[s]imultaneously with the issuance of [air quality] criteria under subsection (a) of this section, the Administrator shall . . . issue to the States and appropriate air pollution control agencies information on air pollution control techniques." 42 U.S.C. 7408(b)(1). Whether or not this requirement applies to revisions (as opposed to initial issuance) of criteria documents, EPA in fact issued a comprehensive control technology document ("CTD") for PM<sub>10</sub> when it issued the revised criteria document and published proposed PM<sub>10</sub> standards in 1984.<sup>24</sup> The Act also states: "The Administrator shall from time to time review, and as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section." Section 108(c), 42 U.S.C. 7408(c) (emphasis added). As the statutory language makes clear, it is for the Administrator to determine when the modification or reissuance of such material is appropriate. This is a matter left to his discretion. See *Consolidation Coal Co. v. Costle*, 483 F.Supp. 1003 (S.D. Ohio 1979) (Administrator did not abuse his discretion in refusing to expedite schedule for review and revision of sulfur dioxide criteria). Cf. *Environmental Defense Fund v. Thomas*, 27 ERC 2008, 2017 (S.D.N.Y. 1988) ("revision and publication of sulfur oxide pollutant standards falls within the discretion of the Administrator").

During the past decade the Agency has stressed the need to control nontraditional sources, as well as the more traditional industrial sources of particulate matter emissions. EPA has made voluminous amounts of material on control techniques for both traditional and nontraditional sources (including unpaved roads) available to the States since issuance of the PM<sub>10</sub> CTD.<sup>25</sup> The Agency is continuing to

<sup>24</sup> The CTD was actually published in September 1982, and distributed to the States before the proposal of the PM<sub>10</sub> standards. As a formal matter, however, the Agency deems a document in the *Federal Register*. See section 108(b)(1) and (d), 42 U.S.C. 7408(b)(1) and (d).

<sup>25</sup> A number of these reports and other materials are referenced in the Agency's "PM<sub>10</sub> SIP Development Guideline," which was published in June 1987 and mailed to approximately 300 State and local air pollution control agencies shortly after the final PM<sub>10</sub> implementation regulations were published on July 1, 1987. (The July 1 *Federal Register* notice references the PM<sub>10</sub> SIP Development Guideline. 52 FR 24672).

In addition, EPA has published and made available through the National Technical Information Service ("NTIS"), to which State and local agencies have access, numerous studies on

study and provide guidance on PM<sub>10</sub> control techniques, including information on the control of fine particulate emissions from nontraditional sources.<sup>26</sup> The issuance of a newly-packaged CTD is not necessary. What is helpful to the States is the publication of up-to-date information on control techniques, which the Agency has provided in the past and will continue to provide in the future.

## III. Request for Stay of Implementation

The petitioner also requests that EPA stay implementation of the revised PM<sub>10</sub> standards pending reconsideration of the standards or, in the alternative pending judicial review. Because I am denying AISI's petition for reconsideration in its entirety, a stay pending reconsideration is unnecessary, and I have decided that a stay pending judicial review would not be in the public interest. The revised standards are designed to protect human health and welfare. Delay in their implementation would be contrary to these goals. It would also foster an atmosphere of confusion because the States currently are engaged in revising their PM<sub>10</sub> State Implementation Plans ("SIPs") and submitting them to EPA for approval under section 110 of the Act, 42 U.S.C. 7410. Staying the standards would disrupt this process.<sup>27</sup>

control techniques for such sources of fugitive dust as industrial processes, unpaved roads, storage piles, construction sites and mines. A report published by the Agency in 1986 summarized the results of several of these studies, and provided cost information on various control techniques. See "Identification, Assessment and Control of Fugitive Particulate Emissions," EPA-600/8-86-023 (August 1986).

EPA also held four workshops across the country in August 1987 to brief State and local pollution control officials on implementing the PM<sub>10</sub> NAAQS standards. A list of reference materials on PM<sub>10</sub> control technology for point sources, fugitive sources and woodstoves was made available at these workshops. These materials were mailed to anyone who requested copies.

<sup>26</sup> The Agency recently has published and distributed to the States a document summarizing technical and regulatory information on PM<sub>10</sub> controls for a variety of nontraditional sources. See "Control of Open Fugitive Dust Sources," EPA-450/3-88-008 (September 1988). Among the technical matters discussed in this document are demonstrated control techniques for PM<sub>10</sub> emissions and, for the various techniques, (1) procedures for estimating control-effectiveness; (2) estimated effectiveness; (3) estimated costs and cost-effectiveness; and (4) procedures for estimating costs and cost-effectiveness.

<sup>27</sup> Moreover, even if the Agency were required to change the PM<sub>10</sub> standards or implementing regulations as a result of judicial review, the States would be free to amend their SIP submissions. The SIPs may also be revised after they are approved.

AISI has not made any arguments that would lead me to seriously question the correctness of my decisions in promulgating the PM<sub>10</sub> NAAQS and implementing regulations. For all the above reasons, its request for a stay is denied.

Dated: December 22, 1988.

Lee M. Thomas,  
Administrator.

[FR Doc. 88-29961 Filed 12-28-88; 8:45 am]  
BILLING CODE 6560-50-M

## 40 CFR Parts 50, 51, 52, 53, and 58

[FRL-3499-5]

### National Ambient Air Quality Standards for Particulate Matter; Regulations for Implementing Revised Particulate Matter Standards

AGENCY: Environmental Protection Agency.

ACTION: Denial of petition for reconsideration.

**SUMMARY:** The American Mining Congress ("AMC") has petitioned the Environmental Protection Agency ("EPA" or "the Agency") for reconsideration of the national ambient air quality standards for particulate matter promulgated under section 109 of the Clean Air Act on July 1, 1987 (52 FR 24634) and of regulations for implementing the standards promulgated the same day (52 FR 24672). The AMC petition asks that EPA make several "technical" changes in the standards and implementing regulations: (1) To provide for use of a geometric rather than an arithmetic mean in evaluating compliance with the annual-average standards; (2) to authorize adjustments for ambient temperature and pressure in calculating and reporting particulate matter sampling results; and (3) to authorize discounting of sampling results during periods of high wind speed. AMC also asks EPA to make what it calls a "policy" change to provide that the prevention of significant deterioration ("PSD") increments for particulate matter specified in section 163 of the Act be defined and measured by the particulate matter indicator (generally referred to as "PM<sub>10</sub>") that was adopted for other purposes in the standards and implementing regulations.

After careful review of AMC's petition, EPA has concluded that it should be denied in full. Most of the points AMC raises were made and considered in the rulemakings at issue; as to the others, AMC has neither documented them nor shown that it was

impracticable to raise them during the rulemaking proceedings. Accordingly, the Administrator has concluded that AMC's arguments do not meet the applicable criteria for reconsideration under the Clean Air Act, and that reopening the rulemakings to consider them further is unwarranted.

**ADDRESSES:** Material relevant to EPA's review and revision of the particulate matter standards can be found in Public Docket No. A-82-37, and material relevant to the promulgation of the implementing regulations (including issues involving the prevention of significant deterioration program) can be found in Public Docket A-82-38. The dockets are available for public inspection between 8:00 a.m. and 3:00 p.m. on weekdays at EPA's Central Docket Section, South Conference Center, Room 4, 401 M Street, SW., Washington, DC, telephone (202) 382-7549.

**FOR FURTHER INFORMATION CONTACT:** For information relating to the particulate matter standards, contact Mr. John H. Haines, Ambient Standards Branch (Mail Code 12), Air Quality Management Division, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5533. For information relating to the PSD increments for particulate matter, contact Mr. Gary McCutchen, Non-Criteria Pollutant Programs Branch (Mail Code 15), Air Quality Management Division, Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5592.

## SUPPLEMENTARY INFORMATION:

### Background

On July 1, 1987 (52 FR 24634), EPA published final revisions of the national ambient air quality standards ("NAAQS") for particulate matter, originally adopted in 1971 under section 109 of the Clean Air Act (42 U.S.C. 7409). On the same day, EPA published final revisions of the regulations for implementing the standards (52 FR 24672) and of various related regulations. These actions were the products of a lengthy and exhaustive administrative process, formally commenced in 1979 when EPA announced that it was (1) revising the air quality criteria underlying the 1971 standards and (2) reviewing those standards for possible revisions (44 FR 56731, Oct. 1, 1979).

The process began with preparation of a revised criteria document under

section 108 of the Act (42 U.S.C. 7408).<sup>1</sup> With the endorsement of the Clean Air Scientific Advisory Committee ("CASAC")<sup>2</sup> of EPA's Science Advisory Board, EPA had decided to revise the criteria document for particulate matter concurrently with that for sulfur oxides and to produce a combined document addressing both pollutants. After review of successive drafts of the document by CASAC and the public, EPA made the revised criteria document available to the public in 1982.

EPA staff also prepared a "staff paper" evaluating and interpreting the available scientific and technical information most relevant to review of the standards for particulate matter and presenting staff recommendations on revision of the standards. Drafts of this paper were also reviewed by CASAC and the public, and the final paper was issued in 1982.

In March 1984, EPA proposed a number of revisions of the existing standards (49 FR 10408, March 20, 1984).<sup>3</sup> Extensive comments were received on the proposal, both in writing and in testimony at a public hearing. CASAC also held a public meeting to review the proposal and to discuss the relevance of newly available health studies. On CASAC's recommendation, EPA prepared addenda to the criteria document and staff paper to evaluate the new studies. EPA also announced a supplementary period for public comment on the implications of the new studies and of drafts of the two addenda for its decision on revision of the standards. The final addenda, revised to reflect CASAC and public comments, were published in 1986.

As noted, the final revisions of the particulate matter standards were published on July 1, 1987 (52 FR 24634), together with revisions of EPA's regulations for implementing the standards (52 FR 24672) and of various related regulations. The preamble to the revised standards responded to the most important comments received on the proposal, and a more comprehensive compilation of comments and EPA responses to them (hereafter "Response

<sup>1</sup> A more detailed description of the process EPA followed in revising the criteria document and standards for particulate matter appears in the preamble to the revised standards (52 FR 24636-37).

<sup>2</sup> CASAC is a standing committee of scientists and engineers external to the federal government, established under section 109(d) of the Clean Air Act to advise the Administrator on the scientific basis for ambient air quality standards.

<sup>3</sup> EPA proposed corresponding revisions of the regulations for implementing the standards on April 2, 1985 (50 FR 13130).



to Comments" or "RTC") was placed in the docket for the rulemaking.<sup>4</sup>

The American Mining Congress ("AMC") and other interested parties filed a total of five petitions for judicial review of the revised standards and related regulations. On December 7, 1987, AMC filed the petition for reconsideration (hereafter "Pet.") to which this notice responds. The American Iron and Steel Institute ("AISI") also filed a petition for reconsideration, to which EPA is responding separately. The five petitions for judicial review have been consolidated into one case, *Natural Resources Defense Council v. Thomas*, D.C. Circuit No. 87-1437, which has been held in abeyance pending EPA's response to the AISI petition for reconsideration.

#### Criteria for Reconsideration

AMC seeks "administrative reconsideration of certain aspects of the final rules issued by [EPA] . . . relating to promulgation and implementation of revised [NAAQS] for particulate matter." (Pet. at 2). AMC does not state the statutory basis for its request for reconsideration. Presumably, the request was made pursuant to section 307(d)(7)(B) of the Clean Air Act, as section 307(d) is the provision under which the rulemaking was conducted.<sup>5</sup> Section 307(d)(7)(B) limits petitions for reconsideration both in time and scope. Specifically, it provides that EPA shall convene a proceeding to reconsider a rule if a person raising an objection can demonstrate (1) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after

<sup>4</sup> Docket A-82-37, Item V-C-1. A similar procedure was followed for public comment on the proposal to revise the regulations for implementing the standards.

<sup>5</sup> Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. 7607(d)(7)(B), states: "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States Court of Appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months."

the comment period but within the time specified for judicial review (i.e., within 60 days after publication of the final rulemaking notice in the *Federal Register*, see section 307(b)(1), 42 U.S.C. 7607(b)(1)); and (2) that the objection is of central relevance to the outcome of the rule. An objection is of central relevance only if it provides substantial support for the argument that the standards should be revised. See Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54 (December 11, 1980), and decisions cited therein.

Although section 4(d) of the Administrative Procedure Act (APA) also establishes a right to petition for issuance, amendment, or repeal of a rule,<sup>6</sup> that provision almost certainly does not apply to petitions for reconsideration of actions to which under the rulemaking provisions of section 307(d) of the Clean Air Act apply.<sup>7</sup> In any event, the criteria for evaluating such petitions under the APA are essentially the same as those for section 307(d)(7)(B) petitions. See Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54, and decisions cited therein.

#### Discussion

Congress sought to bring about a measure of finality in rulemakings under the Clean Air Act by requiring interested parties to raise all available objections during the rulemaking proceedings or not at all. The only exception provided is for objections based on "new information" of the type specified in section 307(d)(7)(B). See Denial of Petition to Revise NSPS for Stationary Gas Turbines, 45 FR 81653-54 (December 11, 1980), and decisions cited therein.

With the exception of its comments regarding periods of high wind speed, AMC simply reiterates comments that were made and considered in the rulemakings at issue. As to the windspeed issue, AMC has neither documented its objections nor shown that it was impracticable to raise them during the rulemaking proceedings.<sup>8</sup>

<sup>6</sup> Section 4(d) of the APA, 5 U.S.C. 553(e).

<sup>7</sup> Section 307(d)(1)(N), 42 U.S.C. 7607(d)(1)(N) states: "The provisions of section 553 through 557 . . . of title 5 of the United States Code shall not, except as expressly provided in this subsection, apply to action to which this subsection applies."

<sup>8</sup> Moreover, AMC delayed five months before filing its petition. Such a delay is inconsistent with the principle of finality embodied in the mandatory reconsideration provision of section 307(d)(7)(B). The five-month delay, coupled with the utter lack of explanation for the delay, is further support for my conclusion that the petition does not meet the requirements for reconsideration under section 307(d)(7)(B).

Further, I am not persuaded by any of the old or new arguments AMC raises. Accordingly, I conclude that no part of AMC's petition meets the criteria for reconsideration in section 307(d) of the Act, and that reopening the rulemaking as a discretionary matter is not warranted.

#### I. Technical Issues A. Arithmetic Versus Geometric Mean

AMC asks EPA to reconsider its selection of an arithmetic mean for evaluating compliance with the annual average NAAQS and to require instead the use of a geometric mean (Pet. at 3-5). In support of this request, AMC argues that the geometric mean is a better statistical measure and, in particular, is less sensitive to "aberrational" high values (id. at 4-5).

AMC makes no claim that these arguments are new, or that it was impracticable to raise them in the rulemaking. Indeed, AMC made virtually identical arguments in its comments on the rulemaking proposal (Docket A-82-37, IV-D-255 #11-12; Docket A-83-48, Item IV-D-46 at 43-46), and similar arguments were made by a number of other commenters. Thus, the arguments do not meet the criteria for reconsideration under section 307(d) of the Clean Air Act.

Nor was there any failure to consider this issue fully in the rulemaking. The rationale for my decision to adopt an arithmetic mean, as recommended by EPA staff and CASAC, is explained in the EPA staff paper (at 80-81) and in the preamble to the final rule (52 FR 24640). EPA considered the comments of AMC and others carefully and responded to them both in the preamble (id. at 24653) and in its detailed Response to Comments (e.g., Docket A-82-37, RTC IV-D-92 #1; IV-D-221 #14; IV-D-247 #7; IV-D-225 #12).

For these reasons, I see no reason to reopen the rulemaking based on the objections to selection of an arithmetic mean presented in AMC's petition.

#### B. Adjustments for Temperature and Pressure

The procedures specified for determining PM<sub>10</sub> concentrations in the ambient air require correction of sampler measurements to "reference" temperature and pressure. 40 CFR Part 50, App. J. Arguing that these procedures yield calculated PM<sub>10</sub> concentrations that overestimate actual PM<sub>10</sub> exposures at high altitudes as compared to sea-level exposures, AMC asks EPA to allow adjustments for ambient temperature and pressure in calculating and reporting PM<sub>10</sub> sampling results (Pet. at 5-7).

Again, AMC makes no claim that its arguments on this issue are new, or that it was impracticable to raise them in the rulemaking. In fact, nearly identical arguments were raised during the rulemaking (Docket A-82-37, Item IV-D-327). Thus, AMC's arguments do not meet the criteria for reconsideration under section 307(d) of the Clean Air Act.

As indicated in EPA's discussion of this issue in the Response to Comments (Docket A-82-37, RTC IV-D-327 #3), the issue was not raised during the initial comment period on the rulemaking proposal, was not within the scope of the subsequent comment period, and had not been considered in the criteria document or by CASAC. EPA nonetheless addressed the issue by conducting a literature survey and assessment of the effect of altitude on the dosimetry of ambient aerosols (Docket A-82-37, Item IV-A-13), and it responded in detail to the arguments that had been raised (Docket A-82-37, RTC IV-D-327 #3). Among other things, EPA noted that the corrections for pressure were supported by concerns about possible health effects in exercising individuals and in individuals with compromised lung capacity; that (as is true of AMC's petition) the commenters had not discussed the merits of the correction for temperature; that eliminating the correction for temperature would increase the stringency of the standards in colder areas and decrease it in warmer areas; and that the levels of the standards in effect assumed the use of such corrections. For these and other reasons specified in the response, EPA concluded that it would be unwise to change its longstanding procedure at that time and indicated that the issue would receive further consideration during the next review of the particulate matter standards.

As indicated above, AMC does not claim that its arguments on this issue are new. Nor does AMC's petition discuss, much less seek to refute, the points made in EPA's Response to Comments on the issue. Because EPA has already considered and responded to the arguments AMC raises, I see no reason to reopen the rulemaking on this issue.

#### C. Discounting of PM<sub>10</sub> Concentrations During High Wind Speeds

AMC asks EPA to amend 40 CFR Parts 53 and 58 "to allow discounting of PM<sub>10</sub> concentrations during periods of high wind speed; e.g., where the average wind speed exceeds 12 mph for more than 10% of the applicable monitoring period" (Pet. at 8). AMC furnishes no support or documentation for its

arguments. It simply states in conclusory fashion that in certain areas of the country frequent dust episodes arise from sources that are naturally occurring and not subject to control. Similarly, AMC asserts in a conclusory manner that EPA's approach to discounting PM<sub>10</sub> concentrations during high wind speeds is too limited and constrained to respond to this alleged problem.

AMC does not contend that it was impracticable to raise these arguments during the rulemaking, when the Agency amended Parts 53 and 58, nor that the petition is based on information that was not available during the rulemaking. In fact, there was full opportunity for comment on this issue. Yet AMC failed to comment on the wind-speed issue then and raises it now for the first time. Thus, AMC's arguments on this issue do not meet the criteria for reconsideration under section 307(d) of the Clean Air Act.

Nevertheless, I believe it appropriate to respond briefly to AMC's arguments, because they were not raised during the rulemaking and EPA therefore did not have an opportunity to state its views on this issue. EPA has already adopted a reasonable remedy for high particulate matter readings caused by high wind speeds, in Appendix K to 40 CFR Part 50. Section 2.4 of Appendix K provides a mechanism for adjustment of air quality data upon the occurrence of an "exceptional event," which is defined as "an uncontrollable event caused by natural sources of particulate matter or an event that is not expected to recur at a given location." EPA has also issued guidance on when air quality data affected by high wind speeds may be discounted. *Guideline on the Identification and Use of Air Quality Data Affected by Exceptional Events*, EPA-450/4-86-007 (July 1986). This guidance allows State and local air pollution control agencies to "flag" data they believe to have been caused by naturally occurring dust during periods of high wind speed.<sup>9</sup> Id. at 5-6. The data may then be excluded from any regulatory use, such as a determination of whether the area attains the NAAQS. Id. at 3. The guidance also provides specific criteria for the identification of exceptional events, including high wind

<sup>9</sup> AMC's suggested approach, on the other hand, would draw no distinction between high particulate matter readings caused by naturally occurring windblown dust and high readings caused by industrial source stack emissions or fugitive emissions (such as coal dust). AMC does not advance any reason why high particulate matter ambient readings due to industrial emissions should be discounted merely because the wind is blowing hard.

speeds.<sup>10</sup> Thus, a system already exists which allows EPA and State air pollution control agencies to judge the validity of high ambient air quality readings during periods of high winds.

For the above reasons, I conclude that further amendment of 40 C.F.R. Parts 53 and 58 to provide for discounting of PM<sub>10</sub> air quality data during periods of high wind speed is not justified.

#### II. Policy Issue—PSD Increments

AMC also petitions EPA to amend 40 CFR Parts 51 and 52 to provide that the numerical values of the prevention of significant deterioration ("PSD") increments for particulate matter specified in section 163(b) of the Act be defined and measured by the PM<sub>10</sub> indicator. AMC argues that (1) Congress did not intend the particulate matter increments in section 163 to be defined in terms of total suspended particulate ("TSP"), (2) the decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980), suggests that EPA could simply retain the numerical values for the section 163 increments but redefine them in terms of PM<sub>10</sub>, (3) retaining the TSP increments is unlawful because there no longer is a TSP NAAQS, (4) the failure to adopt AMC's suggested approach will prove burdensome to the mining industry, and (5) EPA has violated the settlement agreement in *Chemical Manufacturers Association v. EPA*, No. 79-1112 (D.C. Cir.).

AMC and others raised all of these arguments during the comment period (see, e.g., Docket A-83-48, Item VI-D-46; Docket A-82-38, Items IV-D-59, IV-D-35). Once again, AMC makes no claim that any of the arguments it now raises are new, that it was impracticable to raise them in the rulemaking, or that it is providing any new information on this issue. Thus, none of these arguments meets the criteria for reconsideration under section 307(d) of the Clean Air Act. Moreover, EPA carefully considered and fully responded to these arguments in the preamble to the regulations implementing the PM<sub>10</sub> standards (52 FR 24672, 24699-24702) and in its detailed Response to Comments on the April 1985 proposal to revise those regulations (Docket A-82-

<sup>10</sup> While the guidance's definition of high winds is significantly higher than the 12 mph figure suggested by AMC, EPA's figures are simply guidance and not rigid cutoffs. State and local agencies are still free to flag data gathered during periods of wind speed lower than that mentioned in the EPA guidance. EPA would then consider whether the data were truly caused by an exceptional event, and whether they should be excluded from regulatory use. Moreover, the 12 mph cutoff suggested by AMC makes little sense, because many areas of the country routinely experience winds greater than that speed.



38, Item V-C-1 at 13-22). Therefore, I conclude that none of these arguments justifies reopening the rulemaking as a discretionary matter.

Dated: December 22, 1988.

Lee M. Thomas,  
Administrator.

[FR Doc. 88-29960 Filed 12-28-88; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 180

[OPP-300194; FRL-3499-9]

#### Butanoic Anhydride and Pine Oil; Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical amendments.

**SUMMARY:** This document clarifies the intent of two regulations currently listed in 40 CFR Part 180. These are merely technical amendments that impose no new regulatory requirements; therefore, advance notice and public comment are unnecessary.

**EFFECTIVE DATE:** December 29, 1988.

**FOR FURTHER INFORMATION CONTACT:** Patricia C. Critchlow, Registration Division (TS-767C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-1806.

**SUPPLEMENTARY INFORMATION:** This document amends 40 CFR Part 180 by revising § 180.1034 (butanoic anhydride) and § 180.1035 (pine oil) to clarify that honey and beeswax are the raw agricultural commodities for which residues of the named chemicals are exempted from the requirement of a tolerance.

No new regulatory requirements are being added. The changes being made are merely technical amendments to produce conformity with other regulations in Part 180.

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 7, 1988.

Anne E. Lindsay,  
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, the following technical amendments are made to 40 CFR Part 180:

#### PART 180—[AMENDED]

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.1034 is revised to read as follows:

§ 180.1034 Butanoic anhydride; exemption from the requirement of a tolerance.

The insect repellent butanoic anhydride is exempted from the requirement of a tolerance for residues in the raw agricultural commodities honey and beeswax, when present therein as a result of its application in an absorbent pad over the hive to repel bees during the harvesting of honey.

3. Section 180.1035 is revised to read as follows:

§ 180.1035 Pine oil; exemption from the requirement of a tolerance.

Pine oil is exempted from the requirement of a tolerance for residues in the raw agricultural commodities honey and beeswax, when present therein as a result of its use as a deodorant at no more than 12 percent in formulation with the bee repellent butanoic anhydride applied in an absorbent pad over the hive.

[FR Doc. 88-29953 Filed 12-28-88; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 180

[PP 8E3583/R989; FRL-3499-7]

#### Pesticide Tolerances For Permethrin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** This rule establishes tolerances for residues of the herbicide permethrin and the sum total of its metabolites in or on the raw agricultural commodities bulb onions and garlic. The Interregional Research Project No. 4 (IR-4) petitioned for these tolerances.

**EFFECTIVE DATE:** December 29, 1988.

**ADDRESS:** Written objections, identified by the document control number. [PP 8E3583/R989], may be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, Rm. 3708, 401 M St., SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (TS-767C), Registration Division (TS-767C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2310.

**SUPPLEMENTARY INFORMATION:** EPA issued a proposed rule, published in the Federal Register of September 21, 1988 (53 FR 36588), in which it was announced that the Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, had submitted pesticide petition 8E3583 to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR-4 Project, and the Agricultural Experiment Stations of New York and Oklahoma.

The petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, proposed the establishment of a tolerance for the residues of the insecticide permethrin [(3-phenoxyphenyl)methyl-3-(2,2-dichloroethyl)-2,2-dimethylcyclopropane carboxylate] and the sum of its metabolites 3-(2,2-dichloroethyl)-2,2-dimethylcyclopropane carboxylic acid (DCVA) and (3-phenoxyphenyl)-methanol (3-PBA) in or on the raw agricultural commodities dry bulb onions and garlic at 0.1 part per million (ppm).

There were no comments or requests for referral to an advisory committee received in response to the proposed rule.

The data submitted in the petition and all other relevant material have been evaluated and discussed in the proposed rule. Based on the data and information considered, the Agency concludes that the tolerance will protect the public health. Therefore, the tolerance is established as set forth below.

Any person adversely affected by this regulation may, within 30 days after publication of this document in the Federal Register, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial

number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 15, 1988.

Susan H. Wayland,  
Acting Director, Office of Pesticide Programs.

Therefore, 40 CFR Part 180 is amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.378(b) is amended by adding and alphabetically inserting the listing for the raw agricultural commodities dry bulb onions and garlic, to read as follows:

§ 180.378 Permethrin; tolerances for residues.

(b) \* \* \*

Commodities	Parts per million
Garlic.....	0.1
Onions, dry bulb.....	0.1

[FR Doc. 88-29958 Filed 12-28-88; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 185

[OPP-300193; FRL-3499-8]

#### Inorganic Bromides; Technical Amendments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical amendments.

**SUMMARY:** This document clarifies the intent of a food additive regulation for inorganic bromides. These are merely technical amendments that impose no new regulatory requirements; therefore, advance notice and public comment are unnecessary.

**EFFECTIVE DATE:** December 28, 1988.

**FOR FURTHER INFORMATION CONTACT:** Patricia C. Critchlow, Registration Division (TS-767C), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Office location and telephone number: Rm. 716, CM #2,

1921 Jefferson Davis Highway, Arlington, VA, (703)-557-1806.

**SUPPLEMENTARY INFORMATION:** This document amends 40 CFR Part 185 by amending § 185.3700(a) to remove the reference to authorized use of 1,2-dibromo-3-chloropropane (DBCP) on raw agricultural commodities and, further, to remove the reference in § 185.3700(w) to the regulation 40 CFR 180.151.

All registrations for use of the nematocide DBCP in the production of food commodities were cancelled by December 31, 1988; and all tolerances for residues of inorganic bromides in or on raw agricultural commodities grown in soil treated with DBCP were revoked by a regulation published in the Federal Register of January 15, 1988 (51 FR 1791). However, the reference in § 185.3700(a) (formerly 21 CFR 193.250(a) prior to recodification published in the Federal Register of July 29, 1988 (53 FR 24866)) to DBCP was overlooked and not removed at that time.

The reference in 40 CFR 185.3700(w) to 40 CFR 180.151 is in error. There is no relationship between § 180.151, which regulates residues of ethylene oxide, and § 185.3700(w), which pertains only to residues of inorganic bromides. Therefore, § 185.3700(w) is being amended to remove the reference to 40 CFR 180.151. Section 185.3700(w) is being amended further to remove the reference therein to paragraph (b) of the same section, as paragraph (b) is "reserved" and lists no residue levels.

No new regulatory requirements are being added. The changes being made are merely technical amendments to achieve conformity with other regulations in Part 185.

#### List of Subjects in 40 CFR Part 185

Administrative practice and procedure, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 7, 1988.

Anne E. Lindsay,  
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, the following technical amendments are made to 40 CFR 185.3700:

1. The authority citation for Part 185 continues to read as follows:

Authority: 21 U.S.C. 348.

2. Section 185.3700 is amended in paragraph (a) by removing the phrase "or the nematocide 1,2-dibromo-3-chloropropane" and by revising paragraph (w), to read as follows:

#### § 185.3700 Inorganic bromides.

(w) Where tolerances are established under sections 408 and 409 of the FFDCA on both the raw agricultural commodities and processed foods made therefrom, the total residues of inorganic bromides in or on the processed food shall not be greater than those designated in paragraph (a) of this section, unless a higher level is established elsewhere in this Part or in Part 180.

[FR Doc. 88-29954 Filed 12-28-88; 8:45 am]  
BILLING CODE 6560-50-M

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### Family Support Administration

#### 45 CFR Part 205

#### Targeting in the Income and Eligibility Verification System for the Aid to Families With Dependent Children Program and the Adult Assistance Programs

AGENCY: Family Support Administration, HHS.

ACTION: Interim rule with request for comments.

**SUMMARY:** This interim final rule applies to State agencies administering Aid to Families with Dependent Children (AFDC) under Title IV-A and the Adult Assistance programs under Titles I, X, XIV, and XVI (Aid to the Aged, Blind, or Disabled) of the Social Security Act. It rescinds the current requirement that a State must follow up on all information items received under the matching operations of its Income and Eligibility Verification System (IEVS). This interim final rule allows States to allocate their resources to those categories of information items which are most cost-effective for follow-up and establishes procedures for submitting follow-up plans for approval. In addition, this rule changes the timeliness standard for the completion of action from 30 to 45 days.

**DATES:** This interim rule is effective January 30, 1989; comments will be considered if we receive them no later than February 27, 1989.

**ADDRESSES:** Comments should be sent to the Administrator of the Family Support Administration, Attention: Ms. Diann Dawson, Director, Division of Policy, Office of Family Assistance, 5th Floor, 370 L'Enfant Promenade, SW., Washington, DC 20447, or delivered to the Office of Family Assistance, Family Support Administration, 5th Floor, 370



L'Enfant Promenade, SW., Washington, DC 20447, between 8:00 a.m. and 4:30 p.m. on regular business days. Comments received may be inspected during the same hours by making arrangements with the contact person below.

**FOR FURTHER INFORMATION CONTACT:** Ms. Diann Dawson, 5th Floor, 370 L'Enfant Promenade, SW., Washington, DC 20447, telephone 202-252-5116.

**SUPPLEMENTARY INFORMATION:** The Deficit Reduction Act of 1984 (DEFRA) amended titles I, IV-A, X, XIV, and XVI (AABD) to require that a State plan must provide that information necessary for verification of income and eligibility is requested and exchanged in accordance with a State system which meets the requirements of section 1137 of the Social Security Act. We refer to this procedure as the Income and Eligibility Verification System. (IEVS).

Current regulations at 45 CFR 205.56 require that State agencies must actually avail themselves of the information received from each data source by following up on all information items and initiating a notice of case action or an entry in the case record that no case action is necessary within 30 days.

Section 9101 of Pub. L. 99-509, the Budget Reconciliation Act of 1986, revised section 1137 to ensure that no State is required to follow up on all of the information items received to verify the eligibility of recipients. The House Report accompanying the legislation (House Report 99-727, July 31, 1986 (pages 424-425)) further states that IEVS data are to be targeted by States to those uses which are likely to be the most productive. Under this interim final rule, States will no longer be required to follow up on all information items, but may instead follow up on a smaller number based on an approved State follow-up plan which defines the information to be excluded and provides a convincing justification for that exclusion.

This rule also affects the follow-up of IEVS information under the Food Stamp and Medicaid programs. Follow-up of information items covering recipients of those programs who also receive AFDC or adult assistance benefits are covered under this rule. On February 2, 1988, the Food and Nutrition Service published in the Federal Register (53 FR 2817) the rules for targeting IEVS information items for Food Stamp recipients who are not covered under this rule. The Health Care Financing Administration will also publish rules or instructions for Medicaid recipients not covered under this rule.

#### Approval of State Follow-up Plan

Section 9101 of Pub. L. 99-509 provides that no State shall be required to use 100 percent of such information items to verify the eligibility of all recipients. Congress directed the Secretary of the Department of Health and Human Services and the Secretary of the Department of Agriculture to publish rules to ensure that States are afforded the flexibility to target their efforts to the most productive use. Congress specified that States must be permitted the flexibility to prioritize and target the follow-up of match information and encouraged to use tolerance levels as an efficient method of targeting scarce State resources. Accordingly, we have revised 45 CFR 205.56(a)(1) to allow States to choose a strategy of excluding from follow-up categories of information items which they believe are not cost-effective.

States which intend to exclude items from follow-up must submit a follow-up plan which specifies the categories to be excluded and provides a description of the criteria defining each category. For each category, the State must provide a reasonable justification explaining why the follow-up would not be cost-effective. A formal cost-benefit analysis is not required. States may find it preferable to base their justifications on the general experience of their program in following up on specific categories of information.

States have a great deal of flexibility in developing these criteria. States could, for example, use Quality Control studies or past IEVS experience to justify discontinuation of follow-up with respect to selected information items. They may develop dollar thresholds or other techniques to isolate information items most likely to be practical for follow-up. For example, suppose that analysis of past IEVS experience reveals that State administrative costs of follow-up for interest income are not justified for items of \$10 or less. Accordingly, the State could develop a follow-up plan which selects (for follow-up) interest items greater than \$10 and excludes the rest.

The exclusion criteria may also use case characteristics of assistance units. The State in the above example might also discover that follow-up of interest income of \$30 or less is not practical for assistance units residing in rural areas. Accordingly, the State could develop methods to classify its assistance units as "rural" or "metropolitan" according to county of residence. The plan might then indicate that follow-up would be reserved for metropolitan assistance units with interest income greater than

\$10 and rural assistance units with interest income greater than \$30.

Whatever method of justification is chosen, the State must consider the effects of overpayments and underpayments in the Food Stamp and Medicaid programs as well as AFDC cash benefits.

This rule will allow States to allocate their best efforts to those data sources which they believe provide the best leads to unreported income or resources. However, we wish to emphasize the utility of the quarterly match with the State Wage Information Collection Agency (SWICA) which provides leads to unreported wage income and the annual match with the Internal Revenue Service which provides leads to unreported resources. We believe that States will continue to find these two sources to be very cost-effective tools in reducing payment errors. Therefore, in the absence of substantial justification, these items would not be excluded.

A State may exclude duplicative information items from two data sources without written justification if these items had been previously followed up with other sources. They are:

(1) Unemployment compensation information items received from the Internal Revenue Service.

(2) Earnings information items received from the Social Security Administration.

The State must indicate in the follow-up plan that it intends to exclude these duplicative items. Information items in these categories which are not duplicative, but provide new information, as in the case of leads to earnings or unemployment compensation in other States, may not be excluded without the written justification.

The Secretary will approve all categories of a State follow-up plan for which a reasonable justification has been provided and will notify the State within 60 days of submission of the plan. Those categories approved by the Secretary constitute "an approved State follow-up plan" and are incorporated into the IEVS requirements under the State plan. The State will also be notified which categories have not been approved and the reason for the disapproval.

The State must follow up on all information items in categories which have not been approved, but may submit a new follow-up plan, revise categories of a current follow-up plan, or submit additional justification for cost-effectiveness at any time. To deviate from an approved follow-up plan or to follow up at a rate of less than 100

percent for categories which have not been approved by the Secretary raises a question of noncompliance as set forth in 45 CFR 201.6.

Approval of a State follow-up plan does not relieve the State of its responsibility for erroneous payments or the State's liability for those payments, as provided by the Quality Control (QC) requirements. In addition, exclusion of items under a State follow-up plan does not alter the present requirement to retain all information items for use in QC reviews. All information items must be readily available to QC staff, including those items not selected for follow-up.

#### Follow-up of Information Items

Since publication of the final IEVS regulation, we received comments which indicated some misunderstanding of the action necessary to follow up on information items. Therefore, we wish to emphasize here that "follow-up" refers to comparison of match information items with case file information (either in an automated or manual file) and a determination of further action, if necessary. There is no Federal requirement that States re-document case file information each time an information item is received.

Follow-up is considered complete when the State annotates the case record that no case action is necessary because the information item substantially conforms to the information in the case file, is excluded from follow-up by an approved State plan, or when any discrepancy arising from their comparison is resolved and the case file is annotated and the recipient notified of any case action. For example, if the local agency compares an interest income item with the case file and discovers that a bank account balance was documented at a previous redetermination, it is not necessary to re-contact the bank to document the most recent account balance. In such a case, the State may consider that the information item substantially conforms with case file information; follow up is completed when the case file is annotated that no further case action is necessary.

We have not defined when an information item "substantially conforms" to the information in the case file. We believe that each State can best decide what information merits closer scrutiny and third-party contact. In cases where the information item does not substantially conform to the information in the case file, follow-up will not be complete until the local agency has resolved the discrepancy. If further investigation reveals the

existence of income or resources not previously considered in the determination of eligibility or payment amount and resolution results in a reduction or termination of assistance, the State must send the recipient the appropriate notice of case action. On the other hand, if resolution of the discrepancy does not affect eligibility or the amount of payment, the required follow-up is considered complete when the local agency documents the case file that no further case action is necessary.

Some States are concerned whether their current IEVS procedures meet the requirements for follow-up. In those States with advanced information systems, it may be possible to compare match information items against case folder information without case worker involvement. For example, assume a State has an automated system with data fields for unearned income. The State programs its computer to compare information items from the IRS data source to information in corresponding data fields and provide a listing of those recipients for whom IRS information does not substantially conform to case file information. Subsequently, caseworkers resolve all questions arising from these discrepancies and annotate the case files accordingly. Even though only a small number of cases was manually reviewed, we consider the State to have followed up on all items. In other words, automated comparison of information may be considered as follow-up even without physical inspection of the case folder.

In other States, physical examination of the case folder information may be necessary. However, States need not "re-invent the wheel" for each subsequent match. States may compile lists or retain documentation of resolution of discrepancies from previous matches, curtailing duplicate development where possible.

#### Follow-up and Applicants

Current regulations at 45 CFR 205.56(a)(1)(iii) provide that IEVS-obtained information received during the application period shall be used, to the extent possible, to make the initial determination of eligibility. This provision is not changed. The statute refers only to follow-up actions with respect to recipients, and, therefore, this rule is applicable only to recipient households. We carefully considered revising current regulations to extend follow-up requirements to applicants, but concluded that it was not in the best interest of the program to include information items received during the application period in this interim final rule.

The application period is particularly important in that the State conducts an intensive review of all of the factors of eligibility, including the economic circumstances of the household. Thereafter, periodic redeterminations tend to be somewhat less intensive with questions concentrating on whether a change in circumstances has occurred in the past few months or is expected to occur in the next few months. Moreover, redeterminations are also frequently conducted by telephone or mail or in group interviews. The application process is therefore crucial to the integrity of the program and all information items should be pursued and resolved to the extent possible prior to authorization of assistance.

However, States may not delay a pending application solely to await IEVS information if other evidence establishes the individual's eligibility for assistance. Information requested on an applicant, but received after assistance is authorized, is considered as information regarding a recipient, and may therefore be excluded under an approved follow-up plan.

#### Timeframes for Action

Current regulations at 45 CFR 205.56(a)(1)(iv) require that the State will either initiate a notice of case action or make an entry in the case record that no case action is necessary within 30 days of the receipt of an information item. Completion of action may be delayed beyond 30 days on up to 20 percent of the total information items received, but only if third-party verification has been timely requested and not received. In these cases, appropriate action must be completed no later than the date of the next redetermination or other case action.

The House Report accompanying Pub. L. 99-509 referred to this 30-day timeframe as too restrictive and suggested a 45-day standard for completion of follow-up. We, therefore, have revised regulations at 45 CFR 205.56(a)(1)(iv) to allow a 45-day standard for follow-up. We will continue to allow completion of action to be delayed beyond this time limit on up to 20 percent of the information items selected for follow-up, but not beyond the date of the next case acting or redetermination, whichever is earlier. This is a maximum time period and does not preclude a State from setting shorter timeframes for action on information items from a particular data base.



**Justification for Dispensing with Notice of Proposed Rulemaking**

The Administrative Procedure Act, 5 U.S.C. 553(b)(A), provides an exception to notice and comment rulemaking requirements for rules of agency organization, procedure, or practice. We believe this rule can be characterized as procedural.

Section 402(a)(25) of the Social Security Act currently requires a State plan to provide for a system of income and eligibility verification in accordance with section 1137 of the Act. The primary effect of this rule is to implement a statutory change to section 1137 relaxing current verification procedures to allow States to determine which IEVS data is cost-effective for follow-up. In order to ensure that the State system is consistent with the statutory change, the rule requires the State to submit a plan amendment that includes a reasonable justification for excluding categories of information items from follow-up as not cost-effective. The plan amendment will be approved if the justification is provided. The rule does not prescribe criteria by which cost-effectiveness must be judged.

The rule also reflects Congress' intent that a State be provided more than the 30 days currently allowed by regulation to complete its follow-up on information received through IEVS. We have therefore amended current rules to extend the follow-up timeframe to 45 days. While we also view this provision as relaxing current procedural requirements, we recognize that it could be viewed as having a substantive impact on States. However, we believe notice and comment procedures need not be followed for this requirement, since to delay publication would be contrary to the public interest. The Administrative Procedure Act, 5 U.S.C. 553(b)(A), provides that where the Department for good cause finds that prior notice and public comment is unnecessary, impracticable or contrary to the public interest, it may dispense with that notice and public comment if it incorporates a brief statement in the interim final regulations of the reasons for doing so.

The Department finds that there is good cause to dispense with prior notice a public comment with respect to this change. We find that publication of this requirement in proposed form would be contrary to the public interest since it relaxes a restriction contained in current regulations and delay would prevent States from taking advantage of the longer time period Congress indicated in the legislative history should be granted

to the States to follow up (H.R. Rep. No. 99-797, pages 424 and 425).

While Notice of Proposed Rulemaking is being waived, we are interested in comments and advice regarding these changes. We will review any comments which we receive on or before February 27, 1989 and will publish the final rule with any necessary changes.

**Executive Order 12291**

This interim final rule has been reviewed under Executive Order 12291 and does not meet any of the criteria for a major regulation. The effect of this regulatory change on the economy will be less than \$100 million and will have an insignificant effect on costs or prices. Competition, employment, investment, productivity and innovation will remain unaffected. There will be no effect on the competition of United States-based enterprises with foreign-based enterprises. Therefore, it is not a major rule within the definition of Executive Order 12291.

**Paperwork Reduction Act**

This rule contains information collection requirements that are subject to Office of Management and Budget review under the Paperwork Reduction Act of 1980. The requirement will not be effective until the Department obtains OMB approval at which time a notice will be published in the Federal Register to notify the public of such action. Other organizations and individuals desiring to submit comments on these requirements should direct them to the agency official designated for this purpose whose name appears in this preamble, and to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building (Room 3208), Washington, DC 20503, ATTN: Justin Kopca.

**Regulatory Flexibility Analysis**

We certify that this action, if promulgated, will not have a significant impact on a substantial number of small entities because it primarily affects State governments and individuals. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96-354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program 13.808, Public Assistance)

**List of Subjects in 45 CFR Part 205**

Computer technology, Grant programs-social programs, Privacy, Public assistance programs, Reporting and recordkeeping requirements, Wages.

Dated: June 13, 1988.

Wayne A. Stanton,  
Administrator, Family Support  
Administration.

Approved: September 21, 1988.

Otis R. Bowen,  
Secretary of Health and Human Services.

For the reasons set forth in the preamble, 45 CFR Part 205 is amended as set forth below:

**PART 205—GENERAL ADMINISTRATION—PUBLIC ASSISTANCE PROGRAMS**

1. The authority citation for Part 205 continues to read as set forth below, and the authority citations following all the sections in Part 205 are removed.

Authority: Section 1102, 49 Stat. 647; 42 U.S.C. 1302.

2. Section 205.56 is amended by revising paragraphs (a)(1) introductory text, (a)(1)(iv) introductory text, and (a)(1)(iv)(A), to read as follows:

**§ 205.56 Requirements governing the use of income and eligibility information.**

(a) \* \* \*

(1) Determining individuals' eligibility for assistance under the State plan and determining the amount of assistance. States wishing to exclude categories of information items from follow-up must submit for the Secretary's approval a follow-up plan describing the categories of information items which it proposes to exclude. For each category, the State must provide a reasonable justification that follow-up is not cost-effective. A formal cost-benefit analysis is not required. A State may exclude information items from the following data sources without written justification if followed up previously from another source: Unemployment compensation information received from the Internal Revenue Service, and earnings information received from the Social Security Administration. Information items in these categories which are not duplicative, but provide new leads, may not be excluded without written justification. A State may submit a follow-up plan or alter its plan at any time by notifying the Secretary and submitting the necessary justification. The Secretary will approve or disapprove categories of information items to be excluded under the plan within 60 days of its submission. Those categories approved by the Secretary will constitute an approved State follow-up plan for IEVS. For those information items not excluded from follow-up.

\* \* \*

(iv) For individuals who are recipients when the information is received or for whom a decision could not be made prior to authorization of benefits, the State agency shall within forty-five (45) days of its receipt, initiate a notice of case action or an entry in the case record that no case action is necessary, except that: Completion of action may be delayed beyond forty-five (45) days on no more than twenty (20) percent of the information items targeted for follow-up, if:

(A) The reason that the action cannot be completed within forty-five (45) days is the nonreceipt of requested third-party verification; and

[FR Doc. 88-29917 Filed 12-28-88; 6:45 am]  
BILLING CODE 4150-04-M

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 95****Personal Radio Services; Technical Amendments, Correction**

AGENCY: Federal Communications Commission.

ACTION: Erratum; final rules.

**SUMMARY:** This document corrects an inadvertent error in an Order adopted by the FCC (53 FR 36788) that clarified the Technical Regulations of the Personal Radio Services. The Personal Radio Services include the General Mobile Radio Service, the Radio Control Service and the Citizens Band Radio Service. The correction is to add the frequency 75.79 MHz between 75.77 MHz and 75.81 MHz in the list of frequencies in paragraph (a) of Section 95.623, 47 CFR 95.623(a).

**DATES:** This correction is effective December 29, 1988.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:** John J. Borkowski, Special Services Division, Private Radio Bureau, (202) 632-4964.

**Erratum**

Released: December 14, 1988.  
By the Commission:

1. On July 26, 1988, the Commission adopted an Order, 3 FCC Rcd 5032 (1988), in this matter rewriting the technical regulations of the Personal Radio Services Rules contained in Subpart E of Part 95, 47 CFR 95.601-95.669. The Personal Radio Services include the General Mobile Radio Service (GMRS), the Radio Control Radio Service (R/C), and the Citizens Band Radio Service (CB).

2. In the rules that were adopted, one frequency was inadvertently omitted from the listing of frequencies in paragraph (a) of § 95.623. The frequency 75.79 MHz should be inserted between 75.77 MHz and 75.81 MHz in this paragraph.

3. Paragraph (a) of § 95.623, 47 CFR 95.623(a), is hereby amended to correct this error. This action is effective upon public notice of the correction appearing in the Federal Register.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 88-29870 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Part 1815****Change to NASA FAR Supplement Concerning Proposal Evaluators**

AGENCY: Office of Procurement, Procurement Policy Division, National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

**SUMMARY:** This notice amends the NASA Federal Acquisition Regulation Supplement (NFS), Chapter 18 of the Federal Acquisition Regulation System in Title 48 of the Code of Federal Regulations. This rule requires that non-government proposal evaluators be appointed special government employees before participating in the evaluating process.

**EFFECTIVE DATE:** December 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** W.A. Greene, Chief, Regulations Development Branch, Procurement Policy Division (Code HP), Office of Procurement, NASA Headquarters, Washington, DC 20546, Telephone: (202) 453-8923.

**SUPPLEMENTARY INFORMATION: Background**

This rule was published for comment as a proposed rule in the Federal Register of September 20, 1988 (53 FR 36475). One public-sector comment was received, which was given due consideration in preparing the final rule. This rule requires that JPL and other non-government participants in certain proposal evaluation proceedings be appointed special government employees because these appointees would then be subject to the same conflict of interest statutes and policies that regular Federal employees are subject to, and this would ensure better control and management over the evaluation process. Individual

arrangements are made between NASA and each special government employee. The terms of appointment are flexible and can accommodate considerations related to other employment. Remuneration, if any, may range from reimbursement of expenses to payment for services. Special government employees are authorized under 18 U.S.C. 202.

**Impact**

The Director, Office of Management and Budget (OMB), by memorandum dated December 14, 1988, exempted certain agency procurement regulations from Executive Order 12291. This proposed regulation falls in this category. NASA certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule does not impose any reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980.

**List of Subjects in 48 CFR Part 1815**

Government procurement.

S.J. Evans,

Assistant Administrator for Procurement.

**PART 1815—[AMENDED]**

1. The authority citation for 48 CFR Part 1815 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

2. In 1815.413-2, paragraph (b), is revised to read as follows:

1815.413-2 Alternate II.

\* \* \*

(b) Policy. It is NASA policy to have proposals evaluated by the most competent technical and management sources available. When it is necessary to disclose a proposal outside the Government to meet NASA's evaluation needs—

(1) Personnel participating in evaluation proceedings shall be instructed to observe the restrictions in FAR 15.413 and 1815.413.

(2) The requirements in paragraphs (c) and (d) below shall be met.

(3) JPL and other non-government participants in evaluation proceedings shall be appointed as special government employees, except for evaluation proceedings resulting from Broad Agency Announcements (1835.016) and unsolicited proposals.

\* \* \*

[FR Doc. 88-29884 Filed 12-28-88; 6:45 am]

BILLING CODE 7510-01-M



## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Parts 611 and 672

[Docket No. 71146-8001]

## Foreign Fishing; Groundfish of the Gulf of Alaska

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.  
**ACTION:** Notice of inseason adjustment.

**SUMMARY:** NOAA announces the apportionment of Pacific cod to total allowable level of foreign fishing (TALFF) in the Western Regulatory Area of the Gulf of Alaska. This action is necessary as an amount of Pacific cod in the Western Regulatory Area will not be harvested by U.S. fishermen during the remainder of the 1988 fishing year, and may therefore be apportioned to TALFF. It is intended to comply with the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska.

**DATES:** Effective December 23, 1988. Comments are invited until January 13, 1989.

**ADDRESS:** Comments should be sent to James W. Brooks, Acting Director, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802-1668.

**FOR FURTHER INFORMATION CONTACT:** James W. Brooks at 907-586-7230.

**SUPPLEMENTARY INFORMATION:**

## Background

The domestic and foreign groundfish fisheries in the EEZ of the Gulf of

Alaska are managed by the Secretary under the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). The FMP was prepared by the North Pacific Fishery Management Council (Council) under the Magnuson Fishery Conservation and Management Act (Magnuson Act) and is implemented by regulations for the foreign fishery at 50 CFR Part 611 and for the U.S. fishery at 50 CFR Part 672.

One of the groundfish species managed under the FMP is Pacific cod, for which a total allowable catch (TAC) in the Western Regulatory Area of the Gulf of Alaska equal to 19,000 metric tons (mt) has been specified for 1988 (53 FR 890, January 14, 1988). Under § 672.20(d)(2), the Secretary of Commerce (Secretary) may apportion to TALFF any part of the domestic annual harvest (DAH) amounts that he determines will not be harvested by U.S. fishermen during the remainder of the year.

During August 1988, the Director, Alaska Region, NMFS, (Regional Director) conducted a survey of the U.S. industry that indicated 12,000 mt of Pacific cod in the Western Regulatory Area would not be harvested by U.S. fishermen during the remainder of the fishing year. At its September 28-October 1, 1988 meeting, the Council concurred with the survey findings, and certified to the Secretary that this amount of Pacific cod was surplus to U.S. fishing needs, and, therefore, was available for apportionment to TALFF. A more recent assessment of domestic fishery performance by the Regional Director indicated that the surplus does not exceed 7,600 mt. Consequently, the Secretary finds that 7,600 mt of Pacific

cod in the Western Regulatory Area will not be harvested by U.S. fishermen and reapportions this amount from DAH to TALFF.

## Other Matters

This action is taken under the authority of 50 CFR 672.22 and complies with Executive Order 12291.

The Assistant Administrator for Fisheries finds for good cause that a prior opportunity for public comment for 30 days under § 672.22(b)(1) is impracticable and contrary to the public interest, because reapportioning DAH to TALFF for Pacific cod would have no effect due to the few remaining days of the 1988 fishing year.

Under 672.22(b)(2), public comments will be accepted on the necessity for, and extent of, the adjustment for a period of fifteen (15) days after the effective date of this notice.

## List of Subjects

## 50 CFR Part 611

Fisheries, Foreign relations, Reporting and recordkeeping requirements.

## 50 CFR Part 672

Fisheries, Reporting and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 23, 1988.

Richard H. Schaefer,

Director of Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 88-30000 Filed 12-23-88; 3:42 pm]

BILLING CODE 3510-22-M

## Proposed Rules

Federal Register

Vol. 53, No. 250

Thursday, December 29, 1988

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

## Animal and Plant Health Inspection Service

## 9 CFR Part 94

[Docket No. 88-149]

## Swine, Pork, and Pork Products Imported From Great Britain; Addition to List

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to amend the regulations concerning the entry into the United States of pork and pork products and the movement into the United States of swine by adding Great Britain to the lists of countries in which hog cholera is not known and not determined to exist. We have determined that hog cholera has been eradicated from Great Britain. The proposed revision would relieve certain restrictions on the entry into the United States of pork and pork products and the movement into the United States of swine from Great Britain.

**DATE:** Consideration will be given only to comments postmarked or received on or before February 27, 1989.

**ADDRESSES:** Send an original and two copies of written comments to Regulatory Analysis and Development, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 88-149. Comments received may be inspected at USDA, Room 1141, South Building, 14th and Independence Ave. SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Dr. Harvey A. Kryder, Senior Staff Veterinarian, Import-Export Products Staff, VS, APHIS, USDA, Room 753, Federal Building, 6505 Belcrest Road, Hyattsville, MD 10782, 301-436-8695.

**SUPPLEMENTARY INFORMATION:**

## Background

The regulations in 9 CFR Part 94 (referred to below as the regulations) regulate the entry and movement into the United States of specified animals and animal products in order to prevent the introduction into the United States of various diseases, including hog cholera.

Section 94.9 of the regulations restricts the entry into the United States of pork and pork products from countries where hog cholera is known to exist. The restrictions include cooking, heating, or curing and drying procedures designed to destroy organisms that could spread hog cholera. Section 94.10 of the regulations, with certain exceptions, prohibits the movement into the United States of swine that originate in, are shipped from, or transit any country in which hog cholera is determined to exist. Section 94.9 lists all countries of the world where hog cholera is not known to exist; § 94.10 lists all countries of the world where hog cholera is not determined to exist.

Based on surveys conducted by the government of Great Britain, we have determined that there is no reason to believe that hog cholera exists in Great Britain. No case of hog cholera has been reported in Great Britain since the disease was eradicated in August 1987.

Therefore, we are proposing to amend § 94.9 by adding Great Britain to the list of countries in which hog cholera is not known to exist; we also propose to amend § 94.10 by adding Great Britain to the list of countries in which hog cholera is not determined to exist. The adoption of this proposal would relieve restrictions on the entry into the United States of pork and pork products and the movement into the United States of swine from Great Britain.

## Miscellaneous

On July 27, 1973, we amended § 94.9(a) (See 38 FR 20065, Docket Number 73-085), to add Sweden to the list of countries in which hog cholera is not known to exist. However, Sweden was inadvertently left out in the first sentence, and should have been added after "New Zealand". Therefore, this document would correct the list to include Sweden.

This document would also make nonsubstantive changes in § 94.9(a) by deleting surplusage.

In a document published in the Federal Register on July 2, 1987 (52 FR 25020-25021, Docket Number 87-063), we had proposed to amend the regulations by adding Great Britain to the lists of countries contained in §§ 94.9(a) and 94.10. Shortly after the proposed rule was published, however, hog cholera was discovered in Great Britain. Therefore, we did not publish a final rule. However, Great Britain has again eradicated hog cholera and has remained free of the disease for one year. We are therefore repropounding the rule to add Great Britain to the lists of countries in which hog cholera is not known and not determined to exist.

## Executive Order 12291 and Regulatory Flexibility Act

We are issuing this proposed rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule would have an effect on the economy of less than \$100 million; would not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and would not cause a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

For this action, the Office of Management and Budget has waived its review process required by Executive Order 12291.

Our proposal would affect only the small number of U.S. swine producers who have expressed an interest in obtaining breeding stock, swine semen, or both, from Great Britain. We anticipate that the number of swine and the amount of swine semen that would be imported annually from Great Britain would not be significant, and would not have an impact on other U.S. swine producers. We expect that only one or two shipments of swine semen would be imported from Great Britain each year. We expect that no more than 100 swine would be imported from Great Britain each year, and we anticipate that only 3

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or 4 importers would be involved. These importations are insignificant when compared with the 300,000 or more swine that were imported into the United States in 1987.

In addition, Great Britain has no pork processing plants that are approved by the USDA's Food Safety and Inspection Service. Therefore, even if Great Britain were to be recognized as being free of hog cholera, commercial shipments of pork products from that country to the United States would still be prohibited. Thus, while individuals would be allowed to import small quantities of pork and pork products for personal consumption, commercial shipments would continue to be ineligible for importation.

For these reasons, the amount of pork and pork products imported into the United States from Great Britain would remain very small, and would have no significant impact on U.S. swine producers.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act

The regulations in this proposal contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

#### List of Subjects in 9 CFR Part 94

Animal diseases, Hog cholera, Import, Livestock and livestock products, Meat and meat products, Milk, Poultry and poultry products.

Accordingly, 9 CFR Part 94 would be amended as follows:

#### PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, FOWL PEST (FOWL PLAGUE), NEWCASTLE DISEASE (AVIAN PNEUMOENCEPHALITIS), AFRICAN SWINE FEVER, AND HOG CHOLERA: PROHIBITED AND RESTRICTED IMPORTATIONS

1. The authority citation for Part 94 would continue to read as follows:

Authority: 7 U.S.C. 147a, 150ee, 161, 162, 450; 19 U.S.C. 1308; 21 U.S.C. 111, 114a, 134a, 134b, 134c, and 134f; 31 U.S.C. 9701; 42 U.S.C. 4331, 4332; 7 CFR 2.17, 2.51, and 371.2(d).

2. Paragraph (a) of § 94.9 would be revised to read as follows:

#### § 94.9 Pork and pork products from countries where hog cholera exists.

(a) Hog cholera is known to exist in all countries of the world except Australia, Canada, Denmark, Dominican Republic, Finland, Great Britain (England, Scotland, Wales, and Isle of Man), Iceland, New Zealand, Northern Ireland, Norway, the Republic of Ireland, Sweden, and Trust Territory of the Pacific Islands.<sup>1</sup>

#### § 94.10 [Amended.]

3. Section 94.10 would be amended by adding "Great Britain (England, Scotland, Wales, and Isle of Man)," immediately after "Finland."

Done in Washington, DC, this 22 day of December 1988.

James W. Glosser,  
Administrator, Animal and Plant Health  
Inspection Service.

[FR Doc. 88-29912 Filed 12-28-88; 8:45 am]  
BILLING CODE 3410-34-M

#### NUCLEAR REGULATORY COMMISSION

##### 10 CFR Part 50

#### Ensuring the Effectiveness of Maintenance Programs for Nuclear Power Plants; Extension of Comment Period

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule: Extension of comment period.

SUMMARY: On November 28, 1988 (53 FR 47822) the Commission published for public comment a rule that would require commercial nuclear power plant licensees to strengthen their maintenance activities in order to reduce the likelihood of failures and events caused by the lack of effective maintenance. The comment period for this proposed rule was to have expired on January 27, 1989. The Nuclear Management and Resources Council (NUMARC) has requested a sixty-day extension of the comment period. In view of the importance of the proposed rule, the amount of time that the NUMARC suggests is required in order to provide meaningful comments on behalf of its member utilities, and the desirability of developing a final rule as

<sup>1</sup> See also other provisions of this part and Parts 92, 95, 96, and 327 of this chapter for other prohibitions and restrictions upon importation of swine and their products.

soon as practicable, the Commission has decided to extend the comment period for an additional thirty days. The extended comment period now expires on February 27, 1989.

DATE: The comment period has been extended and now expires February 27, 1989. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before this date.

ADDRESSES: Mail written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street NW., Washington, DC.

Deliver comments to: 11155 Rockville Pike, Rockville, MD between 7:30 a.m. and 4:15 p.m. weekdays.

FOR FURTHER INFORMATION CONTACT: Moni Dey, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone (301) 492-3730.

Dated at Rockville, Maryland this 22nd day of December, 1988.

For the Nuclear Regulatory Commission.

John C. Hoyle,  
Acting Secretary for the Commission.

[FR Doc. 88-29992 Filed 12-28-88; 8:45 am]  
BILLING CODE 7590-01-M

##### 10 CFR Parts 50 and 55

#### Education and Experience Requirements for Senior Reactor Operators and Supervisors at Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its regulations regarding educational requirements for operating personnel at nuclear power plants. The proposed amendments would require additional education and experience requirements for senior operators and supervisors. In promulgating the proposed amendments, the Commission has identified two alternatives.

Under the first alternative, the proposed amendment would apply to senior operators. It would require that each applicant for a senior operator license to operate a nuclear power reactor have a bachelor's degree in engineering, engineering technology, or the physical sciences from an accredited

university or college. The proposed amendment would upgrade the operating, engineering, and accident management expertise provided on shift by combining engineering expertise and operating experience in the senior operator position.

Under the second alternative, the proposed amendment would apply to persons who have supervisory responsibilities, such as shift supervisors or senior managers. It would require that they have enhanced educational credentials and experience over that which is normally required for senior reactor operators. The proposed amendment would upgrade the operating, engineering, and accident management expertise provided on shift by combining engineering expertise and operating experience in the shift supervisor position.

The Commission believes that adoption of either of the alternatives, for senior operators or shift supervisors, would further ensure the protection of the health and safety of the public by enhancing the capability of the operating staff to respond to accidents and restore the reactor to a safe and stable condition.

DATES: Comment period expires February 27, 1989. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Mail comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

Deliver comments to: One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. Comments may also be delivered to the NRC Public Document Room, 2120 L Street, Lower Level, NW., Washington, DC between 7:30 a.m. and 4:15 p.m.

Examine comments received, the environmental assessment and finding of no significant impact, and the regulatory analysis at the NRC Public Document Room, 2120 L Street, Lower Level, NW., Washington, DC.

Obtain single copies of the environmental assessment and finding of no significant impact and the regulatory analysis from M.R. Fleishman, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-3794.

FOR FURTHER INFORMATION CONTACT: M.R. Fleishman, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 492-3794.

#### SUPPLEMENTARY INFORMATION:

##### Background

Since the Three Mile Island Unit (TMI-2) accident on March 28, 1979, in which human error, among other factors, contributed to the consequences of the accident, the issue of academic requirements for reactor operators has been a major concern of the Nuclear Regulatory Commission (NRC). In July 1979, "TMI-2 Lessons Learned Task Force Status Report and Short-Term Recommendations," (NUREG-0578)<sup>1</sup> made specific recommendations for a Shift Technical Advisor (STA) to provide engineering and accident assessment expertise during other than normal operating conditions. On October 30, 1979, the NRC notified all operating nuclear power licensees of the short-term STA requirements, i.e., that STAs should be on shift by January 1980, and that they should be fully trained by January 1981. In November 1980, "Clarification of TMI Action Plan Requirements," (NUREG-0737), provided further details to licensees regarding implementation of the STA position. It identified the STA as a temporary position pending a Commission decision regarding long range upgrading of reactor operator and senior operator capabilities.

The qualifications of operators were also addressed by the 1979, "Lessons Learned Task Force," (NUREG-0585), the 1980 Rogovin report, "Three Mile Island: A Report to the Commissioners and to the Public," (NUREG/CR-1240), and the 1982, "Report of the Peer Advisory Panel and the Nuclear Regulatory Commission on Operator Qualifications," (SECY 82-162).<sup>2</sup> Although the 1982 report recommended against imposition of a degree requirement, the consensus among these reports was that greater technical and academic knowledge among shift operating personnel would be beneficial to the safety of nuclear power plants.

On October 28, 1985, the NRC published in the Federal Register (50 FR 43621) a final policy statement on engineering expertise on shift to allow

<sup>1</sup> Copies of all NUREGS referenced may be purchased through the U.S. Government Printing Office by calling (202) 275-2060 or by writing to the U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013-7082. Copies may also be purchased from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161. A copy is available for inspection or copying for a fee in the NRC Public Document Room, 2120 L Street, Lower Level, NW., Washington, DC.

<sup>2</sup> The documents with SECY designators and the Generic Letter discussed in this rule are available at the NRC Public Document Room at 2120 L Street, Lower Level, NW., Washington, DC.

an alternate means of providing the necessary technical and academic knowledge to the shift crew. Option 1 of the Policy Statement permits an individual to serve in the combined Senior Operator/Shift Technical Advisor (SO/STA) role if that individual holds either a bachelor's degree in engineering, engineering technology, physical science, or a professional engineer's license. Option 2 permits continuation of the separate STA who rotates with the shift and holds a bachelor's degree or equivalent and meets the criteria as stated in, "Clarification of TMI Action Plan Requirements," (NUREG-0737). The Commission also encourages the shift supervisor to serve in the dual-role position, and the STA to take an active role in shift activities.

On May 30, 1986, the NRC published an advance notice of proposed rulemaking (ANPRM) (51 FR 19561). The purpose of the ANPRM was to extend the current level of engineering expertise on shift, as described in the Commission's Policy Statement on Engineering Expertise on Shift (50 FR 43621) and to ensure that senior operators have operating experience on a commercial nuclear reactor operating at greater than twenty percent power, e.g., "hot" operating experience (Generic Letter 84-16). The ANPRM was the result of a Commission decision to consider an amendment to its regulations (Parts 50 and 55) and to obtain comments on the contemplated action to upgrade the levels of operating, engineering, and accident management expertise on shift.

In addition to describing the proposed rule in general, the ANPRM presented a list of twenty questions concerning various aspects and implications of the proposed rule. Two hundred letters were received in response to the ANPRM. A summary and analysis of the comments are included in SECY-87-101 dated April 16, 1987. The NRC has reviewed, in detail, all the comments made on the ANPRM as well as comments received since that time. In general, the commenters were opposed to a degree requirement for senior operators. The proposed amendments in this notice reflect in detail many of the comments and responses to the questions posed. Apart from the detailed comments on the proposed contents of the rule, a number of general comments were provided regarding the possible adverse effects of requiring degrees for senior operators. The public comments as well as those raised during NRC staff review, can be categorized as follows:



1. The proposed rule is not necessary.
2. Experience is more important than a bachelor's degree.
3. The proposed rule will have a negative impact on safety.
4. The proposed rule result in a greater operator turnover rate.
5. The proposed rule will basically block the career path of reactor operators, resulting in lower morale.
6. There will be less overall experience on shift due to the promotion of SOs into management positions.

The Advisory Committee on Reactor Safeguards (ACRS) also considered the proposed requirement and discussed it at several meetings in 1986 and 1987. The ACRS strongly supported the concept of having engineering expertise on each shift. However, they did not agree that requiring a degree for senior operators was the best approach, though they agreed that specific technical knowledge should be required. They believed that, because of the concern about adverse effects raised by many knowledgeable individuals, the proposed rule should be reconsidered.

The Commission has carefully considered the numerous comments received on the ANPRM as well as the recommendations of the ACRS. During its deliberations subsequent to the ANPRM, the Commission considered the following three options regarding improving engineering expertise on shift:

1. Proceed with the contemplated degree rule and concurrent policy statement as proposed in the ANPRM. This option would in the long-term result in at least two Senior Operators on shift who have bachelor's degrees.
2. Propose a rule to require a degreed individual on shift similar to a Senior Manager, as described in SECY-84-106, "Proposed Rulemaking Concerning Requirements for Senior Managers."
3. Amend the Policy Statement on Engineering Expertise on Shift (50 FR 43621) to explicitly encourage licensees to develop programs leading to degrees, to utilize the combined SO/STA option and to phase out use of separate STA.

The Commission has decided to proposed two alternative amendments for consideration and public comment with the understanding that, following the public comment period, only one alternative would be selected for final promulgation. The alternatives proposed are similar to Options 1 and 2 but with significant differences based on comments and further considerations by the Commission following the ANPRM. Although comments received on the ANPRM were generally unfavorable, the Commission believes that it would be beneficial to have a full public airing of views on these proposals.

#### Concurrent Policy Statement

The Commission will publish concurrently with the final rule a policy statement which encourages nuclear power plant licensees, working with the nuclear industry, to:

1. Implement personnel policies that emphasize the opportunities for licensed operators to assume positions of increased management responsibility;
2. Develop programs that would enable currently licensed senior operators, reactor operators and shift supervisors to obtain college degrees; and
3. Obtain college credit for appropriate nuclear power plant training and work experience through arrangements with the academic sector.

#### Discussion

The NRC is concerned that operator qualifications to deal with accidents beyond design basis conditions warrant improvement. Operator training programs and related emergency operating procedures generally do not consider accident conditions beyond inadequate core cooling. There is a general consensus that well qualified operators can substantially mitigate the effects of severe accidents. The industry Degraded Core Rulemaking Program (IDCOR) industry group, for example, has developed arguments that operators could substantially reduce the risk posed by these conditions. The NRC is considering the need for more extensive severe accident training and emergency operating procedures as well as engineering qualifications for senior operators.

There are numerous approaches that may be taken regarding the issue of improved operator capabilities; the Commission has decided to request comments on two approaches. The proposed amendments would only affect persons associated with nuclear power reactors. They would not affect persons associated with non-power nuclear reactors such as research and test reactors. Each alternative approach will be considered in parallel. Each approach is discussed separately. Much of the discussion of Alternative 2 duplicates that of Alternative 1 so that each may be viewed on its own merits.

#### Alternative 1—Requirements for Senior Operators

The purpose of this proposed alternative is to upgrade the operating, engineering, and accident management expertise provided on shift by combining both engineering expertise and operating experience in the senior operator function. The NRC believes this approach will enhance the capability of the operating staff to analyze and

respond to complex transients and accidents and thereby further ensure the protection of the health and safety of the public.

The policy statement on engineering expertise on shift published in the *Federal Register* on October 28, 1985 (50 FR 43621) provided an interim method of achieving more engineering capability on shift. Essentially, with Alternative 1 the NRC is moving from interim requirements which provide engineering capability for accident conditions (the STA), to requiring engineering capability, and nuclear power plant operating experience, in the same individual (the SO).

In Alternative 1, the proposed amendment would require each applicant for a senior operator (SO) license to operate a nuclear reactor, after [4 years following the effective date of the rule], to have a bachelor's degree in engineering, engineering technology, or the physical sciences from an accredited university or college. Applicants with other bachelor's degrees from an accredited institution, or from a foreign college or university, would be considered on a case-by-case basis if the utility (licensee) certifies that the applicant has demonstrated engineering expertise and high potential for the SO position. The Commission does not want to prevent individuals with excellent engineering experience, but with nontechnical degrees, from becoming SOs; however, degree equivalency will no longer be accepted. An accredited university or college is defined as an educational institution in the United States which has been approved by a regional accrediting body.

The proposed amendment would apply to applicants for a SO to operate a nuclear power reactor. People who held SO licenses on [4 years following the effective date of the rule] would be exempt from the degree requirement. Thus, those persons who hold a senior operator license on [4 years following the effective date of the rule], would be "grandfathered" (i.e., a lifetime exemption) by the proposed amendment. Even if they were to lose their SO license in the future, e.g. due to a change in jobs of plants, they could still reapply for a new SO license without satisfying the degree requirement. It is recognized that "grandfathering" current SOs could result in SOs without degrees for an extended period of time. Since the Commission's intent is to maintain at least the same degree of engineering expertise on shift as currently exists, the STA policy described under options 1

and 2 of the October 28, 1985 policy statement (50 FR 43621) would continue in effect. Thus, if two "grandfathered" SOs are used on shift, the facility licensee would be required to have a separate individual on shift who has the STA education and experience described in NUREG-0737. If one of the SOs has a degree and one is "grandfathered," Option 1 of the policy statement would be satisfied. When all SOs have degrees, the policy statement would no longer be needed.

The concurrent policy statement will encourage previously licensed SOs to obtain degrees. In the past the NRC has accepted "equivalents" to the bachelor's degree for a separate STA. The equivalents were based upon specialized utility training or other work experiences. For the proposed amendment, however, equivalency would not be acceptable to the NRC in lieu of a degree. Because the Commission is not in a position to evaluate the academic equivalency of utility training, it encourages utilities to seek out academic institutions who will evaluate the training programs and grant course credit for such equivalency based upon work experience or specialized training. Thus the concurrent policy statement will encourage efforts to have the training accepted by the colleges for partial credit toward fulfilling the requirements of an accredited degree.

The degree requirement would not apply to licensed reactor operators (ROs). However, the concurrent policy statement will encourage ROs to obtain degrees so that they can progress to the SO position and to other utility positions. The Commission believes a degree requirement for SOs on shift, along with the concurrent policy statement, will not only enhance public health and safety, but will also enhance promotion opportunities for SOs.

The cutoff date of four years following the effective date of the rule for application for a SO license by individuals who do not have degrees is chosen for three reasons. First, it will allow operators now in training sufficient time and notice to complete a degree before application. Second, it should not cause undue hardship on operators who are now in the process of preparing and training for the senior operator license, and third, licensees have been encouraged by the Policy Statement on Engineering Expertise on Shift (Option 1) to move toward a dual-role SO/STA position. Furthermore, those operators who are licensed as SOs on the cutoff date would be "grandfathered."

In Alternative 1, the proposed amendment would also require one year

of "hot" and at least 3 years total operating experience for each applicant for a SO license. A RO license is required in order to get "hot" control room operating experience; thus, the proposed amendment expands the current NRC policy, described in Regulatory Guide 1.8, Revision 2, dated April 1987, "Qualification and Training of Personnel for Nuclear Power Plants," to ensure that SOs with degrees have sufficient operating experience. Regulatory Guide 1.8, in position C.1.e., allows an applicant for a SO license with a degree to have only 2 years of responsible power plant experience, none of which needs to be as a reactor operator. Thus, Regulatory Guide 1.8 will be revised if the proposed amendment is adopted. The proposed amendment would require the SO applicant with a degree to serve as a RO at greater than 20 percent power for at least 1 year. This does not mean that the reactor must be at power 100 percent of the time during the year, however, the 1 year time period should not include periods of significant downtime for maintenance or refueling (i.e., periods that exceed 6 weeks duration). Special provisions are proposed in order to accommodate those applicants from facilities that are unable to operate above twenty percent power due either to (a) the facilities not having completed their initial startup program and being licensed to run at power, or (b) the facilities being in an extended shutdown mode. In the case of the facilities not yet licensed to run at power, alternative approaches to meet the twenty percent power requirement may be approved by the Commission. In the case of facilities in extended shutdown, the Commission may process the application and administer the written and operating tests but would defer issuance of the senior operating license until the twenty percent power requirement is fulfilled.

This proposed requirement for a SO applicant with a degree also implies that an applicant for a RO license with a degree must only have 2 years of related nuclear power plant experience. This is a change to the guidance in Regulatory Guide 1.8 which endorses the American National Standard, ANSI/ANS-3.1-1981, "Selection, Qualification and Training of Personnel for Nuclear Power Plants." The standard indicates that a RO applicant must have a minimum of 3 years of power plant experience of which at least 1 year shall be nuclear power experience. If the proposed amendment is adopted, it would supersede the guidance in Regulatory Guide 1.8 and necessitate its revision in accord with the amendment. Also, position C.1.d of Regulatory Guide 1.8,

on educational criteria, would have to be revised to reflect this amendment.

The concurrent policy statement is intended to encourage licensees (utilities) and the nuclear industry to provide incentives and management opportunities for SOs as well as to improve the engineering capabilities of the on shift crew. The SO with a degree and shift operating experience can become a valuable personnel resource for the utility, one who combines shift operational management experience with the potential for greater management responsibility. The policy statement, among other things, will encourage licensees to provide that career path.

The Commission believes that requiring a degree will contribute to the goal of having SOs who have operational experience, technical and academic knowledge, and educational credentials that should improve their performance as operators and possibly open career paths from which they may have been excluded in the past. The SOs with degrees should be able to respond better to off normal incidents. While there will be increased training to cover accident conditions, training alone is not sufficient. It is impossible to cover every eventuality during training. The operators must have sufficient understanding of basic engineering principles, and detailed knowledge of nuclear design and operation to appropriately respond to situations that have not been previously covered in training sessions. In addition, SOs with degrees will have greater opportunity for professional growth since they will have the qualifications needed to advance to managerial positions. With the chance for personal growth should come greater job satisfaction. The validity of these beliefs has been reinforced by the experiences of licensed operators participating in an ongoing utility sponsored program similar to what is being proposed herein. The Commission also believes that migration of SOs upward into plant management will contribute to improved plant safety.

#### Alternative 2—Requirements for Supervisors

The purpose of this proposed alternative is to upgrade the operating, engineering, and accident management expertise provided on shift by combining both engineering expertise and operating experience in the shift supervisor or senior manager function described in § 50.54(m)(2)(ii) of the regulations. The NRC believes this will enhance the capability of the operating staff to analyze and respond to complex



transients and accidents and thereby further ensure the protection of the health and safety of the public.

The policy statement on engineering expertise on shift published in the *Federal Register* on October 28, 1985 (50 FR 43621) provided an interim method of achieving more engineering capability on shift. Essentially, with Alternative 2, the NRC is moving from interim requirements which provide engineering capability for accident conditions (the STA), to requiring engineering capability, and nuclear power plant operating experience, in the shift supervisor or senior manager.

In Alternative 2, the proposed amendment would revise § 50.54, Conditions of licenses, regarding the requirements for a shift supervisor or senior manager. It makes a distinction between power plant sites with one control room and those with two or more control rooms. The intent of the proposed amendment is to ensure that there is a separate shift supervisor for each control room who is responsible for overall operation of all fueled units operated by the control room at all times there is fuel in any of the units. The Commission may permit exemptions to the one supervisor per control room amendment, on a case-by-case basis, for those situations where control rooms may be close to each other. The proposed amendment would require each shift supervisor, after 4 years following the effective date of the rule, to have one or more of the following enhanced educational credentials: A bachelor's degree from a program accredited by the Accreditation Board for Engineering and Technology (ABET); a professional engineer license issued by a state government; or, a bachelor's degree and an Engineer-in-Training (EIT) certificate that indicates one has passed an examination administered by a state or other recognized authority. This requirement will ensure a minimum level of engineering expertise for each shift supervisor. The bachelor's degree with the EIT would not necessarily have to be in a technical discipline, provided the person meets the state education and experience criteria for administration of the EIT. The NRC recognizes that in some states it may not be possible to be registered as a professional engineer or receive an EIT certificate without having received either a bachelor's degree from an ABET accredited program or a bachelor's degree in a technical discipline. For individuals in those states, the NRC is considering other options available for administering an EIT equivalent examination. The STA policy described

under options 1 and 2 in the October 28, 1985 policy statement (50 FR 43621) would be eliminated since the shift supervisor would be providing the engineering expertise on shift and there would be no need for the STA.

In the past the NRC has accepted "equivalents" to the bachelor's degree for a separate STA. The equivalents were based upon specialized utility training or other work experiences. For the proposed amendment, however, equivalency would not be acceptable to the NRC in lieu of one of the educational credentials. Because the Commission is not in a position to evaluate the academic equivalency of utility training, it encourages utilities to seek out academic institutions who will evaluate the training programs and grant course credit for such equivalency based upon work experience or specialized training. Thus, the concurrent policy statement will encourage efforts to have the training accepted by the colleges for partial credit toward fulfilling the educational requirements for the shift supervisors.

The educational credential requirement would not apply to licensed reactor operators (ROs) or senior operators (SOs). The concurrent policy statement will encourage all ROs and SOs to obtain the enhanced educational credentials so that they can progress to the shift supervisor position and to other utility positions. The Commission believes that the educational requirement for shift supervisors, along with the current policy statement, will not only enhance public health and safety, but will also provide a route for promoting ROs and SOs. By restricting the requirement to shift supervisors, the Commission believes that the normal progression from RO to SO can be retained for those ROs and SOs who do not wish to obtain the enhanced educational credentials and who have no desire to enter management.

The date of four years following the effective date of the rule for implementation of the educational credentials requirement for shift supervisors is chosen for two reasons. First, it will allow shift supervisors sufficient time and notice to complete a degree. Second, it should not cause undue hardship on shift supervisors since licensees have been encouraged by the Policy Statement on Engineering Expertise on Shift (Option 1) to move toward a dual-role SO/STA position; which has frequently been assumed by the shift supervisor.

In Alternative 2, the proposed amendment would also require one year of "hot" and at least 3 years total

operating experience for each shift supervisor or senior manager. The proposed amendment changes the current NRC policy, described in Regulatory Guide 1.8, Revision 2, dated April 1987, "Qualification and Training of Personnel for Nuclear Power Plants." Regulatory Guide 1.8, in position C.1.d., states that a shift supervisor only needs a high school diploma. Thus, Regulatory Guide 1.8 will be revised, if the proposed amendment is adopted, to reflect the new educational credentials and experience required to become a shift supervisor (i.e., 3 years experience with 1 year as a RO). The proposed amendment would require the shift supervisor to serve as a RO at greater than 20 percent power for at least 1 year. This does not mean that the reactor must be at power 100 percent of the time during the year; however, the 1 year time period should not include periods of significant downtime for maintenance or refueling (i.e., periods that exceed 6 weeks duration). Special provisions are proposed in order to accommodate shift supervisors from facilities that are unable to operate above twenty percent power due to the facilities not having completed their initial startup program and being licensed to run at power. For such facilities, alternative approaches to meet the twenty percent power requirement may be approved by the Commission.

The concurrent policy statement is intended to encourage licensees (utilities) and the nuclear industry to provide incentives and management opportunities for shift supervisors as well as to improve the engineering capabilities of the on shift crew. The shift supervisor with enhanced educational credentials and shift operating experience can become a valuable personnel resource for the utility, one who combines shift operational management experience with the potential for greater management responsibility. The policy statement, among other things, will encourage licensees to provide that career path; both for shift supervisors and other operating personnel who obtain enhanced educational credentials.

The Commission believes that requiring enhanced educational credentials will contribute to the goal of having shift supervisors who have operational experience, and technical and academic knowledge, that should improve their performance as supervisors and possibly open career paths from which they may have been excluded in the past. The shift supervisors should be able to respond

better to off normal incidents. While there will be increased training to cover accident conditions, training alone is not sufficient. It is impossible to cover every eventuality during training. The shift supervisors must have sufficient understanding of basic engineering principles, and detailed knowledge of nuclear design and operation to appropriately respond to situations that have not been previously covered in training sessions. In addition, shift supervisors with enhanced educational credentials will have greater opportunity for professional growth since they will have the qualifications needed to advance to managerial positions. The Commission also believes that migration of shift supervisors upward into plant management will contribute to improved overall plant safety.

#### Conclusion

Although the Commission believes there is a net benefit of the proposed amendments in enhancing public health and safety, it acknowledges that this judgment is based on a qualitative assessment of the relative contributions of various factors, some with potential positive impacts and others with potential negative impacts. The most significant positive factor is the enhanced capability of the shift operating staff to effectively manage accidents. Increased operating experience of plant management is also an anticipated longer term benefit. However, there are possible disadvantages. For Alternative 1, they include (1) the potential for lower morale among reactor operators without degrees whose natural career path, promotion to the SO level, is blocked, and (2) the potential reduction of overall operating experience on shift as SOs with degrees move to other work. For Alternative 2, the disadvantages include the potential for lower morale among senior operators without degrees whose promotion to the shift supervisor level is blocked.

Upon consideration of these and other factors, such as those identified by the public comment process on the ANPRM, the Commission concludes, at this time, that the overall effect of the proposed amendments would be beneficial and would result in greater plant safety. This benefit will be achieved over time by improved quality of the operational personnel and by plant management that has a better understanding of the unique operational problems associated with nuclear power reactor operations. The Commission believes that increasing the educational level of the operating staff will increase professionalism both in the control room

and throughout the utility with a resultant improvement in plant safety.

#### Invitation to Comment

In view of the unusual nature of this notice of proposed rulemaking, in which two alternatives are proposed, the Commission specifically encourages comments regarding comparison of the alternatives. Comments are particularly solicited in regard to:

1. Which alternative is preferable assuming one will be selected?
2. What are the potential impacts of each of the alternatives on licensee staffing?
3. Regarding implementation of the alternatives, would there be a more appropriate transition period for each alternative than the one proposed?
4. Alternative 2 provides for three different methods for demonstrating technical expertise with educational credentials. Would some other method be desirable for this purpose? Are there other alternative ways to demonstrate knowledge of appropriate engineering fundamentals for people who may be ineligible to take the EIT examination?
5. Should a requirement be imposed requiring all senior operators to pass an Engineering in Training (EIT) or equivalent examination as a measure of basic technical expertise in addition to, or instead of, the two proposals in this notice? If such a requirement were in place, would it be necessary to require enhanced educational credentials for shift supervisors?
6. Independent of a degree requirement, is there a need for the experience requirements to be increased for the shift supervisor position? Are the proposed requirements called for in the two alternatives sufficient?

#### Additional Views of Commissioner Roberts

In this proposed rulemaking the Commission is considering two alternatives regarding educational requirements for operating personnel. The first alternative, which is an old proposal, would impose a degree requirement in senior operators. The second alternative would require enhanced educational credentials for supervisory personnel. Although I have not reached a judgment on the need for supervisory personnel to have enhanced educational credentials, I am supporting the publishing of the second alternative in order to obtain the benefit of the public's comments. In the case of the degreed operator proposal, I cannot do so.

Since I have been a member of the Commission, there have been numerous proposals dealing with the size, qualifications and organization of the operating crew at nuclear power plants. Several of these proposals were adopted by the Commission because it was determined that they would enhance

safety; others were discussed and dropped because no basis was found to support them. The proposal for degreed operators was an example of the latter.

It is unfortunate that this issue continues to surface. As reflected in the earlier public comments on this issue, the mere potential for imposition of this requirement is having a negative impact on operator morale. I continue to believe a requirement for degreed senior operators is ill advised. Not only is there no demonstrated safety benefit from this action but there is a significant potential for negative safety implications. To once again publish this proposal will only continue the negative impact this issue is having on operator morale.

In 1981, the Commission formed a peer review panel to consider specifically reactor operator qualifications including whether a BS level degree should be required for senior operators. This peer review panel concluded (ref. SECY-82-162) that not only was there no evidence that a formal degree was necessary for job performance but that "imposition of such a requirement, without evidence that the requirement is needed to perform the job, is likely to result in a decrement in overall performance and thus *impair public safety*" (emphasis added). In spite of numerous studies conducted by the staff since 1982, there is still no evidence that a BS degree is needed to perform the job of senior operator. In fact, in the recent report entitled "Human Factors Research and Nuclear Safety", the National Research Council Panel on Human Factors Research Needs in Nuclear Regulatory Research recommended research in this area prior to making a degree mandatory. The panel considered this research a high priority as "(a)n injudicious regulation could lead to problems with both morale and recruiting without necessarily improving safety."

Although I agree that it is valuable to have personnel with operating experience in utility management, it is inappropriate to attempt to accomplish this objective by so severely penalizing reactor operators and senior operators. I do not believe that one obtains the motivation and abilities that makes an individual a good manager merely by obtaining a degree. Those individuals with motivation and ability will pursue a degree to improve their qualifications. There are currently a significant number of senior operators who have degrees. This should provide a sufficient pool of individuals resulting in an infusion of operating experience into utility management.



I believe that the Commission and the industry have put in place a number of programs which have upgraded and will continue to upgrade the qualifications of reactor operators. In addition, the increased recognition of the importance of well qualified operators will continue to pay dividends in the future. A number of utilities are providing opportunities for their operators to further their education. I fully support and encourage these initiatives. These programs will allow those with ability and desire to progress up the management chain. I am confident that these initiatives will enhance the safe operation of our nuclear power plants. However, one can not expect immediate results. These initiatives take time to show improvements.

When commenting on Alternative 2 of the proposed rulemaking I will be particularly interested in comments concerning the viability of this proposal. To be viable, this proposal must allow for the orderly progression of operating personnel through the ranks from auxiliary operator to shift supervisor so as to ensure experienced personnel on shift. Specifically, I would like to know, from the perspective of current operating personnel, how accessible are ABET accredited engineering programs? If the PE or EIT options are selected, which states allow registration and/or classification as an EIT without an ABET accredited degree? In light of the fact that states require work experience to be registered as a PE and, with a non-accredited engineering or related degree, often require work experience to be classified as an EIT, will state registration boards grant credit for operating experience as "acceptable professional experience . . . of a grade and character indicating that the applicant may be competent to practice engineering"? If credit is granted for operating experience, does this experience have to be acquired after receiving a degree?

I will also be interested in comments in response to Questions 4, 5 and 6 of the Invitation to Comment.

#### Environmental Impact—Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

#### Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork

Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval numbers 3150-0011, 3150-0018, and 3150-0090.

#### Regulatory Analysis

The Commission has prepared a draft regulatory analysis for this proposed regulation. The analysis examines the costs and benefits of the alternatives considered by the Commission. The draft regulatory analysis is available for inspection and copying for a fee at the NRC Public Document Room, 2120 L Street, Lower Level, NW., Washington, DC. Single copies of the analysis may be obtained from M. R. Fleishman, Office of Nuclear Regulatory Research, Washington, DC 20555, telephone (301) 492-3794.

The Commission requests public comment on the draft analysis. Comments on the draft analysis may be submitted to the NRC as indicated under the ADDRESSES heading.

#### Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities. This proposed rule affects only the licensing and operation of nuclear power plants. It also affects individuals licensed as operators at these plants. The companies that own these plants and the individual plant employees licensed to operate them do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration in 13 CFR Part 121. Since these companies are dominant in their service areas, this proposed rule does not fall within the purview of the Act.

However, because there may be now or in the future small entities which will provide licensed operators to nuclear power plants on a contractual basis, the NRC is specifically seeking comment as to how the regulations will affect them and how the regulations may be tiered or otherwise modified to impose less stringent requirements on them while still adequately protecting the public health and safety. Those small entities which offer comments on how the regulations could be modified to take into account the differing needs of small entities should specifically discuss the following items:

1. The size of their business and how the proposed regulations would result in a significant economic burden upon them as

compared to larger organizations in the same business community.

2. How the proposed regulations could be modified to take into account their differing needs or capabilities.

3. The benefits that would accrue, or the detriments that would be avoided, if the proposed regulations were modified as suggested by the commenter.

4. How the proposed regulations, as modified, would more closely equalize the impact of NRC regulations or create more equal access to the benefits of Federal programs as opposed to providing special advantages to any individuals or groups.

5. How the proposed regulations, as modified, would still adequately protect the public health and safety.

The comments should be sent to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch.

#### Backfit Analysis

As required by 10 CFR 50.109, the Commission has completed a backfit analysis for the proposed rule. The Commission has determined, based on this analysis, that backfitting to comply with the requirements of this proposed rule will provide a substantial increase in protection to public health and safety or the common defense and security at a cost which is justified by the substantial increase. The backfit analysis on which this determination is based reads as follows:

1. *Statement of the specific objectives that the proposed backfit is designed to achieve.*

The objective of the proposed rule is to upgrade the operating, engineering, and accident management expertise provided on shift by combining both engineering expertise and operating experience in the senior operator or shift supervisor functions.

2. *General description of the activity that would be required by the licensee or applicant in order to complete the backfit.*

The proposed rule, under Alternative 1, would require each applicant for a senior operator (SO) license to operate a nuclear power reactor, after [4 years following the effective date of the rule], to have a bachelor's degree in engineering, engineering technology, or the physical sciences from an accredited university or college. Applicants with other bachelor's degrees from an accredited institution, or from a foreign college or university, would be considered on a case-by-case basis if the utility (licensee) certifies that the applicant has demonstrated engineering expertise and high potential for the SO position. The Commission does not want

to prevent individuals with excellent engineering experience, but with nontechnical degrees, from becoming SOs; however, degree equivalency will no longer be accepted. An accredited university or college is defined as an educational institution in the United States which has been approved by a regional accrediting body.

The proposed amendment would apply only to applicants for a SO license to operate a nuclear power reactor. People who hold SO licenses on [4 years following the effective date of the rule] would be exempt from the degree requirement. Those persons who hold a senior operator license on [4 years following the effective date of the rule] would be "grandfathered" by the proposed rule. The proposed amendment would not apply to SO applicants for non-power nuclear reactors such as research and test reactors. Licensed reactor operator (ROs) would not be required to have a degree. The proposed rule would also require one year of "hot" (i.e. as an RO at greater than 20 percent power) and at least 3 years total operating experience for each applicant for a SO license. Special provisions would be proposed to accommodate those applicants from facilities that are unable to operate above 20 percent power.

The proposed requirements of Alternative 1 would only apply to power reactor licensees indirectly. There would be no modification of or addition to the organization, i.e. administrative and functional structure, required to operate a nuclear power reactor as a result of this proposed amendment because:

1. the person to whom the SOs report would not change;
2. the number of SOs per shift would not change;
3. the total number of operators per shift would not change;
4. the training requirements, written examinations and operating tests for a SO would not change; and
5. the tasks performed by a SO would not change.

However, the power reactor licensees would have to get new SOs from a group of individuals who already have appropriate degrees or else provide the educational opportunity for their own employees to obtain a degree.

The proposed rule, under Alternative 2, would require a separate shift supervisor for each control room who is responsible for overall operation of all fueled units operated by the control room at all times there is fuel in any of the units. The requirement would only apply to power reactor licensees; it would not apply to licensees for non-

power nuclear reactors such as research and test reactors. Exemptions to the one supervisor per control room requirement, may be permitted, on a case-by-case basis, for those situations where control rooms may be close to each other. Each shift supervisor, after [4 years following the effective date of the rule], would need to have one or more of the following enhanced educational credentials: A bachelor's degree from a program accredited by the Accreditation Board of Engineering and Technology (ABET); a professional engineer license issued by a state government; or, a bachelor's degree and an Engineer-in-Training (EIT) certificate that indicates one has passed an examination administered by a state or other recognized authority. This requirement will ensure a minimum level of engineering expertise for each shift supervisor. The bachelor's degree with the EIT would not necessarily have to be in a technical discipline provided the person meets the state education and experience criteria for administration of the EIT. The proposed rule would also require one year of "hot" and at least 3 years total operating experience for each shift supervisor or senior manager. Special provisions would be proposed to accommodate those applicants from facilities that are unable to operate above 20 percent power.

3. *Potential change in the risk to the public from the accidental off-site release of radioactive material.*

It is not feasible to quantitatively evaluate the change in risk to the public as a result of the proposed rule. That is, the effect of the SO or shift supervisor on the probability and consequences of an accident, and the change in the probability and consequences of an accident as a result of requiring either the SO to have a bachelor's degree or the shift supervisor to have enhanced educational credentials is not known. The Commission believes that requiring degrees for SOs or enhanced educational credentials for shift supervisors will contribute to the goal of having SOs or shift supervisors who have operational experience and technical and academic knowledge that should improve their performance as operators and possibly open career paths from which they may have been excluded in the past. The SOs with degrees or shift supervisors with enhanced educational credentials should be able to respond better to off normal incidents. While there will be increased training to cover accident conditions, training alone is not sufficient. It is impossible to cover every eventuality during training. The

operators must have sufficient understanding of basic engineering principles, and detailed knowledge of nuclear design and operation to appropriately respond to situations that have not been previously covered in training sessions. In addition, SOs with degrees or shift supervisors with enhanced educational credentials will have greater opportunity for professional growth since they will have the qualifications needed to advance to managerial positions. The Commission believes that there will also be an improvement in plant safety as SOs or shift supervisors migrate upward into plant management although this improvement could be counter balanced, in part, by a potential reduction in overall operating experience on shift as SOs with degrees move to other work.

4. *Potential impact on radiological exposure of facility employees.*

There is not expected to be any significant change in the radiological exposure of facility employees due to the proposed rule except for the unquantifiable reduction in the probability and consequences of an accident and the subsequent reduction in exposure.

5. *Installation and continuing costs associated with the backfit, including the cost of facility downtime or the cost of construction delay.*

One of the questions posed in the May 30, 1986 ANPRM, relative to Alternative 1, concerned what the implementation and operation costs of the proposed amendment would be to the utilities. The cost estimates received ranged from negligible to prohibitive. Various scenarios for achieving the desired staffing level of SOs with degrees were assumed. These varied from hiring individuals with degrees and passing them through the normal utility training programs to taking ROs and sending them to college while either paying them at overtime rates or hiring replacement ROs. A utility could also implement an onsite college degree program for its operators, for example, a program currently being run for an operating plant costs \$250,000 per year to educate 60 people. The range of costs of such an onsite program are estimated to vary from \$250,000 to \$480,000 per year. The cost to the utilities of Alternative 2 would be less since there would be fewer shift supervisors to train.

It is clear that there are numerous methods that can be used to implement the proposed rule with an extreme range of costs depending on the method adopted. It would be a utility's choice as to which method to adopt, taking into



account the various cost and personnel considerations.

6. *The potential safety impact of changes in plant or operational complexity, including the effect on other proposed and existing regulatory requirements.*

There would be no changes in the plant or operational complexity and hence, no potential safety impact related to them. However, there would be an effect on the guidance provided in Regulatory Guide 1.8. Relative to Alternative 1, the guidance in Regulatory Guide 1.8 allows an applicant for a SO license with a degree to have only 2 years of responsible power plant experience, none of which needs to be as a reactor operator. This would have to be revised if Alternative 1 is adopted since the proposed amendment would require a SO applicant with a degree to serve as a RO at greater than 20 percent power for at least 1 year. Furthermore, the guidance indicates that a RO applicant must have a minimum of 3 years of power plant experience of which at least 1 year shall be nuclear power experience. This would have to be revised since it is inconsistent with the proposed amendment which implies that an applicant for a RO license with a degree must have 2 years of related nuclear power plant experience. Finally, position C.1.d of the Regulatory Guide would have to be revised to indicate that a bachelor's degree is the minimum educational requirement for a SO candidate rather than a high school diploma. Relative to Alternative 2, current guidance in Regulatory Guide 1.8, Revision 2, April 1987, "Qualification and Training of Personnel for Nuclear Power Plants," states that a shift supervisor only needs a high school diploma. This would have to be revised, if Alternative 2 is adopted, to reflect the new educational credentials and experience required to become a shift supervisor (i.e., 3 years experience with 1 year as a RO).

7. *The estimated resource burden in the NRC associated with the proposed backfit and the availability of such resources.*

It is anticipated that there will be relatively minor impact on NRC staff resources as a result of implementing the proposed rule. For Alternative 1, there may be some increase in the number of applications to process and tests to administer, because of the attempts of current ROs to become SOs prior to the cut-off date, but this should not cause a significant impact on the NRC staff. No new resource requirements are expected.

8. *The potential impact of differences in facility type, design or age on the relevancy and practicality of the proposed backfit.*

The proposed rule only applies to SO applicants for operation of a nuclear power reactor or to shift supervisors. It does not apply to SO applicants or shift supervisors for non-power nuclear reactors such as research and test reactors.

The facility type, design or age should have no relevancy to the impact or practicality of the proposed backfit. For Alternative 1, the degree to which each utility licensee has already implemented an educational program would be most important. Those facilities which have implemented such a program will clearly be less affected by the proposed backfit than would those facilities that have not. For Alternative 2, the number of reactors and control rooms on a site would have greater significance. Those facilities which have only one control room on their site would be least affected by the proposed rule.

9. *Whether the proposed backfit is interim or final and, if interim, the justification for imposing the proposed backfit on an interim basis.*

The proposed rule, when made effective, would be in final form and not on an interim basis.

#### Alternative 1—Requirements for Senior Operators

##### List of Subjects in 10 CFR Part 55

Manpower training programs, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 55.

#### PART 55—OPERATORS' LICENSES

1. The authority citation for Part 55 continues to read as follows:

Authority: Secs. 107, 161, 182, 68 Stat. 939, 948, 953, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2137, 2201, 2232, 2282); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Sections 55.41, 55.43, 55.45, and 55.59 also issued under sec. 306, Pub. L. 97-425, 98 Stat. 2282 (42 U.S.C. 10226). Section 55.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 55.3, 55.21, 55.48, and 55.53 are issued under sec. 1611, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 55.9, 55.23, 55.25, and 55.53(f) are issued

under sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 55.4, a new definition is added in alphabetical order to read as follows:

#### § 55.4 Definitions.

"Accredited university or college" means an educational institution in the United States which has been approved by a regional accrediting body.

3. In § 55.31, a new paragraph (e) is added to read as follows:

#### § 55.31 How to apply.

(e) Each applicant for a senior operator license to operate a nuclear power reactor, after [4 years following the effective date of the rule], must have a bachelor's degree in engineering, engineering technology, or the physical sciences from an accredited university or college. Applicants with other bachelor's degrees from an accredited institution, or from a foreign college or university, will be considered on a case-by-case basis if the reactor plant licensee certifies that the applicant has demonstrated engineering expertise and high potential for the senior operator position. In addition, except as noted in paragraphs (e)(1) and (e)(2) of this section, after [4 years following the effective date of the rule], each applicant for a senior operator license must have at least three years of operating experience at a nuclear power plant, of which one year's experience must be as a licensed control room operator for a nuclear power reactor operating at greater than twenty percent power. At least six months of the nuclear power plant experience must be at the plant for which the applicant seeks the license. An authorized representative of the facility licensee will verify that the requirements of this paragraph have been met as a part of certifying the applicant's qualifications pursuant to paragraph (a)(4) of this section. Any person holding a senior operator license on [4 years following the effective date of the rule] is exempt from the requirement to have a bachelor's degree.

(1) For each applicant from a facility that has not completed preoperational testing and an initial startup test program as described in its Final Safety Analysis Report, as amended and approved by the Commission, and has not yet been licensed to operate at power, the Commission may approve alternatives that provide experience equivalent to operation at twenty percent power.

(2) For each applicant from a facility that has (i) completed preoperational testing as described in its Final Safety Analysis Report, as amended and approved by the Commission, and (ii) is in an extended shutdown which precludes operation at greater than twenty percent power, the Commission may process the application and may administer the written examination and operating test required by §§ 55.43 and 55.45 of this part, but may not issue the license until the required evidence of operation at greater than twenty percent power is supplied.

#### Alternative 2—Requirements for Supervisors

##### List of Subjects in 10 CFR Part 50

Antitrust, Classified information, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Penalty, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR Part 50.

#### PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

1. The authority citation for Part 50 continues to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 958, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.23, 50.35, 50.55, and 50.58 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415, 98 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 50.10(a), (b),

and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 181b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.10(b) and (c), and 50.54 are issued under sec. 1611, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.9, 50.55(e), 50.59(b), 50.70, 50.71, 50.72, 50.73, and 50.78 are issued under sec. 1610, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

2. In § 50.54, paragraph (m)(3) is removed and the introductory text to paragraph (m)(2) and paragraph (m)(2)(ii) are revised, to read as follows:

#### § 50.54 Conditions of licenses.

(m) \* \* \*

(2) Notwithstanding any other provisions of this section, licensees of nuclear power units shall meet the following requirements:

(i) \* \* \*

(ii)(A) For single unit sites or multiple unit sites with one control room, the licensee shall have at its site a person holding a senior operator license for all fueled units at the site who is assigned responsibility for overall plant operation at all times there is fuel in any unit.

(B) For multiple unit sites with two or more control rooms, the licensee shall have at its site a person for each control room who: holds a senior operator license for all fueled units operated by the control room; and is responsible for overall operation of these units at all times there is fuel in any of them. Exemptions may be considered on a case-by-case basis taking into account the physical location of the control rooms.

(C) After [4 years following the effective date of the rule], each person described in paragraphs (m)(2)(ii)(A) and (m)(2)(ii)(B) of this section must have one or more of the following educational credentials: A bachelor's degree from a program accredited by the Accreditation Board for Engineering and Technology (ABET); a professional engineer license issued by a state government; or, a bachelor's degree and an Engineer-in-Training (EIT) certificate that indicates one has passed an examination administered by a state or other recognized authority.

(D) Except as noted below, after [4 years following the effective date of the rule], each person described in paragraphs (m)(2)(ii)(A) and (m)(2)(ii)(B) of this section must have at least three years of operating experience at a nuclear power plant, of which one year's experience must be as a licensed control room operator for a nuclear power reactor operating at greater than twenty percent power. At least six months of the nuclear power plant experience must be at the plant for which the person has responsibility. For each person at a

plant that has not completed preoperational testing and an initial startup test program as described in its Final Safety Analysis Report, as amended and approved by the Commission, and has not yet been licensed to operate at power, the Commission may approve alternatives that provide experience equivalent to operation at twenty percent power.

Dated at Rockville, Maryland this 23rd day of December, 1988.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Acting Secretary for the Commission.

[FR Doc. 29993 Filed 12-28-88; 8:45 am]

BILLING CODE 7590-01-M

#### DEPARTMENT OF TRANSPORTATION

##### Federal Aviation Administration

##### 14 CFR Part 73

[Airspace Docket No. 88-AEA-4]

#### Proposed Alteration of Restricted Area R-6601 Fort A.P. Hill, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to alter the boundaries and change the controlling agency for Restricted Area R-6601 Fort A.P. Hill, VA. The Department of the Army has requested an enlargement of R-6601 to accommodate additional training requirements. In addition, the proposed action would revise the assigned controlling agency.

DATES: Comments must be received on or before February 13, 1989.

ADDRESSES: Send comments on the proposal in triplicate to: Director, FAA, Eastern Region, Attention: Manager, Air Traffic Division, Docket No. 88-AEA-4, Federal Aviation Administration, JFK International Airport, The Fitzgerald Federal Building, Jamaica, NY 11430.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical



Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9253.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic and energy aspects of the proposal. Send comments on environmental and land use aspects to: Ron Boucher, Environmental Coordinator, Attn.: AFZI-DEH, Fort A.P. Hill, Bowling Green, VA 22427-5000.

Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AEA-4." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2 which describes the application procedure.

#### The Proposal

The FAA is considering an amendment to Part 73 of the Federal Aviation Regulations (14 CFR Part 73) to increase the size of Restricted Area R-6601 by approximately 2 miles to the northeast and about ½ mile to the southwest. This enlargement is needed to permit more effective utilization of terrain and installation facilities and to provide increased training opportunities in establishing mortar and artillery firing positions during advance and retrograde operations. All additional land to be incorporated into R-6601 is owned by Fort A.P. Hill. In addition, the amendment would revise the controlling agency assigned for R-6601. Section 73.66 of Part 73 of the Federal Aviation Regulations was republished in Handbook 74.00.6D dated January 4, 1988.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

##### List of Subjects in 14 CFR Part 73

Aviation safety, Restricted areas.

##### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 73 of the Federal Aviation Regulations (14 CFR Part 73) as follows:

#### PART 73—SPECIAL USE AIRSPACE

1. The authority citation for Part 73 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510, 1522; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.89.

##### § 73.66 [Amended]

2. § 73.66 is amended as follows:

#### R-6601 Fort A.P. Hill, VA [Amended]

By removing the present boundaries and controlling agency and substituting the following:

Boundaries. Beginning at lat. 38°04'37" N., long. 77°18'45" W.; thence along U.S. Highway 301; to lat. 38°09'45" N., long. 77°12'00" W.; thence along U.S. Highway 17; to lat. 38°07'50" N., long. 77°08'30" W.; to lat. 38°05'30" N., long. 77°09'08" W.; to lat. 38°04'40" N., long. 77°10'20" W.; to lat. 38°03'12" N., long. 77°09'35" W.; to lat. 38°02'22" N., long. 77°11'40" W.; to lat. 38°02'30" N., long. 77°14'40" W.; to lat. 38°01'50" N., long. 77°16'08" W.; to lat. 38°02'15" N., long. 77°18'04" W.; to lat. 38°02'40" N., long. 77°19'00" W.; thence to the point of beginning.

Controlling agency. FAA, Richmond ATCT. Issued in Washington, DC, on December 21, 1988.

Harold W. Becker, Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 88-29894 Filed 12-28-88; 8:45 am] BILLING CODE 4910-13-M

#### FEDERAL TRADE COMMISSION

##### 16 CFR Part 453

#### Mandatory Review of the Funeral Industry Practices Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Rescheduling of the additional public hearing in Washington, DC.

SUMMARY: On December 1, 1988, the Presiding Officer published in the *Federal Register* (53 FR 48550) an announcement that an additional public hearing would be held on January 17, 1989, in Washington, DC. The Presiding Officer has now rescheduled that hearing to commence on February 3, 1989.

DATES: The public hearing will commence in Washington, DC, at 9:30 a.m. on February 3, 1989, in Room 332, Federal Trade Commission Building, 6th and Pennsylvania Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Henry B. Cabell, Presiding Officer, Room 319, Federal Trade Commission, 6th and Pennsylvania Avenue NW., Washington, DC 20580, telephone number: 202-326-3642.

SUPPLEMENTARY INFORMATION: On December 1, 1988, the Presiding Officer publishing in the *Federal Register* (53 FR 48550) an announcement that an additional public hearing would be held on January 17, 1989, for the purpose of receiving testimony upon substantial economic issues from three expert

witnesses, Dr. Burt F. Barnow, Dr. Timothy P. Daniel, and Dr. Fred S. McChesney.

In order to accommodate all of the witnesses who requested an opportunity to testify at the San Francisco, California hearing, it has been necessary to extend that hearing through January 18, 1989. For this reason, the Presiding Officer has rescheduled the additional Washington, DC hearing to commence on February 3, 1989. Only the witnesses named above will be permitted to testify.

##### List of Subjects in 16 CFR Part 453

Funeral homes, Price disclosure, Trade practices.

Henry B. Cabell,

Presiding Officer.

[FR Doc. 88-29942 Filed 12-28-88; 8:45 am]

BILLING CODE 6750-01-M

#### DEPARTMENT OF LABOR

##### Mine Safety and Health Administration

##### 30 CFR Part 50

#### Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment, and Coal Production in Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Advance notice of proposed rulemaking; Extension of comment period.

SUMMARY: The Mine Safety and Health Administration (MSHA) is extending the period for public comment regarding the Agency's advance notice of proposed rulemaking (ANPRM) for 30 CFR Part 50 which requires mine operators to investigate mine accidents and injuries; report mine accidents, injuries, illnesses, employment, and coal production; and maintain copies of these reports.

DATE: Written comments must be received on or before February 17, 1989.

ADDRESS: Send comments to Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, (703) 235-1910.

SUPPLEMENTARY INFORMATION: On November 14, 1988, MSHA published an ANPRM in the *Federal Register* (53 FR 45878) on 30 CFR Part 50 which sets forth investigation, recordkeeping, and reporting requirements. Mine operators are required to investigate each accident

and occupational injury; report each accident, occupational injury or occupational illness to MSHA; and maintain records of each accident and investigation report. The mine operators must also submit employment and coal production data. This information is used by MSHA and the mining community to identify safety and health problems and injury trends. MSHA also uses this information to determine national fatality and injury incidence rates of the mining industry.

The ANPRM stated that the comment period would remain open until January 13, 1989. In response to requests from the mining community, MSHA is extending the comment period to February 17, 1989. All interested parties are encouraged to submit comments prior to this date.

Date: December 22, 1988.

David C. O'Neal,

Assistant Secretary for Mine Safety and Health.

[FR Doc. 88-29922 Filed 12-28-88; 8:45 am]

BILLING CODE 4510-43-M

#### ENVIRONMENTAL PROTECTION AGENCY

##### 40 CFR Part 81

(FRL-3498-8)

#### Designation of Areas for Air Quality Planning Purposes Attainment Status Designations; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Proposed rule.

SUMMARY: On January 27, 1983, the Illinois Environmental Protection Agency (IEPA) submitted a request for Kane and DuPage Counties to be redesignated under section 107(d) of the Clean Air Act from nonattainment to attainment for the ozone national ambient air quality standards (NAAQS). This request was based on a lack of monitored violations of the ozone standard in these counties. USEPA's June 12, 1984 (48 FR 46082), final rulemaking rejected the State's request to redesignate Kane and DuPage Counties. IEPA and Illinois State Chamber of Commerce petitioned for review of USEPA's action before the United States Court of Appeals for the Seventh Circuit. In its November 4, 1985, opinion in *Illinois State Chamber of Commerce v. USEPA*, 775 F.2d 1141 (7th Cir. 1985), the court remanded the rulemaking to USEPA, calling for a clarification of the basis on which USEPA disapproved the request for

redesignation of Kane and DuPage Counties.

Today's rulemaking clarifies USEPA's ozone redesignation policy and announces USEPA's proposed rulemaking action, which again would reject the State's request to redesignate Kane and DuPage Counties to attainment for ozone.

DATE: Comments on this revision and on the proposed USEPA action must be received by January 30, 1989.

ADDRESSES: Copies of the redesignation request, technical support documents and the supporting air quality data are available at the following addresses:

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604

Illinois Environmental Protection Agency, Division of Air Pollution Control, 2200 Churchill Road, Springfield, Illinois 62706.

Comments on this proposed rule should be addressed to:

Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Randolph O. Cano, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, Chicago, Illinois 60604, (312) 886-6036.

##### SUPPLEMENTARY INFORMATION:

##### I. Introduction

##### A. History

Under section 107(d) of the Clean Air Act (Act), the Administrator of USEPA has promulgated the NAAQS attainment status for each area of every State. See, e.g., 43 FR 8962 (March 3, 1978) and 43 FR 46004 (October 5, 1978). As part of that promulgation EPA promulgated Illinois' initial request to designate Kane and DuPage Counties as nonattainment for ozone 43 FR 8962, 8998-89 (March 3, 1978) In accordance with section 107(d)(5) of the Act, on January 27, 1983, the Illinois Environmental Protection Agency (IEPA) submitted an ozone redesignation request for a number of counties in Illinois. Among those for which Illinois sought redesignation to attainment for ozone were Kane and DuPage Counties (the Counties). This request was based on a lack of monitored ozone standard violations in these counties.

USEPA originally found the redesignation request for Kane and DuPage to be unacceptable because: (1)



Ozone standard violations continue to occur in the Chicago area, which suggests that additional control of ozone precursor emissions (in particular, control of Volatile Organic Compound (VOC) emissions) is necessary to attain the standard there; and (2) VOC emissions from Kane and DuPage Counties are believed to contribute significantly to high ozone concentrations monitored downwind of the Chicago urban area. For these reasons, USEPA proposed to disapprove the redesignation request for Kane and DuPage Counties on October 11, 1983 (48 FR 46082).

A number of comments were submitted to the USEPA during the comment period following the proposed rulemaking. These comments were addressed by USEPA in final rulemaking on June 12, 1984 (48 FR 24128). This final rulemaking disapproved the redesignation of Kane and DuPage Counties to attainment for ozone.

The IEPA and the Illinois State Chamber of Commerce (ISCC) submitted a joint petition for review of USEPA's action before the Court of Appeals for the Seventh Circuit (herein referred to as the Seventh Circuit or simply as the court).

In its challenge, Illinois argued that, among other things, because no violations had been monitored in Kane and DuPage counties and since those counties had originally been approved as nonattainment areas separate from other nonattainment areas in the Chicago area, EPA had improperly based its decision to retain their nonattainment designation on air quality monitored in other areas or was trying to change the borders of the nonattainment area to make all of Chicago one nonattainment area. Under either approach, the state argued, EPA was doing something not authorized by law. *Id.* at 1146-47.

In its opinion in *Illinois State Chamber of Commerce*, the court stated that the basis of EPA's action was unclear, and speculated on two theories EPA might have used to justify the denial of the redesignation request. The first was that an entire urbanized area should be considered one nonattainment area for ozone because all sources in and near a city should be assumed to contribute to the ozone problem monitored in the urbanized area. *Id.* at 1145. A second, slightly different, theory that could have been advanced by EPA, according to the court, was that a nonattainment area for ozone must be large enough to include both the polluted area and all major sources contributing to ozone pollution in that area, even if those sources were located

well upwind of the monitored pollution. *Id.* Under that theory, though, southeastern Wisconsin, which monitors the worst ozone concentrations attributable to Chicago-area sources, and the greater Chicago area itself would be part of the same nonattainment area. The court noted that those theories were inconsistent with each other because under the "urbanized area" theory, the peak ozone concentration area, miles downwind of the urbanized area, would not be included in the nonattainment area for the city but under the "polluted area plus sources" theory, it would. *Id.*

The court questioned whether EPA was actually applying either of these theories. It noted, first, that EPA had approved Illinois' initial request to designate each county in the Chicago area as a separate nonattainment area, rather than grouping the counties as a single nonattainment area under one of the two theories just described. It also noted that EPA had subsequently approved the redesignation of Will and McHenry Counties from nonattainment to attainment, even though both counties, in the court's words, were "arguably part of the larger Chicago area," and hence perhaps should not have been redesignated to attainment. *Id.* at 1145-46.

Although the court could not decipher EPA's rationale for denying the redesignations, it noted that either of the theories it had identified could be defended. It recognized that, because ozone pollution occurs downwind of sources, the polluted area itself typically does not contain all of the sources of the pollution. For that reason, the court concluded that the nonattainment area might need to be large enough to include even areas with clean air. *Id.*

Several other theories advanced by the court presume, by contrast, that EPA intended to label the counties as separate nonattainment areas, on the ground that an area's ozone attainment designation must be determined by looking at air quality downwind and outside the area itself. *Id.* The court noted that nothing in the statute required EPA to monitor within the area itself and that, according to the first of these alternative theories, perhaps the best way to monitor for ozone was downwind. *Id.* at 1149. The court stated, however, that if this were the rationale for EPA's action, the Agency needed to clarify its off-location monitoring requirements. *Id.* The court also theorized that an area's designation could be determined on the basis of ozone precursors monitored in the area itself. The court stated, however, that this theory too would require a better

explanation of EPA's use of measurements of ozone precursors.

The court believed it more likely, though, that EPA was arguing that it never intended to treat each county in the Chicago area as a separate nonattainment area and that Kane and DuPage counties, as part of the Chicago nonattainment area or its fringe area of development, could not be upgraded until the entire area reached attainment. *Id.* Under this theory, EPA's promulgation of the original listing of counties was merely an accident of recordkeeping, rather than reflecting an intent to treat adjacent counties as separate nonattainment areas. *Id.* at 1149-1150. The court noted, moreover, that the "urbanized area" theory described above would explain the different treatment of Will and McHenry counties which, although containing significant sources of ozone, do not contain any part of the Chicago urbanized area as defined by the U.S. Census Bureau on the basis of the 1970 Census. *Id.* Finally, the court questioned how the attainment status of an area should be changed—whether on the basis of monitoring within the area itself or otherwise. *Id.*

Because the Court could not determine from the record a rational, internally consistent basis for EPA's denial of the redesignation of Kane and DuPage Counties, the court remanded the denial to EPA for reconsideration and for clarification of the grounds on which EPA dealt with the Illinois request.

#### B. Purpose of This Notice of Proposed Rulemaking

It is the purpose of this proposed rulemaking to:

1. Summarize and clarify USEPA's current policy on the designation of areas for ozone, taking into account the various theories described by the court in *Illinois State Chamber*.
2. Summarize technical study results on the formation and transport of ozone.
3. Review available local data that affect USEPA's decision on the merits of the State's redesignation request for Kane and DuPage Counties. An effort is made to expand upon the USEPA's logic contained in the technical review documents used to support the previous proposed and final rulemakings on this issue. More recent data are also discussed.
4. Provide a list of literature and policy memoranda used by USEPA in reaching its decision on this issue.
5. Provide a new starting point for public response to USEPA's revised proposed rulemaking.

6. Provide as thoroughly as possible the rationale for USEPA's revised proposed action.

7. Announce USEPA's proposed rulemaking action and solicit comment.

#### II. Review of Ozone Designation Policy

##### A. The Statute

Current USEPA designation policy was generated following the 1977 amendment of the Act. Recognizing a lack of progress in attaining the air quality standards, Congress added Part D to the Act to provide a set of control requirements and attainment dates for areas not attaining the air quality standards. While Part D requirements apply only to areas designated as nonattainment under section 107 of the Act, States may choose to control emissions in areas larger than designated nonattainment areas.

Section 107 directed States to submit to the Administrator a list of all areas within the boundaries of the State and how they should be designated in relation to the NAAQS. EPA was to review the list, modify it as necessary, and promulgate it in final form. Section 107(d)(2), 42 U.S.C. 7407(d)(2). A designation of nonattainment triggered a requirement for Part D SIP revisions providing for, among other measures, the implementation of reasonably available control technology (RACT) as a means to bring about attainment of the standard as expeditiously as practicable but no later than the statutory deadline. Section 172(b)(3), 42 U.S.C. 7502(b)(3).

Section 171(2) of the Act defines the term "nonattainment area" as " \* \* \* for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant." The defined nonattainment area must include any area defined to be nonattainment of the primary (health-related) or secondary (welfare-related) NAAQS under Section 107(d)(1).

Two points concerning the Section 171(2) nonattainment area definition should be noted. First, the size of a nonattainment area is not defined (nor is it defined in Section 107). Second, discretion is given to USEPA (the Administrator) in selecting procedures other than modeling or monitoring for defining the existence and extent of nonattainment areas.

##### B. Ozone Formation and Transport

USEPA and IEPA have not conducted area specific photochemical dispersion modeling for the Chicago area. Without

such modeling or equivalent techniques, it is impossible to isolate the impacts of Kane and DuPage Counties' precursor emissions on downwind ozone concentrations. A number of studies, however, exist which allow USEPA to develop an opinion on the potential for such air quality impacts. Presented in this subsection of this *Federal Register* is a discussion of USEPA's view of ozone formation and transport derived from various studies and reports. Specific reports are referenced where appropriate. Other publications which discuss the formation and transport of ozone are listed in the May 23, 1986, Technical Support Document (TSD) for this proposed rulemaking.

Smog chamber studies confirm that reactions involving VOC and nitrogen oxide (NOx) and the presence of sunlight are a source of ozone.<sup>1</sup> Urban areas are significant source areas of these ozone precursors. Monitoring studies in and downwind of a number of urban areas<sup>2</sup> show that major urban areas are associated with significant downwind ozone concentrations. These studies also show that urban ozone plumes are spatially broad with plume widths being measured on the order of tens of kilometers. Monitoring at fixed sites shows elevated ozone concentrations that span several hours. These large spatial and temporal dimensions, coupled with a wide range of transport trajectories typically found in the atmosphere's near-surface mixing layer, suggest that precursor emissions from a large spatial area may be responsible for the high ozone

concentrations observed significantly downwind of that area.

Analyses of transport trajectories<sup>3</sup> indicate that transport trajectories exhibit a significant variation over height and time. Within the surface mixing layer, pollutant transport and dispersion can occur in the vertical direction, as well as in the horizontal direction. Therefore, an air parcel arriving at a given location may have passed over a relatively large upwind area over which precursor loading may have occurred. For this reason, one cannot narrowly define the upwind source areas based on the wind trajectory for a single level.

Ozone concentrations resulting from precursor emissions in a given area may peak some distance downwind of a source area. The distance to peak ozone concentrations may be increased by the injection of new ozone precursors into air parcels downwind of the initial source areas.

Monitoring studies<sup>4</sup> also indicate that relatively high ozone concentrations can be detected 50 to 100 kilometers or more downwind of major source areas. Such distances involve relatively long transport times and, because of the variability of wind trajectories over time, large upwind source areas. Smog chamber studies and modeling<sup>5</sup> indicate

<sup>1</sup> Karl, *Ozone Transport in the St. Louis Area*, 12 Atmospheric Environment 1421 (July, 1978).

<sup>2</sup> P. Samson, J. Moddy, "Trajectories as Two-Dimensional Probability Fields" (November, 1980) (unpublished report).

<sup>3</sup> Cleveland, Kleiner, *Transport of Photochemical Air Pollution from Camden-Philadelphia Complex*, 9 Environmental Science and Technology 886 (September, 1975).

<sup>4</sup> E. Martinez, E. Meyer, "Urban-Nonurban Ozone Gradients and Their Significance (March, 1976) (Proceedings from Symposium Held March 12, 1976).

<sup>5</sup> USEPA, EPA-600/3-77-017, "Proceedings, International Conference on Photochemical Oxidant Pollution and Its Control" (February, 1977).

<sup>6</sup> N. Possel, W. Eaton, M. Seeger, J. Sickles, W. Bach, C. Decker, "Ozone Precursor Concentrations in Vicinity of a Medium Sized City" (June, 1979) (unpublished paper presented at the 1979 Air Pollution Control Association Conference).

<sup>7</sup> K. Sexton, H. Westburg, "Ambient Ozone and Hydrocarbon Measurements in the Houston Urban Plume" (June, 1980) (unpublished paper presented at the 1980 Air Pollution Control Association Conference).

<sup>8</sup> Correspondence to Donald Theiler, Wisconsin DNR, and Daniel Goodwin, Illinois EPA, from Steve Rothblatt, USEPA, dated April 7, 1982, with attachment: "Analysis of Chicago and Milwaukee Ozone Concentrations for the Impact of Interstate Ozone Transport".

<sup>9</sup> USEPA, EPA-600/8-78-004, "Air Quality Criteria for Ozone and Other Photochemical Oxidants" (April, 1978).



that peak ozone concentrations take several hours to form after the initial emission of ozone precursors.

The above observations support USEPA's policy, explained below, of requiring that an entire urban area and its adjacent areas of development be assumed to be responsible for downwind ozone standard violations. Without the use of a photochemical dispersion model or equivalent techniques, it is impossible to distinguish the precise downwind effect of the precursor emissions from one subsection of an urban area from that due to precursor emissions from another subsection of the urban area.

#### C. Designation Policy Statements

Since enactment of the 1977 Amendments, USEPA has produced a number of rulemakings and policy memoranda concerning USEPA's policy on the designation of attainment, nonattainment, or unclassifiable areas. The most significant of these are listed below along with the summary of USEPA policy statements related to the size of area designations for nonattainment areas. For a more complete discussion of redesignation policy, see the Technical Support Document (TSD). The publications are discussed in their chronological order.

1. October 7, 1977, Memorandum from David G. Hawkins (USEPA) to Regional Administrators, Region I-X, Subject: "Model Letter Regarding State Designation of Attainment Status".

[Since oxidant levels well in excess of the oxidant standard (0.08 parts per million (ppm), 1-hour average, not to be exceeded more than once per year at the time of this memorandum) have been shown to persist for many miles downwind or urban areas, the area designated as nonattainment around urban areas should reflect this phenomenon.]

2. January 3, 1978, Memorandum from David G. Hawkins (USEPA) to Regional Administrators, Region I-X, Subject: "Attainment/Nonattainment Status Designations".

[The designated nonattainment area for photochemical oxidants should be of sufficient size to include most of the significant hydrocarbon sources.]

3. February 24, 1978, Memorandum from The Administrator to Regional Administrators, I-X, Subject: "Criteria for Approval of 1979 SIP Revisions".

[In defining the area for which ozone precursor emissions must be evaluated, it is stated that the analysis area must be large enough to cover the entire urbanized area, as defined by the U.S. Bureau of Census, and adjacent fringe areas of development.]

4. October 5, 1978, Federal Register, 43 FR 46993, Subject: "Part 81—Air

#### Quality Control Regions, Criteria, and Control Techniques.

[In responding to a negative comment on the designation of an entire county as nonattainment for photochemical oxidants, it is stated that to declare solely the urbanized area as nonattainment would be inconsistent with the physical nature of ozone formation and transport.]

5. March 5, 1982, Memorandum from G.T. Helms (USEPA) to David Howekamp, Subject: "National Policy Issues Concerning Section 107 of the Clean Air Act".

[Nonattainment areas should be large enough to include both the areas where the monitored violations occur and the areas where the sources causing these violations are located. The urbanized area should be the minimum nonattainment area size for ozone.]

6. April 21, 1983, Memorandum from Sheldon Meyers (USEPA) to Director, Air Management Division Regions I, V, IX, and to Director, Air and Waste Management Division, Regions II-IV, VI-VIII, X, Subject: "Section 107 Designation Policy Summary."

[An entire urbanized area, plus fringe areas of development, should be designated as nonattainment for urban ozone nonattainment areas. The nonattainment area for ozone should include the significant VOC sources.]

7. March 2, 1984, Letter from Darryl T. Tyler (USEPA) to Daniel J. Goodwin (IEPA)

[The area of ozone nonattainment must include the urbanized area as defined by the U.S. Bureau of Census and other fringe areas with significant VOC sources.]

Thus, EPA's policies have consistently held that, in urban areas, an ozone nonattainment area shall include, at a minimum, the urbanized area as defined by the U.S. Bureau of Census, and the adjacent fringe areas of development containing significant precursor (VOC or nitrogen oxide (NOx)) sources. This theory comports with the court's speculation that EPA believed an urbanized area should be considered one nonattainment area because all the sources in the area were assumed to contribute to the ozone problem in and downwind of the area. In addition to the urban area and its fringe areas of development, the downwind areas experiencing monitored violations of the ozone standard should also be designated as nonattainment. These areas may be treated as their own isolated area for the purpose of developing an attainment demonstration, assigned to the upwind urban nonattainment area or assigned to a different neighboring urban nonattainment area. If urban nonattainment areas overlap, it will be

necessary for the State Implementation Plan (SIP) to address the participating of downwind areas into one of the possible urban ozone nonattainment areas for the purpose of assembling ozone attainment demonstrations.

Moreover, EPA's initial acceptance of states' lists that designated adjacent urban and suburban counties as separate nonattainment areas does not reflect the view that urban area designations should be divided along county lines. Such prior approvals resulted from inadvertent recordkeeping rather than a conscious intent to divide urbanized areas into several separate nonattainment areas. This is reflected in EPA's policies on air quality planning in ozone attainment areas. EPA requires each state to prepare a single plan, based on a single set of technical data, for the entire group of designated nonattainment counties located in a single urban area and its adjacent areas of development. All such counties, furthermore, are subject to the same pollution control requirements. Thus, the division of urban areas into separate, county-specific designated nonattainment areas is an artifact of the lists the states submitted, and has no substantive consequence under Part D.

#### III. Redesignation Request for Kane and DuPage Counties

##### A. The State Submittal

On January 27, 1983, the IEPA submitted a request to USEPA proposing redesignation to attainment for a number of areas for ozone, carbon monoxide, total suspended particulates, and nitrogen dioxide. The remainder of this Federal Register addresses the ozone portion of this redesignation request for Kane and DuPage Counties, Illinois. All other portions of the January 27, 1983, redesignation request have undergone final USEPA rulemaking.

As support for the redesignation request and in accordance with EPA policy of requiring the most recent 3 years of data, the IEPA referenced 1980 through 1982 ozone data and 1979 through 1981 annual air quality summary reports which cover the ozone monitoring data for the entire State. The peak 1980-1982 ozone concentrations and expected ozone standard exceedances for all Kane and DuPage ozone monitoring sites were summarized.

The data indicate that no violation of the ozone standard was recorded in either DuPage County or Kane County in the 1980-1982 period. This lack of monitored ozone standard violations

forms the basis of the IEPA redesignation request.

In Kane and DuPage Counties, no violations of the ozone NAAQS have been monitored during the period of 1980 through 1987.

##### B. The Chicago Area Ozone Problem: The Role of Kane and DuPage Counties

For reasons described above, USEPA's ozone designation policy requires that the ozone nonattainment area include all of an urbanized area, as defined by the U.S. Bureau of the Census, and its adjacent areas of development and/or significant VOC emissions. DuPage County contains a significant portion of the Chicago urbanized area and, for this reason, must be maintained as part of the Chicago designated nonattainment area. Kane County, on the other hand, contains the separate urban areas of Aurora and Elgin as defined by the 1980 Census. These urban areas are the most significant VOC source areas in Kane County. It should be noted that these adjacent urban areas were part of a single urban area, Aurora-Elgin, as defined by the 1970 Census, when Kane County was originally designated as nonattainment for ozone. This unified urban area has a population exceeding 200,000.

The 1980 Census specifies the urban area population of Kane County as being 239,018 (95,482 in Elgin and 143,536 in Aurora). Both Aurora and Elgin are adjacent to the Chicago urbanized area along the north-south border between Kane and DuPage Counties. Even though the 1980 Census defined these areas as separate urban areas, USEPA views these areas as a single area of significant VOC-source contributions to the Chicago-area ozone problem, as well as a component of the greater Chicago source area. Regardless of how these areas are defined by the Census Bureau, USEPA considers them to be areas of development adjacent to, and hence contributing to, ozone violations in and downwind of, the Chicago urban area.

To assess the significance of the Kane County area (particularly Aurora-Elgin) as a Chicago ozone-precursor source area, it is appropriate to compare the VOC emissions and urban population (a barometer of area and mobile source VOC emissions) of Kane County with those from small, isolated urban areas where elevated ozone levels have been monitored. Monitoring data from 1977 from Harrisburg, Pennsylvania, Columbia, South Carolina, and Shreveport, Louisiana, showed multiple ozone concentrations in excess of the current 0.12 ppm ozone standard. The 1977 VOC emissions in these urban

areas were: Harrisburg—19,772 tons/year; Columbia—25,107 tons/year and Shreveport—19,074 tons/year. The 1970 populations were Harrisburg—241,000; Columbia—242,000; and Shreveport—234,000.\* These urban populations and VOC emission rates are similar to the urban population (239,018) and 1980 VOC emission rate (48,083 Kilograms/day or approximately 10,100 tons/year) of Kane County. Thus, the VOC emissions from Kane County are significant and have a high potential of contributing significantly to elevated downwind ozone concentrations. A similar conclusion can be drawn for DuPage County, which had a 1980 urban population of 646,408 and 1980 VOC emissions of 97,316 Kilograms/day (38,930 tons/year).

Furthermore, in 1977, airborne ozone sampling was conducted upwind and downwind of Springfield, Illinois,<sup>7</sup> to determine if cities smaller than the Aurora-Elgin urban area (with populations under 10,000) could contribute detectable additions to downwind ozone concentrations. A comparison of VOC and NOx emissions from Springfield with those from other urban areas showed it was similar in precursor emissions levels to other cities with populations of 100,000.<sup>8</sup> The airborne studies clearly showed that, under ozone conducive conditions, precursor emissions from a small city (smaller than the urbanized populations of Kane and DuPage Counties) could produce a significant, measurable increase in downwind ozone concentrations. As much as 0.02 ppm above background ozone concentrations could be detected up to 72 kilometers (45 miles) downwind of the urban area.

The center of the Aurora-Elgin area is approximately 54 kilometers west-southwest of Deerfield, 56 kilometers south-southwest of Libertyville, 56 kilometers west-southwest of Evanston, and 68 kilometers south-southwest of Waukegan. The center of DuPage County is approximately 44 kilometers south-southwest of Deerfield, 51 kilometers south-southwest of Libertyville, 38 kilometers southwest of Evanston, 60 kilometers south-southwest of Waukegan. All of the monitoring locations in those areas show ozone standard violations during the 1984-86 and 1980-82 periods. These distances

\* Memorandum from Warren P. Freas, USEPA, to Robert E. Neligan, USEPA, Subject: Ozone Data for Shreveport, Louisiana, Dated December 6, 1977.

<sup>7</sup> C.W. Spicer, D.W. Joseph, P.R. Stickel, An Investigation of the Ozone Plume from a Small City, 32(3) Journal of the Air Pollution Control Association (March, 1982).

<sup>8</sup> Ibid.

are in the range of significant ozone transport observed in other areas.

##### C. Future Source Growth

It is also appropriate to consider future source growth. Where significant source growth is expected to occur, potentially increasing ozone concentrations, it is appropriate to maintain nonattainment designations to ensure full implementation of all emission control requirements necessary to address the contribution of the growth to the area's problem.

In the Chicago area, the VOC emissions inventories in the 1982 SIPs make it difficult to determine relative changes in point source industrial emissions due to source growth. Considerable variation in source growth estimates exists among the various source categories. In addition, certain portions of the 1980 emission inventory for the Chicago demonstration area have undergone significant revision over time, making it unclear what the growth rates by county actually are.

On the other hand, it is possible to make assumptions about area source and mobile source emissions which comprise more than 50 percent of the total VOC emissions. Assuming that changes in population are good indicators of changes in area source and mobile source emissions, population projections for DuPage and Kane Counties can be used to predict area and mobile source emission growth in the Counties. Data presented in the Illinois SIP indicated that Kane County is expected to undergo a 26.0 percent population increase between 1980 and 1987. DuPage County was expected to undergo a 11.2 percent population increase between 1980 and 1987. Therefore, both counties were expected to experience a significant population increase. These growth rates are in contrast to the 0.5 percent decrease in population indicated for Cook County, as presented in the SIP. Given that the predicted increase in population was fairly sizable, significant increases in area source (e.g., consumer product) and mobile source (e.g., car) emissions were expected to result from the population growth. This emissions growth warrants continuing the nonattainment designations for these counties.

In previous rulemaking on this issue and in this notice, it was previously indicated by the USEPA that no 1980-1982 violations of the ozone NAAQS had been monitored in Kane and DuPage Counties. It was also indicated, however, that the local monitoring data do not present a complete picture of the ozone formation potential of precursor



emissions from these counties. Due to the secondary nature of ozone formation, precursor emissions may contribute to ozone concentrations outside of these counties. For this reason, monitoring only inside of a precursor source area does not demonstrate the full impact of the local precursor emissions and downwind ozone concentrations. Therefore, monitoring data alone for Kane and DuPage Counties cannot form the sole basis for the designation of these counties.

Moreover, the distance between the precursor sources and the downwind ozone peak concentrations may be increased as additional NOx emissions are encountered downwind. Nitrogen oxide reacts with ozone to produce nitrogen dioxide and oxygen, thus locally suppressing ozone concentrations. The resultant nitrogen dioxide, along with other ozone precursors, may result in added ozone in the source area plume further downwind (See E. Martinez and E. Meyer, pages 30-35, 44 and 55-57).

Several studies have been conducted in the Chicago-Milwaukee area which provide some evidence concerning the extent of the source area for ozone standard violations in the Chicago area. Relevant conclusions drawn from these studies are given here.

Considering only days with high ozone concentrations somewhere in the Chicago area or its downwind environs including southeastern Wisconsin, USEPA found high ozone concentrations to be primarily associated with winds from the southerly quadrants (the quadrant bounded by east and south and the quadrant bounded by south and west). This was particularly true for ozone monitoring sites in northeastern Illinois and southeastern Wisconsin. Considerable variation in resultant wind directions<sup>9</sup> measured at Midway Airport, O'Hare Airport, and Racine were found in these quadrants for high ozone days.<sup>10</sup> This indicates a large precursor source area must be considered when evaluating all ozone standard violation sites in the Chicago area and its downwind environs.

<sup>9</sup> A "resultant wind direction" is the direction of the wind vector that is the sum of a number of discrete wind vectors measured during the day and, in particular, during the daylight hours.

<sup>10</sup> Correspondence to Donald Theiller, Wisconsin DNR, and Daniel Goodwin, Illinois EPA, from Steve Rothblatt, USEPA, dated April 7, 1982, with attachment: "Analysis of Chicago and Milwaukee Ozone Concentrations for the Impact of Interstate Ozone Transport".

Based on airborne and ground-based observations, Lyons and Cole<sup>11</sup> concluded that precursor emissions from the entire Chicago metropolitan area with its 7 million population was responsible for the ozone standard violations monitored in Racine and Kenosha, Wisconsin. A similar conclusion was drawn in a report by Cole and Shaffer.<sup>12</sup> This study concluded that precursor emissions from the Chicago Metropolitan Interstate Air Quality Control Region (which includes Kane and DuPage Counties) contributed substantially to ozone standard violations monitored in Southeastern Wisconsin in 1976. The Cole and Shaffer report also described a mechanism by which precursor emissions well inland from the Lake Michigan shoreline can contribute to ozone standard violations monitored downwind along the shoreline under lake breeze conditions. Precursor emissions from inland may be injected into the offshore return air flow at a lake breeze front, thus adding to downwind ozone concentrations resulting from a recycling of transported pollutants further downwind.<sup>13</sup>

An analysis of ozone data from Racine and resultant wind directions measured at Mitchell field in Milwaukee during 1973 showed that 92 percent of the days with peak hourly ozone concentrations above 0.08 ppm had daytime winds from the southwest through east-southeast.<sup>14</sup>

From the above, it can be concluded that the Chicago urban area and its adjacent fringe areas of development and significant sources is the precursor emission source area responsible for the ozone standard violations monitored in Northeastern Illinois and in Kenosha and Racine Counties, Wisconsin. Since Kane and DuPage Counties are part of this source area, it must be further concluded that precursor emissions in these counties do contribute to the ozone standard violations monitored in Northeastern Illinois, and in Kenosha and Racine Counties, Wisconsin. USEPA's ozone redesignation policy requires that monitoring data in all of an urban area and nearby potentially affected downwind areas be considered.

<sup>11</sup> Lyons, Cole, Photochemical Oxidant Transport: Mesoscale Lake Breeze and Synoptic Scale Aspects, 15 Journal of Applied Meteorology 733 (July 1976).

<sup>12</sup> H.S. Cole, J. Shaffer, "Photochemical Oxidant Transport Along The Western Shoreline of Lake Michigan: A Case Study, August 17-22, 1976" (August, 1977) (unpublished report).

<sup>13</sup> *Ibid.*

<sup>14</sup> Lyons, Cole, Photochemical Oxidant Transport: Mesoscale Lake Breeze and Synoptic Scale Aspects, 15 Journal of Applied Meteorology 733 (July, 1976).

The NAAQS for ozone is defined at 40 CFR Part 50 to be violated when the annual average expected number of daily exceedances of the standard (0.12 parts per million (ppm), 1-hour average) over the most recent three years of monitoring at each site is greater than one (0.1). A monitored exceedance occurs when the peak one hour concentration monitored during a given day exceeds 0.124 ppm (See "Guideline for the Interpretation of Ozone Air Quality Standard", EPA-450/4-79-003). The expected number of daily exceedances is calculated from the observed number of exceedances by making the assumption that non-monitored days (invalid or incomplete data) have the same fraction of daily exceedances as observed on monitored days.

Since the number of expected standard exceedances must equal or exceed the number of observed standard exceedances, it can be concluded that any monitor recording four or more observed standard exceedances during a 3-year period has recorded a violation of the ozone standard. If less than 3 years of data are available for a given monitoring site, fewer exceedances constitute a violation of the ozone standard: for example, three exceedances when only 2 years of data are available; and two exceedances when only 1 year of data is available. Using the above exceedance frequencies, the peak ozone data can be screened for sites with obvious ozone standard violations. During the 1980-1982 period (the period addressed in the State's redesignation request), the ozone standard was violated at the following Chicago related sites: (1) Illinois: Taft High School; Dixie Highway; Evanston; Skokie; Deerfield; Libertyville; and Waukegan; (2) Indiana: Hammond (1300 141st Street site); 900 North County Road; and Burns Harbor; and (3) in Wisconsin: Kenosha and Racine. During a recent 3 year period, 1984 through 1986, the ozone standard was violated at the following Chicago related sites: (1) Illinois: Evanston; Deerfield; Libertyville; and Waukegan; (2) Indiana: Gary; Hammond (1300 141st Street site) and Porter Counties sites (1100 North Mineral Street, Water Treatment Plant, and Valparaiso); and (3) Wisconsin: Kenosha and Racine.

It is of interest to note that a recent (1983-1985) violation of the ozone standard was monitored in Des Plaines. Des Plaines is only 2 miles from the northeastern corner of DuPage County. Given the spatial nature of ozone concentrations (ozone concentrations are relatively constant over long

distances), this monitored ozone standard violation implies that part of DuPage County may be experiencing unmonitored ozone standard violations.

In Kane and DuPage Counties, no violations of the ozone NAAQS have been monitored during the period of 1980 through 1987. Nevertheless, during both the period covered by the State's redesignation request and during the most recent 3 years, ozone standard violations have been monitored in the Chicago urban area and in southeastern Wisconsin where, as explained above, EPA believes Chicago's ozone precursor emissions have a significant impact on ozone concentrations.

As the court theorized, EPA's redesignation policy requires that a nonattainment area consist of the entire urbanized area and fringe areas of development and ozone precursor sources. The Court also correctly theorized that, although the Chicago area is listed by counties, a single county, if part of an urbanized area or fringe area of development, may not be redesignated to attainment until the entire area has reached attainment. Accordingly, Kane and DuPage counties, as part of the Chicago urbanized area, may not be redesignated to attainment.

#### IV. Will County and McHenry County Designations

In their previous arguments before the Seventh Circuit Court of Appeals, the IEPA and ISCOC argued that USEPA's previous action in approving a redesignation request for Will and McHenry Counties for ozone was inconsistent with its action on Kane and DuPage Counties. The Illinois State Chamber of Commerce (ISCOC) argued that the USEPA only considered the in-county data in approving the redesignation of Will and McHenry Counties. It is obvious from the Seventh Circuit decision that there is a likelihood of confusion about USEPA's designation policy, particularly as a result of the different actions taken by USEPA in Will and McHenry Counties and in Kane and DuPage Counties.

As noted in USEPA's final rulemaking technical support document, the primary reason that USEPA approved the State's redesignation request for McHenry and Will Counties was that these counties contain essentially none of the Chicago urbanized area nor a contiguous urbanized area. (The 1970 census showed that the Joliet and Chicago urbanized areas were not in direct contact with each other).

To be sure, USEPA was aware of the VOC precursor emissions in Will County. It determined, however, that, unlike emissions from Kane and DuPage

Counties, these emissions come mainly from stationary source emissions,<sup>15</sup> and it assumed that these emissions would be significantly reduced as a result of Illinois' statewide reasonably available control technology (RACT) regulations, which were to apply to major stationary sources in all areas of the State regardless of the attainment status of an area. USEPA was operating under the assumption that nothing (in terms of stationary source control) could be gained by keeping Will and McHenry Counties designated nonattainment. Reliance on the State's commitment to RACT, however, later proved misplaced. The State later withdrew its commitment to statewide RACT.<sup>16</sup> Furthermore, at the time EPA believed it could unilaterally redesignate an area to nonattainment. Subsequently the Seventh Circuit Court of Appeals ruled that EPA could not unilaterally redesignate an area. See *Bethlehem Steel v. EPA*, 638 F.2d 944 (7th Cir. 1983).

#### V. Conclusions

EPA concludes that:

1. Ozone standard violations continue to be monitored in the Chicago area and its downwind environs.
2. Kane and DuPage Counties either contain a significant part of the Chicago urbanized area (as defined by the U.S. Census Bureau) or contain adjacent areas of significant ozone precursor emissions.
3. VOC emissions from Kane and DuPage Counties contribute significantly to the monitored standard violations attributable to Chicago-area sources, and are expected to continue to contribute in the future.
4. Portions of DuPage County could be experiencing nonmonitored violations of the ozone standard as evidenced by the recent standard violations in Des Plaines.

#### Proposed Action and Solicitation of Public Comment

USEPA again proposes to reject the State's request to redesignate Kane and DuPage Counties, Illinois, to attainment of the ozone NAAQS.

<sup>15</sup> In McHenry County, in contract, emissions levels are lower and dominated by mobile source emissions.

<sup>16</sup> In its May 26, 1988 SIP call, EPA proposed that a broader nonattainment area, to include all counties listed in the Metropolitan Statistical Area (MSA) or Consolidated Metropolitan Statistical Area (CMSA) as defined by OMB, be used for future ozone SIP planning purposes. On June 8, 1988 (53 FR 20722), EPA formally proposed such a broad designation for purposes of implementing a recent Congressional enactment called the "Mitchell-Conte Amendment" to the 1987 Continuing Resolution. Under this directive, if made final, Will and McHenry Counties would be included in the nonattainment area.

In making this proposal, USEPA requests that all commentors submit all cited support publications along with a synopsis of the relevant portions of these publications. A simple submittal of a reference list with no elaboration will not allow an adequate, thorough response by USEPA.

Under 5 U.S.C. 605(b), the Administrator has certified that redesignations do not have a significant economic impact on a substantial number of small entities (See 46 FR 8709).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Authority: 42 U.S.C. 7401-7642.

Dated: November 6, 1987.

Editorial Note: This document was received at the Office of the Federal Register, December 23, 1988.

William H. Sanders,

Acting Regional Administrator.

[FR Doc. 88-29962 Filed 12-28-88; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 180

[PP 9E2149, 3E2910/P474, FRL-3499-6]

#### Sodium Chlorate; Proposed Exemption From Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** This document proposes that exemptions from the requirement of a tolerance be established for residues of the defoliant, desiccant, and fungicide sodium chlorate when used as a harvest aid in or on the raw agricultural commodities dry edible beans and southern peas. This proposal, which eliminates the need to establish a maximum permissible level for residues of sodium chlorate in or on the commodities, was requested in petitions submitted by the Interregional Research Project No. 4 (IR-4).

**DATE:** Comments, identified by the document control number [PP 9E2149, 3E2910/P474], must be received on or before January 30, 1989.

**ADDRESS:** By mail, submit written comments to: Public Docket and Freedom of Information Section, Field Operations Division (TS-755C), Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.



Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 248 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**SUPPLEMENTARY INFORMATION CONTACT:** By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (TS-767C), Registration Division, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Office location and telephone number: Rm. 716C, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703) 557-2310.

**SUPPLEMENTARY INFORMATION:** The Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petitions to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR-4 Project, and the named Agricultural Experiment Stations. These petitions requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of exemptions from the requirement of a tolerance for residues of sodium chlorate when used in accordance with good agricultural practice as a harvest aid in or on certain raw agricultural commodities.

1. **PP9E2149.** Petition submitted on behalf of the California, Minnesota, Michigan, and North Dakota Agricultural Experiment Stations for edible dry beans.

2. **PP3E2910.** Petition submitted on behalf of the Arkansas, Georgia, Missouri, Oklahoma, and Tennessee Agricultural Experiment Stations for southern peas.

Sodium chlorate is a strong oxidizing agent that can be easily reduced to sodium chloride in the presence of organic material. The available data indicate that the proposed use results in negligible residues of sodium chlorate on the raw agricultural commodities. Dried beans and southern peas are normally rehydrated and cooked prior to human consumption, and these processes favor

further reduction of sodium chlorate residues to sodium chloride.

The data submitted in the petitions and other relevant material have been evaluated. The toxicological data considered in support of the proposed exemptions from the requirement of a tolerance include:

1. An acute oral study in rats with an LD<sub>50</sub> (median lethal dose) of 5 grams (gms)/kilogram (kg).

2. A 90-day feeding study in rats with a no-observed-effect level (NOEL) of 100 milligrams (mg)/kilogram (kg)/day.

3. A 90-day feeding study in dogs with a NOEL of greater than 360 mg/kg/day (highest dose tested).

4. A teratogenicity study in rats with NOEL's of greater than 1,000 mg/kg/day (highest dose tested) for maternal and developmental effects.

The above studies were submitted to provide a basis for evaluating the toxicological significance of sodium chlorate residues in the human diet and for determining whether additional studies are needed to complete an evaluation of the chemical. Although the available studies are adequate to determine that the proposed exemption from the requirement of a tolerance for sodium chlorate is adequate to protect the public health, the Agency has requested mutagenicity studies to determine whether it is acceptable to continue to defer or to waive the remaining chronic toxicity requirements for sodium chlorate. The mutagenicity studies are due in October 1989.

Based on the above information considered by the Agency, the exemptions from the requirement of a tolerance established by amending 40 CFR 180.1020 would protect the public health. Therefore, it is proposed that the exemptions be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number [PP 9E2149, 3E2910/P474]. All written comments filed in response to this petition will be available in the Public Docket and Freedom of Information Section, at the

address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-602), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (48 FR 24950).

(Sec. 408(e), 68 Stat. 514 (21 U.S.C. 346a(e)))

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recording and recordkeeping requirements.

Dated: December 16, 1988.

**Herbert Harrison,**  
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR Part 180 be amended as follows:

#### PART 180—[AMENDED]

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.1020 is revised to read as follows:

**§ 180.1020 Sodium chlorate; exemption from the requirement of a tolerance.**

Sodium chlorate is exempted from the requirement of a tolerance for residues in or on the following raw agricultural commodities when used as a defoliant, desiccant, or fungicide in accordance with good agricultural practice.

#### Commodities

Beans, dry, edible  
Corn, fodder  
Corn, forage  
Corn, grain  
Cottonseed  
Flaxseed  
Flax, straw  
Guar beans  
Peas, southern  
Peppers, chili  
Rice  
Rice, straw  
Safflower, grain  
Sorghum, grain  
Sorghum, fodder  
Sorghum, forage  
Soybeans

Sunflower seed

[FR Doc. 88-29959 Filed 12-28-88; 8:45 am]

BILLING CODE 6560-50-M

#### DEPARTMENT OF TRANSPORTATION

##### Coast Guard

##### 46 CFR Ch. I

[CGD86-025; CGD 88-079]

RIN 2115-AD 12

##### Commercial Fishing Industry Vessel Regulations

**AGENCY:** Coast Guard, DOT.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Coast Guard is developing safety regulations for uninspected fishing, fish processing and fish tender vessels to implement the provisions of the Commercial Fishing Industry Vessel Safety Act of 1988 (Act), Pub. L. 100-424. Response to this advance notice will help the Coast Guard determine the appropriate standards to propose for these vessels.

**DATE:** Comments on this advance notice must be received on or before February 27, 1989.

**ADDRESSES:** Comments should be submitted in writing to the Executive Secretary, Marine Safety Council (G-LRA-2/3600) (CGD 88-079), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593-0001. The comments and materials referenced in this notice will be available for examination and copying between the hours of 8 a.m. and 4 p.m., Monday through Friday, except federal holidays, at the Marine Safety Council (G-LRA-2), Room 3600, Coast Guard Headquarters, 2100 Second Street SW., Washington, DC. Comments may also be delivered to this address.

**FOR FURTHER INFORMATION CONTACT:** Mr. Noman Lemley, Office of Marine Safety, Security and Environmental Protection, (202) 287-0001.

**SUPPLEMENTARY INFORMATION:** The public is invited to participate in the earliest stages of this rulemaking procedure by submitting written views, data, or arguments. Persons submitting comments should include their names and addresses, identify this advance notice (OGD 88-079), identify the specific issues of this advance notice to which each comment applies, and give reasons for the comments. Receipt of comments will be acknowledged if a stamped self-addressed post card or envelope is enclosed with the comments. All comments received

before the expiration of the comment period will be considered before further action is taken. No public hearing is currently planned for this notice, however, one may be held at a time and place to be set in a later notice in the Federal Register if written requests for a hearing are received and the Coast Guard determines that the opportunity to make oral presentations at this stage will aid the rulemaking process.

This advance notice outlines the requirements that are being considered and requests specific information that commentors believe will aid the Coast Guard in developing proposed regulations for uninspected fishing, fish processing and fish tender vessels. Views, data, or arguments that are considered pertinent should be submitted.

An Advance Notice of Proposed Rulemaking was published in the Federal Register on July 9, 1987 (52 FR 25890) (CGD 86-025) addressing potential requirements for uninspected fish processing vessels necessary to implement the Commercial Fishing Industry Vessel Act (Pub. L. 98-364). A correction document was published on August 10, 1987 (52 FR 29556). That project is overtaken by this rulemaking since Pub. L. 100-424 has revised the requirements of Public Law 98-364. Therefore, Coast Guard Docket 86-025 is withdrawn. Comments received by the Coast Guard under CGD 86-025 will be placed in the docket with those received on this rulemaking.

#### Drafting Information

The principal persons involved in drafting this advance notice are Mr. N.W. Lemley, Office of Marine Safety, Security and Environmental Protection and CDR G.A. Gallion, Office of the Chief Counsel.

#### Background

Commercial fishing is now one of the most dangerous industries in the United States. On the average, 84 fishermen die and 250 fishing vessels are total losses each year. The Coast Guard investigates 1100 marine casualties involving fishing vessels each year. A lack of comprehensive regulatory safety requirements has been perceived as a contributing cause of this high casualty rate. Commercial fishing is the only major marine commercial industry for which inspection, licensing, operation and equipment regulations, other than for basic safety equipment, are essentially non-existent.

Each year the Coast Guard responds to approximately 3000 offshore search and rescue (SAR) cases involving commercial fishing vessels. These cases

result in the saving of over 500 lives and over \$75 million in property annually. The Coast Guard's SAR data base for FY86 and FY87 also shows, not surprisingly, that more than 85% of the commercial fishing vessels assisted are greater than 25 feet in length, and about 20% of cases occur more than 20 miles offshore. Although fishing vessels account for about 5% of the SAR cases worked by the Coast Guard, the cases on average tend to be more serious in nature, requiring more rescue resources and more rescue time. For these reasons, commercial fishing vessel SAR cases account for nearly 15% of the operating cost of the Coast Guard's SAR program. SAR statistics for Alaska alone show that 25% of SAR cases involve commercial fishing vessels and about 250 lives and \$30 million of property are saved each year.

The Coast Guard, recognizing the importance of improving the safety record of the U.S. fishing fleet, but not having specific legal authority to regulate, developed a voluntary safety program for the commercial fishing industry in 1985. The program includes voluntary design standards developed and published by the Coast Guard as Navigation and Vessel Inspection Circular No. 5-86 (NVIC 5-86) and a Vessel Safety Manual for personnel training published by the North Pacific Fishing Vessel Owners' Association (NPFVOA). Both were well received throughout the U.S. as well as internationally. They provide practical advice on improving fishing vessel safety. The Congress, recognizing the need to make significant improvements more quickly, adopted legislation to assure corrective action in several specific safety areas. The President signed the legislation September 9, 1988.

The Commercial Fishing Industry Vessel Safety Act of 1988 requires safety regulations, studies of licensing and inspection issues, and the establishment of a Commercial Fishing Industry Vessel Advisory Committee, all provided in an effort to greatly improve safety in this dangerous industry. The Coast Guard solicited applications for appointment to membership on the Committee in the Federal Register on September 23, 1988 (53 FR 37075). Implementation of the law will impact about 33,000 documented fishing industry vessels and about 100,000 fishing industry vessels numbered under state laws.

#### Discussion

On September 9, 1988, Title 46 United States Code, was amended in Chapter 45 (Uninspected Commercial Fishing Industry Vessels, Sections 4501 through

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4508) by the Commercial Fishing Industry Vessel Safety Act of 1988, Pub. L. 100-424. This Chapter, as amended, is applicable to all uninspected fishing vessels, fish processing vessels and fish tender vessels. It does not apply to fish processing vessels of more than 5000 gross tons and fish tender vessels of more than 500 gross tons since they are subject to inspection under 46 U.S.C. 3301 (11) and (12). Also, it does not apply to vessels engaged solely in sport fishing that are subject to inspection under 46 U.S.C. 3301(6) as small passenger vessels and are regulated under 46 CFR Subchapter T, or to vessels carrying 6 or less passengers that operate as uninspected passenger vessels regulated under 46 CFR Subchapter C. Vessels that alternate between commercial and sport fishing must comply with the requirements for the service in which they are engaged.

The Act requires the Secretary of Transportation to prescribe regulations for certain safety equipment and vessel operating procedures. Certain of these requirements may be made applicable only to documented vessels that operate beyond the boundary line described in 46 CFR Part 7 or that operate with more than 16 individuals on board. In prescribing regulations, the Secretary must consider the specialized nature and economics of the operations and the character, design, and construction of these vessels. Requiring alteration of a vessel or associated equipment that was constructed or manufactured before the effective date of the regulations is not permitted. Certain fish processing vessels must meet the requirements for classification by the American Bureau of Shipping or other similarly qualified organization. Chapter 45 also provides

for the enforcement of the regulations as well as authority for termination of a voyage when conditions warrant that action.

To implement the Act, the Coast Guard will assess information concerning the appropriate safety equipment and operational standards, their costs, and the current safety practices in fishing, fish processing and fish tender vessel operation. The Coast Guard is considering adding the standards developed to Subchapter C of Title 46, Code of Federal Regulations in a new part which would apply only to uninspected fishing industry vessels. The Coast Guard envisions using the requirements of 46 CFR Subchapter C, together with the voluntary standards of the American Boat and Yacht Council and the voluntary standards in the Coast Guard's NVIC 5-86, as a basis for developing the standards. The Coast Guard published notification of the issuance of NVIC 5-86 in the Federal Register of October 20, 1986 (51 FR 37247), indicating that it contains recommended standards for commercial fishing vessels. In addition to the location described in the ADDRESSES section above, NVIC 5-86 may be seen at any Coast Guard District Headquarters, Marine Inspection or Marine Safety Office. It may be purchased by sending a check to Commandant (G-MTH), U.S. Coast Guard, 2100 Second Street S.W., Washington, DC, 20593-0001 in the amount of \$11.00 payable to the U.S. Treasury.

The Act authorizes the Secretary of Transportation to prescribe regulations over a wide range of safety issues, and directs issuance of regulations to require installation, maintenance and use of

specific equipment. Subjects to be addressed by this rulemaking include:

- (1) Navigation equipment such as compasses, anchors, charts, radars, radar reflectors and depth sounders,
  - (2) Radio communication equipment such as emergency position indicating radio beacons and radios allowing communications with land based search and rescue units,
  - (3) Visual distress signals,
  - (4) Lifesaving equipment such as life preservers, buoyant apparatus, liferafts and immersion suits,
  - (5) Life rails, grab rails, and other equipment to address risk of serious injury,
  - (6) Firefighting equipment such as portable and semiportable extinguishers, detection systems, fixed extinguishing systems and fire alarms,
  - (7) Flame arrestors or similar devices for gasoline engines,
  - (8) Use and installation of insulation materials,
  - (9) Storage of flammable and combustible materials,
  - (10) First aid equipment,
  - (11) Fuel, ventilation and electrical systems,
  - (12) Operational stability including bilge pumps, bilge alarms, and stability information,
  - (13) Collection of casualty information, and
  - (14) Information relative to a seaman's duty to notify his employer regarding illness.
- The Act has varied applicability depending on the date of vessel construction or conversion, area of operations, or number of persons on board. The categories of applicability of safety standards are given in the following table:

TABLE.—APPLICABILITY OF SAFETY STANDARDS

Section 46 U.S.C.	Vessels affected	Nature of authority to regulate
<b>46 U.S.C. 4502(a)—Requires the Development of Regulations for Equipping All Affected Vessels With Specified Safety Equipment.</b>		
4502(a)	All Uninspected Commercial Fishing Industry Vessels..... <i>Includes:</i> All state numbered vessels. (See footnote 1). All documented vessels. (See footnote 2).	The Coast Guard is required to develop regulations in the areas discussed in this section of the Act.
<b>46 U.S.C. 4502(b)—Requires the Development of Regulations for Equipping All Affected Vessels With Specified Lifesaving and Navigation Equipment.</b>		
4502(b)	Only those documented Uninspected Commercial Fishing Industry Vessels that operate beyond the boundary line or that operate with more than 16 individuals on board. (See footnote 3). <i>Includes:</i> (1) All documented vessels that operate beyond the boundary line. (2) All documented vessels that operate with more than 16 individuals on board.	The Coast Guard is required to develop regulations in the areas discussed in this section of the Act. The Coast Guard is permitted to develop regulations to minimize risk of injury to the crew during vessel operations.

TABLE.—APPLICABILITY OF SAFETY STANDARDS—Continued

Section 46 U.S.C.	Vessels affected	Nature of authority to regulate
<b>46 U.S.C. 4502(c)—Permits the Development of Regulations for Equipping All Affected Vessels With Specified Navigation, Lifesaving, Fire Protection and Fire Fighting Equipment</b>		
4502(c)	Uninspected Commercial Fishing Industry Vessels built or converted after 31 December 1988 that operate with more than 16 individuals on board. <i>Includes:</i> (1) All new or converted state numbered vessels that operate with more than 16 individuals on board. (2) All new or converted documented vessels that operate with more than 16 individuals on board.	The Coast Guard is permitted to develop regulations in the areas discussed in this section of the Act.
<b>46 U.S.C. 4502(d)—Requires the Development of Regulations for Operating Stability</b>		
4502(d)	Uninspected Commercial Fishing Industry Vessels built or substantially altered in a manner that affects operating stability after 31 December 1988. <i>Includes:</i> (1) All new or substantially altered state numbered vessels. (See footnote 4.) (2) All new or substantially altered documented vessels.	The Coast Guard is required to develop regulations in the areas discussed in this section of the Act.

Footnote 1: State numbered vessels are those which are not documented with the Coast Guard and therefore registered with the a state. The Coast Guard issues certificates of number in locations where states do not register vessels. Currently, only Alaska does not have an approved numbering system.  
Footnote 2: Any vessel of at least 5 net tons which engages in the fisheries, unless exempted under 46 CFR 67.01-7, must be documented. Documentation required for the operation of vessels in certain trades, serves as evidence of vessel nationality, and, with certain exceptions, permits vessels to be subject to preferred mortgages.  
Footnote 3: Boundary lines are set forth in 46 CFR 7. In general, they follow the trend of the seaward high water shorelines and cross entrances to small bays, inlets and rivers. In some areas, they are along the 12 mile line which marks the seaward limits of the contiguous zone.  
Footnote 4: Substantially altered means alteration of a vessel to engage in a different fishery or to have significant amounts of equipment or permanent topside weights added that would materially alter its seakeeping characteristics so as to make it an unstable platform.

Comments and recommendations on specific items are requested which will assist the Coast Guard in formulating the proposed standards outlined below. The Coast Guard welcomes information that commentors might offer the assist it in considering the specialized nature and economics of fishing, fish processing and fish tender vessel operations; their character, design, and construction; and the costs associated with equipment, construction, reporting and operating requirements being considered.

The entries in the following outline of the proposed requirements indicate which of the legal cites authorizes the specific requirements.

#### Outline of Proposed Requirements

##### Subchapter C—Uninspected Vessels

Add as Parts 27, 28 and 29:

#### PART 27—UNINSPECTED COMMERCIAL FISHING INDUSTRY VESSELS

##### Section 27.01 Authority and Purpose.

##### Section 27.05 Application.

Section 27.10 Definitions of terms used in Parts 27, 28, and 29 (Buoyant apparatus and vessel examination may have different meanings than now used for inspected vessels.).

##### Section 27.15 Exemptions and Equivalents.

(Vessels of less than 36 feet and not operating on the high seas are exempted

from the requirements for life boats or liferafts by the Act. The Act also authorizes the Secretary of Transportation to exempt vessels from specific regulations prescribed under the Act for good cause. This section would give procedures for establishing good cause. This section would also provide for determinations by the Coast Guard in establishing equivalents to the regulations.)

#### PART 28 REQUIREMENTS

##### Section 28.01 Application.

##### Section 28.05 Life Preservers and other Lifesaving Equipment.

##### Section 28.05.1 Life Preservers and Ring Lifebuoys.

(One USCG approved life preserver for each person on board plus an additional number to provide for emergency situations when some members of the crew may not have access to principal life preserver stowage locations are being considered. One ring life buoy on each side as a minimum and equivalency provisions for providing for man overboard retrieval are also being given consideration. Requirements relating to work vests are also envisioned. Requirements for lifesaving gear for individuals would be similar to those found in 46 CFR Subchapter C, Part 25, which are currently applicable to these vessels. Additionally, an approved immersion

suit would be an acceptable substitute for a life preserver.)

(Applicability: 4502(a), 4502(b), 4502(c)).

##### Section 28.05.5 Liferafts.

(Liferafts to accommodate 100% of those on board are being considered. Liferafts would ultimately, by some specific date, be required to be USCG approved, but as an interim measure the liferafts on board could be used, if serviceable and adequate, to meet safety needs. The survival equipment may also be different from that in approved liferafts if it is adequate to meet safety needs. Hydraulic release units or alternate float-free arrangements and servicing will be addressed.)

(Applicability: 4502(b); 4502(c), not applicable to vessels less than 36 feet in length not operating on the high seas).

##### Section 28.05.10 Immersion Suits.

(One USCG approved immersion suit of a suitable size will be required for each person on board. These would only be required north of 32 degrees north latitude and south of 32 degrees south latitude. Design standards, stowage, and maintenance requirements would be included as well as provisions to address continued carriage of nonapproved immersion suits considered acceptable.)

(Applicability: 4502(b), 4502(c)).



**Section 28.05.15 Marking, Stowage, Maintenance.**

(Requirements for marking, stowage and periodic maintenance are being considered. Life preservers would be required to be marked with the name of the vessel, while immersion suits would not since they often are the property of the crew and may be moved from vessel to vessel. Rafts would not be required to be marked with the vessel name since they are not always carried on the same vessel. Equipment would be required to be easily accessible in an emergency and stowed so that it can be used in drills where drills are required. Lifesaving equipment would be required to be maintained in a ready for use condition. Where servicing is required, a periodic schedule would be specified.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.10 Distress Signals.**

(USCG approved signals, 6 hand red flares and 6 hand orange smoke signals, or alternatively 12 combination flare and smoke distress signals, stowed in a watertight container are being considered.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.20 Emergency Position Indicating Radio Beacons (EPIRBs).**

(Type, stowage and maintenance requirements. The provisions will reflect those found in 46 CFR 25.26, published in the Federal Register August 17, 1988 (53 FR 31004). The new 406 Mhz EPIRB is required on vessels that operate on the high seas on or after August 17, 1989.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.30 Fire Extinguishing and Detecting Equipment.****Section 28.30.1 Fire Extinguishers.**

(A USCG approved B-U would be required in each galley and engineroom, and a USCG approved A-U would be required in each space accessed by the crew. These are similar requirements to those now found in NVIC 5-88 and 46 CFR Subchapter C, Part 25.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.30.5 Fire Extinguishing Systems.**

(Fixed systems for enginerooms on certain sized vessels are being considered. USCG approved Halon or carbon dioxide systems are envisioned.)

(Applicability: 4502(c)).

**Section 28.30.10 Fire Pumps.**

(Fire pumps for certain sized vessels are being considered.)

(Applicability: 4502(c)).

**Section 28.30.15 Fire Alarms.**

(Alarm systems for certain sized vessels are being considered for machinery and living spaces.)

(Applicability: 4502(b), 4502(c)).

**Section 28.30.20 Fire Detection Systems.**

(Detection systems for certain sized vessels are being considered for machinery and living spaces.)

(Applicability: 4502(b), 4502(c)).

**Section 28.35 Bilge Systems.**

(Fixed bilge piping, fixed bilge pumps and high level alarms are being considered. Such requirements would be similar to standards in NVIC 5-86.)

**Section 28.35.1 Bilge Alarms**

(Bilge alarms are being considered for spaces subject to entry of water during vessel operations through openings or seal failures, such as lazarettes and enginerooms.)

(Applicability: 4502(c)).

**Section 28.35.5 Bilge Pumps and Fixed Piping**

(Applicability: 4502(c)).

**Section 28.40 Stowage and Handling of Flammable and Combustible Material.**

(Quantity limitations, stowage, handling, and transfer requirements similar to the provisions of 46 CFR Part 105 are being considered. These requirements will not address pollution concerns currently covered elsewhere in the regulations. They may include stowage of combustible solids, such as packing materials, and other items such as paint.)

(Applicability: 4502(b), 4502(c)).

**Section 28.45 Fuel, Ventilation, and Electrical Systems****Section 28.45.1 Fuel Systems**

(Specific standards for fuel piping and fuel tanks are being considered. Standards similar to recreational vessel standards such as those of the American Boat and Yacht Council or, for vessels on the high seas or carrying more than 16 individuals, standards in 46 CFR Subchapters F and T, are being contemplated. The use of nonconventional fuels, such as liquefied gas, will be addressed.)

(Applicability: 4502(c)).

**Section 28.45.5 Ventilation**

(A requirement for two fire proof and gastight vent ducts with one extending

to the bilge for each space containing internal combustion machinery is being considered. Spaces containing fuel tanks would be required to be fitted with gooseneck vents at least 1½ inches in diameter. Fuel tanks would be required to be fitted with vents exiting on the exterior of the hull and fitted with flame screens of corrosion resistant wire mesh. Requirements similar to those of 46 CFR Subchapter T are being contemplated. The removal of explosive vapors is the primary concern.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.45.10 Electrical Systems**

(Specific requirements for electrical systems are being considered. Standards similar to those for recreational vessels such as those of the American Boat and Yacht Council or, for vessels on the high seas or carrying more than 16 individuals, standards in 46 CFR Subchapters J and T, are being contemplated.)

(Applicability: 4502(c)).

**Section 28.50 Equipment to Minimize Injuries****Section 28.50.1 Protection from Moving Machinery**

(Requirements to provide protective shields, etc., for exposed moving machinery parts are being considered.)

(Applicability: 4502(b), 4502(c)).

**Section 28.50.5 Cooking and Heating Appliances**

(Standards for cooking and heating appliances, fuels and their installation, similar to those in 46 CFR Subchapter T, are being considered.)

(Applicability: 4502(d), 4502(c)).

**Section 28.50.10 Life Rails and Grab Rails**

(Standards for rails at the periphery of weather decks and standards for grab rails at deck house sides and in corridors are being considered. Requirements similar to those in 46 CFR Subchapter T are being contemplated.)

(Applicability: 4502(b), 4502(c)).

**Section 28.55 Structural Fire Protection**

(Fire resistant bulkheads between the engineroom accommodation spaces are being considered for larger vessels, as is use of noncombustible insulation.)

(Applicability: 4502(c)).

**Section 28.60 Means of Escape**

(Provisions are being considered which would assure effective access to lifesaving equipment. Additionally, for larger vessels the general rule would be

to provide two means of escape from areas frequented by the crew. Text similar to that of 46 CFR Subchapter T, Part 177.15 is being considered.)

(Applicability: 4502(b), 4502(c)).

**Section 28.65 First Aid Kits**

(First aid kits meeting an industry standard, or a medicine chest for larger vessels, are being considered.)

(Applicability: 4502(b), 4502(c)).

**Section 28.70 Operational Stability****Section 28.70.1 Stability Standards**

(The intact and damaged stability standards in NVIC 5-86 are being considered for all sizes of vessels and all services. The approval of calculations and stability guidance would be necessary. Roll testing and simplified forms of determining stability are considered to be unacceptable. Procedures will be included to specify how the Coast Guard will accept evidence of compliance with stability requirements from an insurance company, a classification society or other qualified organization. The Coast Guard is considering accepting certification of compliance only from approved third party organizations.)

(Applicability: 4502(d)).

**Section 28.70.5 Stability Guidance for Vessel Operators**

(Guidance material would be required to be carried in a simplified form that would permit a master to make a knowledgeable judgment about vessel loadings. There are several acceptable formats for presenting such guidance. Therefore, the form of the guidance would be the choice of the owner. Certification of compliance with the stability standards would include approval of the guidance material.)

(Applicability: 4502(d); this applies only to vessels built or substantially altered after 31 December 1989.)

**Section 28.70.10 Inclining Tests**

(Inclining tests will be necessary to determine the weight and center of gravity of the vessel without consumables, liquid ballast or fish on board for use in required stability calculations. Testing procedures used on inspected vessels and vessels with load lines are being considered and would require that the Coast Guard, or its approved representative, witness and approve the test. Requiring tests after major modifications and conversions is also being considered.)

(Applicability: 4502(d)).

**Section 28.75 Navigation and Radio Communications Equipment.**

(Equipment standards similar to those in NVIC 5-86 are being considered.)

**Section 28.75.1 Navigation Equipment****Section 28.75.1.1 Nautical Charts**

(Applicability: 4502(b), 4502(c)).

**Section 28.75.1.2 Compasses**

(Applicability: 4502(b), 4502(c)).

**Section 28.75.1.3 Anchors**

(Applicability: 4502(b), 4502(c)).

**Section 28.75.1.4 Radar Reflectors**

(Applicability: 4502(b), 4502(c)).

**Section 28.75.1.5 Radar**

(Applicability: 4502(c)).

**Section 28.75.1.6 Depth Sounders**

(Applicability: 4502(c)).

**Section 28.75.5 Radio Communication Equipment**

(Applicability: 4502(b), 4502(c)).

**Section 28.80 Reporting of Casualty Information**

(Consideration is being given to requiring self-insured owners, and/or any entity underwriting primary insurance for commercial fishing industry vessels, to periodically report information on accidents that result in a personnel injury, loss of life, or damage by or to a vessel, its outfitting, gear, or cargo. The thresholds being considered are personnel injuries that result in payments in excess of \$5,000 and material damage that results in payments in excess of \$25,000. These reporting requirements are separate from the casualty notification requirements of 46 CFR Part 4, which also require submission of accident information. Delegation to a third party organization of the information collection activity under these new regulations is also being considered.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.85 Instruction on Notification Relative to Seaman Incapacitation**

(Notification procedures would be specified. The posting of a placard as required by the Act will be included.)

(Applicability: 4502(a), 4502(b), 4502(c)).

**Section 28.90 Operations****Section 28.90.1 Preparations for Emergencies**

(Consideration is being given to requiring the person in charge of the

vessel to provide vessel familiarization briefings for crew and to conduct periodic emergency fire and lifesaving equipment drills.)

(Applicability: 4502(b), 4502(c)).

**PART 29—FISH PROCESSING VESSELS****Section 29.01 Application**

(All uninspected fish processing vessels. Those over 5000 gross tons are required to be inspected under 46 USC 3301(11). Regulations addressing those vessels will be published under a separate docket (GGD 86-026).)

**Section 29.05 Definitions****Section 29.10 Vessel Examination**

(The Act requires an examination of all fish processing vessels by the Coast Guard at least every two years. Examination is limited to checking compliance with the requirements of Pub. L. 100-424.)

**Section 29.15 Certification of Classification**

(Certification of classification by American Bureau of Shipping or another similarly qualified organization is required by the Act for all fish processing vessels built or converted after July 27, 1990. Which organizations should be qualified is being considered.)

**Preliminary Economic Analysis and Certification**

Although the regulations being developed are considered to be non-major under Executive Order 12291, they are considered to be significant under the Department of Transportation regulatory policies and procedures (44 FR 11034; February 28, 1979). The regulations being developed are considered significant because of the potential for substantial public interest and the substantial expansion of the regulatory program applicable to commercial fishing industry vessels. The regulations being developed are considered non-major because the economic data at this time does not warrant a conclusion that the program is likely to result in an annual effect on the economy of \$100 million or more, a major increase in the costs or prices for the affected industry or public, or significant adverse effects on competition, employment, or other market-place factors. One of the purposes of this ANPRM is to generate additional cost data with which, if warranted, a full regulatory evaluation can be made.

The regulations being developed would impact owners and operators of



uninspected fishing, fish processing and fish tender vessels and marine underwriters of those vessels. There may be certain of these vessels that can be classified as small entities. There may also be a significant economic impact on certain of these entities as a result of the costs associated with compliance with new equipment requirements being considered. The Coast Guard encourages specific comments describing in detail the size of entities to be affected by the regulations outlined above, including information regarding the number of vessels owned or operated and the number of individuals employed. The Coast Guard also encourages comments estimating the expected cost of complying with the outlined regulations. The information received will assist the Coast Guard in determining whether the regulations being developed will have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act

The regulations being developed will require the submission of data concerning marine casualties by persons underwriting primary insurance for fishing, fish processing and fish tender vessels. The submission of this data is required by the Act. Information collection requirements will be submitted to the Office of Management and Budget for review under the Paperwork Management Act (44 U.S.C. 3501 et seq.)

#### Federalism

The regulations being developed will affect commercial fishing industry vessels and their underwriters. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12812, and it has been determined that the regulations being developed do not have sufficient federalism implications to warrant the preparation of Federalism Assessment.

#### Regulatory Identification Number

A regulatory information number (RIN) is assigned to each regulatory action listed on the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

October 27, 1988.

Clyde T. Lusk, Jr.,  
Vice Admiral, U.S. Coast Guard Acting Commandant.

[FR Doc. 88-29919 Filed 12-28-88; 8:45 am]

BILLING CODE 4910-14-M

#### FEDERAL COMMUNICATIONS COMMISSION

##### 47 CFR Part 73

[MM Docket No. 88-571, RM-6460]

#### Radio Broadcasting Services; Plainview, TX

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition by Adams-Shelton Communications, licensee of Station KKYN-FM, Channel 280C1, Plainview, Texas, proposing the substitution of Channel 280C1 for Channel 280A and modification of its license to specify operation on the higher class co-channel. The channel substitution can be made consistent with the Commission's minimum distance separation requirements at the station's current transmitter site at coordinates 34-13-05 and 101-42-02.

**DATES:** Comments must be filed on or before February 17, 1989, and reply comments on or before March 6, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel or consultant, as follows: Thomas J. Hutton, Esquire, Dow, Lohnes & 1255 Twenty Third Street NW., Suite 500, Washington, DC (Counsel for petitioner).

**FOR FURTHER INFORMATION CONTACT:** Patricia Rowlings, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-571, adopted November 30, 1988, and released December 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

##### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 88-29863 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

##### 47 CFR Part 73

[MM Docket No. 88-563, RM-6441]

#### Radio Broadcasting Services; Russell Springs, KY

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition by P&G Communications-Kentucky which proposed to allot Channel 300A to Russell Springs, Kentucky, as its first FM service, at coordinates 37-03-00 and 85-05-00.

**DATES:** Comments must be filed on or before February 17, 1989, and reply comments on or before March 6, 1989.

**ADDRESS:** Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners, or their counsel or consultant, as follows: Paul H. Reynolds, Amerimedia, Inc., 415 N. College Street, Greenville, AL 36037, (Consultant for Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Walls, Mass Media Bureau (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-563, adopted November 29, 1988, and released December 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC

Dockets Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, D.C. 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

##### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

Steve Kaminer,

Deputy Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 88-29866 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

##### 47 CFR Part 73

[MM Docket No. 88-573, RM-95]

#### Radio Broadcasting Services; Tawas City and Wurtsmith, MI

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition filed by Tawas City Broadcasting, Inc. requesting the substitution of FM Channel 235A for Channel 269A at Tawas City, Michigan, and modification of its license for Station WDBI(FM) to specify operation on Channel 235A. Channel 235A can be allotted to Tawas City in compliance with the Commission's spacing requirements at petitioners specified site (44-18-27 and 83-39-42) provided Channel 235A is deleted from Wurtsmith, Michigan. Channel 235A was allotted to Wurtsmith in MM Docket No. 84-231 and made available for application from May 12, 1988 until June 16 1988. Currently there are no applications on file at the Commission for this channel. Canadian concurrence is required for the allotment of Channel 235A at Tawas City.

**DATE:** Comments must be filed on or before February 17, 1989, and reply comments on or before March 6, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: David Tillotson, Arent, Fox, Kintner, Plotkin & Kahn, 1050 Connecticut Avenue, NW., Washington, DC 20036-5337.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-573, adopted November 18, 1988, and released December 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

##### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission

Steve Kaminer,

Deputy Chief, Policy and Rules Division Mass Media Bureau.

[FR Doc. 88-29869 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

##### 47 CFR Part 73

[MM Docket No. 88-574, RM-6478]

#### Radio Broadcasting Services; Kirksville, MO

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document requests comments on a petition filed by KIRX, Inc., licensee of Station KRXL(FM), Kirksville, Missouri, requesting the substitution of Channel 233C for Channel 233C1 at Kirksville. The coordinates for Channel 233C are 40-14-34 and 92-25-42.

**DATES:** Comments must be filed on or before February 17, 1989, and reply comments on or before March 6, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: David L. Nelson, President, KIRX, Inc., 4321 West College Avenue, Suite 402, Appleton, Wisconsin 54914.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-574, adopted November 18, 1988, and released December 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

##### List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-29868 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M



## 47 CFR Part 73

[MM Docket No. 88-575; RM-6405]

Radio Broadcasting Services;  
Englewood, Ohio

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by LC Communications seeking the allotment of Channel 233A to Englewood, Ohio, as the community's first local FM service. Channel 233A can be allotted to Englewood in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.6 kilometers (2.2 miles) north to avoid a short-spacing to Station WLAP-FM, Lexington, Kentucky, and Station WLLT, Fairfield, Ohio. The coordinates for this allotment are North Latitude 39-54-34 and West Longitude 84-17-37. Canadian concurrence is required since Englewood is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

**DATES:** Comments must be filed on or before February 17, 1989, and reply comments on or before March 6, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Lewis Gibbs, 23010 Harding Drive, Oak Park, Michigan 48237 (Petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-575, adopted November 15, 1988, and released December 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in

Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division,  
Mass Media Bureau.

[FR Doc. 88-29864 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 73

[MM Docket No. 88-572, RM-6564]

Radio Broadcasting Services; Myrtle  
Beach, SC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

**SUMMARY:** The Commission requests comments on a petition by Myrtle Beach Broadcasting Limited Partnership seeking the substitution of Channel 221C2 for Channel 221A at Myrtle Beach, SC, and the modification of its license for Station WJYR-FM to specify operation on the higher powered channel. Channel 221C2 can be allotted to Myrtle Beach in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site, if the application of Station WFSS for noncommercial educational Channel \*220C1 at Fayetteville, North Carolina, is not granted. The coordinates for this allotment are North Latitude 33-42-56 and West Longitude 78-52-56. Petitioner is requested to furnish additional information concerning the impact of the Channel 221C2 allotment on noncommercial educational allocations in the area.

**DATES:** Comments must be filed on or before February 17, 1989, and reply comments on or before March 8, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: James F. Rogers, Esq., Latham & Watkins, 1001 Pennsylvania Avenue, NW., Suite 1300, Washington, DC 20004-2505 (Counsel to petitioner).

**FOR FURTHER INFORMATION CONTACT:** Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-572, adopted November 18, 1988, and released December 22, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 88-29862 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 74

[MM Docket No. 88-140; RM 5416 and 5472]

## FM Translator Stations

AGENCY: Federal Communications Commission.

ACTION: Order reopening docket for additional comment.

**SUMMARY:** Action taken herein reopens the record in MM Docket No. 88-140 (53 FR 22035, June 13, 1988) <sup>1</sup> to afford parties an opportunity to comment on additional information submitted by the National Association of Broadcasters after the closing of the comment period. This *Notice of Inquiry* initiated a study of the role of FM translators in the radio broadcast service.

<sup>1</sup> The document published on June 13, 1988, linked this action to 47 CFR Part 73. The correct citation is 47 CFR Part 74.

**DATES:** Comments due January 23, 1989; Replies due February 7, 1989.

**ADDRESS:** Federal Communications Commission, Washington, DC 20554.

**FOR FURTHER INFORMATION CONTACT:**

Marcia Glauberman, Mass Media Bureau, (202) 632-6302.

**SUPPLEMENTARY INFORMATION:**

List of Subjects in 47 CFR Part 74

Radio broadcasting.

[MM Docket No. 88-140; RM-5416, RM-5472]

Order Reopening the Period for Filing  
Comments

Adopted: December 5, 1988.

Released: December 14, 1988.

By the Chief, Mass Media Bureau

1. By this *Order*, we are reopening the above-captioned proceeding to afford parties an opportunity to comment on a study of radio listening behavior submitted by the National Association of Broadcasters (NAB) on November 4, 1988. In its reply comments in this proceeding, NAB contended that an empirical analysis included in the initial comments filed by the staff of the Bureau of Economics of the Federal Trade Commission (FTC) used misleading data and did not address the relevant issues. It also indicated that it intended to further respond to the FTC study by undertaking its own study. However, because access to the detailed data needed to conduct such a study would not be available until after the deadline for filing reply comments, NAB stated that it would subsequently submit a supplement to the record. It now has filed its study and a motion requesting that the Commission accept its supplemental submission. MHS Holdings, Ltd., has filed an opposition to the request for acceptance of NAB's supplement on the grounds that the Commission denied its earlier request for an extension of time for filing reply comments. <sup>1</sup> An opposition to the request for acceptance of NAB's supplement also was submitted by John S. La Tour who contends that this submission is merely a late-filed comment.

2. While we indicated at the outset of this proceeding that we would be disinclined to extend the time period for filing comments at this stage, <sup>2</sup> we believe that it is appropriate to permit interested parties to comment on the NAB study. Unlike MHS Holdings' request for additional time to respond to arguments presented in the initial

comments, NAB's supplemental submission includes information that was unavailable during the original comment period. Thus, we believe that acceptance of this study and any additional comments we receive in response to it will further our objective to develop the most complete factual record possible in order to determine our general FM translator policy. Therefore, we are reopening the comment period in the proceeding. Parties are requested to limit their comments and submissions to the empirical evidence in the studies before us and any other recent data.

3. Accordingly, *It is ordered*, pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, that the period for filing comments in the above-captioned proceeding is REOPENED and interested parties may file comments on or before January 23, 1989, and reply comments on or before February 7, 1989. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street NW., Washington DC 20554.

4. Accordingly, *It is ordered* that the Motion for Acceptance of National Association of Broadcasters Supplement to Reply Comments is granted.

5. Accordingly, *It is ordered* that the Opposition to Motion for Acceptance of National Association of Broadcasters Supplement to Reply Comments filed by MHS Holdings, Ltd., and John S. La Tour *Are Denied*.

6. For further information concerning this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

Federal Communications Commission.

Alex D. Felker,

Chief, Mass Media Bureau.

[FR Doc. 88-29867 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

## 47 CFR Part 90

[PR Docket No. 88-576, FCC 88-409]

Private Land Mobile Radio Services,  
Secondary Fixed Tone Signaling

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

**SUMMARY:** The Commission has adopted a Notice of Proposed Rule Making that proposes to extend tone signaling capability to all Part 90 radio services. Licensees would be permitted to use their base/mobile frequencies for fixed tone signaling operations on a secondary basis for any use consistent with the Rules and essential to the activities of the licensee. A signaling message would be limited to two seconds duration and could not be repeated more than three times. Automatic transmitter deactivation is also required when an r.f. carrier remains on for more than three minutes or if a transmission for the same signaling function is repeated more than five times.

**DATES:** Comments are due on or before February 13, 1989, and reply comments on or before February 28, 1989.

**FOR FURTHER INFORMATION CONTACT:** Eugene Thomson, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Notice of Proposed Rule Making, PR Docket No. 88-576, adopted December 12, 1988, and released December 22, 1988.

The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street NW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, 2100 M Street NW., Suite 140, Washington, DC, telephone (202) 857-3800.

Summary of Notice of Proposed Rule  
Making

1. This proceeding was initiated by separate petitions for rule making filed by Forest Industries Telecommunications (FIT), and the Manufacturers Radio Frequency Advisory Committee (MRFAC). Both petitioners requested that licensees in their respective radio services be permitted to conduct secondary fixed tone signaling and alarm operations similar to those now permitted in the Public Safety and the Power and

<sup>1</sup> See *Order Denying Extension of Time* in MM Docket No. 88-140, DA 88-1444, adopted September 15, 1988.

<sup>2</sup> See *Notice of Inquiry* in MM Docket No. 88-140, 3 FCC Rod 3964 (1988) at para. 63.



Petroleum Radio Services under § 90.235 of the Commission's Rules.

2. Over the years, the Commission has authorized tone signaling capability in a number of Part 90 radio services to provide various point-to-point alarm and operational functions. Since the Commission can find no basis for distinguishing the tone signaling needs of any one radio service from another, it now proposes that the benefits of tone signaling operations be made available to all Part 90 radio services.

3. Presently, the Rules permit a tone signaling message length of two seconds which may be repeated at any interval three times in the Public Safety and Petroleum Radio Services and five times in the Power Radio Service. The Commission is proposing to retain the two second message length and to standardize the number of message repetitions to three in all radio services. Additionally, to prevent a "stuck" tone signaling transmitter from disrupting voice communications, automatic transmitter deactivation would be required after an r.f. carrier remains on for more than three minutes or after five tone signaling transmissions for the same event.

#### Regulatory Flexibility Act Initial Analysis

4. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 604, an initial regulatory flexibility analysis has been prepared. It is available for public viewing as a part of the full text of this decision, which may be obtained from the Commission or its copy contractor.

#### Paperwork Reduction Act Statement

5. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

#### List of Subjects in 47 CFR Part 90

Radio, Private land mobile radio services.

#### Amendatory Text

47 CFR Part 90 is proposed to be amended as follows:

#### PART 90—[AMENDED]

1. The authority citation for Part 90 continues to read as follows:

Authority: Section 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 CFR 90.235 is revised in its entirety as follows:

#### § 90.235 Secondary fixed signaling operations.

Fixed operations may, subject to the following conditions, be authorized on a secondary basis for voice, tone or impulse signaling on mobile service frequencies above 25 MHz within the area normally covered by the Licensee's mobile system. Voice signaling will be permitted only in the Police Radio Service.

(a) The bandwidth shall not exceed that authorized to the licensee for the primary operations on the frequency concerned.

(b) The output power shall not exceed 30 watts at the remote site.

(c) A1D, A2D, F1D, F2D, G1D and G2D emissions may be authorized. In the Police Radio Service, A3E, F1E, F2E, F3E, G1E, G2E, or G3E emissions may also be authorized.

(d) Except for those systems covered under subparagraph (e) of this section, the maximum duration of any non-voice signaling transmission shall not exceed 2 seconds and shall not be repeated more than 3 times. Tone signaling transmissions may be staggered or continuous. In the Police Radio Service, the maximum duration of any voice signaling transmission shall not exceed 6 seconds and shall not be repeated more than 3 times.

(e) For systems in the Public Safety Radio Services authorized prior to June 20, 1975, and in the Power and Petroleum Radio Services authorized prior to June 1, 1976, the maximum duration of any signaling transmission shall not exceed 6 seconds and shall not be repeated more than 5 times.

(f) Systems employing automatic interrogation shall be limited to non-voice techniques and shall not be activated for this purpose more than 10 seconds out of any 60 second period. This 10 second timeframe includes both transmit and response times.

(g) Automatic means shall be provided to deactivate the transmitter in the event the carrier remains on for a period in excess of 3 minutes or if the transmission for the same signaling function is repeated more than five times.

(h) Operational fixed stations authorized pursuant to the provisions of this section are exempt from the requirements of §§ 90.137(b), 90.425, and 90.429.

(i) Base, mobile, or mobile relay stations may transmit secondary tone or impulse signals to receivers at fixed locations subject to the conditions set forth in this section.

(j) Under the provisions of this section, a mobile service frequency may

not be used exclusively for secondary signaling.

(k) The use of secondary signaling will not be considered in whole or in part as a justification for authorizing additional frequencies in a licensee's land mobile radio system.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 88-29874 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

#### DEPARTMENT OF DEFENSE

##### 48 CFR Parts 203, 209 and 252

#### Department of Defense Federal Acquisition Regulation Supplement; Mandatory Code of Conduct Program

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule and request for comments.

SUMMARY: The Department of Defense is considering revisions to the DFARS which will make mandatory the voluntary Code of Conduct Program at DFARS 203.7000. A new solicitation provision is also being considered.

DATE: Comments on the proposed changes should be submitted in writing to the Executive Secretary, DAR Council, at the address shown below on or before January 30, 1989, to be considered in the formulation of the final rule.

ADDRESS: Interested parties should submit written comments to: Defense Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, ODASD (P)/DARS, c/o OASD (P&L) (M&RS), Room 3D139, The Pentagon, Washington, DC 20301-3062. Please cite DAR Case 88-148 in all correspondence related to this subject.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7266.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

The Secretary of Defense has determined to issue a proposed rule revising DFARS 203.7000, adding 209.104-1(d), and adding a solicitation provision at 252.203-7004 making the current voluntary Code of Conduct Program a mandatory requirement in the contracting officer's determination of responsibility of a bidder or offeror.

#### B. Regulatory Flexibility Act

The proposed rule may have significant economic impact upon a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and an Initial Regulatory Flexibility Analysis is deemed necessary. However, the DoD has determined that it is necessary to delay preparation of an analysis, under authority of 5 U.S.C. 608, in order to ascertain the extent of the impact on small businesses in the transition from a voluntary program to a mandatory one. The impact of the proposed coverage has been minimized by excluding contracts under \$25,000 and by providing a tailoring process to adjust the program to the size, nature and extent of the company's government contracting, but at this time the overall effect on small business has not been determined. The initial analysis will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration at a later date. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS Subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite DAR Case 88-610D in correspondence.

#### C. Paperwork Reduction Act

The rule does contain information collection requirements which require the approval of OMB under 44 U.S.C. 3501 et. seq. While the initial burden associated with establishing a Code of Conduct Program may be high, the Department expects the on-going burden, once the Code of Conduct Programs are in place, to be minimal. A request for an information collection requirement has been submitted to OMB for review and approval.

List of Subjects in 48 CFR Parts 203, 209 and 252

Government procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, it is proposed that 48 CFR Parts 203, 209 and 252 be amended as follows:

1. The authority citation for 48 CFR Parts 203, 209 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

#### PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

##### 203.7000 [Amended]

2. Section 203.7000 is amended by inserting in the second sentence of 203.7000 Policy, between the word "contractors" and the word "have" the word "must" in lieu of the word "should" and by modifying the third sentence by deleting the words "For example" from the beginning of the sentence and replacing "a" with "A" at the beginning of the sentence.

##### 203.7002 [Amended]

3. Section 203.7002 is revised by adding between the words "Contract" and "Clause" in the title, the words "Provision and" and by adding a new sentence before the existing first sentence, "The contracting officer shall insert the provision at 252.203-7004, Mandatory Code of Conduct Program, in solicitations where the resulting contract is expected to equal or exceed \$25,000."

#### PART 209—CONTRACTORS QUALIFICATIONS

4. Subsection 209.104-1 is added to read as follows:

##### 209.104-1 General standards.

(d) In this regard, contractors shall have a written code of conduct program that includes those management controls (see 203.700) that are suitable to the size of the company, the nature of the entity, and the extent of its involvement in government contracting.

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Section 252.203-7004 is added to read as follows:

##### 252.203-7004 Mandatory Code of Conduct Program.

As prescribed in 203.7002, insert the following provision in all solicitations where the resulting contract is expected to equal or exceed \$25,000.

##### Mandatory Code of Conduct Program (xxx 1988)

The Contractor must have a Code of Conduct Program established and in effect prior to award of any contract resulting from this solicitation. Such a program will be tailored to be suitable to the size of the company, the nature of the entity, and the extent of its involvement in government contracting. Elements of the program should include, as appropriate:

(a) A written code of business ethics and conduct and an ethics training program for all employees;

(b) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting;

(c) A mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports (but see 203.7001);

(d) Internal and/or external audits as appropriate;

(e) Disciplinary action for improper conduct;

(f) Timely reporting to appropriate Government officials of any suspected or possible violation of law in connection with Government contracts or any other irregularities in connection with such contracts; and

(g) Full cooperation with any Government agencies responsible for either investigation or corrective actions.

Failure to comply with the requirements of this provision will render the contractor nonresponsible in regard to this solicitation. (End of Provision)

[FR Doc. 88-30026 Filed 12-28-88; 8:45 am]

BILLING CODE 3010-01-M

#### DEPARTMENT OF THE INTERIOR

##### Fish and Wildlife Service

##### 50 CFR Part 17

#### Endangered and Threatened Wildlife and Plants; Notice of Finding on Petitions To List an Ozark Cave Crayfish and an Idaho Snail

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of finding on petitions and initiation of status review

SUMMARY: The U.S. Fish and Wildlife Service announces 90-day petition findings for two petitions to amend the Lists of Endangered and Threatened Wildlife and Plants. Substantial information has not been presented that a petition to list the cave-dwelling crayfish *Cambarus aculabrum* may be warranted. Substantial information has been presented that a petition to list the Idaho springsnail *Fonticella idahoensis* may be warranted.

DATES: The findings announced in this notice were made in July 1988 and in October 1988 for the snail and for the crayfish, respectively. Comments and information in respect to the snail should be submitted by February 13, 1989. Other comments and information may be submitted until further notice.

ADDRESSES: Information, comments, or questions regarding the crayfish petition may be submitted to the Jackson Field



Office, U.S. Fish and Wildlife Service, Jackson Mall Office Center, Suite 316, 300 Woodrow Wilson Avenue, Jackson, Mississippi 39213 (telephone 601/965-4900, FTS 490-4900). Information, comments, or questions regarding the snail petition may be submitted to the Field Supervisor, U.S. Fish and Wildlife Service, 4696 Overland Road, Room 576, Boise, Idaho 83705 (telephone 208/334-1931 or FTS 554-1931). The petitions, findings, and supporting data are available for public inspection, by appointment, during normal business hours at the addresses listed above.

**FOR FURTHER INFORMATION CONTACT:** Mr. James Stewart at the Jackson, Mississippi, Field Office listed above, or Mr. Charles Lobdell at the Boise, Idaho, Field Office listed above.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended in 1982 (16 U.S.C. 1531 *et seq.*), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the Federal Register. If the finding is positive, the Service is also required to promptly commence a review of the status of the involved species.

The Service has received and made a 90-day finding on the following petition from Dr. Arthur Brown. It was dated July 15, 1988, and was received by the Service on July 21, 1988. It requested the Service to list the troglodytic (cave dwelling) crayfish *Cambarus aculobrum* as an endangered species. The petition cited known distribution of the species as limited to two caves in Benton County, Arkansas. It claimed that the caves receive moderate to heavy abuse from spelunkers and are threatened in a variety of other ways. The data was gathered incidental to status work conducted by the petitioner and his students for the Ozark cavefish, *Amblyopsis rosae*.

The Service has reviewed the petition, including a report on the Ozark cavefish by Lawrence D. Willis and Arthur V. Brown, and has communicated with Mr. Willis and examined data on the subject provided by the Missouri Department of Conservation. Both caves where this species is known to occur are in the Springfield Plateau, which lies in the tri-State area of Missouri, Oklahoma, and

Arkansas. The Springfield Plateau is considered isolated in terms of cave crayfish distribution. It has 29 caves known to contain cave crayfish, 20 in Missouri, 6 in Oklahoma, and 3 in Arkansas. For these 29 caves the species of the cave crayfish has been verified in only 7 caves (24 percent of the total.) Our distributional knowledge about the subject species therefore appears to be in a very early stage. Candidate status and formal status review for the species would be premature at this time.

On the basis of the best scientific and commercial information presently available, the Service determined that this petition has not presented substantial information indicating that the action requested may be warranted. The Service will remain very interested, however, in any additional information about this species as it may become available.

The Service received a petition from Dr. Peter Bowler of the University of California, Irvine, on November 12, 1987. The petition requested the Service to list the freshwater snail *Fonticella idahoensis* (Idaho springsnail) as an endangered species. The species has also been called the Homedale Creek springsnail. Data provided by the petitioner indicates that the species has been eliminated from about 80 percent of its historic range by impoundments in the mainstem Snake River, and that it remains only in an approximately 28 river mile stretch between Bancroft Springs and the C.J. Strike Reservoir. Primary threats cited are pollution and impoundment.

The Service found that substantial information has been presented that the action requested may be warranted.

Review of the status of the Idaho springsnail *Fonticella idahoensis*, is initiated herewith. The Service would appreciate any additional data, comments, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any interested party concerning this species.

**Author**

This notice was prepared by Dr. George Drewry, Division of Endangered Species and Habitat Conservation, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235-1975 or FTS 235-1975).

**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411; Pub. L.

100-478, 102 Stat. 2306; Pub. L. 100-653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99-625, 100 Stat. 3500 (1986), unless otherwise noted.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened Wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: December 20, 1988.

Becky Norton Dunlop,  
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88-29944 Filed 12-28-88; 8:45 am]

BILLING CODE 4310-55-M

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; Findings on Pending Petitions and Description of Progress on Listing Actions**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings.

**SUMMARY:** The Service announces its findings on pending petitions to add to and revise the Lists of Endangered and Threatened Wildlife and Plants. These findings must be made within 1 year of either the date of receipt of such a petition or of a previous positive finding. The Service also describes its progress in revising the lists during the period from October 1, 1987, to September 30, 1988.

**DATES:** The findings announced in this notice were made between July 25, 1988, and October 25, 1988. The description of the Service's progress in revising the lists is current as of October 1, 1988.

**FOR FURTHER INFORMATION CONTACT:** Chief, Division of Endangered Species and Habitat Conservation, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235-2771 or FTS 235-2771).

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended in 1982 (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information, a finding be made on the merits within 12 months of the date of receipt of the petition. Provisions of the Endangered Species Act Amendments of 1982 required that such petitions pending on the date of enactment of the Amendments be treated as having been filed on that date, i.e. October 13, 1982. Section 4(b)(3)(C)(i) of the Act requires

that any petition for which a 12-month finding of "warranted but precluded" is made should be treated as having been resubmitted, with substantial scientific or commercial information that the petitioned action may be warranted, on the date of such a finding, i.e. requiring an additional finding to be made within 12 months. This notice reports findings made on or before October 29, 1988, in respect to pending petitions for which such additional findings were due, and describes the Service's progress in revising the Lists of Endangered and Threatened Wildlife and Plants during the sixth year following the enactment of the 1982 Amendments.

The initial (90-day) findings for petitions considered here were announced in the Federal Register on January 16, 1984 (49 FR 1919), December 18, 1984 (49 FR 49118), April 2, 1985 (50 FR 13054), May 2, 1986 (51 FR 16363), January 21, 1987 (52 FR 2239), or July 1, 1987 (52 FR 24485).

All but one of the plant species involved in these petition findings were listed individually in a comprehensive notice of review for plants first published in the Federal Register on December 15, 1980 (45 FR 82480), and most recently updated as a notice of review published September 27, 1985 (50 FR 39526). The animal species mentioned below, but not named individually, were identified individually in the first announcement of 12-month petition findings published in the Federal Register on January 20, 1984 (49 FR 2485), and again in the second annual announcement published on May 10, 1985 (50 FR 19761).

**Findings**

Section 4(b)(3)(B) of the Act requires that the Service make one of the following 12-month findings on each petition presenting substantial information: (i) The petitioned action is not warranted; (ii) the petitioned action is warranted and will be proposed promptly; or (iii) the petitioned action is warranted but precluded by other efforts to revise the lists, and expeditious progress is being made in listing and delisting species. Petitioned actions found to be warranted are the subjects of proposals that will be published promptly or have already been published in the Federal Register. Therefore only findings of "not warranted" and "warranted but precluded" for pending petitions are reported here.

"Not warranted" and "warranted but precluded" findings for pending plant petitions repeat the findings made in October 1987 and announced in the Federal Register of July 7, 1988 (53 FR 25511), except for the removal of 17 plant species proposed for listing as threatened or endangered during fiscal year 1988. Findings on the plants are made by notice of review categories; application of these to individual taxa is published in a notice of review for plants published September 27, 1985 (50 FR 39526). The plant notice category number opposite the name of each taxon that is the subject of a pending petition indicates the Service's finding on that taxon. Findings of "not warranted" on the petitioned action are reported by the designation of subcategories 3A, 3B, or

3C for such taxa. Findings of "warranted but precluded" are reported by the designation of category 1, 1\*, 1\*\*, 2, 2\*, or 2\*\* for such subject taxa. The complete definitions of these category numbers are described on pages 39526 and 39527 in the 1985 general plant notice of review (50 FR 39526). A finding of "warranted but precluded" was also made for a petition to list the plant *Talinum humile* (the Pinos Altos fame flower) received October 15, 1985, from Mr. Paul R. Neal. This plant is being treated as a category 2 candidate species.

The Service's 12-month findings of "not warranted" and "warranted but precluded" on pending animal petitions are presented in Table 1. Each petition mentioned in Table 1 has had one or more previous findings of "warranted but precluded" reported in the Federal Register. The word "Yes" in the "Warranted?" column indicates petitions to list, delist, or reclassify species for which the principal findings are "warranted but precluded" from immediate proposal by other efforts to revise the lists. Note in the "Description" column that at least some species mentioned in the original petitions have been individually found to be not warranted. The species so noted were named in previous notices of petition findings. Four of the species (noted by the word "No" in the "Warranted?" column) have new 1988 findings of "not warranted" announced here.

TABLE 1.—12-MONTH FINDINGS ON PENDING ANIMAL PETITIONS

Description	Petitioner	Date received	Warranted?
5 species of sponges (2 others not warranted)	Mr. Ronald M. Cowden	June 17, 1974	Yes.
37 species of cave crustaceans (1 species listed, 12 others not warranted)	National Speleological Society	Sept. 9, 1974	Yes.
5 species of cave amphipods (1 other not warranted)	Dr. John Holsinger	July 12, 1974	Yes.
Uncompahgre fritillary butterfly	Dr. Lawrence F. Gail	Nov. 5, 1979	Yes.
Columbia River tiger beetle	Mr. Gary Shook	Dec. 15, 1979	No.
Shoshone sculpin	Dr. Peter A. Bowler	Dec. 3, 1979	No.
Bonneville cutthroat trout	Desert Fishes Council	Oct. 23, 1979	Yes.
Silver rice rat	Center for Action on Endangered Species	Mar. 12, 1980	No.
Bliss Rapids snail and Snake River physa snail	Dr. Peter A. Bowler	Feb. 7, 1980	Yes.
10 U.S. and 60 foreign species of birds (4 others listed, 5 not warranted)	International Council for Bird Preservation	Nov. 24, 1980	Yes.
Orange-fin madtom	Mr. Noel M. Burkhead	Oct. 6 1983	Yes.
Barbara Anne's tiger beetle and Guadeloupe Mountains tiger beetle	W.D. Sumlin III and Christopher D. Nagano	July 24, 1984	Yes.
Spiny River Snail	American Malacological Union	Aug. 13, 1984	Yes.
Desert tortoise in remainder of its range	Dr. Martha L. Stout, Dr. Faith T. Campbell, and Mr. Michael J. Bean	Sept. 14, 1984	Yes.
Lower (Florida) Keys marsh rabbit	Ms. Joel L. Beardsley	Apr. 27, 1985	Yes.
Henne's eucosman moth	Mr. Bruce S. Mannheim, Jr.	May 21, 1985	Yes.
Western yellow-billed cuckoo	Dr. Tim Manolis and coalition of groups	May 20, 1986	No.
Appalachian Bewick's wren	Mr. Rodney Bartgis and Mr. D. Daniel Boone	Aug. 13, 1986	Yes.
White-necked crow	Mr. Alexander R. Brash	July 25, 1986	Yes.

\*But precluded by other actions to revise the List of Endangered and Threatened Wildlife.



The four findings of "not warranted" in Table 1 require explanation. The Service was requested by Mr. Gary Shook to list the Columbia River tiger beetle in a petition received by the Service December 15, 1979. Information presented in the petition and a status survey conducted by the petitioner indicated that about 15 populations of this species are found in the lower reaches of the Salmon River in Idaho. The construction of dams, resulting in the inundation and destruction of the species' sandbar habitat, has extirpated this beetle from its former range along the Columbia and Snake Rivers. At the time of the petitioning, potential damming of the Salmon River posed a threat to the continued existence of this species.

Current review of the available data indicates that the damming of the Salmon River is no longer being proposed and the species is substantially less subject to the previously identified threats. Therefore, based on the best scientific and commercial information available, the action requested by this petition is considered not warranted at this time and the status of this species is to be reclassified from 2 to 3C in the next animal notice of review.

A second finding of "not warranted" was made for a petition to list the Shoshone sculpin (*Cottus greeniei*). This petition came from Dr. Peter A. Bowler and was received by the Service on December 3, 1979. Current review of the status shows that the Idaho State University and the Idaho Department of Fish and Game have found additional populations of the species. They have also transplanted approximately 30,000 fish to widely distributed spring habitats. Two of the larger spring complexes are now managed under the protection of the Nature Conservancy. Therefore, based on the best scientific and commercial information available, the action requested by this petition is considered not warranted at this time. The species is to be reclassified from category 1 to subcategory 3C in the next animal notice of review.

The third "not warranted" finding in Table 1 concerns the silver rice rat (*Oryzomys argentatus*). The Service was petitioned to list the species by the Center For Action On Endangered Species on March 12, 1980. In a recent (unpublished MS, in press) thorough study of geographic variation in rice rats of the United States, Drs. Steven Humphrey and Henry Setzer of the Florida Museum of Natural History concluded that no good evidence for the taxonomic recognition of *Oryzomys*

*argentatus* exists. The Service has therefore determined on the best scientific and commercial information available that the action requested by this petitioner is not warranted, and it therefore is to be relegated to Category 3B.

In a petition received May 20, 1986, the Service was requested to list the western yellow-billed cuckoo, *Coccyzus americanus occidentalis*, as an endangered species in the State of California, Oregon, Washington, Idaho, and Nevada. The petition was submitted by Dr. Tim Manolis, Acting President, Western Field Ornithologists, and was co-signed by representatives of the Animal Protection Institute, Defenders of Wildlife, Sacramento River Preservation Trust, Friends of the River, Planning and Conservation League, Davis Audubon Society, Sacramento Audubon Society, and Sierra Club. The Service determined that the petition presented substantial information indicating that the requested action may be warranted and announced the finding January 21, 1987 (52 FR 2239). At that time the Service acknowledged that difficulties existed in defining separate biologically defensible populations of the western yellow-billed cuckoo for possible listing, and that gaps remained in our knowledge of its status in certain portions of its range. Additional information on the status of the yellow-billed cuckoo in Arizona, California, and New Mexico was obtained as the result of the review.

The American Ornithologists' Union *Checklist of North American Birds* (1957) recognized two subspecies of yellow-billed cuckoo: *Coccyzus americanus americanus* in eastern North America and *C. a. occidentalis* in western North America. This classification was first proposed by Ridgway in 1887. A recent analysis of the geographic variation in this species was conducted by Banks (Condor 90:473-477). On the basis of bill size (length and upper mandible depth), wing length, and plumage color, Banks concluded that the eastern and western birds are not distinguishable and that subspecific recognition is not warranted. Since the Banks investigation is the most current published work on the taxonomic question the Service has accepted his interpretation.

Section 3 of the Act defines "endangered species" as, " . . . a species that is in danger of extinction throughout all or a significant portion of its range" and "species" to include "any subspecies of fish or wildlife or plants, and any distinction population segment of any species of vertebrate fish or

wildlife which interbreeds when mature." Apparently no data exist (such as banding studies or electrophoretic information) regarding the degree of genetic difference between the eastern and western birds to indicate that they form separate subspecies. Based on Banks' (1988) findings regarding morphometrics and plumage color, yellow-billed cuckoos in the petitioned area do not constitute a subspecies, as eastern and western birds are not taxonomically distinct. Therefore, yellow-billed cuckoos in the West do not qualify for listing as a subspecies.

Moreover, there is not indication that yellow-billed cuckoos in the petitioned area constitute a distinct population segment of a species that interbreeds when mature. Cuckoos immediately across the State line from the area referenced in the petition (e.g., such as those along the Arizona border across from California) are part of the same population and often interbreed. Yellow-billed cuckoos in the petitioned states cannot be regarded as a population separate from adjoining states that were not included in the petition. Therefore, the petitioned action is not warranted, because the yellow-billed cuckoos in the petitioned states do not constitute a subspecies or a distinct population segment.

The information in previous 12-month finding notices is current for the species indicated by "Yes" in the "Warranted" column of Table 1. In the case of the desert tortoise the Service has some information to add to the finding announced on July 7, 1988 (52 FR 24485). In an updated review of the species, the Service has documented an accelerated declining trend in tortoise population, especially north and west of the Colorado River. The primary factors causing a threat and resulting in the decline are considered to be as follows: (1) Loss of habitat due to housing developments, pipeline construction and operation, transmission line construction, solar facility development, mining, grazing, a proposed racetrack project, and highway projects; (2) predation of young tortoises by ravens; (3) illegal collecting; and (4) disease. The threats in Nevada have remained similar to earlier reports. The populations north and west of the Colorado River will be placed in Category 1 status in the next animal notice of review.

**Progress in Revision of the Lists**

Section 4(b)(3)(B)(iii) of the Act states that petitioned actions may be found to be warranted but precluded by other listing actions when it is also found that the Service is making expeditious

progress in revising the lists. The Service's progress in revising the lists in the year following October 1, 1987, the cutoff date of the previous report, is described below. For simplification in reporting, the 12-month period described actually coincides with the 1988 fiscal year; activity during the last 12 days preceding the anniversary of the Amendments will be described in a subsequent notice. The described activities prevented immediate action on the "warranted but precluded" petitioned actions.

The Service's progress in revising the lists during fiscal year 1988 is represented by the publication in the *Federal Register* of final listing actions on 60 species, and proposed listing actions on 39 species. The number of species affected by each type of listing action published during this period is presented in Table 2.

TABLE 2.—LISTING ACTIONS DURING THE PERIOD OCTOBER 1, 1987, THROUGH SEPTEMBER 30, 1988

Type of action	Number of species affected
Final endangered status	39
Final threatened status	18
Final reclassification threatened to endangered	1
Final reclassification endangered to threatened	1
Final delisting	1
Proposed endangered status	26
Proposed threatened status	12
Proposed reclassification from threatened to endangered	1

As of October 1, 1988, the Service's Division of Endangered Species and Habitat Conservation was also reviewing documents that would propose or make final listing actions on 27 species. The type of action and numbers of affected species are given in Table 3.

TABLE 3.—POSSIBLE LISTING ACTIONS FOR WHICH THE SERVICE WAS REVIEWING DRAFT DOCUMENTS ON OCTOBER 1, 1988

Type of action	Number of species affected
Final endangered status	8
Final threatened status	1
Final critical habitat	6
Final reclassification from endangered to threatened	1
Final experimental population	1
Proposed endangered status	6
Proposed threatened status	2
Proposed delisting	1

TABLE 3.—POSSIBLE LISTING ACTIONS FOR WHICH THE SERVICE WAS REVIEWING DRAFT DOCUMENTS ON OCTOBER 1, 1988—Continued

Type of action	Number of species affected
Proposed experimental population	1

The general plant and animal notices of review are important tools for gathering data on species that are candidates for listing and for informing interested parties on the Service's general views on the status of present and past candidate species. The Service is currently preparing a general notice of review for animals, to include both vertebrate and invertebrate species. The most recent previous general notices were for plants on September 27, 1985 (50 FR 39526), for vertebrate animals on September 18, 1985 (50 FR 37958), and for invertebrate animals on May 22, 1984 (49 FR 21664).

**Author**

This notice was prepared by Dr. George Drewry, Division of Endangered Species and Habitat Conservation, U.S. Fish and Wildlife Service, Washington, DC 20240 (703/235-1975 or FTS 235-1975).

**Authority:** The authority for this action is the Endangered Species Act of 1973, as amended: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411; Pub. L. 100-478, 102 Stat. 2306; Pub. L. 100-653, 102 Stat. 3825 (16 U.S.C. 1531 *et seq.*); Pub. L. 99-625, 100 Stat. 3500 (1986), unless otherwise noted.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: December 21, 1988.  
Becky Norton Dunlop,  
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88-29945 Filed 12-28-88; 8:45 am]  
BILLING CODE 4310-55-M

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 671**

**King and Tanner Crab Fisheries**

**AGENCY:** National Marine Fisheries Service (NMFS), NOAA, Commerce.

**ACTION:** Notice of availability and request for comments on a draft environmental assessment and regulatory impact review/initial regulatory flexibility analysis (EA/RIR/IRFA), and a draft fishery management plan (FMP).

**SUMMARY:** The North Pacific Fishery Management Council (Council) has prepared a new draft EA/RIR/IRFA dated December 1, 1988, in conjunction with a new draft FMP for the Commercial King and Tanner Crab Fisheries in the Bering Sea and Aleutian Islands dated November 28, 1988. The purpose of this notice is to solicit public comments on the new draft EA/RIR/IRFA and the new draft FMP which focuses specifically on the management role of Federal and State agencies when making preseason and inseason decisions.

**DATE:** Comments on the new draft EA/RIR/IRFA and the new draft FMP are due by 5:00 p.m., on January 17, 1989.

**ADDRESSES:** Comments should be addressed to Steve Davis, Deputy Director, North Pacific Fishery Management Council, P.O. Box 103136, Anchorage, AK 99510.

Copies of the new draft EA/RIR/IRFA and the new draft FMP are available upon request by calling 907-271-2809 or at one of the following locations: (1) Alaska Crab Coalition, 3901 Leary NW., Suite 6, Seattle, WA; (2) Alaska Department of Fish and Game, Unisea Building, Dutch Harbor, AK; (3) North Pacific Fishing Vessel Owner's Association, Fishermen's Terminal C-3, Room 218, Seattle, WA; and (4) United Fishermen's Marketing Association, Fishermen's Hall, Kodiak, AK.

**FOR FURTHER INFORMATION CONTACT:** Raymond E. Baglin, 907-586-7230.

**SUPPLEMENTARY INFORMATION:** The Council directed its crab plan team to prepare an FMP for king and Tanner crab fisheries in the Bering Sea and Aleutian Islands area in December 1986. A committee of Council members and industry representatives was established to work with the plan team during the development process. The plan team reviewed the issues and identified and analyzed the biological, socioeconomic, and management impacts of various alternative solutions for public and Council consideration based on all available information. Public comments were received on a draft EA/RIR/IRFA dated June 1, 1988, and a draft FMP dated June 30, 1988 (53 FR 29931, dated August 9, 1988). Based on the comments received on these documents, the Council decided to make



revisions to the documents and include options for three of the proposed management measures. The Council is asking the fishing community and other affected individuals which alternatives or options should be approved. It is hoped that the draft EA/RIR/IRFA will help the public provide constructive comments to aid the Council in its deliberations. At its January 17-20, 1989,

meeting in Anchorage, the Council will make its final decision and, if approved, submit the FMP and supporting documentation to the Secretary of Commerce for implementation. The Council will accept oral testimony at the January meeting; however, such testimony should be limited to clarification of earlier written comments and recommendations about the

Council's choice rather than submission of new information.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 23, 1988.

Richard H. Schaefer,  
Director of Office of Fisheries Conservation  
and Management, National Marine Fisheries  
Service.

[FR Doc. 88-30010 Filed 12-23-88; 3:42 pm]

BILLING CODE 3510-22-M

## Notices

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### DEPARTMENT OF AGRICULTURE

#### Forms Under Review by Office of Management and Budget

December 23, 1988.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Pub. L. 96-511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, Room 404-W Admin. Bldg., Washington, DC 20250, (202) 447-2118.

Comments on any of the items listed should be submitted directly to: Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Attn: Desk Officer for USDA.

If you anticipate commenting on a submission but find that preparation time will prevent you from doing so promptly, you should advise the OMB Desk Officer of your intent as early as possible

#### Revision

• Packers and Stockyards Administration Regulations and Related Reporting and Recordkeeping Requirements—Packers and Stockyards Act P&SA-5, 116, 116-1, 122, 124, 124-1, 125, 125-1, 125-3, 125-4, 126, 126-2, 126-3, 130, 131, 132, 134, 135, 202, 212, 215, 216, 218, 315, and 316

On occasion; Semi-annually Annually; Recordkeeping

Business or other for-profit; 31,273 responses; 361,479 hours; not applicable under section 3504(h) Tommy Morris (202) 447-5877

#### New Collection

• Food Safety and Inspection Service Processing Procedures and Cooking Instruction for Cooked, Uncured, Comminuted Meat Patties (9 CFR Parts 318 and 320)

None Recordkeeping Businesses or other for-profit; 680 responses; 115 hours; not applicable under section 3504(h) Roy Purdie, Jr. (202) 447-5372

• Forest Service 36 CFR Subpart E—Oil and Gas

None Recordkeeping; on Occasion Businesses or other for-profit; 2,250 responses; 1,250 hours; not applicable under section 3504(h)

Stanley W. Kurcaba (703) 235-9715

Jane A. Benoit,  
Departmental Clearance Officer.

[FR Doc. 88-29975 Filed 12-28-88; 8:45 am]

BILLING CODE 3410-01-M

#### Agricultural Stabilization and Conservation Service

##### Feed Grain Donations for the Lower Brule Sioux Tribe Indian Reservation in South Dakota

Pursuant to the authority set forth in section 407 of the Agricultural Act of 1949, as amended (7 U.S.C. 1427) and Executive Order 11336, I have determined that:

1. The chronic economic distress of the needy members of the Lower Brule Sioux Tribe Reservation in South Dakota has been materially increased and become acute because of severe and prolonged drought, thereby creating a serious shortage of feed and causing

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Thursday, December 29, 1988

Increased economic distress. This reservation is designated for Indian use and is utilized by members of the the Lower Brule Sioux Tribe for grazing purposes.

2. The use of feed grain or products thereof made available by the Commodity Credit Corporation (CCC) for livestock feed for such needy members of the Tribe will not displace or interfere with normal marketing of agricultural commodities.

3. Based on the above determinations, I hereby declare the reservation and grazing lands of the Tribe to be acute distress areas and authorize the donation of feed grain owned by the CCC to livestock owners who are determined by the Bureau of Indian Affairs, Department of the Interior, to be needy members of the Tribe utilizing such lands. These donations by the CCC may commence upon January 1, 1989, and shall be made available through May 15, 1989, or such other date as may be stated in a notice issued by the USDA.

Signed at Washington, DC, on December 23, 1988.

Vern Neppi,

Acting Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 88-29974 Filed 12-28-88; 8:45 am]

BILLING CODE 3410-05-M

##### Feed Grain Donations for the Turtle Mountain Band of Chippewa Indians in North Dakota

Pursuant to the authority set forth in section 407 of the Agricultural Act of 1949, as amended (7 U.S.C. 1427) and Executive Order 11336, I have determined that:

1. The chronic economic distress of the needy members of the Turtle Mountain Band of Chippewa Indians Reservation in North Dakota has been materially increased and become acute because of severe and prolonged drought, thereby creating a serious shortage of feed and causing increased economic distress. This reservation is designated for Indian use and is utilized by members of the the Turtle Mountain Band of Chippewa Indians for grazing purposes.

2. The use of feed grain or products thereof made available by the Commodity Credit Corporation (CCC)



for livestock feed for such needy members of the Tribe will not displace or interfere with normal marketing of agricultural commodities.

3. Based on the above determinations, I hereby declare the reservation and grazing lands of the Tribe to be acute distress areas and authorize the donation of feed grain owned by the CCC to livestock owners who are determined by the Bureau of Indian Affairs, Department of the Interior, to be needy members of the Tribe utilizing such lands. These donations by the CCC may commence upon January 1, 1989, and shall be made available through May 15, 1989, or such other date as may be stated in a notice issued by the USDA.

Signed at Washington, DC, on December 23, 1988.

Vern Neppi,

Acting Administrator, Agricultural Stabilization and Conservation Service.

[FR Doc. 88-29973 Filed 12-28-88; 8:45 am]

BILLING CODE 3410-05-M

#### Rural Electrification Administration

##### Southern Maryland Electric Cooperative, Inc.; Finding of No Significant Impact

AGENCY: Rural Electrification Administration, USDA.

ACTION: Finding of no significant impact.

Notice is hereby given that the Rural Electrification Administration (REA), pursuant to the National Environmental Policy Act of 1969, as amended, (42 U.S.C. 4321 *et seq.*), The Council on Environmental Quality Regulations (40 CFR Parts 1500 through 1508), and REA Environmental Policy and Procedures (7 CFR Part 1794), has made a Finding of No Significant Impact (FONSI) with respect to the construction of a 70-100 megawatt (MW) combustion turbine generating unit and associated facilities at the Chalk Point Generating Station in southeastern Prince George's County, Maryland by Southern Maryland Electric Cooperative, Inc. (SMECO).

**FOR FURTHER INFORMATION CONTACT:** Joseph R. Binder, Director, Northeast Area—Electric, Room 0241, South Agriculture Building, Rural Electrification Administration, Washington, DC 20250, telephone (202) 382-1420.

**SUPPLEMENTARY INFORMATION:** REA, in conjunction with a request for financing assistance from SMECO, required that SMECO develop environmental support information reflecting the potential environmental impacts of the project. The information supplied by SMECO is

contained in an Environmental Analysis (EVAL) which was a primary source document used by REA to develop its Environmental Assessment (EA). REA concluded that the EA represents an accurate assessment of the environmental impacts of the proposed project and that the impacts are acceptable.

The proposed project consists of constructing a 70-100 MW combustion turbine generating unit with a 23 meter (75 ft) high stack, a water treatment facility, a 113.6 cubic meter (30,000 gal) above-ground water storage tank, one 4,731 cubic meter (1,250,000 gal) above ground fuel oil storage tank, a 66 kilovolt (kV) substation, two 107 meter (350 ft) 66 kV transmission lines and a 137 meter (450 ft) long natural gas pipeline. The facilities would be located on a 1.2 hectare (ha) (3 acre (ac)) site which is located within the property boundaries of the Potomac Electric Power Company (PEPCO) 485.6 ha (1200 ac) Chalk Point site. Both the transmission lines and natural gas pipeline would be connected to existing facilities on site. The unit would operate a maximum of 1000 hours per year.

REA has concluded that the proposed project will have no effect on prime forest land or rangeland, wetlands, or floodplains, threatened or endangered species or critical habitat, and properties listed or eligible for listing in the *National Register of Historic Places*. Less than 0.4 ha (1 ac) of important farmland would be impacted. When the facility is operating it would withdraw approximately 4.7 liter/sec (75 gallons per minute (gpm)) of groundwater, discharge approximately 0.6 liter/sec. (10 gpm) of wastewater, produce some noise, and emit combustion by products. These impacts will be minimal for the unit operating independently and will not contribute significantly to the total impact of the combined generation facilities at Chalk Point. No other matters of environmental concern have come to REA's attention.

Alternatives examined for the proposed project included no action, energy conservation, purchased power or participation in the projects of other utilities, self generation, and alternative sites. REA determined that there is a need for the proposed project and that constructing the facilities as recommended is an environmentally acceptable alternative for SMECO to furnish its system with a reliable long-term supply of peaking power which will reduce SMECO's purchased power requirements and meet a portion of its future load growth.

Based upon the environmental support information provided, REA prepared an

EA concerning the proposed project and its impacts. As a result of its independent evaluation, REA has concluded that approval for SMECO to construct the proposed project would not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, REA has made a FONSI with respect to the proposed project. The preparation of an environmental impact statement is not necessary.

Copies of REA's EA and FONSI and SMECO's EVAL can be obtained from; or reviewed at the offices of REA in the South Agriculture Building, Room 0250, 14th and Independence Avenue, SW., Washington, DC 20250; or at the office of Southern Maryland Electric Cooperative, Inc. (Walter H. Smith, Executive Vice President and General Manager), Hughesville, Maryland 20637, during regular business hours. Copies of the documents are also available for review at the public libraries in La Plata, Oxon Hill, Prince Frederick and Upper Marlboro. REA welcomes comments from the general public, Federal, State of Maryland, and local governmental bodies, and other interested parties. All comments should be sent to REA at the address given above. REA will take no final action with respect to SMECO's approval request for at least thirty (30) days after the publication of this notice in the *Federal Register* and in newspapers of general circulation in Calvert, Charles, Prince George's and St. Mary's Counties.

Date: December 22, 1988.

John H. Arnesen,

Assistant Administrator—Electric

[FR Doc. 88-29911 Filed 12-28-88; 8:45 am]

BILLING CODE 3410-15-M

#### COMMISSION ON CIVIL RIGHTS

##### Iowa Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Iowa Advisory Committee to the Commission will convene at 10:00 a.m. and adjourn at 9:00 p.m., on January 25, 1989, at the Best Western Starlite Village, 929 Third Street, Des Moines, Iowa. The purpose of the meeting is to receive information on State educational policies and to determine to what extent discrimination based on race or national origin is taking place in the talented and gifted programs.

Persons desiring additional information should contact Committee

Chairperson, Dr. Lenola Allen-Sommerville, or William F. Muldrow, Acting Director of the Central Regional Division (816) 426-5253, (TDD 816/426-5009). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, December 21, 1988.

Melvin L. Jenkin,

Acting Staff Director.

[FR Doc. 88-29925 Filed 12-28-88; 8:45 am]

BILLING CODE 6335-01-M

##### Rhode Island Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Rhode Island Advisory Committee to the Commission will convene at 4:00 p.m. and adjourn at 8:00 p.m., on January 12, 1989, at the Providence Marriott Hotel, the Washington Room, Charles & Orms Streets, Providence, R.I. 02904. The purpose of the meeting is (1) to receive a briefing on Eastern Regional Conference of SAC chairs, and (2) to plan a community forum on "Police-Community Relations in Selected Cities" to be held some time in April 1989.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson David H. Sholes, (401/463-5800) or John I. Binkley, Director of the Eastern Regional Division of the Commission at (202/523-5284 or (TDD 202/376-6117). Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter, should contact the Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, December 21, 1988.

Melvin L. Jenkin,

Acting Staff Director.

[FR Doc. 88-29926 Filed 12-28-88; 8:45 am]

BILLING CODE 6335-01-M

#### DEPARTMENT OF COMMERCE

##### Bureau of Export Administration

[Docket Nos. 7114-01, 7114-02]

##### Actions Affecting Export Privileges; Martin Coyle, Individually and Doing Business As DATAGON, GMBH

##### Summary

Pursuant to the November 23, 1988 recommended Decision and Order of the Administrative Law Judge (ALJ), which Decision and Order is attached hereto and affirmed by me, Martin Coyle, individually and doing business as DATAGON, GMBH, with addresses of Swerther Strasse 195, D-5050 Bruehl, Federal Republic of Germany, and the Respondent are collectively, denied for a period of five (5) years from the date hereof, all privileges of participating in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Regulations (14 CFR Parts 768 through 700); provided, however, that said five year denial period is suspended for the five year period provided that the Respondents, or either of them, commit no further violations of the Act, the Regulations, or this final Order during the suspension period.

##### Order

On November 23, 1988, the ALJ entered his recommended Decision and Order in the captioned matter. That Decision and Order, a copy of which is attached hereto and made a part hereof, has been referred to me for final action. I hereby affirm the recommended Decision and Order of the ALJ subject only to the modification of the last sentence of paragraph III on page 29 of the ALJ's recommended Decision and Order. That sentence is changed to read as follows: "Such denial of export privileges shall extend only to those commodities and technical data which are subject to the Act and Regulations."

This constitutes final agency action in this matter.

December 23, 1988.

Paul Freedenberg,

Under Secretary for Export Administration.

##### Decision and Order

Appearance for Respondent: F. Gordon Lee, Esq., O'Connor & Hannan, 1919 Pennsylvania Ave., NW., Suite 800, Washington, DC 20006.

Appearance for Agency: Daniel C. Hurley, Jr., Esq., Attorney-Advisor, Office of the Chief Counsel for Export Administration, U.S. Department of Commerce, Room H-3329, 14th and Constitution Ave., NW., Washington, DC 20230.

##### Preliminary Statement

This proceeding against Respondent Martin Coyle, individually and doing business as Respondent Datagon, GmbH, began with the issuance September 21, 1987 of a charging letter by the Office of Export Enforcement ("the Agency"), Bureau of Export Administration,<sup>1</sup> U.S. Department of Commerce. This letter was issued under the authority of the Export Administration Act of 1979, as amended (50 U.S.C. App. 2401-2420) (the Act), and the Export Administration Regulations ("the Regulations").<sup>2</sup>

The letter charged that Respondent Coyle had violated Section 387.6 of the Regulations by reexporting, on or about September 1, 1982, a U.S.-origin computer system from the Federal Republic of Germany through the United Kingdom to Bulgaria without the required U.S. reexport authorization. The letter charged further that in connection with such reexport, in violation of §387.12 of the Regulations, Respondent Coyle had participated in transactions with Bryan Williamson, a person then denied U.S. export privileges, without Respondent Coyle's having obtained the required U.S. authorization for such participation.

Respondent Coyle filed a December 30, 1987 answer denying the charges and requesting a hearing. The hearing was held April 15 and July 7, 1988 in Washington, DC; Respondent Coyle testified at the hearing by telephone from the Federal Republic of Germany. The final posthearing filings were made September 28, 1988.

##### Facts

Certain facts that underlie this case are without serious dispute. In 1979 Respondent Coyle established Respondent Datagon, GmbH in the Federal Republic of Germany, and served as managing director of the company. Respondent Datagon, GmbH bought and sold computer equipment,

<sup>1</sup> When the Office of Export Enforcement issued the charging letter September 21, 1987, it was part of an organization within the U.S. Department of Commerce titled the International Trade Administration. As of October 1, 1987, however, it became part of an organization within the Department now titled the Bureau of Export Administration.

<sup>2</sup> The Act was reauthorized and amended by the Export Administration Amendments Act of 1985, Pub. L. 99-64, 99 Stat. 120 (July 12, 1985), and amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (Aug. 23, 1988).

The Regulations, formerly codified at 15 CFR Parts 368-398, were redesignated as 15 CFR Parts 768-799, effective October 1, 1988 (53 FR 37751, Sept. 28, 1988).



sometimes assembling purchased pieces of equipment into complete computer systems that it then sold. In June-July 1982 Respondent Coyle ordered, from a U.S. firm, a U.S.-origin computer that he intended to sell to Datalec, Ltd., a U.K. company controlled by Bryan Williamson.

Sometime during August-September 1982 this computer was shipped from the United States to Respondent Datagon, GmbH in the Federal Republic of Germany, reshipped from there to Datalec, Ltd. in the United Kingdom, and reshipped from there to Bulgaria. A U.S. export license was obtained for the shipment from the United States to the Federal Republic of Germany, but no U.S. reexport authorizations were obtained for the subsequent reshipments. The computer was controlled for national security reasons. A reexport authorization for Bulgaria, had one been requested, would not have been issued. As for Bryan Williamson, he was a person denied U.S. export privileges throughout 1982 and thereafter up through present times.

#### Positions of Parties

Respondent Coyle argued that he had no part in the unlawful reshipment of the computer to Bulgaria because he had been in Barbados on vacation from mid-August 1982 to mid-September 1982, when the computer was sent from the United States to the FRG and from there to the United Kingdom. He claimed to have known nothing of the subsequent reshipment to Bulgaria, or of any intention for such subsequent reshipment, until after that reshipment had already been made. Finally, he stated that he had been unaware that Williamson was on the U.S. denial list.

Essentially, Respondent Coyle contended that he was the innocent victim of a scheme masterminded by Williamson to divert the computer to Bulgaria. Williamson was able to implement his scheme, according to Respondent Coyle, both through his control of Datalec, Ltd. and also through his having gained an interest in Respondent Datagon, GmbH in 1980-81 by taking advantage of financial difficulties then experienced by that company. Respondent Coyle testified that he had been deliberately deceived by Williamson into believing that Williamson was not a denied person.

The Agency's case consisted of various documents and the testimony of three U.S. Government officials who had investigated this matter. As to the shipment of the computer from the United States to the FRG, one of these witnesses testified as to interviews he had conducted with two members of the

U.S. freight forwarding firm that had handled the shipment. The thrust of the testimony was that in June-July 1982 Respondent Coyle and arranged to purchase the computer from the U.S. company for shipment initially to the FRG and then reshipment to the United Kingdom. Certain Agency documentary exhibits also were cited to make this point, and to put the date of the U.S.-FRG shipment as the end of August 1982.

As for the subsequent reshipment of the computer from the FRG to the United Kingdom and from there to Bulgaria, the Agency presented especially the testimony of one of its witnesses and the 1983 written statements of four former employees of Respondent Datagon, GmbH. According to this Agency witness, these statements were the English language versions of sworn statements, in German, based on interviews of these four former employees by FRG authorities. The thrust of these statements was that Respondent Coyle knew that Bryan Williamson was a denied person under U.S. law and that he nonetheless collaborated with Williamson to ship the computer from the United States through the FRG and the United Kingdom to Bulgaria. In terms of dates, the Agency suggested that the FRG-U.K. reshipment occurred in the first part of September 1982, and the reshipment to Bulgaria in the last part of September or early part of October 1982.

In urging his position in defense, Respondent Coyle attacked the Agency's evidence as lacking credibility especially because he had been deprived of any meaningful chance to test it by cross examination. Further, he argued that the Agency's charges are barred by the statute of limitations, and finally that the Agency's case should be dismissed for reason of prosecutorial misconduct. The Agency, on a procedural point, protested the suppression of six of its hearing documents.

#### Discussion

##### Unauthorized Reexports

The Agency's presentation of its case focused particularly on the charge that Respondent Coyle participated in the unauthorized reexport of the computer system from the United Kingdom to Bulgaria. The Agency's essential evidence to support this charge was the written statements of the four former employees of Respondent Datagon, GmbH, each of which, in one way or another, indicated that Respondent Coyle had a role in the reexport to Bulgaria.

Respondent Coyle denied any such role, claiming that Williamson was the one who had arranged the reexport to Bulgaria and that he, Coyle, had learned of the reexport only after it had been made. The contrary 1983 statements of the four former Datagon, GmbH employees were dismissed by Respondent Coyle as unworthy of belief. Thus he argued that, since all four in their statements admitted some personal knowledge of or participation in the reexport to Bulgaria, each had a motive to shift responsibility for the reexport to him. Additionally, he said that all four had established a company that, when they gave their statements, was competing with Datagon, GmbH, and accordingly they had an interest in provoking sanctions for Respondent Datagon, GmbH that would free their company of its competition. Finally, Respondent Coyle asserted that two of them omitted from their statements that he had fired them from Respondent Datagon, GmbH.

More basically, Respondent Coyle argued that none of these four 1983 statements should be accorded any weight because none has been tested by cross examination. Neither Respondent Coyle nor any representative of him was present at the 1983 interviews in the FRG where each of these statements was given. Nor did the Agency produce any of the four former Datagon, GmbH employees at the hearing. The witness who did testify for the Agency at the hearing regarding the reexport to Bulgaria was a U.S. Government official whose testimony simply described the circumstances in which the statements were obtained and summarized their contents.

On this issue, Respondent Coyle's argument has force. Both his version of events—that he had no part in the reexport to Bulgaria—and the four former employees' version—that he did—are consistent with the other evidence in this case. But the Agency has the burden of proof. Although hearsay evidence is admissible under § 388.13(b) of the Regulations, the Agency failed to meet its burden of proof in this case with these four written statements. None of the four people who gave the statements was made available at any time, either in 1983 when they gave the statements or during the 1987-88 pendency of this case, for cross examination. Nor did the Agency advance any reason for such lack of availability.

Respondent Coyle offered plausible arguments as to why each of the four may have been motivated to give statements inaccurately adverse to him.

Subjection to cross examination is a fundamental method of establishing the credibility of what somebody says. Without the chance for cross examination of any of these four former employees, their statements lack sufficient credibility to sustain the Agency's charge. The absence of meaningful cross examination was not solved by the presence at the hearing of that one of the Agency witnesses who testified as to the circumstances and contents of the statements. Even though this witness, a U.S. Government official, was present at some of the 1983 interviews, he could not speak with any authority, for example, as to the motivations of the four former employees that were challenged by Respondent Coyle.

In terms of opportunity for cross examination, the contrast is marked between the cases presented by Respondent Coyle and by the Agency. Respondent Coyle was available for cross examination at the hearing; and the Agency in fact asked him nothing significant that challenged his version of the reexport to Bulgaria.

One further element remains, however, in the Agency's charge that Respondent Coyle participated in the reexport to Bulgaria. Respondent Coyle testified that, after he learned from Williamson that the computer had been shipped to Bulgaria, Respondent Datagon, GmbH was still unpaid by Williamson for the computer, and needed the money to avert threatened insolvency. Respondent Coyle described the situation as follows (Direct Testimony, April 13, 1988, at 16).

At this point, Mr. Coyle believed that he was the victim of Mr. Williamson's extortion scheme and he had no alternative but to have the computer repaired if there was to be any hope of salvaging Datagon.

The question raised by this statement is whether Respondent Coyle's admitted participation in repair of the computer means that he participated in any way in its reexport from the United Kingdom to Bulgaria. More precisely, the section of the Regulations under which Respondent's reexport is charged, § 387.6, prohibits certain acts subject to the Regulations. These acts are to "export, dispose of, divert, direct, mail or otherwise ship, transship, or reexport commodities or technical data" without proper authorization. Did Respondent Coyle's repair of the computer constitute a reexport of it within the meaning of any of these prohibited acts?

The answer to this question is in the negative. "Reexport" is defined in § 370.2 of the Regulations, and "export" is defined in section 18(5) of the Act (50

U.S.C. App. 2415(5)). From these definitions, it is clear that repair of the computer after its reexport to Bulgaria was an act distinct from the reexport of the computer charged to Respondent Coyle under § 387.6. Respondent Coyle's role in repairing an unlawfully reexported computer may well have violated one or more sections of the Regulations. But this behavior did not constitute reexporting a computer in violation of § 387.6 as charged in this proceeding.

Still another aspect of the charging letter's allegation regarding the reexport, nonetheless, needs attention. The letter charged that Respondent Coyle reexported the computer without the required U.S. authorization "from the Federal Republic of Germany through the United Kingdom to Bulgaria." Did Respondent Coyle violate the Regulations in connection with the FRG-U.K. reexport?

Respondent Coyle testified that he was out of the FRG, on vacation in Barbados, from mid-August to mid-September when first the U.S.-FRG export and then this FRG-U.K. reexport occurred, and that the actual reexport was handled by Williamson. Nevertheless, it is evident from Respondent Coyle's own testimony that he negotiated Respondent Datagon, GmbH's purchase of the computer in the United States specifically to bring it to the FRG and then to sell it to Williamson's company in the United Kingdom. Respondent Coyle further testified that, to implement this plan, Datagon, GmbH obtained an FRG export license for the shipment to the United Kingdom. Finally, Respondent Coyle was managing director of Respondent Datagon, GmbH.

On the basis of Respondent Coyle's position in Respondent Datagon, GmbH and his personal participation in setting up the U.S.-FRG-U.K. transaction, he can fairly be held responsible for it even though he may have been out of the FRG when the physical shipments of the computer actually occurred. As noted above, the U.S. seller obtained a U.S. export license for the U.S.-FRG shipment, and Respondent Coyle testified that Datagon, GmbH obtained an FRG export license for the FRG-U.K. shipment. But the Agency apparently argued that the Regulations required also a U.S. authorization for the FRG-U.K. reshipment, that this authorization was not obtained, and that the requirement was not met by the obtaining of the FRG license (Agency Post-Hearing Brief, August 22, 1988, at 8 n.10). Thus the question is whether Respondent Coyle is liable for this

failure to obtain the U.S. reexport authorization.

#### Statute of Limitations

Here Respondent Coyle's statute of limitations defense becomes relevant. Both parties agreed that the applicable period is five years (28 U.S.C. 2842). Respondent Coyle made two arguments based on the statute. First, he argued that this case is time barred because it was begun by the issuance of the charging letter on September 21, 1987, exactly five years after the date on which the Agency claimed that the unauthorized reexport occurred. The statute requires, contended Respondent Coyle, that within the five-year period the administrative proceeding must be completed and any judicial action to enforce a civil penalty be initiated, citing *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985). Hence this case is barred, concluded Respondent Coyle, since completion of this administrative proceeding and initiation of any ensuing judicial action must obviously come after the five-year period that ended on the day the charging letter was issued.

On this first statute of limitations defense, the Agency's position prevails. The agency cited *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), which held, contrary to *Core Laboratories*, that the Government has five years from the date a civil penalty is imposed, but not paid, to initiate the judicial enforcement action. More to the point, in this situation of conflicting courts of appeals decisions, the Agency cited a Commerce Department ruling that it is not for this Tribunal to decide which decision will control the judicial action in any case (*Linotype Company, a Subsidiary of Allied Corporation*, Docket No. ITA-AB-6-84 (April 10, 1987)). The Agency further cited two decisions of this Tribunal in which this Departmental ruling has been followed (*Safeway Stores, Inc.*, Docket No. AB-1-87 (Order of February 10, 1988); *Sara Lee Corporation*, Docket No. AB-2-87 (Order of March 22, 1988)).

As stated, the Agency's position on this point is correct: the Department has held that this Tribunal is not to dismiss cases on the basis of the *Core Laboratories* decision. Therefore the pertinent inquiry becomes, as suggested by the Agency and as argued by Respondent Coyle as his second statute of limitations defense, whether this administrative action was initiated within the five-year period.

As applied to the reexport of the computer from the FRG to the United Kingdom, the question is when that

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reexport occurred. According to Respondent Coyle, the record establishes that date as on or about September 2, 1982 (memorandum of Points and Authorities, August 22, 1988, at 31). According to the Agency, the date of the subsequent reexport of the computer from the United Kingdom to Bulgaria, as reflected by the record of this case, was sometime after September 13, 1982 (Post-Hearing Brief, August 22, 1988, at 17). By this Agency reasoning, then, the reexport from the FRG to the United Kingdom must have taken place before September 13, 1982.

On the basis of either Respondent Coyle's date of approximately September 2, 1982, or the Agency's date of sometime before September 13, 1982, the five-year statute of limitations period for this FRG-U.K. reexport had expired before the Agency issued its September 21, 1987 charging letter. Thus any Agency action focused on that reexport is time barred. Furthermore, the Agency may not avoid this conclusion by arguing that the FRG-U.K. reexport was part of a continuous transaction that culminated in the U.K.-Bulgaria reexport after September 21, 1982, because it has been held above that the record fails to prove that Respondent Coyle participated in that second reexport.

As to that U.K.-Bulgaria reexport of the computer, Respondent Coyle naturally asserted his statute of limitations defense against it also. In addition to the failure on the merits of the Agency charge regarding that reexport, is that Agency charge also time barred? Here the Agency claimed that the date of the U.K.-Bulgaria reexport, as shown by the record, is sometime after September 13 and before October 5, 1982 (*id.*). If the date were September 21, 1982 or later in that month or the next, it would come within the five-year period that the Agency had to issue the charging letter. Respondent Coyle offered no particular date for this U.K.-Bulgaria reexport, other than noting Agency evidence that the date was September 21, 1982 (Memorandum of Points and Authorities, August 22, 1988, at 31).

On this issue of the statute of limitations, Respondent Coyle has the burden of proof. Consequently, his failure to establish that the U.K.-Bulgaria reexport occurred before September 21, 1982 means that this Agency charge is not barred by the statute of limitations. This Agency charge was, however, as set forth above, found on its merits not to be sustained by the record.

#### Transactions with a Denied Person

The Agency's second charge against Respondent Coyle was that he participated with a denied person in transactions subject to the Regulations without having obtained the U.S. authorization required for such transactions. That Respondent Coyle did in fact participate with Williamson in transactions subject to the Regulations is evident from Respondent Coyle's own testimony. Thus Respondent Coyle described how he arranged the purchase of the computer in the United States in order that he could take delivery of it in the FRG and then resell it to Williamson's company in the United Kingdom, and how Respondent Datagon, GmbH had obtained an FRG export license for that FRG-U.K. shipment. Further Respondent Coyle outlined how, after learning that the computer had been reshipped to Bulgaria, he assisted in repair of the computer in a continuing effort to obtain payment for the computer from Williamson.

Respondent Coyle denied, however, that he should be found in this proceeding to have engaged unlawfully in transactions with a denied person. He made essentially three arguments. First, he contended that he had no knowledge of Williamson's denied status. On this point Respondent Coyle testified that, apparently at some time during the course of the events underlying this case, he heard a rumor that Williamson was a denied person. When he confronted Williamson with this rumor, according to Respondent Coyle, Williamson claimed it to be untrue, and showed Respondent Coyle a page from the Export Administration Regulations dated October 1, 1980 (Respondent's exhibit A). This page listed Williamson as a denied person whose denial period was to expire May 31, 1981. Respondent Coyle testified that he accordingly concluded that Williamson's U.S. export privileges had been restored.

What in fact happened was that, shortly after May 31, 1981, Williamson's U.S. export privileges were again denied by an Order of June 4, 1981 (46 FR 30676 (June 10, 1981)), and they remained denied throughout all times relevant to this proceeding. Respondent Coyle noted, nevertheless, that the Export Administration Bulletin did not report this June 4, 1981 denial until issuance of the Bulletin dated August 9, 1982, over fourteen months later. Respondent Coyle evidently claimed to having been unaware of either the June 1981 Federal Register publication or the August 1982 Export Administration Bulletin.

The Agency's position was that whether or not Respondent Coyle knew

that Williamson was returned to the denial list on June 4, 1981 is irrelevant. All that counts, according to the Agency, is that Williamson was a denied person during 1982 when Respondent Coyle dealt with him regarding the export and reexport of this U.S.-origin computer. The Agency argued that publication in the Federal Register of the June 4, 1981 order constituted legal notice to Respondent Coyle of Williamson's renewed denial status. Further, dealing with a denied person without obtaining the required authorization violates the Regulations, asserted the Agency, regardless of whether one is aware of the person's denied status.

On this first defense by Respondent Coyle against the charge that he engaged in transactions with a denied person, the Agency's basic position is correct. Publication in the Federal Register of the Order of June 4, 1981 was effective as legal notice to Respondent Coyle that Williamson was again a denied person. Section 387.12 of the Regulations prohibits engaging in transactions subject to the Regulations with such a person "[w]ithout prior disclosure of the facts to and specific authorization" from the Department. Knowledge of a denied person's status as such is not required to violate this section by dealing with Williamson regardless of whether he knew of Williamson's denied status.

Respondent Coyle's second defense against the charge of dealing with a denied person centered on the wording of the charging letter. It charged that Respondent Coyle had these unauthorized dealings "[i]n connection with the reexport of the . . . [computer] described above." The reexport described above was that Respondent "Coyle reexported or caused to be reexported, from the Federal Republic of Germany through the United Kingdom to Bulgaria" a computer without the required authorization. If he were found not to have committed the unauthorized reexport, Respondent Coyle argued, he then also could not be found to have dealt unauthorizedly with Williamson in connection with the reexport, since the charging letter linked the two charges. The Agency, for its part, argued that no indissoluble link exists between the two charges, but that rather the cited reexport comprised a number of actions, in at least some of which Respondent Coyle dealt with Williamson.

On Respondent Coyle's second defense also, the Agency's position prevails. It has been concluded above that the record establishes a participation by Respondent Coyle in

the FRG-U.K. reexport, although not in the U.K.-Bulgaria reexport. From Respondent Coyle's own testimony, it is clear that he engaged in transactions with Williamson in connection with that FRG-U.K. reexport. Respondent Coyle had arranged purchase of the computer by Respondent Datagon, GmbH specifically so that it could be resold to Williamson's company in the United Kingdom.

The manner in which Respondent Coyle testified that Respondent Datagon, GmbH obtained an FRG export license for the reexport to the United Kingdom leaves it uncertain whether he himself was involved in obtaining it (Direct Testimony, April 13, 1988, at 11); but he was aware at the time that the license had been obtained, and as managing director he would bear responsibility for such company actions. Furthermore, again by Respondent Coyle's own testimony, after he learned that the computer had been reexported to Bulgaria, he engaged in repair servicing of it and continued to pursue payment for it.

Consequently, Respondent Coyle did participate in transactions with Williamson in connection with the FRG-U.K.-Bulgaria sequence of reexports, even though the record does not establish that Respondent Coyle participated in the U.K.-Bulgaria reexport. The phrase "in connection with" legitimately encompasses actions related to the reexport, in addition to those actions that actually constitute the reexports.

Respondent Coyle's third and final defense is the statute of limitations. This defense also fails. The date of the charging letter, as noted, was September 21, 1987. The FRG-U.K. reexport occurred before September 13, 1982, and accordingly those actions done by Respondent Coyle before that reexport fall outside the statutory five-year period. But he did have dealings with Williamson in connection with the reexports within the five-year period. His efforts to work out with Williamson the payment for the computer, for example, continued into October 1982 and beyond (see, e.g., Agency Exhibit 10), as apparently did his repair efforts to make the computer properly functional so that payment could be obtained. This payment is reasonably connected with the FRG-U.K. reexport for which Respondent Coyle did have a responsibility. Consequently, Respondent Coyle engaged, as charged, in some transactions with Williamson within the statutory five-year period.

#### Prosecutorial Misconduct

Respondent Coyle moved that this case be dismissed for reason of prosecutorial misconduct (Motion, April 18, 1988; Motion, September 6, 1988). He cited the Agency's refusal, at the April 15, 1988 hearing, to make available to him portions of an investigative report without having time beyond that day's hearing to review the report. He cited further a series of inaccurate statements by the Agency, particularly in its Post-Hearing Brief. He cited also the attempted introduction into the record by that Brief of additional evidence, primarily in the form of a copy of a judgment and probation/commitment order in a U.S. District Court for an individual connected with the events underlying this case. These actions by the Agency, contended Respondent Coyle, warrant dismissal of the case, referral of the matter to an appropriate Departmental office for investigation and the possible imposition of sanctions, and striking from the record of the Agency's Post-Hearing Brief.

In its reply regarding the alleged inaccurate statements, the Agency acknowledged some of the inaccuracies, but attributed them to inadvertent oversight (Reply, September 15, 1988). The Agency accordingly opposed dismissal of the case or the seeking of sanctions against it.

As for the problem with the investigative report, the Agency did comply with the Order of April 18, 1988. In view of that compliance, the sensitivity that the Agency ascribed to the report, its length, and the briefness of time before the hearing when it became an issue, the Agency's actions do not warrant dismissal of this case. As to the Agency's inaccurate statements, this Tribunal accepts the Agency's representation that they were the product of inadvertence.

Respondent Coyle's motion for dismissal of this case and referral of the alleged prosecutorial misconduct to an appropriate Departmental office for investigation is denied. As for Respondent Coyle's objection to the Agency's attempted introduction of additional evidence as part of its Post-Hearing Brief, that objection is well founded; and accordingly the judgment and commitment/probation order is not considered in this Decision. It will be additionally stated, however, that even were this document to be admitted as evidence, the conclusions of this Decision as to Respondents would remain unchanged.

#### Suppressed Agency Exhibits

The Agency protested the suppression of six of its exhibits offered for the hearing. To preserve this issue for review beyond this Tribunal, the Agency was directed to submit the suppressed exhibits together with an offer of proof. Should such subsequent review modify this Tribunal's suppression of these exhibits, rulings are stated below regarding the significance of each of these exhibits. Each exhibit is identified below based on the description of it in the Agency's submission (Offer of Proof, September 15, 1988).

Exhibit 17 is a July 12, 1982 letter to Respondent Coyle from an official of the U.S. freight forwarding firm that handled the shipment of the computer from the United States to the FRG. According to the Agency, this letter "shows that Coyle had reason to know the requirements of the 'U.S. Export Regulation'" (*id.* 1). Respondent Coyle's knowledge of the Regulations, as distinguished from his awareness of Williamson's denied status, was not a contested issue in this case. Consequently admission of this Exhibit would cause no change in this Decision.

Exhibit 18 consists of handwritten notes made by another member of that freight forwarding firm regarding telephone calls she had with various people, including Respondent Coyle. The Agency claimed that these notes show that Respondent Coyle remained involved with the export of the computer from the United States to the FRG even while he was in Barbados. This Decision has stated above that Respondent Coyle's own testimony establishes his involvement in that export, though not necessarily during the time that he was in Barbados. But whether that involvement occurred while Respondent Coyle was in Barbados has no meaning for any of the rulings in this Decision. Therefore admission of this Exhibit would produce no change in this Decision.

Exhibit 19 is a May 14, 1984 letter from Williamson to a U.S. Government official that, according to the Agency, implicates Respondent Coyle in the reexport of the computer to Bulgaria. It also suggests that Respondent Coyle when dealing with Williamson knew that he was a denied person. Respondent Coyle vigorously disputed those statements in this letter adverse to him (Response, September 28, 1988), since his position throughout this case has been that it was Williamson who deceived him and masterminded the diversion of the computer to Bulgaria. If this letter were to be declared



admissible, it would be accorded little weight, because Respondent Coyle was afforded no chance to cross examine Williamson, who on the record of this proceeding might well have a self interest in shifting some responsibility for the diversion to somebody other than himself. Thus admission of this Exhibit would not change this Decision.

Exhibit 21 is a June 25, 1982 telex from Respondent Coyle to the U.S. firm from which the computer was purchased, and Exhibit 22 is an August 19, 1982 invoice addressed to that firm from the U.S. manufacturer of the computer. These Exhibits were offered by the Agency to establish various aspects of the purchase in the United States of the computer that was ultimately diverted to Bulgaria; but none of these aspects became a disputed issue in this case. Consequently admission of these Exhibits would work no change in this Decision.

Exhibit 23 comprises a bill of lading, an invoice, and several telexes that together, according to the Agency, establish that on September 21, 1982 the computer was shipped from the United Kingdom and that on September 23, 1982 it arrived in Bulgaria. If admitted, this Exhibit would show that the U.K.-Bulgaria export occurred within five years of the September 21, 1987 issuance of the charging letter. It was concluded above, however, that the Agency charge based on the U.K.-Bulgaria reexport is not barred by the statute of limitations because Respondent Coyle failed to prove that it occurred beyond the statutory five years. Therefore admission of this Exhibit would not change this Decision.

In sum, admission of all of these Exhibits would not change any of the conclusions of this Decision. Respondent Coyle objected to a review in this Decision of these Exhibits on three grounds (Motion for Reconsideration and Vacating, September 9, 1988; Response, September 26, 1988). He contended that their authenticity had not been established, that he was unable to challenge them effectively since the hearing has been completed and witnesses are no longer available, and that their review in these circumstances could prejudice him. As it has turned out, however, the review has concluded that, even were all the Exhibits to be authenticated and admitted and no challenge to them effectively made other than the challenge to Exhibit 19 noted above, this Decision would remain unchanged in its conclusions.

#### Conclusion

The charge that Respondent Coyle violated § 387.6 of the Regulations by reexporting a U.S.-origin computer from the FRG through the United Kingdom to Bulgaria in 1982 is dismissed. The charge that Respondent Coyle violated § 387.12 in 1982 by engaging in transactions subject to the Regulations with Bryan Williamson, a denied person, is sustained by the record. Engaging in transactions with a denied person in violation of the Regulations is a serious offense because it undercuts the effectiveness of the denial order sanction. A denial of Respondent Coyle's U.S. export privileges for five years is therefore warranted.

In this case, however, reason exists to suspend the denial. Respondent Coyle's U.S. export privileges were actually denied during 1987 for a brief period through an administrative error by the Department. Although the Department subsequently corrected its error, Respondent Coyle claimed that it cost him customers, his job, and his shareholding interest in the company where he was then employed (Direct Testimony, April 13, 1988, at 30-31, and attached Exhibit I). In view of these claimed losses already incurred by Respondent Coyle, the entire period of this five-year denial hereby imposed will be suspended, provided that he commits no further violation of the Act or the Regulations during such five-year period.

#### Order

I. For a period of five years from the date of the final Agency action, as modified by the suspension set forth in paragraph II below, Respondents Martin Coyle, individually and doing business as Datagon, GmbH, Swerther Strasse 195, D-5050 Bruehl, Federal Republic of Germany, and all successors, assignees, officers, partners, representatives, agents, and employees hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction involving commodities or technical data exported from the United States in whole or in part, or to be exported, or that are otherwise subject to the Regulations.

II. Commencing from the date that this Order becomes effective, the denial of export privileges set forth above shall be suspended, in accordance with § 388.16 of the Regulations, for the five-year period set forth in Paragraph I above, and shall be terminated at the end of

such period, provided that Respondents have committed no further violation of the Act, the Regulations, or the final Order entered in this proceeding. During the five-year suspension period, Respondents may participate in transactions involving the export of U.S.-origin commodities or technical data from the United States or abroad in accordance with the requirements of the Act and the Regulations. The provisions of Paragraphs III to VI of the Order shall also be suspended during the five-year period.

III. Participation prohibited in any such transaction, either in the United States or abroad, shall include, but not be limited to, participation:

(i) As a party or as a representative of a party to a validated export license application;

(ii) In preparing or filing any export license application or reexport authorization, or any document to be submitted therewith;

(iii) In obtaining or using any validated or general export license or other export control document;

(iv) In carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodities or technical data exported from the United States, or to be exported; and

(v) In the financing, forwarding, transporting, or other servicing of such commodities or technical data.

Such denial of export privileges shall extend to matters which are subject to the Act and the Regulations.

IV. After notice and opportunity for comment, such denial of export privileges may be made applicable to any person, firm, corporation, or business organization with which any Respondent is now or hereafter may be related by affiliation, ownership, control, position of responsibility, or other connection in the conduct of export trade or related services.

V. All outstanding individual validated export licenses in which Respondents appear or participate, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Respondents' privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

VI. No person, firm, corporation, partnership, or other business organization, whether in the United States or elsewhere, without prior disclosure and specific authorization

from the Office of Export Licensing, shall, with respect to U.S.-origin commodities and technical data, do any of the following acts, directly or indirectly, or carry on negotiations with respect thereto, in any manner or capacity, on behalf of or in any association with any Respondent or any related person, or whereby any Respondent or any related person may obtain any benefit therefrom or have any interest or participation therein, directly or indirectly:

(a) Apply for, obtain, transfer, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to any export, reexport, transshipment, or diversion of any commodity or technical data exported in whole or in part, or to be exported by, to, or for any Respondent or related person denied export privileges, or

(b) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance or otherwise service or participate in any export, reexport, transshipment or diversion of any commodity or technical data exported or to be exported from the United States.

VII. This Order as affirmed or modified shall become effective upon entry of the Secretary's final action in this proceeding pursuant to the Act (50 U.S.C. App. 2412(c)(1)).

Thomas W. Hays,  
Administrative Law Judge.

Date: November 28, 1988.

To be considered in the 30 day statutory review process which is mandated by section 13(c) of the Act, submissions must be received in the Office of the Under Secretary for Export Administration, U.S. Department of Commerce, 14th & Constitution Ave., NW., Room 3898B, Washington, DC, 20230, within 12 days. Replies to the other party's submission are to be made within the following 6 days. 15 CFR 388.23(b), 50 FR 53134 (1985).

[FR Doc. 88-29920 Filed 12-28-88; 8:45 am]  
BILLING CODE 3510-DT-M

#### Semiconductor Technical Advisory Committee; Closed Meeting

A meeting of the Semiconductor Technical Advisory Committee will be held January 18, 1989, at 9:00 a.m., Herbert C. Hoover Building, Room 1617F, 14th Street and Constitution Avenue, NW., Washington, DC. The Committee advises the Office of Technology and Policy Analysis with respect to technical questions which affect the level of export controls

applicable to Semiconductor equipment or technology.

The Committee will meet only in Executive Session to discuss matters properly classified under Executive Order 12358, dealing with the U.S. and COCOM control program and strategic criteria related thereto.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 10, 1988, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings or portions of meetings of the Committee and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C. 552b(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings or portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of the Committee is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6628, U.S. Department of Commerce, Washington, DC. For further information call Ruth D. Fitts at 202-377-2583.

Date: December 22, 1988.

Betty A. Ferrell,  
Director, Technical Advisory Committee Unit,  
Office of Technology and Policy Analysis.  
[FR Doc. 88-29879 Filed 12-28-88; 8:45 am]  
BILLING CODE 3510-DT-M

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

##### Solicitation of Public Comment on Bilateral Negotiations During 1989

December 23, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Announcement.

SUPPLEMENTARY INFORMATION: The U.S. Government anticipates holding negotiations during 1989 concerning expiring bilateral agreements covering certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and apparel from Bangladesh (January 31, 1989, except Categories 338/339, 342/842, 838/839 and 845/846), Bulgaria (April 30, 1989), Czechoslovakia (May 31, 1989), East Germany (December 31, 1989), Egypt (December 31, 1989), El Salvador (December 31, 1989), Haiti (December 31, 1989), Japan

(December 31, 1989), Korea (December 31, 1989), Peru (April 30, 1989), Poland (December 31, 1989), Romania (December 31, 1989), Taiwan (December 31, 1989), Trinidad and Tobago (December 31, 1989) and Yugoslavia (December 31, 1989). (The dates noted in parenthesis are the expiration dates of the agreements.)

Anyone who wishes to comment or provide data or information regarding these agreements, or to comment on domestic production or availability of textiles and apparel affected by these agreements, is invited to submit such comments or information in 10 copies to James H. Babb, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230. Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, Room H3100, U.S. Department of Commerce, 14th and Constitution Avenue NW., Washington, DC. Further comment may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments regarding any aspect of the agreements or the implementation thereof is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(1) relating to matters which constitute "a foreign affairs function of the United States."

Philip J. Martella,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-30018 Filed 12-28-88; 8:45 am]

BILLING CODE 3510-DT-M

#### Amendment of Coverage of Certain Part-Categories for Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Various Countries

December 23, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs amending coverage of certain part-categories.

EFFECTIVE DATE: January 1, 1989.

FOR FURTHER INFORMATION CONTACT: Brian Fennessy, Commodity Industry Specialist, Office of Textiles and



Apparel, U.S. Department of Commerce, (202) 377-3400.

#### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

To facilitate the implementation of bilateral textile agreements based upon the Harmonized Tariff Schedule, effective on January 1, 1989, the coverage of part-categories is being amended in all import control directives for countries with part-categories 359-C, 369-L, 369-S, 369-U and 659-C.

The attached directive contains HTS numbers which will be published in the

third supplement to the Harmonized Tariff Schedule.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States Annotated (see Federal Register notice 53 FR 44937, published on November 7, 1988).

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

December 23, 1988

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directives issued to you on December 2, 1988, December 6, 1988, December 8, 1988, December 12, 1988 and December 13, 1988 by the Chairman, Committee for the Implementation of Textile Agreements. These directives concern imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in China, India, Japan, Korea, Malaysia, Pakistan, the Philippines and Taiwan.

Effective on January 1, 1989, you are directed to make the changes shown below in the import control directives for the aforementioned countries with part-categories 359-C, 369-L, 369-S, 369-U and 659-C:

Category	Change
359-C.....	Change from 6103.42.2020 to 6103.42.2025 Add 6203.42.2090 and 6211.32.0025.
369-L.....	Add 4202.92.3015.
369-S.....	Change from 6307.10.2010 to 6307.10.2005.
369-U.....	Change from 6406.10.7500 to 6406.10.7560.
659-C.....	Add 6203.43.2090, 6203.49.1090 and 6211.33.0017.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-30016 Filed 12-28-88; 8:45 am]

BILLING CODE 3510-DR-M

#### Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products Produced or Manufactured in Taiwan

December 23, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Jennifer Tallarico, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 566-8791. For information on embargoes and quota re-openings, call (202) 377-3715.

#### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limits for certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textile products from Taiwan are being adjusted, variously, for carryforward, swing and cancellation of special shift.

A description of the textile and apparel categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see Federal Register notice 52 FR 4, 1988.7745, published on December 16, 1987). Also see 53 FR 62, published on January 5

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

December 23, 1988.

Commissioner of Customs, Department of the Treasury, Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive

issued to you on December 30, 1987 by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Taiwan and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on December 30, 1988, the directive of December 30, 1987 is being amended further to adjust the limits for cotton, wool, man-made fiber, silk blend and other vegetable fiber textile products in the following categories, as provided under the terms of the current bilateral agreement of November 18, 1982, as amended and extended:

Category	Amended twelve-month limit <sup>1</sup>
Sublevels in group I:	
301.....	489,489 pounds.
361.....	1,167,970 numbers.
369-L <sup>2</sup> .....	2,733,651 pounds.
611.....	1,380,495 square yards.
618/620.....	11,099,116 square yards.
625/626/627/628/629.....	10,234,035 square yards.
669-P <sup>3</sup> .....	616,618 pounds.
Sublevels in group II:	
331.....	518,898 dozen pairs.
335.....	100,745 dozen.
338/339.....	782,233 dozen.
340.....	807,195 dozen.
347/348.....	1,089,259 dozen of which not more than 537,121 dozen shall be in Category 347 and not more than 861,490 dozen shall be in Category 348.
351.....	359,290 dozen.
352.....	1,003,635 dozen.

Category	Amended twelve-month limit <sup>1</sup>
444.....	193,691 numbers.
633/634/635.....	1,088,083 dozen of which not more than 1,127,845 dozen shall be in Categories 633/634 and not more than 814,601 dozen shall be in Category 635.
636.....	363,805 dozen.
638.....	1,877,793 dozen.
639.....	4,960,401 dozen.
642.....	690,639 dozen.
647.....	2,798,662 dozen.
648.....	3,278,235 dozen.
650.....	51,751 dozen.
659-H <sup>4</sup> .....	5,412,209 pounds.
Level not in a group:	
870.....	5,466,043 pounds.

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1987.

<sup>2</sup> In Category 369-L, only TSUSA numbers 706.3210, 706.3650 and 706.4111.

<sup>3</sup> In Category 669-P, only TSUSA number 385.5300.

<sup>4</sup> In Category 659-H, only TSUSA numbers 703.0510, 703.0520, 703.0530, 703.0540, 703.0550, 703.0560, 703.1000, 703.1610, 703.1620, 703.1630, 703.1640 and 703.1650.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-30017 Filed 12-28-88; 8:45 am]

BILLING CODE 3510-DR-M

Category	Adjusted twelve-month limit <sup>1</sup>
443/643.....	299,176 numbers of which not more than 114,352 numbers shall be in Category 443.
444.....	86,001 numbers.

<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1987.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 88-30020 Filed 12-28-88; 8:45 am]

BILLING CODE 3510-DR-M

#### Adjustment of Import Limits for Certain Wool and Man-Made Fiber Textile Products Produced or Manufactured in the Socialist Federal Republic of Yugoslavia

December 23, 1988.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: December 30, 1988.

FOR FURTHER INFORMATION CONTACT: Jerome Turtola, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on the quota status of these limits, refer to the bulletin boards of each Customs port. For information on embargoes and quota re-openings, call (202) 377-3715.

#### SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

The current limit for Categories 443/643 and sublimit for Category 443 are being increased by application of swing and carryforward, reducing the limit for Category 444.

A description of the textile and apparel categories in terms of T.S.U.S.A. numbers is available in the CORRELATION: Textile and Apparel Categories with Tariff Schedules of the

United States Annotated (see Federal Register notice 52 FR 47745, published on December 16, 1987). Also see 52 FR 49064, published on December 29, 1987.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the bilateral agreement, but are designed to assist only in the implementation of certain of its provisions.

Philip J. Martello,

Acting Chairman, Committee for the Implementation of Textile Agreements.

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

December 23, 1988

Commissioner of Customs, Department of the Treasury, Washington, DC 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on December 21, 1987, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports into the United States of certain cotton, wool and man-made fiber textile products, produced or manufactured in the Socialist Federal Republic of Yugoslavia and exported during the period which began on January 1, 1988 and extends through December 31, 1988.

Effective on December 30, 1988, the directive of December 21, 1987 is amended further to include adjusted limits for products in the following categories, as provided under the provision of the current bilateral textile agreement between the Governments of the United States and the Socialist Federal Republic of Yugoslavia:



A facsimile of the new visa stamp is published as an enclosure to the letter to the Commissioner of Customs.

Philip J. Martello,  
Acting Chairman, Committee for the  
Implementation of Textile Agreements.

Committee for the Implementation of Textile  
Agreements

December 23, 1988.

Commissioner of Customs,

Department of the Treasury, Washington,  
D.C. 20229

Dear Mr. Commissioner: This directive  
amends, but does not cancel, the directive

issued to you on January 14, 1983, as  
amended, by the Chairman, Committee for  
the Implementation of Textile Agreements,  
that directed you to prohibit entry of certain  
cotton, wool, man-made fiber, silk blend and  
other vegetable fiber textiles and textile  
products, produced or manufactured in Hong  
Kong, for which the Government of Hong  
Kong has not issued an appropriate visa.

Effective on January 1, 1989, the directive  
of January 14, 1983, is amended further to  
provide for the use of a new visa stamp to  
accompany shipments of textiles and textile  
products exported from Hong Kong on and  
after January 1, 1989 and entered into the  
United States for consumption and

withdrawn from warehouse for consumption  
on and after January 1, 1989. A facsimile of  
the new stamp is enclosed with this letter.

The Committee for the Implementation of  
Textile Agreements has determined that  
these actions fall within the foreign affairs  
exception to the rulemaking provisions of 5  
U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

Acting Chairman, Committee for the  
Implementation of Textile Agreements.

BILLING CODE 3510-DR-M

## EXPORT LICENCE (TEXTILES) FORM 5

COPY

Audit No.

Exporter (Name & Address)		Date of Receipt and Receipt No.		HONG KONG GOVERNMENT Import and Export Ordinance (Cap. 60) Import and Export (General) Regulations	
T.C.R. No. (where applicable)		Tel. No.		Date of Issue and Licence No.	
Consignee		Issue of this licence is approved		for Director of Trade	
Manufacturer (Name & Address)		MANUFACTURER'S DECLARATION Date .....		I, .....	
T.C.R. No. (where applicable)		Tel. No.		principal official of .....	
Departure Date		Country of Final Destination		(Name of Manufacturer's Co.)	
Vessel/Flight No.		C.O./Form A No.		hereby declare that I am the manufacturer of the goods in respect of which this application is made, that the goods are of Hong Kong origin in accordance with condition (2) overleaf and that the particulars given herein are true. **I further declare that I am supplying the quotas for the goods covered by this application in accordance with condition (3) overleaf. (**Delete if not applicable)	
FOR CONDITIONS OF ISSUE PLEASE SEE OVERLEAF		WARNING: All alterations must be carried out by authorized officers. Heavy penalties are provided for false declaration and information, unauthorized alterations and misuse of this licence.		Signature .....	
Mark(s) and Number(s)		No. of packages		Full Description of Goods (State Country of Origin of raw materials)	
				No. of Units	
				Value f.o.b. HK\$	
				Total Amount	

Item No.	Category/Sub- Category or Commodity Item Code No.	T.C.R. No. of Quota/ Export Authorization/ Permit Holder	Quota Reference (see * below)	Quantity Shipped in Quota Units	EXPORTER'S DECLARATION Date .....
1	In accordance with the terms of the 1986-1991 HK/USA Textiles Agreement, the shipment made under this licence, covering the quantity(ies) and category(ies) specified below, has been approved for export to the USA. This copy is for presentation to the competent authorities in the USA.				I, .....
2					principal official of .....
3					(Name of Exporter's Co.)
4	in Cat. ....				hereby declare that I am the exporter of the goods in respect of which this application is made and that the particulars given herein are true. **I further declare that I am supplying the quotas for the goods covered by this application in accordance with condition (3) overleaf. (**Delete if not applicable)
5	in Cat. ....				

\* Insert here:—Type of Quota: Export Authorization Number, Swing Transfer or A—Type  
Transfer Number or Quota Permit Number as appropriate.

Signature .....

Chop .....

TIC 353A (Rev. 1985)

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{FR Doc. 88-30024 Filed 12-28-88; 8:45 am}

BILLING CODE 3510-DR-C



**Amendment of Export Visa and Exempt Certification Requirements for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Singapore**

December 23, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs amending visa and exempt requirements.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Ross Aronold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

**SUPPLEMENTARY INFORMATION:**

Authority: Executive Order 11851 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

During recent consultations held between the Governments of the United States and Singapore, agreement was reached to exempt certain textile products from visa and certification requirements.

A description of the textile and apparel categories in terms of HTS numbers is available in the **CORRELATION:** Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 47 FR 6683, published on February 16, 1982; 47 FR 53448, published on November 26, 1982; and 51 FR 43454, published on December 12, 1986.

Philip J. Martello,  
*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS**

December 23, 1988.

Commissioner of Customs,  
*Department of the Treasury,*  
Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive issued to you on February 10, 1982, as amended, by the Chairman, Committee for the Implementation of Textile Agreements, which directed you to prohibit entry and withdrawal from warehouse for consumption in the United States of certain cotton, wool and man-made fiber textiles and textile products, produced on manufactured in Singapore and exported from Singapore, for which the Government of Singapore has not issued an appropriate export visa or exempt certification.

Effective on January 1, 1989, properly marked commercial samples, valued at U.S.

\$250 or less, which are exported to the United States from Singapore on and after January 1, 1989, shall not require a visa or exempt certification, and shall be exempted from all quota requirements. Merchandise for the personal use of the importer and not for resale, regardless of value, shall continue to be exempt from all quota, visa and exempt certification requirements.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 88-30019 Filed 12-28-88; 8:45 am]

**BILLING CODE 3510-DR-M**

**Amendment to the Bilateral Textile Agreement and Export Visa Requirements for Certain Cotton and Wool Textile Products Produced or Manufactured in Uruguay**

December 23, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs amending visa and exempt requirements.

**EFFECTIVE DATE:** January 20, 1989.

**FOR FURTHER INFORMATION CONTACT:** Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212.

**SUPPLEMENTARY INFORMATION:**

Authority: Executive Order 11851 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

During negotiations, the Governments of the United States and the Republic of Uruguay agreed to further amend their current Bilateral Textile Agreement and Export Visa Arrangement to cancel the exempt certification procedure and to amend the quota and visa requirements.

Copies of the current bilateral agreement and visa arrangement are available from the Textiles Division, Bureau of Economic and Business Affairs, U.S. Department of State, (202) 647-1998.

A description of the textile and apparel categories in terms of HTS numbers is available in the **CORRELATION:** Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 53 FR 44937, published on November 7, 1988). Also see 50 FR 6232, published on February

14, 1985; 51 FR 19244, published on May 28, 1986.

Philip J. Martello,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS**

December 23, 1988.

Commissioner of Customs,  
*Department of the Treasury,*  
Washington, D.C. 20229.

Dear Mr. Commissioner: This directive amends, but does not cancel, the directive of February 8, 1985, as amended, which directed you to prohibit entry of certain specified categories of cotton and wool textile products, produced or manufactured in Uruguay for which the Government of the Republic of Uruguay has not issued an appropriate export visa or exempt certification.

Effective on January 20, 1989, shipments of properly marked commercial samples, valued at U.S. \$250 or less, and items for the personal use of the importer, regardless of value, exported from Uruguay on and after January 20, 1989, are exempt from quota requirements and do not require an export visa.

Also effective on January 20, 1989, you are directed to cancel the exempt certification procedure for textile and apparel products exported from Uruguay on and after January 20, 1989. These goods shall be subject to quota requirements under the terms of the current bilateral agreement between the Governments of the United States and the Republic of Uruguay.

Merchandise in Categories 334, 335, 410, 433, 434, 435 and 442 which are exported from Uruguay on and after January 20, 1989, except properly marked commercial samples, valued at U.S. \$250 or less, and items for the personal use of the importer, regardless of value, shall be denied entry if not accompanied by an appropriate visa issued by the Government of Uruguay.

For goods exported from Uruguay on and after January 20, 1989, the two letter code incorporated within the standard nine digit visa number will correspond with the International Organization for Standardization (ISO) Code of Uruguay (UY). Shipments with visas containing other than "UY" will be denied entry.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,

*Acting Chairman, Committee for the Implementation of Textile Agreements.*

[FR Doc. 88-30021 Filed 12-28-88; 8:45 am]

**BILLING CODE 3510-DR-M**

**Announcement of Request for Bilateral Textile Consultations With the Government of Costa Rica**

December 23, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Notice.

**FOR FURTHER INFORMATION CONTACT:** Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-4212. For information on categories on which consultations have been requested, call (202) 377-3740.

**SUPPLEMENTARY INFORMATION:**

Authority: Executive Order 11851 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

On November 30, 1988, the Government of the United States requested consultations with the Government of Costa Rica regarding imports of cotton gloves and mittens in Category 331, produced or manufactured in Costa Rica.

The purpose of this notice is to advise the public that, if no solution is agreed upon in consultations with Costa Rica, the Committee for the Implementation of Textile Agreements may later establish a limit for the entry and withdrawal for warehouse for consumption of cotton textile products in Category 331, produced or manufactured in Costa Rica and exported during the twelve-month period which began on November 30, 1988 and extended through November 29, 1989 at a level of 898,298 dozen pairs.

A summary market statement concerning Category 331 follows this notice.

Anyone wishing to comment or provide data or information regarding the treatment of Category 331, or to comment on domestic production or availability of products included in Category 331, is invited to submit 10 copies of such comments or information to James H. Babb, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230.

Because the exact timing of the consultations is not yet certain, comments should be submitted promptly. Comments or information submitted in response to this notice will be available for public inspection in the Office of Textiles and Apparel, Room H3100, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Washington, DC.

Further comment may be invited regarding particular comments or

information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The United States remains committed to finding a solution concerning Category 331. Should such a solution be reached in consultations with the Government of Costa Rica, further notice will be published in the **Federal Register**.

A description of the textile and apparel categories in terms of T.S.U.S.A. numbers is available in the **CORRELATION:** Textile and Apparel Categories with Tariff Schedules of the United States Annotated (see **Federal Register** 52 FR 47745, published on December 18, 1987). A description of the textile and apparel categories in terms of HTS numbers is available in the **CORRELATION:** Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States Annotated (see **Federal Register** notice 53 FR 44937, published on November 7, 1988).

Philip J. Martello,  
*Acting Chairman, Committee for the Implementation of Textile Agreements.*

**Market statement**

Cotton Gloves and Mittens (Category 331), Costa Rica November 1988.

**Summary and Conclusions**

U.S. imports of cotton gloves and mittens (Category 331) from Costa Rica reached 802,585 dozen pair during the year ending September 1988, more than three times the 244,900 dozen pair imported a year earlier. During the first nine months of 1988, imports of Category 331 from Costa Rica reached 594,505 dozen pair, nearly two and one-half times the 244,900 dozen pair imported during the same period of 1987, and 31 percent above the total imported in calendar year 1987. There were no imports of cotton gloves and mittens from Costa Rica in 1986.

The U.S. market for cotton gloves and mittens (Category 331) has been disrupted by imports. The sharp and substantial increase in imports from Costa Rica is contributing to this disruption.

**U.S. Production and Market Share**

U.S. production of cotton gloves and mittens has been on the decline, dropping from 18,410 thousand dozen pair in 1984 to 15,004 thousand dozen pair average during 1986 and 1987, a decline of nine percent. The domestic manufacturers' share of the market fell below 50 percent, dropping from 51 percent in 1984 to 47 percent in 1987.

**U.S. Imports and Import Penetration**

U.S. imports of Category 331 increased 4.6 percent in 1985 then declined 3.2 percent in 1986, averaging 15,849 dozen pair annually during the three year period 1984-1986. In 1987 imports began surging, increasing nine percent in 1987 over 1986 and another 18 percent during the first nine months of 1988 over the January-September 1987 level. The ratio of imports to domestic production increased 19 percentage points, rising from 95 percent in 1984 to 114 percent in 1987.

**Duty-Paid Value and U.S. Producers' Price**

Approximately 96 percent of Category 331 imports from Costa Rica during the first nine months of 1988 entered under TSUSA numbers 704.4025—cotton woven gloves and glove linings, not ornamented, and 704.4506—cotton gloves and glove linings, not woven, without fourchettes or sidewalls, the lisle type, no pile, not brushed or napped, not ornamented. These gloves entered the U.S. at landed duty-paid values below U.S. producers' prices for comparable gloves.

[FR Doc. 88-30023 Filed 12-28-88; 8:45 am]

**BILLING CODE 3510-DR-M**

**Separate Visa and Quota Reporting for Garments and Clothing Accessories Entered as Sets**

December 23, 1988.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs requiring separate visa and quota reporting for the entry of garments and clothing accessories.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Brian Fennessy, Commodity Industry Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 377-3400.

**SUPPLEMENTARY INFORMATION:**

Authority: Executive Order 11851 of March 3, 1972, as amended; Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

Interested persons are advised to take all necessary steps to ensure that articles of cotton, wool, man-made fiber, silk blend and other vegetable fibers affected by the accompanying letter to the Commissioner of Customs, that are exported on and after January 1, 1989, and are to be entered for consumption



or withdrawn from warehouse for consumption in the United States, will meet the requirements set forth in the letter.

Philip J. Martello,  
Acting Chairman, Committee for the  
Implementation of Textile Agreements.

#### COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

December 23, 1988.

Commissioner of Customs,  
Department of the Treasury,  
Washington, DC. 20229.

Dear Mr. Commissioner: Under the terms of Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended; and as established in U.S. bilateral textile agreements, all garments and clothing accessories entered as sets into the United States for consumption or withdrawn from warehouse for consumption require separate visa and separate statistical reporting for quota purposes.

Effective on January 1, 1989, you are directed to prohibit entry for consumption or withdrawal from warehouse for consumption into the United States (i.e., the 50 states, the District of Columbia and the Commonwealth of Puerto Rico) of garments and clothing accessories or any combination of the proceeding for which classification is claimed as sets under GRI 3 HTSUSA, where separate textile or apparel categories currently exist or come into existence requiring the separate reporting of the components forming those sets.

Entry shall be permitted if separate visa and quota reporting is provided and all other visa and quota requirements are met.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Philip J. Martello,  
Acting Chairman, Committee for the  
Implementation of Textile Agreements.  
[FR Doc. 88-30022 Filed 12-28-88; 8:45 am]  
BILLING CODE 3510-DR-M

#### DEPARTMENT OF DEFENSE

##### Public Information Collection Requirement Submitted to OMB for Review

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Title, Applicable Form, and Applicable OMB Control Number:** Affidavit in Support of Common-Law

**Marriage:** AF Form 3117; and OMB Control Number 0701-0094.

**Type of Request:** Reinstatement.  
**Average Burden Hours/Minutes Per Response:** 12 minutes.

**Frequency of Response:** On occasion.  
**Number of Respondents:** 60.  
**Annual Burden Hours:** 12.  
**Annual Responses:** 60.

**Needs and Uses:** The common law spouse of a deceased Air Force retiree uses this form to verify the common law marriage relationship to the deceased. The Air Force needs the information from the form to support a claim for an annuity for the common law spouse under the Survivor Benefit Plan (SBP)/Retired Serviceman's Family Protection Plan (RSFPP).

**Affected Public:** Individuals.  
**Frequency:** Continuing.  
**Respondent's Obligation:** Required to obtain or retain a benefit.

**OMB Desk Officer:** Dr. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

**DOD Clearance Officer:** Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, telephone (202) 746-0933.

**L.M. Bynum,**  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

December 22, 1988.

[FR Doc. 88-29951 Filed 12-28-88; 8:45 am]  
BILLING CODE 3510-01-M

##### Public Information Collection Requirement Submitted to OMB for Review

**ACTION:** Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

**Title, Applicable Form, and Applicable OMB Control Number:** Evaluation of Commissioning Applicants, AF Form 1145; OMB No. 0701-0104.

**Type of Request:** Reinstatement.  
**Average Burden Hours/Minutes Per Response:** 20 minutes.

**Frequency of Response:** On occasion.

**Number of Respondents:** 2,712.

**Annual Burden Hours:** 904.

**Annual Responses:** 2,712.

**Needs and Uses:** The Air Force uses AF Form 1145 to collect information from applicants for training leading to a commission in the United States Air Force. The Air Force uses the information to determine the applicants' qualifications in terms of education, experience, goals, leadership potential, communicative skills and adaptability for military life. Air Force application processing and approval personnel need this information to evaluate and select applicants for training leading to a commission.

**Affected Public:** Individuals.

**Frequency:** Continuing.

**Respondent's Obligation:** Required to obtain or retain a benefit.

**OMB Desk Officer:** Dr. Timothy Sprehe.

Written comments and recommendations on the proposed information collection should be sent to Dr. Timothy Sprehe at Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

**DOD Clearance Officer:** Ms. Pearl Rascoe-Harrison.

A copy of the information collection proposal may be obtained from Ms. Rascoe-Harrison, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, Virginia 22202-4302, telephone (202) 746-0933.

**L.M. Bynum,**  
Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

December 22, 1988.

[FR Doc. 88-29952 Filed 12-28-88; 8:45 am]  
BILLING CODE 3510-01-M

#### Office of the Secretary

##### Defense Advisory Committee on Women in the Services; Meeting

**AGENCY:** Defense Advisory Committee on Women in the Services (DACOWITS), DOD.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to Pub. L. 92-463, notice is hereby given of a forthcoming meeting of the Executive Committee of the Defense Advisory Committee on Women in the Services (DACOWITS). The purpose of the meeting is to review the responses to the resolutions made by the committee at the 1988 fall conference, review the subcommittee issue agendas, discuss issues relevant to women in the Services, and plan the program for the next semiannual

conference scheduled for April 16-20, 1989. All meeting sessions will be open to the public.

**DATE:** February 7, 1989, 9:30 a.m.-4:00 p.m.

**ADDRESS:** SecDef Conference Room 3E869, The Pentagon, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Major Ilona E. Prewitt, Director, DACOWITS and Military Women Matters, OASD (Force Management and Personnel), The Pentagon, Room 3D769, Washington, DC 20301-4000; telephone (202) 697-2122.

**L.M. Bynum,**

Alternate OSD Federal Register Liaison  
Officer, Department of Defense.

December 23, 1988.

[FR Doc. 88-29949 Filed 12-28-88; 8:45 am]  
BILLING CODE 3510-01-M

#### Department of the Army

##### Army Science Board, Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

**Name of the Committee:** Army Science Board (ASB).

**Dates of Meeting:** January, 18-19, 1989.

**Time:** 0800-1700 hours each day.

**Place:** Fort Hood, Texas.

**Agenda:** The Army Science Board Ad Hoc Subgroup on Human Dimensions in Army Safety will conduct its fourth meeting at Fort Hood, Texas. The panel will hold discussions and receive briefings from personnel in operational units including air and ground experience in combating human error accidents. The panel, specifically, will hold discussions with commanders from corps to company level and observe units in training/daily operations with opportunity to talk with junior leaders. These meetings will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039/7046.

**Sally A. Warner,**  
Administrative Officer, Army Science Board.  
[FR Doc. 88-29883 Filed 12-28-88; 8:45 am]

BILLING CODE 3710-06-M

#### DEPARTMENT OF ENERGY

##### Grants; Louisiana State University, Basin Research Institute

**AGENCY:** Department of Energy.

**ACTION:** Intent to negotiate a grant with Louisiana State University, Basin Research Institute.

**SUMMARY:** "Development of Improved Methods for Locating Large Areas of Bypassed Oil." The U.S. Department of Energy (DOE), Idaho Operations Office intends to negotiate on a noncompetitive basis a \$1.7M cost share grant with Louisiana State University, Basin Research Institute, Baton Rouge, Louisiana. This action is prompted by the consummation of Annex 1 to the Memorandum of Understanding between DOE and the State of Louisiana, which defines the research proposal and the participants, and specifies cost sharing. The grant will be to develop a predictive method for locating large areas of bypassed oil and for estimating the volume of this resource. The participant shall (1) develop systematic methods for characterizing reservoir heterogeneities for several types of Louisiana reservoirs, (2) test the proposed methods using simulators and field tests, and (3) transfer the technologies to the oil operators through publications and workshops. The authority and justification for determination of noncompetitive financial assistance (DNCPA) is DOE Financial Assistance Rules 10 CFR 600.72(f) (B), (C), and (D). The activities proposed in Annex I to the agreement between the U.S. Department of Energy and the State of Louisiana are in support of a public purpose and are as directed by the agreement. DOE support of the activity would enhance the public benefits to be derived, and DOE knows of no other entity which is conducting or planning to conduct such an activity. The applicant is a unit of Government and the activity to be supported is related to performance of a Governmental function within the subject jurisdiction, thereby precluding DOE provision of support to another entity.

The applicant has exclusive domestic capability to perform the activity successfully based on unique equipment, proprietary data, technical expertise and other unique qualifications. The applicant has access to data relative to the proposed activities that will be identified and structured and made available to developers, decision-makers, and researchers. Public response may be addressed to the contract specialist stated below.

**CONTACT:** U.S. Department of Energy, Idaho Operations Office, 785 DOE Place, Idaho Falls, Idaho 83402, Trudy A. Thorne, Contract Specialist (208) 526-9519.

Date: December 16, 1988.

**H. Brent Clark,**  
Director, Contracts Management Division.  
[FR Doc. 88-30001 Filed 12-28-88; 8:45 am]  
BILLING CODE 6450-01-M

#### Federal Energy Regulatory Commission

[Docket Nos. ER89-132-000 et al.]

##### Commonwealth Electric Co. et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

December 23, 1988.

Take notice that the following filings have been made with the Commission:

##### 1. Commonwealth Electric Company

[Docket No. ER89-132-000]

Take notice that on December 19, 1988, Commonwealth Electric Company (Commonwealth) tendered for filing on behalf of itself, Montaup Electric Company and Boston Edison Company supplemental data pertaining to their applicable gross investments, combined Federal income and franchise tax rates, and local tax rates for the twelve-month period ending December 31, 1987. Commonwealth states that this supplemental data is submitted pursuant to a letter order of the Federal Power Commission in Docket No. E-7981 dated April 26, 1973 accepting for filing Commonwealth's Rate Schedule FERC No. 21, Boston Edison Company's Rate Schedule FERC No. 87, and Montaup Electric Company's Rate schedule No. 27.

Commonwealth states that these rate schedules have been previously been similarly supplemented for the calendar years 1972 through 1986.

**Comment date:** January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

##### 2. Florida Power & Light Company

[Docket No. ER89-128-000]

Take notice that Florida Power & Light Company (FPL), on December 19, 1988, tendered for filing a document entitled Amendment Number Five to Contract for Interchange Service Between Florida Power Corporation (FPC) and Florida Power & Light Company (Rate Schedule FPC No. 81).

FPL states that under the Amendment and pursuant to the provisions of the existing Contract for Interchange



Service between FPL and FPC, the parties have: (1) abandoned an existing interconnection at FPL's East Oak Substation; (2) established a new interconnection at FPC's Suwannee Plant; and (3) have amended certain Schedules to the Interchange Agreement to allow for more flexibility in the assignment of units for a transaction.

FPL requests that waiver of the Commission's Regulations be granted and that the proposed Amendment be made effective on December 3, 1988. FPL states that copies of the filing were served on FPC.

*Comment date:* January 9, 1989, in accordance with Standard Paragraph E at the end of this notice.

### 3. Southern California Edison Company [Docket No. ER89-129-000]

Take notice that on December 19, 1988, Southern California Edison Company (Edison) tendered for filing the Edison-Azusa Pasadena Firm Transmission Service Agreement, the Edison-Banning Pasadena Firm Transmission Service Agreement, and the Edison-Colton Pasadena Firm Transmission Service Agreement (Agreements) which have been executed by Edison and the Cities of (Cities) Azusa, California (Azusa), Banning, California (Banning), and Colton, California (Colton).

Under the Agreements, Edison agrees to make firm transmission service available to Azusa, Banning, and Colton until midnight, October 31, 1992, from Goodrich Substation to the Cities' point of Delivery per firm Transmission Service Agreements. These Firm Transmission Service Agreements are resource-specific. Service is provided only for the energy and capacity delivered to Edison's Sales Agreement, and may not be used by the Cities for any other purpose. The capacity will be allocated to the Cities as follows:

#### City:

Azusa—17 MW.  
Banning—8 MW.  
Colton—15 MW.

Copies of this filing were served upon the Public Utilities Commission of the State of California and the Cities of Azusa, Banning, and Colton, California.

*Comment date:* January 9, 1988, in accordance with Standard Paragraph E at the end of this notice.

### 4. Southern California Edison Company [Docket No. ER89-130-000]

Take notice that on December 19, 1988, Southern California Edison (Edison) tendered for filing the Edison Azusa CDWR Firm Transmission Service Agreement and the Edison-

Colton CDWR firm Transmission Service Agreement (Agreements) which has been executed by Edison and the Cities (Cities) of Azusa, California (Azusa) and Colton, California (Colton).

Under the Agreements, Edison agrees to make firm transmission service available to Azusa and Colton until midnight, October 31, 1993, from Vincent Substation to the Cities' Point of Delivery per the Firm Transmission Service Agreements. These Firm Transmission Service Agreements are resource-specific. Service is provided only for the energy and capacity delivered to Edison's interconnection with CDWR at Vincent Substation per the terms of the Power Sale Agreements, and may not be used by the Cities for any other purposes. The maximum capacity to be transmitted for the Cities will be as follows:

#### City:

May-October  
Azusa—7 MW.  
Colton—8 MW.  
November-April  
Azusa—5 MW.  
Colton—5 MW.

Copies of this filing were served upon the Public Utilities Commission of the State of California and the Cities of Azusa and Colton California.

*Comment date:* January 9, 1988, in accordance with Standard Paragraph E at the end of this notice.

#### Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (16 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,  
Secretary.

[FR Doc. 88-29981 Filed 12-28-88; 8:45 am]

BILLING CODE 6717-01-M

### [Project No. 10685-000, et al.]

#### Hydroelectric Applications, North Coast Development Co., Inc., et al.; Applications Filed With the Commission

Take notice that the following hydroelectric applications have been filed with the Federal Energy Regulatory Commission and are available for public inspection:

1a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10685-000.

c. *Date Filed:* November 3, 1988.

3. *Applicant:* North Coast Development Co., Inc.

e. *Name of Project:* Crater Lake.

f. *Location:* At Crater Lake in Sec 11, T15W, R3W and Sec 14, T15S, R3W, Copper River Meridian near Cordova, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Howard T. Harstad, P.O. Box 98787, Des Moines, WA 98198, (206) 243-8606.

i. *FERC Contact:* Ms. Julie Bernt, (202) 376-1936.

j. *Comment Date:* February 9, 1989.

k. *Description of Project:* The proposed project would consist of: (1) Intake No. 1, at water surface elevation 1,514 at Crater Lake, intake No. 2, on a stream from Crater Lake at elevation 340 feet, and intake No. 3 on an unnamed stream to the north of Crater Lake; (2) a 12-inch-diameter, 3,300-foot-long penstock from intake No. 1 terminating at powerhouse No. 1, and two 12-inch-diameter, 3,300-foot-long penstocks from intake No. 2 and intake No. 3 terminating at a storage tank at the powerhouse No. 1 site; (3) a 24-inch-diameter, 1,200-foot-long penstock from the storage tank to powerhouse No. 2; (4) powerhouse No. 1 at elevation 335 feet containing two generating units each with a rated capacity of 500 kW, and powerhouse No. 2 at elevation 27 feet containing two generating units each with a rated capacity of 300 kW; and (5) approximately 1,500 feet of transmission line. Applicant estimates the average annual energy production to be 4 MWh and the cost of the work to be performed under the preliminary permit to be \$52,000.

l. *Purpose of Project:* The power produced will be sold to the local power company.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C and D2.

2a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10686-000.

c. *Date Filed:* November 3, 1988.

3. *Applicant:* North Coast Development Co., Inc.

e. *Name of Project:* Lake Redfield.

f. *Location:* At Lake Redfield within the Tongass National Forest in sec 8, 16, 17, 19, 20, 21, 29, 31, and 32, T26S, R35E and Sec 6, 7, 18, T27S, R35E, Copper River Meridian near Yakutat, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Howard T. Harstad, P.O. Box 98787, Des Moines, WA 98198, (206) 243-8606.

i. *FERC Contact:* Ms. Julie Bernt, (202) 376-1936.

j. *Comment Date:* February 9, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An intake structure at water surface elevation 150 feet at the west end of Lake Redfield; (2) a 2,000-foot-long, 48-inch-diameter penstock; (3) a powerhouse containing 2 generating units each with a rated capacity of 1,000 kW; and (4) a 12-mile-long transmission line. Applicant estimates the average annual energy production to be 10 GWh and the cost of the work to be performed under the preliminary permit to be \$72,000.

l. *Purpose of Project:* The power produced will be sold to the local power company.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C and D2.

3a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10687-000.

c. *Date Filed:* November 3, 1988.

d. *Applicant:* North Coast Development Co., Inc.

e. *Name of Project:* Haines Hydroelectric Project.

f. *Location:* On an unnamed lake at elevation 2,270 feet connected by an unnamed stream into the Chilkoot River partially on BLM land in secs. 23, 24, 25, 26, 27, and 34, T28S, R57E, Copper River Meridian near Haines, Alaska.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Howard T. Harstad, P.O. Box 98787, Des Moines, WA 98198, (206) 243-8606.

i. *FERC Contact:* Ms. Julie Bernt, (202) 376-1936.

j. *Comment Date:* February 13, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An intake structure at elevation 2,260 feet; (2) a 4,600-foot-long, 20-inch-diameter penstock; (3) a powerhouse containing two generating units each with a rated capacity of 1,500 kW; and (4) a 14-mile-long transmission line. Applicant estimates the average annual energy production to be 26 GWh and the

cost of the work to be performed under the preliminary permit to be \$72,000.

l. *Purpose of Project:* The power produced will be sold to the local power company.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C and D2.

4a. *Type of Application:* Declaration of Intention.

b. *Project No.:* EL89-8-000.

c. *Date Filed:* November 25, 1988.

d. *Applicant:* North American Hydro, Inc.

e. *Name of Project:* Delhi Project.

f. *Location:* Located on the Maquoketa River within Delhi Township, Delaware County, IA.

g. *Filed Pursuant to:* Section 23(b) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Charles Alsberg, Secretary/Treasurer, Loyal Lake, Senior Engineer, North American Hydro, Inc., Post Office Box 167, Neshkoro, WI 54960, (414) 293-4628.

i. *FERC Contact:* Diane M. Scire, (202) 376-1758.

j. *Comment Date:* February 2, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An existing reservoir with a surface area of 50 acres; (2) an existing dam, 630 feet long and 58.5 feet high; (3) an existing powerhouse with two identical turbine units, with an installed capacity of approximately 1,500 kilowatts; and (4) appurtenant facilities. The powerplant will be reconditioned and refurbished to replace antiquated and unsafe electrical switchgear and controls with modern equipment, and to install a computerized automation operating system. The County Highway X31 runs along the crest of the dam which serves as a bridge. According to the applicant, the dam is in good condition, as reported by the Iowa Department of Natural Resources during their annual inspections. The powerhouse has not been operating since 1973. The original equipment was installed between the years of 1927 and 1928.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that

may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Purpose of Project:* To sell power to the Iowa Electric Light and Power Company.

m. *This notice also consists of the following standard paragraphs:* B, C, and D2.

5a. *Type of Application:* Major License (5MW or less).

b. *Project No.:* 8747-004.

c. *Date Filed:* May 31, 1988.

d. *Applicant:* Power Resources Development Corporation.

e. *Name of Project:* Sullivan Island.

f. *Location:* Oswegatchie River in St. Lawrence County, New York.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Roger P. Swanson, President, Power Resources Development Corporation, 120 East First Street, Oswego, NY 13126, (315) 343-1954.

i. *FERC Contact:* Steven H. Rossi—(202) 376-9814.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would consist of: (1) A new 12-foot-high, 200-foot-long concrete dam (north) and a new 15-foot-high, 50-foot-long concrete dam (south); (2) a reservoir with a surface area of 50 acres, a gross storage capacity of 568 acre-feet, and a normal water surface elevation of 610 feet m.s.l.; (3) a new intake structure located at the north dam; (4) a new powerhouse located at the north dam containing two generating units with a capacity of 1,250 kW each for a total installed capacity of 2,500 kW; (5) two new 28-foot-long tailraces; (6) a new transmission line, 1,200 feet long; (7) two new access roads; and (8) appurtenant facilities. The applicant estimates the average annual generation would be 11,600,000 kWh. This license application was filed pursuant to a preliminary permit held by the applicant.

l. *Purpose of Project:* Project power would be sold to Niagara Mohawk Power Corporation.

m. *This notice also consists of the following standard paragraphs:* A3, A9, B, C, and D1.

6a. *Type of Application:* License (less than 5 MW).

b. *Project No.:* 9673-003.

c. *Date Filed:* May 2, 1988.

d. *Applicant:* WV Hydro, Inc.

e. *Name of Project:* Elk River.

f. *Location:* On the Elk River near Tullahoma, Franklin County, Tennessee.



g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. James B. Price, 120 Calumet Ct., Aiken, SC 29801, (803) 642-2749.

i. *FERC Contact:* Michael Dees (202) 376-9414.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would utilize the existing U.S. Air Force's Elk River Dam and reservoir and would consist of: (1) a vacuum pump; (2) an intake at the reservoir; (3) a 7-foot-diameter penstock; (4) a powerhouse; (5) a 1500-kW horizontal Kaplan turbine; (6) a 1600-kW, 4.16-kV induction generator; (7) a tailrace; (8) a 150 foot long transmission line connected to the TVA 46-kV line; and (9) appurtenances. The proposed hydropower plant will operate in a run-of-river mode operating at a minimum flow of 80 cfs and a maximum flow of 470 cfs. An estimated total of 6,927,000 kWh of energy will be generated each year.

l. *This notice also consists of the following standard paragraphs:* A3, A9, B, C, and D1.

7a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 9679-000.

c. *Date Filed:* December 10, 1988.

d. *Applicant:* Winooski Two Inc.

e. *Name of Project:* Winooski Two Hydroelectric Facility.

f. *Location:* On the Winooski River in the Cities of Burlington and Winooski, Chittenden County, Vermont.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Dermot A. McGuigan, c/o Vermont Hydroelectric, Inc., Chace Mill, 1 Mill Street, Burlington, VT 05401, (802) 656-5110.

i. *FERC Contact:* Charles T. Raabe—(202) 376-9778.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would consist of: (1) A rebuilt 6-foot-high and 170-foot-long timber crib or concrete dam; (2) a recreated reservoir having a surface area of less than 50 acres at water surface elevation 154 feet m.s.l.; (3) an existing intake; (4) two new 20-foot-long, 10-foot-diameter steel penstocks; (5) a new concrete powerhouse containing two turbine/generators each rated at 1,500-kW operated at a 15-foot head; (6) a 10-foot-deep, 100-foot-wide, 75-foot-long tailrace having water surface elevation 138 feet NGVD; (7) a new 500-foot-long 4,160 volt transmission line, and (8) appurtenant facilities. The applicant estimates that the average annual generation would be 9,000,000 kWh and that the cost of the studies under the terms of the permit would be

\$300,000. Project energy would be sold to Vermont Power Exchange, Inc. A portion of the proposed project boundary for Project No. 9679 lies within the approved project boundary for licensed Project No. 2756. However the proposed project facilities are mutually compatible.

l. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

8a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10694-000.

c. *Date Filed:* November 18, 1988.

d. *Applicant:* Rock River Power and Light Corporation.

e. *Name of Project:* Willow Falls Hydro Project.

f. *Location:* On the Willow River in St. Croix County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Thomas Reiss, P.O. Box 553, Watertown, WI 53094, (414) 261-7975.

i. *FERC Contact:* Ed Lee—(202) 376-5786.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An existing 160-foot-long and 60-foot-high concrete dam; (2) an existing 122-acre reservoir with a maximum storage of 1,295 acre-feet at pool elevation 874 U.S.G.S.; (3) an intake structure at the base of the dam; (4) a powerhouse which is to be located on the left bank of the river and containing a single 1-MW generating unit; (5) a new 1-mile-long, 115-kV transmission line, and (6) appurtenant facilities. The applicant estimates that the average annual generation would be 3.4 GWh. The cost of the work to be performed under the permit by the applicant would be \$30,000. The existing dam is owned by the Wisconsin Department of Natural Resources, 4610 University Avenue, Madison, WI 53711.

l. *Purpose of Project:* The applicant anticipates that the power generated will be sold to a nearby utility company.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

9a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10696-000.

c. *Date filed:* November 18, 1988.

d. *Applicant:* Rock River Power and Light Corporation.

e. *Name of Project:* Mound Dam Hydro Project.

f. *Location:* On the Willow River in St. Croix County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Mr. Thomas Reiss, P.O. Box 553, Watertown, WI 53094, (414) 261-7975.

i. *FERC Contact:* Ed Lee—(202) 376-5786.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would consist of: (1) An Existing 430-foot-long and 49-foot-high concrete dam; (2) an existing 60-acre reservoir with a maximum storage of 770 acre-feet at pool elevation 897 U.S.G.S.; (3) a powerhouse which is integral to the dam and containing a single 400-kW generating unit; (4) a new 1-mile-long, 115-kV transmission line, and (5) appurtenant facilities. The applicant estimates that the average annual generation would be 1.6 GWh. The cost of the work to be performed under the permit by the applicant would be \$25,000. The existing dam is owned by the Wisconsin Department of Natural Resources, 4610 University Avenue, Madison, WI 53711.

l. *Purpose of Project:* The applicant anticipates that the power generated will be sold to a nearby utility company.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

10a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10698-000.

c. *Date filed:* November 30, 1988.

d. *Applicant:* W. M. Lewis & Associates, Inc.

e. *Name of Project:* Green River Reservoir Dam Project.

f. *Location:* On the Green River in Taylor and Adair Counties, Kentucky.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contacts:* Mr. James S. Sigg, W. M. Lewis & Associates, Inc., P.O. Box 1383, Portsmouth, OH 45662, (614) 354-3238.

or  
Kirk H. Betts, Esq., Dickinson, Wright, Moon, Van Dusen & Freeman, 1901 L Street, NW., Suite 800, Washington, DC 20036, (202) 457-0160.

i. *FERC Contact:* Steven H. Rossi, (202) 376-9814.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would utilize the existing Corps of Engineers Green River Reservoir Dam and would consist of: (1) A new 140-foot-high intake structure; (2) a new 1,300-foot-long steel-lined tunnel 182 inches in diameter; (3) a new powerhouse approximately 1,300 feet downstream of the dam, containing four generating units, two each for 4.75 MW, and two of .75 MW capacity, for a total capacity of 11.0 MW; (4) a new trapezoidal discharge channel,

approximately 800 feet long leading to the existing discharge channel to the Green River; (5) a new 69-kV transmission line, approximately 6-miles-long; interconnecting with the Taylor County Rural Electric Cooperative system; and (6) appurtenant facilities. The applicant estimates the average annual generation would be 40,300,000 kWh. The applicant estimates that the cost of the studies under permit would be \$15,000.

l. *Purpose of Project:* Project power would be sold to either the Tennessee Valley Authority or the City of Glasgow, Kentucky.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

11a. *Type of Application:* Preliminary Permit.

b. *Project No.:* 10699-000.

c. *Date filed:* November 30, 1988.

d. *Applicant:* W. M. Lewis & Associates, Inc.

e. *Name of Project:* Nolin River Reservoir Dam Project.

f. *Location:* On the Nolin River in Edmonson County, Kentucky.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Kirk H. Betts, Esq., Dickinson, Wright, Moon, Van Dusen & Freeman, 1901 L Street, NW., Suite 800, Washington, DC 20036, (202) 457-0160.

or  
Mr. James S. Sigg, W. M. Lewis & Associates, Inc., P.O. Box 1383, Portsmouth, OH 45662, (614) 354-3238.  
i. *FERC Contact:* Steven H. Rossi, (202) 376-9814.

j. *Comment Date:* February 21, 1989.

k. *Description of Project:* The proposed project would utilize the existing Corps of Engineers Nolin River Reservoir Dam and would consist of: (1) A new 66-foot-high intake structure; (2) a new 900-foot-long, 164-inch-diameter steel-lined tunnel; (3) a new turbine house containing three generating units, two each for 4.25 MW, and one of 1.5 MW for a total capacity of 10 MW, and located downstream of the existing dam on the right bank of the Nolin River; (4) a new 145-foot-long stilling basin; (5) a new trapezoidal discharge channel about 900 feet long, and leading to the Nolin River; (6) a new 69-kV transmission line, approximately 2 miles long; interconnecting with the Warren Rural Electric Cooperative system; and (7) appurtenant facilities. The applicant estimates the average annual generation would be 39,000,000 kWh. The applicant estimates that the cost of the studies under permit would be \$15,000.

l. *Purpose of Project:* Project power would be sold to either the Tennessee

Valley Authority or the City of Glasgow, Kentucky.

m. *This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

#### Standard Paragraphs

A3. *Development Application*—Any qualified development applicant desiring to file a competing application must submit to the Commission, on or before the specified comment date for the particular application, a competing development application, or a notice of intent to file such an application.

Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified comment date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

A5. *Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36).

Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

A7. *Preliminary Permit*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before the specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) (1) and (9) and 4.36.

A9. *Notice of Intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, include an unequivocal statement of intent to submit, if such an application may be filed, either (1) a preliminary permit application or (2) a development application (specify which type of application), and be served on the applicant(s) named in this public notice.

A10. *Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

B. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of the Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE, Washington, DC 20426. An additional copy must be sent to Dean Shumway, Director, Division of Project Review, Federal Energy Regulatory Commission, Room 203-RB, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D1. *Agency Comments*—States, agencies established pursuant to federal law that have the authority to prepare a comprehensive plan for improving, developing, and conserving a waterway affected by the project, federal and state agencies exercising administration over fish and wildlife, flood control, navigation, irrigation, recreation, cultural or other relevant resources of



the state in which the project is located, and affected Indian tribes are requested to provide comments and recommendations for terms and conditions pursuant to the Federal Power Act as amended by the Electric Consumers Protection Act of 1986, the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Historic Preservation Act, the Historical and Archeological Preservation Act, the National Environmental Policy Act, Pub. L. No. 88-29, and other applicable statutes. Recommended terms and conditions must be based on supporting technical data filed with the Commission along with the recommendations, in order to comply with the requirement in section 313(b) of the Federal Power Act, 16 U.S.C. Section 8251(b), that Commission findings as to facts must be supported by substantial evidence.

All other federal, state, and local agencies that receive this notice through direct mailing from the Commission are requested to provide comments pursuant to the statutes listed above. No other formal requests will be made. Responses should be confined to substantive issues relevant to the issuance of a license. A copy of the application may be obtained directly from the applicant. If an agency does not respond to the Commission within the time set for filing, it will be presumed to have no comments. One copy of an agency's response must also be sent to the Applicant's representatives.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the Application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Dated: December 23, 1988.  
Washington, DC.  
Lois D. Casbell,  
Secretary.  
[FR Doc. 88-29862 Filed 12-28-88; 8:45 am]  
BILLING CODE 6717-01-M

[Docket No. CP89-351-000 et al.]

**Northern Natural Gas Co. et al.,  
Division of Enron Corp.; Natural Gas  
Certificate Filings**

Take notice that the following filings have been made with the Commission:

**1. Northern Natural Gas Company,  
Division of Enron Corp.**

[Docket No. CP89-351-000]

December 22, 1988.

Take notice that on December 7, 1988, Northern Natural Gas Company, Division of Enron Corp., (Northern), 1400 Smith Street, P.O. Box 1188, Houston, Texas 77251-1188, filed in Docket No. CP89-351-000, an application pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authority to transport natural gas on behalf of GasTrak Corporation, a marketer of natural gas, all as more fully set forth in the application on file with the Commission and open to public inspection.

Northern proposes to transport up to 15,000 MMBtu/day for GasTrak Corporation. Northern states that transportation service for GasTrak Corporation commenced on October 19, 1988, for a 120-day period, as reported in Docket No. ST89-549-000, pursuant to § 284.223(a)(1) of the Commission's Regulations and the blanket certificate issued to Northern in Docket No. CP86-435-000. Northern proposes to continue this service in accordance with §§ 284.221 and 284.223 of the Commission's Regulations.

*Comment date:* February 7, 1989, in accordance with Standard Paragraph C at the end of this notice.

**2. United Gas Pipe Company**

[Docket No. CP89-462-000]

December 22, 1988.

Take notice that on December 20, 1988, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP89-462-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to provide transportation on behalf of CITGO Petroleum Corporation (CITGO), under United's blanket certificate issued in Docket No. CP88-6-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

United requests authorization to transport, on an interruptible basis, up to a maximum of 8,240 MMBtu of natural gas per day for CITGO from receipt points located in Louisiana to delivery points located in Louisiana. United anticipates transporting, on an average day 8,240 MMBtu and an annual volume of 3,007,600 MMBtu.

United states that the transportation of natural gas for CITGO commenced November 24, 1988, as reported in Docket No. ST89-1182-000, for a 120-day period pursuant to § 284.223(a) of the

Commission's Regulations and the blanket certificate issued to United in Docket No. CP88-6-000.

*Comment date:* February 7, 1989, in accordance with Standard Paragraph C at the end of this notice.

**3. United Gas Pipe Line Company**

[Docket No. CP89-455-000]

December 22, 1988.

Take notice that on December 20, 1988, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP89-455-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP88-006-000 pursuant to section 7 of the Natural Gas Act for Superior Natural Gas Company (Superior), all as more fully set forth in the request on file with the Commission and open to public inspection.

United proposes to transport natural gas on an interruptible basis for Superior, a marketer. United explains that service commenced October 20, 1988, under Section 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1067. United further explains that the peak day quantity would be 20,600 MMBtu, the average daily quantity would be 20,600 MMBtu, and the annual quantity would be 7,519,000 MMBtu. United explains that it would receive natural gas for Superior's account from Sea Robin Pipeline Company near Erath, Vermilion Parish, Louisiana. United further explains that it would redeliver natural gas for Superior's account to Tennessee Gas Pipeline Company near West Monroe, Quachita Parish, Louisiana.

*Comment date:* February 7, 1989, in accordance with standard Paragraph C at the end of this notice.

**4. United Gas Pipe Line Company**

[Docket No. CP89-443-000]

December 22, 1988.

Take notice that on December 16, 1988, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP89-443-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to provide an interruptible transportation service for Houston Gas Exchange Corporation (Houston Gas), a marketer of natural gas, under its blanket certificate issued in Docket No. CP88-6-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the

Commission and open to public inspection.

United states that pursuant to an Interruptible Gas Transportation Agreement dated October 1, 1988, as amended on October 18, 1988, it would transport a maximum daily quantity of 103,000 MMBtu per day of natural gas for Houston Gas. United further states that the average day and annual transportation volumes would be 103,000 MMBtu and 37,595,000 MMBtu, respectively. United indicates that it would utilize existing facilities to provide the proposed transportation service.

United states that it commenced the transportation of natural gas for Houston Gas on December 1, 1988, at Docket No. ST89-1066-000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations (18 CFR 284.223(a)).

*Comment date:* February 7, 1989, in accordance with Standard Paragraph C at the end of this notice.

**5. Panhandle Eastern Pipe Line Company**

[Docket No. CP89-424-000]

December 22, 1988.

Take notice that on December 15, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas, 77251-1642, filed in Docket No. CP89-424-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas for Amgas, Inc. (Amgas), a shipper and marketer of natural gas, under Panhandle's blanket certificate issued in Docket No. CP86-585-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

Specifically, Panhandle requests authority to transport up to 50 Dt. per day, on an interruptible basis, on behalf of Amgas, pursuant to a transportation agreement dated October 19, 1988. It is stated that the transportation agreement provides for Panhandle to receive gas from various existing points of receipt located in the States of Texas, Oklahoma, Kansas, Colorado, Wyoming, and Illinois and to transport and redeliver subject gas, less fuel used and unaccounted for line loss, to Central Illinois Light Company in Tazewell County, Illinois. Amgas states that the estimated daily and annual quantities would be 13 Dt. and 4750 Dt., respectively. Panhandle advises that the transportation service commenced on November 21, 1988, under Section

284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-1262.

*Comment date:* February 7, 1989, in accordance with Standard Paragraph C at the end of this notice.

**6. ANR Pipeline Company**

[Docket No. CP89-441-000]

December 22, 1988.

Take notice that on December 16, 1988, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP89-441-000 a request pursuant to § 157.205 of the Federal Energy Regulatory Commission's Regulations, (18 CFR 157.205) for authorization to provide a transportation service for Anadarko Trading Company (Anadarko), a marketer, under its blanket certificate issued in Docket No. CP88-532-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission.

ANR states the transportation service would be provided pursuant to a transportation agreement dated October 21, 1988, wherein ANR proposes to transport up to 50,000 dekatherms per day of natural gas on an interruptible basis for Anadarko. ANR states it would receive the gas at an existing point of receipt in the Ship Shoal Area Offshore Louisiana and redeliver the gas for the account of Anadarko at existing interconnections located in the state of Louisiana.

ANR states it commenced service for Anadarko under § 284.223(a) on November 8, 1988, as reported in Docket No. ST89-1232-000.

*Comment date:* February 7, 1989, in accordance with Standard Paragraph C at the end of this notice.

**7. Southern Natural Gas Company**

[Docket No. CP89-450-000]

December 22, 1988.

Take notice that on December 16, 1988, Southern Natural Gas Company (Southern) Post Office Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP89-450-000 a request pursuant to §§ 157.205 and 284.223 (18 CFR 157.205 and 284.223) of the Commission's Regulations under the Natural Gas Act for authority to provide interruptible transportation service for Shell Gas Trading Company (Shell Gas), a marketer, under Southern's blanket transportation certificate authorization which was issued by Commission order on May 5, 1988, in Docket No. CP88-316-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Southern states it will receive the gas at various existing points on its system in the offshore area of Louisiana and Livingston Parish, and redeliver the gas in Yazoo County, Mississippi. Southern will transport the gas under its interruptible Rate Schedule IT.

Southern proposes to transport up to 55,000 Mcf of gas on a peak day, approximately 25,000 Mcf and 9,125,000 Mcf on an average day and annually respectively. Southern states that the transportation service commenced under the 120-day automatic authorization of § 284.223(a) of the Commission's Regulations on October 19, 1988, pursuant a transportation agreement dated September 20, 1988. Southern notified the Commission of the commencement of the transportation service in Docket No. ST89-786-000 on November 18, 1988.

*Comment date:* February 7, 1989, in accordance with Standard Paragraph C at the end of this notice.

**8. Transcontinental Gas Pipe Line Corporation**

[Docket No. CP89-442-000]

December 23, 1988.

Take notice that on December 16, 1988, Transcontinental Pipe Line Corporation (Transco), P.O. Box 1396, Houston, Texas 77251, filed in Docket No. CP89-442-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authorization to transport natural gas for Phillips Petroleum Company (Phillips) under Transco's blanket certificate issued in Docket No. CP88-328-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Transco proposes to transport for Phillips on an interruptible basis up to 120,000 dt equivalent of natural gas on a peak day, 5,000 dt equivalent on an average day, and 1,825,000 dt equivalent on an annual basis. It is stated that Transco would receive the gas at Ship Shoal Block 28/28D, offshore Louisiana and deliver the gas at an existing point of interconnection between Transco and Texas Gas Transmission Corporation in Evangeline Parish, Louisiana. It is indicated that Transco would charge Phillips the applicable rate under Transco's Rate Schedule IT.

It is explained that the service commenced November 22, 1988, under the automatic authorization provisions of Section 284.223 of the Commission's Regulations as reported in Docket No. ST89-1207. Transco states that no new



facilities are necessary for the subject transportation service.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 9. Transcontinental Gas Pipe Line Corporation

[Docket No. CP89-459-000]

December 23, 1988.

Take notice that on December 19, 1988, Transcontinental Gas Pipe Line Corporation (Transco), Post Office Box 1396, Houston, Texas 77251, filed in Docket No. CP89-459-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act, for authorization to provide a transportation service for FRM, Inc. (FRM), under Transco's blanket certificate issued in Docket No. CP88-328-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Transco states that pursuant to an agreement dated October 26, 1988, it proposes to transport up to 5,000 dt equivalent of natural gas per day on an interruptible basis. Transco indicates that it will receive the gas at Jones County, Mississippi and deliver the gas at an existing point of interconnection between Transco and FRM in Jefferson Davis County, Mississippi.

Transco also states that no construction of facilities would be required to provide this service. Transco further states that the maximum day, average day, and annual volumes would be 5,000 dt equivalent of natural gas, 500 dt equivalent of natural gas, and 182,500 dt equivalent of natural gas, respectively. Transco indicates that it would charge the rates and abide by the terms and conditions set forth in its Rate Schedule IT.

Transco indicates that it would provide the service until terminated by either party upon at least 30 days' written notice. It is indicated that Transco may discontinue service if FRM in Transco's reasonable judgement fails to demonstrate credit worthiness and FRM fails to provide adequate security in accordance with section 9.4 of Transco's Rate Schedule IT.

Transco advises that service under § 284.223(a) of the Commission's Regulations commenced on November 17, 1988, as reported in Docket No. ST89-1176.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 10. Natural Gas Pipeline Company of America

[Docket No. CP89-431-000]

December 23, 1988.

Take notice that on December 15, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-431-000 a request pursuant to §§ 157.205 and 284.223(2)(b) of the Commission's Regulations under the Natural Gas Act for authorization to transport gas for MidCon Marketing Corp. (MidCon), a marketer of natural gas, under Natural's blanket certificate issued in Docket No. CP86-582-000 under section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Natural states that it would transport, on an interruptible basis, up to a maximum of 10,000 MMBtu of natural gas per day (plus any additional volumes accepted pursuant to the overrun provisions of Natural's Rate Schedule ITS), for MidCon. Natural states that the receipt point would be located in Beaver, Oklahoma and the delivery point would be located in Ford, Kansas. Natural indicates that the total volume of gas to be transported for MidCon on a peak day would be 10,000 MMBtu; on an average day would be 5,000 MMBtu; and on an annual basis would be 1,825,000 MMBtu. Natural indicates it would perform the proposed transportation service for MidCon pursuant to a service agreement dated October 18, 1988, between Natural and MidCon.

Natural states that it commenced the transportation of natural gas for American on October 24, 1988, at Docket No. ST89-1300-000 for a 120-day period ending February 21, 1989, pursuant to § 284.223(a)(1) of the Commission's Regulations. Natural states that it proposes to continue this service in accordance with §§ 284.221 and 284.223(b). Natural states that no new facilities are proposed in order to provide this transportation service.

Natural also states that it is not aware of any agency relationship under which a local distribution company or an affiliate of MidCon is to receive natural gas on behalf of MidCon, and that it has no and is not aware of other applications that are related to this transaction.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 11. ANR Pipeline Company

[Docket No. CP89-449-000]

December 23, 1988.

Take notice that on December 16, 1988, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP89-449-000, an application pursuant to section 7(b) of the Natural Gas Act (NGA) for permission and approval to abandon a natural gas transportation service for Northern Intrastate Pipeline Company (NIPCO), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

It is stated that ANR and NIPCO entered into an agreement dated October 7, 1985, which provided for ANR to transport for NIPCO, on an interruptible basis, up to 15,000 dekatherm equivalent of natural gas per day which NIPCO caused its seller, Huffco Petroleum Corporation, to tender to ANR in South March Island Area Block 260, offshore Louisiana. ANR was authorized to transport and deliver the gas for NIPCO's account to Columbia Gulf Transmission Company at the Pecan Island Plant located in Vermilion Parish, Louisiana. ANR received certificate authorization to provide the transportation service in Docket No. CP86-270-000, 35 FERC ¶61,270 (1986). The transportation service was authorized for an initial period ending October 31, 1988. The agreement was not extended beyond that term.

ANR requests the issuance of an order permitting and approving the abandonment of the transportation service it was authorized to provide pursuant to the October 7, 1985 agreement.

*Comment date:* January 13, 1989, in accordance with Standard Paragraph F at the end of this notice.

#### 12. Tennessee Gas Pipeline Company

[Docket No. CP89-454-000]

December 23, 1988.

Take notice that on December 13, 1988, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP89-454-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to provide an interruptible transportation service for Total Minatome Corporation (Total), a producer of natural gas, under its blanket certificate issued in Docket No. CP87-115-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the

Commission and open to public inspection.

Tennessee states that it proposes to transport natural gas for Total from numerous points of receipt located in offshore Louisiana, Louisiana, Mississippi, Texas, New York, New Jersey, West Virginia, Ohio, Kentucky, Tennessee and Alabama to numerous points of delivery located in multiple states.

Tennessee further states that the maximum daily, average and annual quantities that it would transport for Total would be 330,000 dt equivalent of natural gas, 330,000 dt equivalent of natural gas and 1,825,000 dt of natural gas, respectively.

Tennessee indicates that in Docket No. ST89-1082, filed with the Commission on December 1, 1988, it reported that transportation service for Total began on November 1, 1988, under the 120-day automatic authorization provisions of § 284.223(a).

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 13. United Gas Pipe Line Company

[Docket No. CP89-456-000]

December 23, 1988.

Take notice that on December 19, 1988, United Gas Pipe Line Company (United), P.O. Box 1478, Houston, Texas 77251-1478, filed in Docket No. CP89-456-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to provide an interruptible transportation service on behalf of Texaco Gas Marketing (Texaco), a marketer of natural gas, under its blanket certificate issued in Docket No. CP88-6-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

United states that it proposes to transport natural gas on behalf of Texaco from numerous points of receipt in Louisiana, Mississippi and Texas to numerous points of delivery in Louisiana, Mississippi and Texas.

United further states that the maximum daily, average and annual quantities that it would transport for Texaco would be 360,500 MMBtu equivalent of natural gas, 360,500 MMBtu equivalent of natural gas and 131,582,500 MMBtu equivalent of natural gas, respectively.

United indicates that in Docket No. ST89-1065, filed with the Commission on December 1, 1988, it reported that transportation service for Texaco began on October 31, 1988, under the 120-day

automatic authorization provisions of § 284.223 (a).

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### 14. Natural Gas Pipeline Company of America

[Docket No. CP89-461-000]

December 23, 1988.

Take notice that on December 20, 1988, Natural Gas Pipeline Company of America (Natural), 701 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP89-461-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas under its blanket authorization issued in Docket No. CP86-582-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Natural proposes to transport natural gas on an interruptible basis for Tejas Power Corp. (Tejas), a marketer of natural gas, pursuant to an interruptible transportation service agreement dated June 22, 1988 (# IGP-1239). Natural proposes to transport on a peak day up to 65,000 MMBtu per day; on an average day up to 40,000 MMBtu; and on an annual basis 14,800,000 MMBtu of natural gas for Tejas. Natural proposes to receive the gas for Tejas' account at Eugene Island Area, Block 57, Offshore Louisiana and deliver the gas to United Gas Pipeline Company for Tejas' account at Eugene Island Area, Block 32, Offshore Louisiana.

It is explained that the proposed service is currently being performed pursuant to the 120-day self-implementing provision of § 284.223(a)(1) of the Commission's Regulations. Natural commenced such self-implementing service on November 1, 1988, as reported in Docket No. ST89-1394-000.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

#### Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be

considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell.

Secretary.

[FR Doc. 88-29983 Filed 12-28-88; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-415-000 et al.]

#### Northwest Pipeline Corp. et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

BEST COPY AVAILABLE



**1. Northwest Pipeline Corporation**

[Docket No. CP89-415-000]

December 22, 1988.

Take notice that on December 14, 1988, Northwest Pipeline Corporation (Northwest), P.O. Box 8900, Salt Lake City, Utah 84108-0900, filed in Docket No. CP89-415-000, a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to transport natural gas for Seattle Steam Corporation (Seattle Steam), an end user of natural gas, under its blanket certificate issued in Docket No. CP86-578-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northwest states that pursuant to a Transportation Agreement dated September 21, 1988, as amended November 3, 1988, under Rate Schedule TI-1, it would transport up to 10,000 MMBtu per day of natural gas for Seattle Steam from various existing receipt points on Northwest's system to the North Seattle Meter Station to Washington Natural Gas Company located in King County, Washington. Northwest further states that the maximum day, average day and annual transportation volumes would be approximately 10,000 MMBtu, 50 MMBtu and 18,000 MMBtu, respectively. Northwest indicates that no construction of new facilities would be required to provide the proposed transportation service.

Northwest states that it commenced the transportation of natural gas for Seattle Steam on November 11, 1988, at Docket No. ST89-1096-000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations (18 CFR 284.223(a)).

*Comment date:* February 7, 1989, in accordance with Standard Paragraph G at the end of this notice.

**2. ANR Pipeline Company**

[Docket No. CP89-404-000]

December 22, 1988.

Take notice that on December 13, 1988, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP89-404-000 a request as supplemented December 19, 1988, pursuant to section 157.205 of the Commission's Regulations for authorization to provide transportation service on behalf of Amoco Production Company (Amoco), under ANR's blanket certificate issued in Docket No. CP88-532-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the application which is on

file with the Commission and open to public inspection.

ANR requests authorization to transport on an interruptible basis, up to a maximum of 3,000 dekatherms of natural gas per day for Amoco from Eugene Island Block 77, offshore Louisiana, to various delivery points in St. Mary, St. Landry, Acadia and Cameron Parishes, Louisiana. ANR anticipates transporting, on an average day 3,000 dekatherms and an annual volume of 1,095,000 dekatherms.

ANR states that that transportation of natural gas for Amoco commenced November 1, 1988, as reported in Docket No. ST89-1061-000, for a 120-day period pursuant to § 284.223(a) of the Commission's Regulations and the blanket certificate issued to ANR in Docket No. CP88-532-000.

*Comment date:* February 7, 1989, in accordance with Standard Paragraph G at the end of this notice.

**3. Williams Natural Gas Company**

[Docket Nos. CP89-386-000; CP89-387-000]

December 23, 1988.

Take notice that on December 12, 1988, Williams Natural Gas Company (Williams), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket Nos. CP89-386-000 and CP89-387-000,<sup>1</sup> requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under its blanket certificate issued in Docket No. CP88-631-000 pursuant to section 7 of the Natural Gas Act for the City of Mulberry, Kansas (Mulberry) and Mesa Operating Limited Partnership (Mesa), all as more fully set forth in the requests on file with the Commission and open to public inspection.

Williams proposes to transport up to a maximum of 55,000 MMBtu of natural gas per day for Mesa and up to 758 MMBtu of natural gas per day for Mulberry, from various receipt points in Kansas, Missouri, Oklahoma, and Wyoming to various delivery points on Williams' pipeline system located in Kansas and Missouri. Williams anticipates transporting up to 55,000 MMBtu on a peak day, 30,000 MMBtu on an average day and 20,075 MMBtu annually for Mesa; and up to 758 MMBtu on a peak day, 165 MMBtu on an average day and 275,940 MMBtu annually for Mulberry. Williams explains that service commenced October 20, 1988, and October 11, 1988, respectively, under § 284.223(a) of the Commission's Regulations, as reported

<sup>1</sup> These dockets are not consolidated.

in Docket Nos. ST89-726-000 and ST89-725-000, respectively.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

**4. Southern Natural Gas Company**

[Docket No. CP89-448-000]

December 23, 1988.

Take notice that on December 16, 1988, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202, filed in Docket No. CP89-448-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under the blanket certificate issued in Docket No. CP88-316-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Southern proposes to transport natural gas for Consolidated Fuel Corporation (Consolidated) pursuant to Rate Schedule IT. Southern explains that service commenced October 16, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-785. Southern explains that the peak day quantity would be 2,600 MMBtu, the average daily quantity would be 2,600 MMBtu, and that the annual quantity would be 949,000 MMBtu. Southern explains that it would receive natural gas for Consolidated's account at existing receipt points in Louisiana, offshore Louisiana, Texas, Georgia, Mississippi, offshore Texas, and Alabama for delivery at delivery points in Georgia.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

**5. Panhandle Eastern Pipe Line Company**

[Docket No. CP89-419-000]

December 23, 1988.

Take notice that on December 15, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-419-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of Dayton Power and Light Company (Dayton), a shipper of natural gas and local distribution company, under Panhandle's blanket certificate issued in Docket No. CP88-585-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Panhandle proposes to transport on a firm basis up to 15,000 dt equivalent of natural gas on a peak day for Dayton, 15,000 dt equivalent on an average day and 5,475,000 dt equivalent on an annual basis. It is stated that the transportation service would be effected using existing facilities and would not require any construction of additional facilities. It is stated that Panhandle would receive the gas for Dayton's account at existing receipt points in Texas, Oklahoma, Kansas, Colorado, Wyoming and Illinois. It is further stated that Panhandle would deliver equivalent volumes of gas less fuel used and unaccounted for line loss to Columbia Gas Transmission Corporation in Darke County, Ohio. It is explained that the service commenced November 1, 1988, under the automatic authorization provisions of § 284.223 of the Commission's Regulations, as reported in Docket No. ST89-816.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

**6. United Gas Pipe Line Company**

[Docket No. CP89-445-000]

December 23, 1988.

Take notice that on December 16, 1988, United Gas Pipe Line Company (United), Post Office Box 1478, Houston, Texas 77251-1478 filed in Docket No. CP89-445-000 a request pursuant to § 157.205 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205) for authorization to abandon in place approximately 850 feet of pipeline and remove a meter station previously used to serve Entex, Inc., a local distribution company, at the Tyler City Gate #4 line, under its blanket authorization issued in Docket No. CP82-430-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection. United states that the installation of the above facilities was authorized under Docket No. G-232 and that such facilities are located in the George Myers Survey, Smith County, Texas.

United states that Entex, Inc. has consented to this proposed authorization request and that removal of the metering facilities and the abandonment of United's pipeline will be accomplished without detriment or disadvantage to its other existing customers. It is stated that the proposed activity is in compliance with Subpart F of Part 157 of the Commission's Regulations, and that United has complied with the procedures in Part 157, Subpart F, Appendix I, as it relates

to environmental compliance. United further states that it will consolidate delivery quantities to Entex, Inc. at an existing delivery point, being Tyler City Gate #1, thereby avoiding any loss of service.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

**7. Panhandle Eastern Pipe Line Company**

[Docket No. CP89-427-000]

December 23, 1988.

Take notice that on December 15, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642 filed in Docket No. CP89-427-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authorization to transport natural gas on behalf of Amgas, Inc. (Amgas), a shipper and marketer of natural gas acting as agent for Certified Equipment & Mfg. Co., under Panhandle's blanket certificate issued in Docket No. CP86-585-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Panhandle proposes to transport for Amgas on an interruptible basis up to 160 dt equivalent of natural gas on a peak day, 30 dt equivalent on an average day, and 10,950 dt equivalent on an annual basis. It is stated that Panhandle would receive the gas at various existing points on its system in Texas, Oklahoma, Kansas, Colorado, Wyoming and Illinois for delivery to Central Illinois Light Company in Sangamon County, Illinois. Panhandle states that the transportation service would have a primary term of one month from the date of first delivery and continue on a monthly basis thereafter. It is indicated that Panhandle would charge Amgas the applicable rate under Panhandle's Rate Schedule PT.

It is explained that the service commenced November 21, 1988, under the automatic authorization provisions of § 284.223 of the Commission's Regulations. Panhandle states that no new facilities are necessary for the subject transportation.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

**8. Panhandle Eastern Pipe Line Company**

[Docket No. CP89-425-000]

December 23, 1988.

Take notice that on December 15, 1988, Panhandle Eastern Pipe Line

Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642 filed in Docket No. CP89-425-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations for authorization to transport natural gas on behalf of Amgas, Inc. (Amgas), a shipper and marketer of natural gas, under Panhandle's blanket certificate issued in Docket No. CP86-585-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Panhandle proposes to transport for Amgas on an interruptible basis up to 50,000 dt equivalent of natural gas on a peak day, 25,000 dt equivalent on an average day, and 9,125,000 dt equivalent on an annual basis. It is stated that Panhandle would receive the gas at various existing points on its system in Texas, Oklahoma, Kansas, Colorado, Wyoming and Illinois for delivery to Illinois Power Company in Macon County, Illinois. Panhandle states that the transportation service would have a primary term of one month from the date of first delivery and continue on a monthly basis thereafter. It is indicated that Panhandle would charge Amgas the applicable rate under Panhandle's Rate Schedule PT.

It is explained that the service commenced November 3, 1988, under the automatic authorization provisions of § 284.223 of the Commission's Regulations. Panhandle states that no new facilities are necessary for the subject transportation.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph G at the end of this notice.

**United Gas Pipe Line Company**

[Docket No. CP89-444-000]

December 23, 1988.

Take notice that on December 16, 1988, United Gas Pipeline Company (United), P. O. Box 1478, Houston, Texas 77251, filed in Docket No. CP89-444-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas under the blanket certificate issued in Docket No. CP88-6-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

United proposes to transport natural gas on an interruptible basis for KM Gas Company (KM Gas). United explains that service commenced November 1, 1988, under § 284.223(a) of the Commission's Regulations, as reported in Docket No. ST89-967. United explains



that the peak day quantity would be 69,536 MMBtu, the average daily quantity would be 69,536 MMBtu, and that the annual quantity would be 25,380,640 MMBtu. United explains that it would receive natural gas for KM Gas' account at existing interconnections in the states of Texas and Louisiana. United states that it would redeliver the gas for KM Gas' at existing interconnections in the states of Louisiana, Florida, and Mississippi.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph C at the end of this notice.

#### 10. Panhandle Eastern Pipe Line Company

[Docket No. CP89-439-000]  
December 23, 1988.

Take notice that on December 16, 1988 Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas, 77251-1642, filed in Docket No. CP89-439-000 a request pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas for General Motors Corporation (General Motors) a shipper and end-user of natural gas, pursuant to Panhandle's blanket certificate issued in Docket No. CP86-585-000 and section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open for public inspection.

Specifically, Panhandle requests authority to transport up to 4,690 Dt. per day on an interruptible basis on behalf of General Motors pursuant to a Transportation Agreement dated November 14, 1988 between Panhandle and General Motors (Transportation Agreement). The Transportation Agreement provides for Panhandle to receive gas from various existing points of receipt on its system in Texas, Oklahoma, Kansas, Colorado, Wyoming, and Illinois. Panhandle will then transport and redeliver subject gas, less fuel used and unaccounted for line loss to General Motors-Central Foundry in Saginaw County, Michigan.

The Shipper states that the estimated daily and estimated annual quantities would be 3,170 Dt. and 1,157,050 Dt., respectively. Transportation service for

Shipper is proposed to commence immediately upon completion of construction of the proposed facilities.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph C at the end of this notice.

#### 11. Panhandle Eastern Pipe Line Company

[Docket No. CP89-421-000]  
December 23, 1988.

Take notice that on December 15, 1988, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP89-421-000 a request pursuant to § 157.205 of the Commission's Regulations for authorization to transport natural gas on behalf of Mobil Natural Gas, Inc. (Mobil), a shipper and marketer of natural gas, under Panhandle's blanket certificate issued in Docket No. CP86-585-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Panhandle proposes to transport on a firm basis up to 20,000 dt equivalent of natural gas on a peak day for Mobil, 10,000 dt equivalent on an average day and 3,650,000 dt equivalent on an annual basis. It is stated that the transportation service would be effected using existing facilities and would not require any construction of additional facilities. It is stated that Panhandle would receive the gas for Mobil's account at existing receipt points in Texas, Oklahoma, Kansas, Colorado, Wyoming and Illinois. It is further stated that Panhandle would deliver equivalent volumes of gas less fuel used and unaccounted for line loss to Gas Service Company in Marion, Anderson, Lyon, Miami, Coffey, and Franklin Counties, Kansas. It is explained that the transportation service has commenced under the automatic authorization provisions of § 284.223 of the Commission's Regulations.

*Comment date:* February 8, 1989, in accordance with Standard Paragraph C at the end of this notice.

#### Standard Paragraph

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 88-29984 Filed 12-28-88; 8:45 am]

BILLING CODE 6717-01-M

#### Office of Hearings and Appeals

##### Cases Filed During the Week of November 25 Through December 2, 1988

During the Week of November 25 through December 2, 1988, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR Part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

December 22, 1988.

George B. Breznay,

Director, Office of Hearings and Appeals.

#### LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS

[Week of November 25 through December 2, 1988]

Date	Name and location of applicant	Case No.	Type of submission
Nov. 28, 1988	Earth Resources/E.L. Morgan Co., Jackson, TN	RR239-1	Request for Modification/Rescission. If granted: The April 1, 1988 Decision and Order issued to E. L. Morgan Company (Case No. RF239-7) would be modified regarding the firm's application in the Earth Resources refund proceeding.

#### LIST OF CASES RECEIVED BY THE OFFICE OF HEARINGS AND APPEALS—Continued

[Week of November 25 through December 2, 1988]

Date	Name and location of applicant	Case No.	Type of submission
Nov. 28, 1988	Earth Resources/E.L. Morgan Co., Jackson, TN	RS239-1	Request for Stay. If granted: The Office of Hearings and Appeals would stay the distribution of any escrowed funds involved in the Earth Resources refund proceeding pending a final determination on E. L. Morgan's request for modification.
Nov. 28, 1988	Herbert L. Tanner & PAD, Inc., Memphis, TN	KFX-0058	Supplemental Order. If granted: The Office of Hearings and Appeals would review the information submitted by Herbert L. Tanner & PAD, Inc. in response to the October 26, 1988 Decision and Order to Show Cause issued to them (Case No. KFX-0056).
Dec. 1, 1988	James R. Hutton, Kingston, TN	KFA-0234	Appeal of an Information Request Denial. If granted: The November 4, 1988 Freedom of Information Request Denial issued by the DOE Oak Ridge Operations Office would be rescinded and Mr. Hutton would receive access to his employee performance appraisal and any proposals for awards made at the Branch Chief level for the past four years.
Dec. 2, 1988	Brown Oil Co., Blue Mound, IL	KEE-0188	Exception to the Reporting Requirements. If granted: Brown Oil Company would no longer be required to file Form EIA-782B, the "Reseller/Retailers' Monthly Petroleum Product Sales Report."
Dec. 2, 1988	Walbridge J. Powell, Mercer Island, WA	KFA-0235	Appeal of an Information Request Denial. If granted: The Freedom of Information Request Denial issued by the DOE Richland Operations Office would be rescinded and Walbridge J. Powell would receive access to studies made of N-Reactor Facts and Equipment Degradation, Hanford Operations.

#### REFUND APPLICATIONS RECEIVED

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
02/09/88	Lenkerbrook Farms.	RF300-10618
10/05/88	Luczan & Ramsoozingh.	RF300-10820
10/07/88	Ethelene Coludrovich.	RF300-10619
11/21/88	George's Service Station.	RF310-324
11/25/88	U.S.A. Gas, Inc.	RF300-10613
11/25/88	Peh, Inc.	RF300-10614
11/28/88	Pride Terminals, Inc.	RF314-1
11/28/88	Costa Auto Repair.	RC272-1
11/28/88	Duane Hemmeh	RC272-2
11/28/88	Robert Anderson	RC272-3
11/28/88	John Sullivan	RC272-4
11/28/88	Jim's Gulf Service Station.	RF300-10615
11/30/88	Richard Kor	RC272-5
11/30/88	Unified School District #46.	RC272-6
11/30/88	Meade USD #228.	RC272-7
11/30/88	Leo M. Bollin	RC272-9
11/30/88	Larry Rinderer	RC272-10
11/30/88	Wilbur W. Benroth.	RC272-11
11/30/88	Waste Management of OH-Lima.	RC272-12
11/30/88	Clausen Ranch Company.	RC272-6
12/01/88	Cohoes Auto Service, Inc.	RF300-10621
12/01/88	Welltech, Inc.	RD272-63692
12/01/88	Squibb Corporation.	RD272-66560
12/01/88	Reliable Contracting Company.	RD272-61324

#### REFUND APPLICATIONS RECEIVED—Continued

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/01/88	Gohmann Asphalt & Const.	RD272-73790
12/01/88	C.A. Rasmussen, Inc.	RD272-72077
12/01/88	L.H. Bossier	RD272-72085
12/01/88	S.C. Johnson & Son, Inc.	RD272-70908
12/01/88	Wyandot Blacktop Company.	RD272-62609
12/01/88	Green Bay Packaging, Inc.	RD272-63419
12/01/88	Starrett City Associates.	RD272-63905
12/01/88	Federated Department Stores.	RD272-66432
12/01/88	Dunn Construction.	RD272-67239
12/01/88	Gardner Industries.	RD272-67920
12/01/88	Sun Enterprises Ltd.	RD272-64407
12/01/88	The Great Eastern Shipping Co.	RD272-65378
12/01/88	M.B. Troy	RD272-69111
12/01/88	Iberia Lineas Aereas De Espana.	RD272-66563
12/01/88	Antares Shipping Co., Ltd.	RD272-67006
12/01/88	Ashmore Bros.	RD272-67016
12/01/88	Reichhold Chemicals, Inc.	RD272-67161
12/01/88	The Holland Corporation.	RD272-67236
12/01/88	Westvaco Corporation.	RD272-67318
12/01/88	Patricia R. Kellam	RD272-67703

#### REFUND APPLICATIONS RECEIVED—Continued

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/01/88	P.J. Keating Company.	RD272-67882
12/01/88	The Henley Lundgren Company.	RD272-67893
12/01/88	Roofing Wholesale.	RD272-67985
12/01/88	The Dow Chemical Company.	RD272-68020
12/01/88	Burrell Const.	RD272-68915
12/01/88	Sterling Paving Company.	RD272-68993
12/01/88	Passaic Crushed Stone Company.	RD272-69025
12/01/88	Witco Corporation.	RD272-69165
12/01/88	Rogers Dye & Finishing.	RD272-69198
12/01/88	U.S. Borax & Chemical Corp.	RD272-69319
12/01/88	Lebeouf Bros. Towing Co., Inc.	RD272-69366
12/01/88	City-Wide Asphalt.	RD272-69546
12/01/88	Compania Sub-Americana De Vapo.	RD272-69666
12/01/88	Great Lakes Dredge & Dock Co.	RD272-69694
12/01/88	East Kentucky Paving Corp.	RD272-69695
12/01/88	Caribbean Marine Serv. Co.	RD272-69699
12/01/88	Greer Steel Company.	RD272-69790
12/01/88	Riedel International, Inc.	RD272-69843



REFUND APPLICATIONS RECEIVED—  
Continued

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/01/88	The Schloss Paving Company	RD272-69946
12/01/88	J.T. Baker, Inc.	RD272-70116
12/01/88	A & B Transportation	RD272-70289
12/01/88	H.P. Hood, Inc.	RD272-70478
12/01/88	Earl C. Smith, Inc.	RD272-70618
12/01/88	Lionmark, Inc.	RD272-70853
12/01/88	Prota Oceanica Brasileira	RD272-71305
12/01/88	American Diesel Service	RD272-72271
12/01/88	Transport Desgagnes, Inc.	RD272-73778
12/01/88	Bouchard Transportation Co.	RD272-74311
12/01/88	Old Fort Finishing Plant	RD272-74447
12/01/88	Sgan Industries	RD272-74580
12/01/88	T.L. James & Company	RD272-64814
12/01/88	The Asphalt Services Co.	RD272-64890
12/01/88	United Piece Dye Works, Inc.	RD272-64974
12/01/88	Aviritt Express	RD272-64979
12/01/88	Sun Chemical—Pigments Div.	RD272-64994
12/01/88	Palm Shipping, Inc.	RD272-65042
12/01/88	Pre Fab Transit	RD272-65097
12/01/88	Eaton Asphalt Paving Company	RD272-65206
12/01/88	Kronos Maritime Agency	RD272-65352
12/01/88	Prometheus Maritime Corp.	RD272-65355
12/01/88	Thenamaris, Inc.	RD272-65357
12/01/88	A. Halcoussis Shipping Ltd.	RD272-65361
12/01/88	Gourdouchalis Maritime S.A.	RD272-65366
12/01/88	N.J. Goulandris (Agencies)	RD272-65373
12/01/88	Royal Bank of Scotland	RD272-65374
12/01/88	Johnson Shipmanagement AB	RD272-65375
12/01/88	Arkia Chemical Corporation	RD272-65429
12/01/88	Guiley Trucking, Inc.	RD272-65827
12/01/88	Banks Construction Company	RD272-66087
12/01/88	Petra Cruise Lines, Inc.	RD272-66368
12/01/88	Mead Corporation	RD272-66380
12/01/88	Dixie Pavers, Inc.	RD272-63800
12/01/88	Holmes Transportation, Inc.	RD272-63845
12/01/88	Skaarup Shipping Corporation	RD272-63888
12/01/88	Cenac Towing Company, Inc.	RD272-63963

REFUND APPLICATIONS RECEIVED—  
Continued

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/01/88	Orion & Global Chartering Co.	RD272-64069
12/01/88	Essex Group, Inc.	RD272-64208
12/01/88	Interplastic Corporation	RD272-64290
12/01/88	Ciba-Gelby Corporation	RD272-64327
12/01/88	Great Lakes Chemical Corp.	RD272-64360
12/01/88	Rogers Group	RD272-64369
12/01/88	Scott Paper Company	RD272-64408
12/01/88	Parkchester Management Corp.	RD272-64604
12/01/88	Allied Corporation	RD272-66433
12/01/88	Rochdale Village, Inc.	RD272-66448
12/01/88	Folk Construction	RD272-66473
12/01/88	Sandoz Chemicals Corp.	RD272-66502
12/01/88	CPM, Inc.	RD272-66548
12/01/88	Lot Polish Airlines	RD272-61176
12/01/88	Dillingham Const. Corporation	RD272-61305
12/01/88	Brostroms Redert AB	RD272-61368
12/01/88	Occidental International Oil	RD272-61369
12/01/88	Vergottis (London) Ltd.	RD272-61370
12/01/88	Companhia De Navegacao	RD272-61506
12/01/88	Broderick & Gibbons	RD272-61526
12/01/88	Ameripol Synpol Company	RD272-61725
12/01/88	Pope Companies	RD272-62127
12/01/88	Orders & Haynes Paving	RD272-62559
12/01/88	Kestrel (Australia) Pty. Ltd.	RD272-62588
12/01/88	Beverage Management, Inc.	RD272-62593
12/01/88	Globe Industries	RD272-62887
12/01/88	Navios Corporation	RD272-63390
12/01/88	Inland Asphalt Company	RD272-63401
12/01/88	Gallagher Asphalt Corporation	RD272-63552
12/01/88	Crowell Constructors	RD272-63794
12/01/88	General Foods Corporation	RD272-61989
12/01/88	Luhr Bros	RD272-63109
12/01/88	Nereus Shipping S.A.	RD272-63207
12/01/88	Liberty Mutual	RD272-63350
12/01/88	Mansfield Asphalt Paving	RD272-63828
12/01/88	Lee Hy Paving	RD272-64964
12/01/88	Grand Packing Company, Inc.	RD272-65441
12/01/88	Pepsi-Cola Company	RD272-65883
12/01/88	Frehner Construction	RD272-66378

REFUND APPLICATIONS RECEIVED—  
Continued

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/01/88	Empresa De Transporte Aereo	RD272-66582
12/01/88	Ferguson Bros. Const.	RD272-67071
12/01/88	Lone Star Industries	RD272-67281
12/01/88	A.H. Smith Assoc.	RD272-67329
12/01/88	C.J. Langenfelder & Son	RD272-67586
12/01/88	DBJ Equipment Corporation	RD272-67759
12/01/88	Emulsion Products	RD272-67919
12/01/88	Martin Marietta Corporation	RD272-69633
12/01/88	The Arundel Corporation	RD272-72080
12/01/88	Vernon Paving	RD272-73273
12/01/88	Jack B. Parson Company	RD272-73734
12/01/88	Hung-Wesson Foods, Inc.	RD272-73865
12/01/88	Genstar Store Products	RD272-74240
12/01/88	Lykes Pasco, Inc.	RD272-67598
12/01/88	John P. Weyer, Inc.	RD272-68275
12/01/88	Hofferber Truck Lines, Inc.	RD272-68846
12/01/88	Liberty Corporation	RD272-69043
12/01/88	Ploof Truck Lines	RD272-69229
12/01/88	Asphalt Products Corporation	RD272-69293
12/01/88	The Pillsbury Company	RD272-69342
12/01/88	Pennsy Supply	RD272-69635
12/01/88	R.B. Pond Construction	RD272-69703
12/01/88	Westminster Hide & Tallow Co.	RD272-69835
12/01/88	Westside Transport, Inc.	RD272-70286
12/01/88	Mississippi Chemical Corp.	RD272-71308
12/01/88	Rein, Schultz & Dehl of IL	RD272-71311
12/01/88	B/J Delivery Service, Inc.	RD272-71321
12/01/88	H.B. Fuller Company	RD272-71336
12/01/88	Western Atlas International	RD272-72078
12/01/88	Amcon Products	RD272-72416
12/01/88	Pendleton Construction Corp.	RD272-73256
12/01/88	Syar Industries	RD272-73595
12/01/88	Elliott Company	RD272-73784
12/01/88	Cummins Construction Company	RD272-73883
12/01/88	Vons Grocery Company	RD272-74026
12/01/88	B.J. McAdams Trucking	RD272-74249
12/01/88	W.J. Runyon and Son, Inc.	RD272-61189
12/01/88	Consolidated Freightways, Inc.	RD272-61630
12/01/88	Lorillard, Inc.	RD272-61905

REFUND APPLICATIONS RECEIVED—  
Continued

[Week of Nov. 25 to Dec. 2, 1988]

Date received	Name of refund proceeding/name of refund applicant	Case No.
12/01/88	Carolina Packers, Inc.	RD272-62260
12/01/88	NDH, Inc.	RD272-62846
12/01/88	Lilly Industrial Coatings, Inc.	RD272-63021
12/01/88	River Bend Corporation	RD272-63096
12/01/88	Nekoosa Packaging Corporation	RD272-63251
12/01/88	Fibreboard Corporation	RD272-63877
12/01/88	Admiral Cruises, Inc.	RD272-63889
12/01/88	American Asphalt Paving	RD272-63941
12/01/88	Wells Cargo, Inc.	RD272-63966
12/01/88	Canteen Company	RD272-64283
12/01/88	McDonnell Douglas Corporation	RD272-64663
12/01/88	Republic Industries Liquidating	RD272-64984
12/01/88	Mallory Transportation	RD272-65048
12/01/88	Lykes Bros. Steamship Co., Inc.	RD272-65096
12/01/88	Monarch Cruise Lines, Inc.	RD272-65436
12/01/88	Ward Foods, Inc.	RD272-65435
12/01/88	Stafford Construction	RD272-65862
12/01/88	Tomahawk Services, Inc.	RD272-66027
12/01/88	Coast Leasing Company	RD272-66048
12/01/88	Dart Container Corporation	RD272-66874
12/01/88	The Dwo Chemical Company	RD272-67009
12/01/88	E & B Paving, Inc.	RD272-67026
12/01/88	Boise Cascade Corporation	RD272-67314
12/01/88	Long Manufacturing Co. N.C.	RD272-67368
12/02/88	Vic Meline Company	RF308-5
12/05/88	Ag Company, Inc. ET AL.	RF225-11053
12/05/88	Ag Company, Inc. ET AL.	RF225-11091
12/05/88	Walsh Propane, Inc.	RF308-6
11/25/88 thru 12/02/88	Exxon Refund Applications Received	RF307-6883 thru RF307-6973
11/25/88 thru 12/02/88	Crude Oil Refund Applications Received	RF272-75132 thru RF272-75139
11/25/88 thru 12/02/88	Atlantic Richfield Refund Applications Received	RF304-7350 thru RF304-7404
11/25/88 thru 12/02/88	Murphy Oil Refund Applications Received	RF309-603 thru RF309-624

[FR Doc. 88-30003 Filed 12-28-88; 8:45 am]

BILLING CODE 6450-01-M

Western Area Power Administration  
Loveland Area Projects; Pick-Sloan  
Missouri Basin Program—Western  
Division and Fryingpan-Arkansas  
Project; Proposed Initial Blended Rate**AGENCY:** Western Area Power Administration, DOE.**ACTION:** Notice of proposed initial rate, Loveland Area Projects (LAP)—Pick-Sloan Missouri Basin Program—Western Division (P-SMBP-WD) and Fryingpan-Arkansas Project (Fry-Ark).**SUMMARY:** The final "Post 1989 General Power Marketing and Allocation Criteria; Pick-Sloan Missouri Basin Program—Western Division and Fryingpan-Arkansas Project" (Criteria) were published in the *Federal Register* on January 31, 1986 (51 FR 4024). The Criteria operationally and contractually integrated the resources of the P-SMBP-WD and Fry-Ark, which is referred to as the LAP, and called for the establishment of a blended rate for the LAP firm power sales.

To establish the LAP firm power rate, the Western Area Power Administration's (Western) Loveland Area Office (LAO) developed the revenue requirements for the LAP from separate fiscal year 1987 power repayment studies for the Pick-Sloan Missouri Basin Program and the Fry-Ark. To meet the LAP revenue requirements, the proposed initial rate for firm power is \$2.26 kW-month and 5.5 mills/kWh. This rate is to become effective on an interim basis on the first day of the October 1989 billing period.

At the present time, the LAO is performing a study relating to transmission service on the LAP system. Because of the ongoing nature of this study, the LAO will not change the existing transmission service rate at this time.

**FURTHER INFORMATION:** A brochure explaining the background for the LAP firm power rate and the power rate design will be distributed to all LAP customers and other interested parties. Public information and public comment forums will be held in accordance with procedures for public participation in general rate adjustments (10 CFR Part 903). Following completion of the consultation and comment period and review of public comments, Western will develop the proposed rate and submit it to the Deputy Secretary to be placed in effect on an interim basis pending final approval by the Federal Energy Regulatory Commission.

Data, studies, reports, and other documents used in the development of the proposed initial LAP rate are available for inspection and/or duplication in Western's LAO. Written comments and requests for information may also be submitted to the following address throughout the entire consultation and comment period: Mr. Stephen A. Fausett, Area Manager, Loveland Area Office, Western Area Power Administration, P.O. Box 3700, Loveland, CO 80539.

**DATES:** The consultation and comment period will begin on the date of publication of this notice and will end on April 11, 1989.

The public information forum, during which Western will explain the need for the development of the initial blended rate and answer questions, will be held on January 31, 1989, at 9:30 a.m. at the Holiday Inn, Northglenn, Colorado.

The public comment forum will be held on March 7, 1989, at 9:30 a.m. at the Holiday Inn, Northglenn, Colorado.

Persons planning to speak at the public comment forum are requested to send their name and organization to the address noted above so that they are received by February 28, 1989. Other persons may also be allowed to comment as time permits.

**SUPPLEMENTAL INFORMATION:** The power rate for the LAP will be established pursuant to the Department of Energy Organization Act, 42 U.S.C. 7101, *et seq.*; the Reclamation Act, 43 U.S.C. 372, *et seq.*, as amended and supplemented by subsequent enactments, particularly section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485(c); section 9 of the Flood Control Act of 1944, 58 Stat. 887; and the other acts specifically applicable to the project system involved.

By Delegation Order No. 0204-108, published on December 14, 1983 (48 FR 55664, December 14, 1983), the Secretary of Energy delegated to the Administrator, on a nonexclusive basis, the authority to develop power and transmission rates, and delegated to the Deputy Secretary, on a nonexclusive basis, the authority to confirm, approve, and place in effect on an interim basis power and transmission rates. The delegation order was amended on May 30, 1986 (51 FR 19744), to delegate the above authority to the Under Secretary rather than to the Deputy Secretary of the Department of Energy (DOE). This authority was subsequently reassigned to the Deputy Secretary by DOE Notice 1110.29 dated October 27, 1988. Existing



DOE procedures for public participation in power and transmission rate adjustments (10 CFR 903) became effective on September 18, 1985 (50 FR 37835, September 18, 1985). Power rate adjustments for the LAP are conducted consistent with 10 CFR Part 903.

**ENVIRONMENTAL COMPLIANCE:** In compliance with the National Environmental Policy Act of 1969 (NEPA), Council on Environmental Quality Regulation (40 CFR Parts 1500 through 1508), and DOE guidelines published in the Federal Register on December 15, 1987 (52 FR 47662), Western is conducting an environmental evaluation on the establishment of the proposed initial rate.

**REGULATORY FLEXIBILITY ANALYSIS:** Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 601, *et seq.*, each agency, when required by 5 U.S.C. 553 to publish a proposed rule, is further required to prepare and make available for public comment an initial regulatory flexibility analysis to describe the impact of the proposed rule on small entities. In this instance the initial rate for LAP relates to nonregulatory services provided by Western at a particular rate. Under 5 U.S.C. 601(2), rates or services of particular applicability are not considered "rules" within the meaning of this Act. Since the rate for LAP power is of limited applicability and is being set in accordance with specific regulations and legislation under particular circumstances, Western believes that no flexibility analysis is required.

#### Paperwork Reduction Act of 1980

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 through 3520, requires that certain information collection requirements be approved by the Office of Management and Budget (OMB) before information is demanded of the public. OMB has issued a final rule on Paperwork Burdens on the Public (48 FR 13666) dated March 31, 1983. Ample opportunity is provided pursuant to this Federal Register notice for the interested public to participate in the development of the LAP rate. There is no requirement that members of the public participating in the development of the LAP rate supply information about themselves to the Government. It follows that the LAP rates are exempt from the Paperwork Reduction Act.

#### Determination Under Executive Order 12291

The DOE has determined that this is not a major rule because it does not meet the criteria of section 1(b) of Executive Order 12291, 46 FR 13193

(February 19, 1981). Western has an exemption from sections 3, 4, and 7 of Executive Order 12291.

Issued at Golden, Colorado, December 19, 1988.

William H. Clagett,  
Administrator.

[FR Doc. 88-30002 Filed 12-28-88; 8:45 am]

BILLING CODE 6450-01-M

#### ENVIRONMENTAL PROTECTION AGENCY

[FRL-3499-1]

#### Agency Information Collection Activities Under OMB Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

**FOR FURTHER INFORMATION CONTACT:** Sandy Farmer at EPA (202-382-2740).

#### SUPPLEMENTARY INFORMATION:

##### Office of Pesticides and Toxic Substances

**Title:** Recordkeeping Requirements for Producers of Pesticides (EPA ICR #0143). This is a previously approved collection.

**Abstract:** This collection requires producers of pesticides to maintain records related to production and other operations. EPA may inspect these records to determine compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Producers themselves may use the records to fulfill various FIFRA-mandated reporting requirements.

**Burden Statement:** The estimated public recordkeeping burden for this collection of information is 2 hours per pesticide producer.

**Respondents:** Pesticide producers  
**Estimated No. of Respondents:** 13,918  
**Estimated Total Annual Burden on Respondents:** 27,836

To obtain a copy of the ICR package contact Sandy Farmer on (202) 382-2740. Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223), 401 M Street, SW., Washington, DC 20460 and

Tim Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503, (Telephone (202) 395-3084).

Date: December 20, 1988.

Paul Lapsley,  
Information and Regulatory Systems Division.

[FR Doc. 88-29964 Filed 12-28-88; 8:45 am]

BILLING CODE 6550-50-M

[FRL-3498-9]

#### Agency Information Collection Activities Under OMB Review

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Requests (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describe the nature of the information collection and their expected cost and burden; where appropriate, they include the actual data collection instrument.

**FOR FURTHER INFORMATION CONTACT:** Sandy Farmer at EPA, (202 382-2740).

#### SUPPLEMENTARY INFORMATION:

##### Office of Solid Waste and Emergency Response

**Title:** Reports for States to Make SARA Capacity Assurances (EPA ICR # 1343). This is a new collection.

**Abstract:** States will provide data and program information biennially to assure EPA that they have (1) an adequate understanding of their current hazardous waste treatment and disposal system, and future capacity needs, and (2) realistic plans for meeting long term needs. EPA will use information to evaluate adequacy of SARA 104(k) assurances.

**Burden Statement:** The estimated average public reporting and recordkeeping burden for this collection of information is 3000 hours per respondent biennially. This estimate includes all aspects of the information collection, including time for reviewing instructions, gathering and maintaining the data needed, and submitting the capacity assurance materials.

**Respondents:** States and territories  
**Estimated No. of Respondents:** 56  
**Estimated Total Annual Burden on Respondents:** 168,000

**Frequency of Collection:** Biennially

#### Office of Solid Waste and Emergency Response

**Title:** National Survey of Solid Waste from Mineral Processing Facilities (EPA ICR #1349). This is a new collection.

**Abstract:** EPA seeks approval from OMB to collect from approximately 180 mineral processing facilities additional information that the Agency needs to respond to the study factors identified in RCRA 8002(p), which requires EPA to prepare and submit a Report to Congress on mineral processing wastes.

**Burden Statement:** EPA estimates that the public reporting burden for this collection of information will range between 40 and 80 hours per respondent. This estimate includes all aspects of the information collection, including time for reviewing instructions, gathering the data, and completing and reviewing the questionnaire.

**Dates:** EPA is requesting that OMB expedite their review of this survey and provide an approval decision by January 31, 1989. Therefore, all comments are due to OMB by January 27, 1989.

**Respondents:** Owners and Operators of Mineral Processing Facilities  
**Estimated No. of Respondents:** 180  
**Estimated Total Annual Burden on Respondents:** 10,800

**Frequency of Collection:** Once

#### Office of Solid Waste and Emergency Response

**Title:** Uniform Hazardous Waste Manifest (EPA ICR # 0801; OMB # 2050-0039). This is a request to use the previously approved form.

**Abstract:** EPA is requesting OMB approval to use existing manifest forms that display the expiration date of September 30, 1988, until June 30, 1989. The regulated community needs the additional time to revise the manifest form to comply with OMB's regulations requiring a burden box statement.

After June 30, 1989, the following burden disclosure statement must be included with the manifest form:

Public reporting burden for this collection of information is estimated to average: 37 minutes for generators, 15 minutes for transporters, and 10 minutes for treatment, storage and disposal facilities. This includes time for reviewing instructions, gathering data, and completing and reviewing the form. Send comments regarding the burden estimate, including suggestions for reducing this burden to: Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street, SW.,

Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

This statement can be included with the form in any of three ways to comply with OMB's requirement:

1. The statement can be printed directly on the face of the form.
2. The statement can be printed on the back of the form, either in the instructions, with other material, or by itself.

3. The statement can be printed on a separate detachable sheet.

In addition, after June 30, 1989, "old" manifest forms, that have a September 30, 1988 expiration date, may be used if: (1) The new date of September 30, 1991, is overprinted on the form, and (2) the burden disclosure statement is included as discussed previously.

**Burden Statement:** The estimated average reporting and recordkeeping burden for this notice is zero, since this is only extending the use of the previously approved form.

**Respondents:** Generators, Transporters and Handlers of Hazardous Waste

**Estimated No. of Respondents:** 149,360  
**Estimated Total Annual Burden on Respondents:** 0

**Frequency of Collection:** As needed

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223), 401 M Street, SW., Washington, DC 20460 and

Tim Hunt (ICR # 0559) and Marcus Peacock (ICR #s 0801, 1343, and 1349), Office of Management and Budget, Office of Information and Regulatory Affairs, 726 Jackson Place, NW., Washington, DC 20503, (Telephone (202) 395-3084).

#### OMB Responses to Agency PRA Clearance Requests

EPA ICR # 0370.08; Underground Injection Control Program Information; OMB # 2040-00421; was approved 11/30/88; expires 9/30/91.

EPA ICR # 0270.11; Public Water System Program Information; OMB # 2040-0090; was approved 11/29/88; expires 9/30/90.

EPA ICR # 1355; Underground Storage Tanks—State Program Application; OMB # 2050-0067; was approved 11/28/88; expires 10/31/91.

EPA ICR # 1360; Underground Storage Tanks—Technical Reporting and Recordkeeping; OMB # 2050-0068; was approved 11/28/88; expires 10/31/91.

EPA ICR # 1063; NSPS For Sewage Treatment Plant Incineration—Reporting and Recordkeeping Requirements; OMB

# 2060-0035; was approved 11/28/88; expires 11/30/91.

EPA ICR # 1325; TSCA Section 8(A) Comprehensive Assessment Information Rule (CAIR); OMB # 2010-0019; was approved 12/5/88; expires 12/31/89.

EPA ICR # 1426; Worker Protection Standards Pursuant to Section 125(F) of the Superfund Amendments and Reauthorization Act; was disapproved 11/28/88.

Date: December 20, 1988.

Paul Lapsley,  
Information and Regulatory Systems Division.

[FR Doc. 88-29965 Filed 12-28-88; 8:45 am]

BILLING CODE 6560-50-P

[FRL-3499-2]

#### Assurance of Hazardous Waste Capacity, Guidance to State Officials

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of availability of guidance.

**SUMMARY:** This document supplies guidance to state officials on providing assurances required by section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA" or "Superfund"). This section of CERCLA requires states in which remedial actions may be taken to provide assurances, prior to EPA taking or funding such actions, of the availability of hazardous waste treatment or disposal facilities which have adequate capacity to manage the hazardous wastes expected to be generated within the states over twenty years. These assurances must be provided in a contract or cooperative agreement entered into between the state and the Administrator. After October 17, 1989, no Superfund remedial actions can be provided unless the state first enters into such a contract or cooperative agreement providing assurances that the Administrator deems adequate.

This guidance document reflects EPA's current understanding of the statutory requirements and describes how EPA currently suggests that states implement these requirements. In addition, the guidance provides substantial information to states, including suggested language for the contracts and cooperative agreements to be signed, instructions on the preparation state Capacity Assurances Plans (CAPs) that can form a basis for the assurances, and a model for the interstate agreements or regional



agreement or authority required when addressing access to capacity in other states.

**ADDRESS:** For copies of the Document, contact the Cross-Media Analysis staff, Mail Code OS-110, Office of Solid Waste and Emergency Response, Cross-Media Analysis Staff, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, (Phone #: 202-475-9829).

**FOR FURTHER INFORMATION CONTACT:** T. Michael Taiml, Director, Cross-Media Analysis Staff at (202) 475-9829.

J. Winston Porter, Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 88-29963 Filed 12-28-88; 8:45 am]

BILLING CODE 6560-50-M

## FEDERAL COMMUNICATIONS COMMISSION

### Advisory Committee on Advanced Television Service; Steering Committee Meeting

The fifth meeting of the Systems Subcommittee of the Advisory Committee on Advanced Television Service will be held at 9:00 a.m. on February 9, 1989, in Room 856 at the FCC's offices at 1919 M Street, NW., in Washington, DC.

The agenda for the meeting will consist of:

1. Introductory Remarks—Irwin Dorros.
- Review of Systems Subcommittee charter, organization and operating procedures
- Description of work flow and general inputs from the Planning Subcommittee
2. Report by Working Part 1 (Systems Analysis)—Birney Dayton.
- Charter and organization
- Review of November "marathon" session
- Schedule of activities
3. Report by Working Part 2 (System Evaluation and Testing)—Ben Crutchfield.
- Charter and organization
- Status of the overall test plan
- Discussion of inputs from the Planning Subcommittee
- Discussion of availability of ATV testing facilities
- Schedule of activities
4. Report by Working Part 3 (Economic Assessment)—Larry Thorpe.
- Charter and organization

- Work plan/status
- Schedule of activities
- 5. Report by Working Part 4 (System Standard)—Robert Hopkins.

- Charter and organization

- Work plan/status

- Schedule of activities

- 6. Discussion of Second Interim Report

- 7. Subcommittee meeting schedule

- 8. Open discussion

All interested parties are invited to attend. Those interested may also submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Committee Chairman.

Any questions regarding this meeting should be directed to Bruce Franca at (202) 632-7060.

Federal Communications Commission  
William F. Caton.

Acting Secretary.

[FR Doc. 88-29875 Filed 12-28-88; 8:45 am]

BILLING CODE 6712-01-M

### Applications For Consolidated Proceeding; Broadcast Facilities Corp. et al.

1. The Commission has before it the following mutually exclusive applications for a new FM station:

#### I

Applicant, city, and State	File No.	MM Docket No.
A. Broadcast Facilities Corp., Frankfort, NY.	BPH-851204MD	88-547
B. Frank E. Penny & Dean Aubol, Frankfort, NY.	BPH-851205MF	
C. Frankfort Associates, Frankfort, NY.	BPH-851205MG	
D. WTMK Broadcasting Corp., Frankfort, NY.	BPH-851205MI	
E. Edward F. & Pamela J. Levine, Joint Tenants, Frankfort, NY.	BPH-851205MJ	

#### Issue Heading and Applicants

1. Environmental D
2. Air Hazard, C, E
3. Comparative, A, B, C, D, E
4. Ultimate, A, B, C, D, E

#### II

Applicant, city, State	File No.	MM Docket No.
A. West Mechenburg Broadcasting, Chase City VA	BPH-880107MS	88-546
B. Patricia B. Wagstaff, Chase City VA	BPH-880107NH	

#### Issue Heading and Applicants

1. Air Hazard, B
2. Comparative, A, B
3. Ultimate, A, B

#### III

Applicant, city, State	File No.	MM Docket No.
A. Winton Broadcasting Co., Winton, Ca.	BPH-880126ND	88-553
B. TGR Broadcasting, inc., Winton, Ca.	BPH-880126NJ	

#### Issue Heading and Applicants

1. Air Hazard, A & B
2. Comparative, All Applicants
3. Ultimate, All Applicants

#### IV

Applicant, city, State	File No.	MM Docket No.
A. Blountville Education Association, Inc., Blountville, Tn.	BPED-840404IA	88-564
B. Family Stations, Inc., Bristol, Tn.	BPED-840629IK	

#### Issue Heading and Applicants

1. Air Hazard, A, B
2. 307(b)-Noncommercial Educational, A, B
3. Contingent Comparative-Noncommercial Educational FM, A, B
4. Ultimate, A, B

2. Pursuant to section 309(e) of the Communications Act of 1934, as amended, the above applications have been designated for hearing in a consolidated proceeding upon the issues whose headings are set forth below. The text of each of these issues has been standardized and is set forth in its entirety under the corresponding headings at 51 FR 19347, May 29, 1986. The letter shown before each applicant's name, above, is used below to signify whether the issue in question applies to that particular applicant.

3. If there is any non-standardized issue in this proceeding, the full text of the issue and the applicants to which it applies are set forth in an Appendix to this Notice. A copy of the complete HDO in this proceeding is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington DC. The complete text may also be purchased from the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, NW., Washington, DC 20037. (Telephone (202) 857-3800).

W. Jan Gay, Assistant Chief,  
Audio Services Division, Mass Media Bureau.  
[FRM Doc. 88-29865 Filed 12-28-88; 8:45 am]  
BILLING CODE 6712-01-M

## FEDERAL HOME LOAN BANK BOARD

[No. AC-758]

### First Federal Savings and Loan Association of Elgin, Elgin, Illinois; Final Action Approval of Conversion and Holding Company Applications

Date: December 16, 1988.

Notice is hereby given that on December 9, 1988, the General Counsel, and the Executive Director of the Office of Regulatory Activities (or their respective designees), acting pursuant to delegated authority, approved the application of First Federal Savings and Loan Association of Elgin, Elgin, Illinois, (the "Association") for permission to convert to the stock form of organization pursuant to a voluntary supervisory conversion, and the application of University Financial Corporation, Chicago, Illinois to acquire control of the Association.

By the Federal Home Loan Bank Board.

John F. Ghizzoni,

Assistant Secretary.

[FR Doc. 88-29979 Filed 12-28-88; 8:45 am]

BILLING CODE 6720-01-M

## FEDERAL MARITIME COMMISSION

### Second Report on Tariff Automation Inquiry

December 23, 1988.

The original Notice of Inquiry on Tariff Automation was published in the *Federal Register* on December 22, 1987 (52 FR 48504). Written comments in response to the notice were received and the Commission's "Report on Tariff Automation Inquiry" was published in the *Federal Register* on April 20, 1988 (53 FR 13066).

On June 13, 1988 (53 FR 22048), a further notice was published, entitled: "Inquiry on Tariff Automation; Delay in Issuance of Request for Proposals." In this most recent notice, the Commission indicated that it would reassess the proposed ATFI system and issue a Request for Proposals (RFP) later than originally scheduled. The Commission explained:

Issues raised by the House Subcommittee on Information, Justice, and Agriculture (Subcommittee) and by the Office of Management and Budget (OMB) have prompted the delay.

The concerns expressed by the Subcommittee and OMB center on the 'remote retrieval' feature in the proposed system. This feature would allow the shipping public to dial for access to an individual tariff of a carrier or conference and would give access to one tariff at a time. However, it would not provide for sophisticated searches.

Questions concerning the 'remote retrieval' feature are based on perceptions that the Commission would compete with existing or intended value-added services offered by private sector firms. The Commission, however, does not intend to provide these value-added services.

Since June, 1988, the Commission has been reassessing the functionality of the ATFI system, especially in the area of remote retrieval. This process has involved a dialogue with officials from Congress and the Executive branch.

During the same period, technical revisions were made to the RFP to reflect new funding exigencies and legal requirements. In October, 1988, the Commission issued a second draft RFP for comment to some 200 potential offerors on the technical revisions made. However, the Commission remained concerned about the questions on remote retrieval and stated in the letter transmitting the second draft RFP:

The remote retrieval issue has not been finally decided. Accordingly, this draft RFP is issued with the remote retrieval question still open. That issue will be decided in the final RFP.

The letter of transmittal further cautioned potential bidders that the original RFP language providing for "remote retrieval" could be substantially changed in the final RFP to be issued in January, 1989.

The Commission intends to issue the final RFP as scheduled and is herein resolving the remote retrieval issue for inclusion in the RFP. The Commission understands that meaningful proposals in response to the RFP cannot be submitted with this critical issue left unanswered.

After much analysis and reconsideration, the Commission has

decided to retain the functionality of its proposed Automated Tariff Filing and information System ("ATFI") as currently described in the second draft RFP. It will, accordingly, be repeated in the final RFP. This will include access functions which have been commonly referred to as "remote retrieval" or "dial-up access." The Commission recognizes, however, that these terms do not begin to accurately describe the functions as set forth in the RFP specifications and believes that the issue thus far may have been obscured by the use of such technological catchwords. The specifications should, therefore, be carefully read for a full understanding. See especially Attachment J-1 to the RFP.

The controlling question is: In designing the functionality of its ATFI system, has the Commission properly considered and balanced competing interests, such as (1) the system's utility to shippers, carriers and other members of the shipping public, and (2) the future role of private-sector information services? The Commission believes it has.

In October, 1986, a year before the Commission heard of any complaints about "remote retrieval," its private-sector contractor issued "A Comprehensive Study of the Feasibility of an Automated Tariff System." This report accurately describes the proposed functionality of the ATFI system in terms sufficiently precise for private-sector firms to fully understand for the purpose of submitting proposals. This public report was considered and discussed by the Commission's Industry Advisory Committee at the time and there were no objections to "remote retrieval." Most of the functionality language of this report is adopted in attachment J-1 of the present RFP.

More importantly, with the approval of the Commission and the Advisory Committee, the Feasibility Study Report suboptimized ATFI's public retrieval functions as an accommodation to private-sector information firms:

FMC does not want to compete with third-party services for the provision of sophisticated retrieval and analysis of tariff data for shippers, carriers, and others in the private market. Page IV-8.

Accordingly, the self-imposed restrictions would allow the general public to perform only "relatively rudimentary" retrievals of tariffs, and essentially no analysis of the data.

In consideration of the statutory duties of the Commission and the available technology required for it to properly perform these functions, the



1986 accommodation appeared reasonable. It still does.

The shipping public should also benefit from this modern technology by being allowed to obtain basic, raw tariff data on a limited basis. For more sophisticated services, the utilization of third-party vendors, both for filing and retrieval, is continued to be encouraged. An efficient tariff filing and retrieval network will promote fair competition and facilitate trade.

Accordingly and after further analysis, the Commission believes that it has sufficiently considered all policies and conflicting interests involved in the proposed system and has struck a proper balance in retaining the functionality of ATF1 as originally devised in the Feasibility Study, and as further refined in the RFP. The final RFP will be issued in early January, 1989.

By the Commission,  
Tony P. Kominoth,  
Assistant Secretary.  
[FR Doc. 89-29930 Filed 12-28-88; 8:45 am]  
BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

### Board of Governors of the Federal Reserve System

#### Agency Forms Under Review

December 22, 1988.

#### Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1980, as per 5 CFR 1320.9, "to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320.9." Board-approved collection of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the SF 83 and supporting statement and the approved collection of information instrument(s) will be placed into OMB's public docket files. The following report, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be

submitted to the Board for final approval under OMB delegated authority.

**DATE:** Comments must be received on or before January 13, 1989.

**ADDRESS:** Comments, which should refer to the OMB Docket number should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or delivered to room B-2223 between 8:45 a.m. and 5:15 p.m. Comments received may be inspected in room B-1122 between 8:45 and 5:15 p.m. except as provided in § 261(a) of the Board's Rules Regarding Availability of Information, 12 CFR 261.6(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** A copy of the request for clearance (SF 83), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below. Federal Reserve Board Clearance Officer—Fred Schroeder—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3822).

*Proposal to approve under OMB delegated authority the extension, without revision, of the following report:*

**Report title:** Report of Claims on Selected Foreign Countries by U.S. Branches and Agencies of Foreign Banks.

**Agency form number:** FR 2028B.

**OMB Docket number:** 7100-0064.

**Frequency:** Semiannually.

**Reporters:** U.S. branches and agencies of foreign banks.

**Annual reporting hours:** 330.

**Estimated average hours per response:** 3.

**Estimated number of respondents:** 55.

**Small businesses are not affected.**

**General description of report:**

This information collection is voluntary (12 U.S.C. 3105(b)) and is given confidential treatment (5 U.S.C. 552(b)(4)).

U.S. branches and agencies of foreign banks report their claims on foreign countries semiannually. The Federal

Reserve System provides the data to the Bank for International Settlements for the semi-annual survey of the maturity of bank lending.

Board of Governors of the Federal Reserve System, December 22, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-29881 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### Agency Forms Under Review

December 22, 1988.

#### Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1980, as per 5 CFR 1320.9, "to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320.9." Board-approved collection of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the SF 83 and supporting statement and the approved collection of information instrument(s) will be placed into OMB's public docket files. The following report, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority.

**DATE:** Comments must be received on or before January 13, 1989.

**ADDRESS:** Comments, which should refer to the OMB Docket number should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or delivered to room B-2223 between 8:45 a.m. and 5:15 p.m. Comments received may be inspected in room B-1122 between 8:45 a.m. and 5:15 p.m. except as provided in § 261(a) of the Board's Rules Regarding Availability of Information, 12 CFR 261.6(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New

Executive Office Building, Room 3208, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** A copy of the request for clearance (SF 83), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below. Federal Reserve Board Clearance Officer—Fred Schroeder—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3822).

*Proposal to approve under OMB delegated authority a revision to the following report:*

**Report title:** Domestic Finance Company Report of Consolidated Assets and Liabilities.

**Agency form number:** FR 2248.

**OMB Docket number:** 7100-0005.

**Frequency:** Monthly.

**Reporters:** Domestic finance companies.

**Annual reporting hours:** 2,045.

**Estimated average hours per response:** 1.1 hours, except 1.4 hours in March, June, September, and December.

**Estimated number of respondents:** 142.

**Small businesses are affected.**

**General description of report:**

This information collection is voluntary (12 U.S.C. 225(a)) and is given confidential treatment (5 U.S.C. 552(b)(4)).

This report collects information on major categories of consumer and business credit extended by domestic finance companies and on major short-term liabilities outstanding. The key revision is the addition of five supplemental items that seek data on securitized financing receivables. Specifically the new items request the outstanding balances of installment credit extended by the finance company that have been packaged and sold and included as collateral for an asset-backed security. The data on the report are used by the Federal Reserve for assessing aggregate credit market activity.

Board of Governors of the Federal Reserve System, December 22, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-29882 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### Agency Forms Under Review

December 23, 1988.

#### Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1980, as per 5 CFR 1320.9, "to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320.9." Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the SF 83 and supporting statement and the approved collection of information instrument(s) will be placed into OMB's public docket files. The following forms, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority.

**DATE:** Comments must be received on or before January 30, 1989.

**ADDRESS:** Comments, which should refer to the Agency form number, should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or delivered to room B-2223 between 8:45 a.m. and 5:15 p.m. Comments received may be inspected in room B-1122 between 8:45 a.m. and 5:15 p.m., except as provided in § 261.6(a) of the Board's Rules Regarding Availability of Information, 12 CFR 261.6(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** A copy of the proposed form, the request for clearance (SF 83), supporting statement, instructions, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below. Federal Reserve Board

Clearance Officer—Martha Bethea, Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202-452-3181).

#### Proposal To Implement Under OMB Delegated Authority the Following Report

1. **Report title:** Report of Foreign (Non-U.S.) Currency Deposits.  
**Agency form number:** FR 2915.  
**OMB Docket Number:** 7100-0237.  
**Frequency:** Monthly or quarterly.  
**Reporters:** Depository institutions.  
**Annual reporting hours:** 600.  
**Number of Respondents:** 100.  
**Average Hours per Response:** 5.  
**Small businesses are not affected.**  
**General description of report:**

The Board of Governors of the Federal Reserve System has decided, in response to an inquiry forwarded to it by the Federal Reserve Bank of Chicago, not to object to issuance of foreign currency deposits at depository institutions in the United States after December 31, 1988. The Board does not expect such deposits to increase rapidly, or ultimately to accumulate to a large amount, given the existing availability of effectively similar instruments. However, to the extent that depository institutions issue foreign currency deposits, a procedure for converting the value of such deposits into dollars for reporting purposes and some limited additional reporting are necessary. The proposed new reporting form will enable the Federal Reserve to exclude foreign currency deposits from measures of the monetary aggregates.

This report is authorized by Federal law (12 U.S.C. 248(a)). Data reported will be given confidential treatment (5 U.S.C. 552(b)(4)).

Board of Governors of the Federal Reserve System, December 23, 1988.

William W. Wiles,

Secretary of the Board.

[FR Doc. 88-29876 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### Change in Bank Control; Acquisitions of Shares of Banks or Bank Holding Companies; Gerald E. Gunderson, et al.

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are



set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 12, 1989.

**A. Federal Reserve Bank of Kansas City** (Thomas M. Hoening, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Gerald E. Gunderson*, Doug Johnson, Rodney E. Banks, Richard L. Tollefson, LaVon Johnson, Gene Johnson, Adrian H. Frevert, Charles R. Carlson, Swanson Brothers (Partnership) Ronald, Jerry & Dennis, principals, Harold V. Johnson, Marian Carlson, Dwain Kumm, Elwin F. Banks, and Lowell C. Erickson, Russell Johnson, all of Wausa, Nebraska; Mark J. Behm, Hartington, Nebraska, Robert H. and Randal Meyer, Randolph, Nebraska, and Lowell Koehn, Osmond, Nebraska; to acquire an additional 61.94 percent of the voting shares of Wausa Bancshares, Inc., Wausa, Nebraska, and thereby indirectly acquire Commercial State Bank, Wausa, Nebraska.

2. *Garold, Brenda, Jenifer and Allison Pryor*, all of Denver, Colorado; to acquire 50.3 percent of the voting shares of First Investco, Inc., and thereby indirectly acquire The First State Bank of Wiggins, Wiggins Colorado.

3. *Jack R. Yoakum*, Locust Grove, Oklahoma; to acquire an additional 41.53 percent of the voting shares of Locust Grove Bancshares, Inc., Locust Grove, Oklahoma, and thereby indirectly acquire Bank of Commerce, Chouteau, Oklahoma, and Bank of Locust Grove, Locust Grove, Oklahoma.

**B. Federal Reserve Bank of Chicago**. (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *George and Ruth Pingrey*; to acquire 62 percent of the voting shares of Aurelia FT & S Bankshares, Inc., Aurelia, Iowa, and thereby indirectly acquire First Trust & Savings Bank, Aurelia, Iowa.

**C. Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. *William W. and Joan T. Becker*, Kingman, Arizona; to acquire an additional 1.75 percent of the voting shares of The Stockmen's Bancorp, Kingman, Arizona, and thereby

indirectly acquire The Stockmen's Bank, Kingman, Arizona.

2. *Antonio Grimaldo*, Cottonwood, Arizona; to acquire 22.4 percent of the voting shares of Verde Valley Bancorp, Cottonwood, Arizona.

Board of Governors of the Federal Reserve System, December 22, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-29859 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### **Brunswick Bancorp et al; Applications To Engage de Novo in Permissible Nonbanking Activities; Correction**

This notice corrects a previous Federal Register notice (FR Doc. 88-28437) published at page 49924 of the issue for Monday, December 12, 1988.

Under the Federal Reserve Bank of Philadelphia, the entry for Keystone Financial, Inc. is amended to read as follows:

1. *Keystone Financial, Inc.*, Harrisburg, Pennsylvania; to engage de novo through its subsidiary, Keystone Brokerage, Inc., Williamsport, Pennsylvania, in the provision of brokerage services restricted to buying and selling securities solely as agent for the account of customers and the purchase and redemption of shares of mutual funds and unit investment trusts as agent for the account of customers pursuant to § 225.25(b)(15) of the Board's Regulation Y. These activities will be conducted in the states of Pennsylvania, Virginia, New York and Florida.

Comments on this application must be received by January 12, 1989.

Board of Governors of the Federal Reserve System, December 22, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-29878 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### **National Bank of Canada et al; Applications To Engage de novo in Permissible Nonbanking Activities**

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage de novo, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise

noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 20, 1989.

**A. Federal Reserve Bank of New York** (William L. Rutledge, Vice President) 33 Liberty Street, New York, New York 10045:

1. *National Bank of Canada*, Montreal, Canada; to engage de novo through its subsidiary, National Canada Corporation, Chicago, Illinois, in real estate lending and general corporate lending pursuant to § 225.25(b)(1) of the Board's Regulation Y. Comments on this application must be received by January 11, 1989.

**B. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *Waskom Bancshares, Inc.*, Waskom, Texas; to engage de novo in providing accident health and life insurance that is directly related to the extension of credit by an institution within the bank holding company organization pursuant to § 225.25(b)(8) of the Board's Regulation Y. These activities will be conducted in the State of Texas.

Board of Governors of the Federal Reserve System, December 22, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-29860 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### **The National Bancorp of Kentucky, et al., Formations of; Acquisitions by; and Mergers of Bank Holding Companies**

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 19, 1989.

**A. Federal Reserve Bank of Cleveland** (John J. Wixted, Jr., Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. *The National Bancorp of Kentucky*, Lexington, Kentucky; to acquire 100 percent of the voting shares of National Bank & Trust Company of Paris, Paris, Kentucky.

**B. Federal Reserve Bank of Chicago** (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *O.A.K. Financial Corporation*, Byron Center, Michigan; to become a bank holding company by acquiring 100 percent of the voting shares of Byron Center State Bank, Byron Center, Michigan. Comments on this application must be received by January 16, 1989.

2. *Tompkins Bancorp, Inc.*, Avon, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of Tompkins State Bank, Avon, Illinois.

3. *Veedersburg Bank Corporation*, Veedersburg, Indiana; to become a bank holding company by acquiring 100 percent of the voting shares of The Veedersburg State Bank, Veedersburg, Indiana. Comments on this application must be received by January 13, 1989.

**C. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Union Planters Corporation*, Memphis, Tennessee; to acquire 100 percent of the voting shares of Cumberland City Bank, Cumberland City, Tennessee. Comments on this application must be received by January 16, 1989.

**D. Federal Reserve Bank of Minneapolis** (James M. Lyon, Vice President) 250 Marquette Avenue, Minneapolis, Minnesota 55480:

1. *Lakeland Bancshares, Inc.*, Lyle, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Lyle, Lyle, Minnesota, a de novo bank.

**E. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 400 South Akard Street, Dallas, Texas 75222:

1. *Miami Bancshares, Inc.*, Miami, Texas; to become a bank holding company by acquiring 100 percent of the voting shares of First State Bank of Miami, Miami, Texas.

Board of Governors of the Federal Reserve System, December 22, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-29861 Filed 12-28-88; 8:45 am]

BILLING CODE 6210-01-M

#### **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

##### **Centers for Disease Control**

##### **National Institute for Occupational Safety and Health, Board of Scientific Counselors; Meeting**

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control (CDC) announces the following National Institute for Occupational Safety and Health (NIOSH) committee meeting:

**Name:** Board of Scientific Counselors (BSC).

**Date:** January 19-20, 1989.

**Place:** Auditorium B, Centers for Disease Control, 1600 Clifton Road, NE., Atlanta, Georgia 30333.

**Time and Type of Meeting:** Closed—8:30 a.m.—12 noon, January 19; Open—12 noon—5 p.m., January 19; Open—8:30 a.m.—11 a.m., January 20; Closed—11 a.m.—12 noon, January 20.

**Contact Person:** Roy M. Fleming, Sc.D., Executive Secretary, BSC, NIOSH, CDC, 1600 Clifton Road, NE., Atlanta, Georgia 30333, Telephone: Commercial: (404) 639-3343, FTS: 236-3343.

**Purpose:** The Board is charged with advising the Director of NIOSH on the

scientific quality and efficacy of the Institute's research.

**Agenda:** Agenda items for the meeting will include announcements, consideration of minutes of the previous meeting, a report from the Director of NIOSH, a discussion of activities related to notification of individual workers associated with cohort studies, a discussion of surveillance programs, a presentation on the Health Hazard Evaluation program, a discussion of strategic research needs, and plans for future site visits of NIOSH research divisions. Beginning at 8:30 a.m. through 12 noon, January 19, and from 11 a.m. through 12 noon, January 20, the Board will discuss certain matters the public disclosure of which would constitute a violation of sections 552b(c)(8) and/or 552b(c)(9)(B) of Title 5, US Code, related to personal privacy. Therefore, pursuant to said provisions and the determination of the Director, CDC, these portions of the meeting will not be open to the public.

Agenda items are subject to change as priorities dictate.

The portions of the meeting so indicated are open to the public for observation and participation. Anyone wishing to make an oral presentation should notify the contact person listed above as soon as possible before the meeting. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the presentation. Oral presentations will be scheduled at the discretion of the Chairperson and as time permits.

A roster of members and other relevant information regarding the meeting may be obtained from the contact person listed above.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control.

[FR Doc. 88-29918 Filed 12-28-88; 8:45 am]

BILLING CODE 4160-19-M

##### **Food and Drug Administration**

[Docket Nos. 87A-0098, 88A-0120, and 88A-02113]

**Request for Exemption From Federal Preemption of State and Local Medical Device Requirements; Hearing Aid Devices; States of Connecticut, Vermont, and Missouri Statutes; Availability**

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the



availability of responses to requests for advisory opinions concerning the applicability of the preemption provisions of the Federal Food, Drug, and Cosmetic Act (the act) to certain Connecticut, Vermont, and Missouri hearing aid statutes or bills.

**ADDRESS:** Individual copies of the advisory opinions may be obtained from the Office of Standards and Regulations, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Joseph M. Sheehan, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

**SUPPLEMENTARY INFORMATION:** FDA is announcing that it has issued responses to three requests for advisory opinions concerning the applicability of the medical device preemption provisions under section 521 of the act (21 U.S.C. 360k) to certain State laws for hearing aid devices. FDA is now making these advisory opinions available to interested persons as follows:

Connecticut—Docket No. 87A-0088: On March 20, 1987, Stanley K. Peck, State of Connecticut Department of Health Services, requested an advisory opinion on whether section 20-396(4) of the Connecticut general statutes precluding a hearing aid dealer from selecting a hearing aid for the customer is preempted by section 521(a) of the act and 21 CFR 801.420(c)(3). FDA's advisory opinion states that Connecticut statute 20-396(4) is a licensing provision for hearing aid dealers. Therefore, it is not a requirement with respect to a device within the meaning of section 521 of the act and is not preempted.

Vermont—Docket No. 88A-0120: Greg Ziegler, 21st Century Products, Inc., also requested an advisory on March 23, 1988, regarding the enforceability of a pending Vermont Senate bill S. 269 which imposes conditions for the sale of hearing aids which differ from FDA requirements. The legislation would prohibit the waiver of a medical evaluation by an informed adult prior to the purchase of a hearing aid as provided in 21 CFR 801.421. FDA's advisory opinion states that the Vermont requirement, if enacted under Senate bill S.269, would be preempted by section 521(a) of the act, because it would be different from the Federal requirement for hearing aids.

Missouri—Docket No. 88A-0213: On May 25, 1988, Q. Russell Hatchl, representative for Clohan, Adams, and Dean, Attorneys at Law, requested an

advisory opinion on whether section 346.250.1 of the Missouri statute which prohibits the sale of hearing aids directly through the mail to the consumer is preempted by section 521(a) of the act. FDA's advisory opinion states that section 346.250.1 of the Missouri statute is not directly related to the safety or the effectiveness of the device. Therefore, it is not a requirement with respect to a device within the meaning of section 521 of the act and is not preempted.

Each of the three advisory opinions is available for public examination under the docket number assigned to the respective requests in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, between 9 a.m. and 4 p.m., Monday through Friday.

Although there is no requirement to publish advisory opinions issued under 21 CFR 10.85, FDA has decided to do so in this instance.

Dated: December 21, 1988.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 88-29988 Filed 12-28-88; 8:45 am]

BILLING CODE 4160-01-M

#### Advisory Committees; Meetings

**AGENCY:** Food and Drug Administration.  
**ACTION:** Notice.

**SUMMARY:** This notice announces the forthcoming meetings of public advisory committees of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meetings and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

**Meetings:** The following advisory committee meetings are announced:

#### General and Plastic Surgery Devices Panel

**Date, time, and place.** January 26, 1989, 9 a.m., Auditorium, Wilbur J. Cohen Bldg., 330 Independence Ave. SW., Washington, DC.

**Type of meeting and contact person.** Open public hearing, 9 a.m. to 10 a.m.; open committee discussion, 10 a.m. to 4 p.m.; closed committee deliberations, 4 p.m. to 5 p.m.; Paul F. Tilton, Center for Devices and Radiological Health (HFZ-410), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7238.

**General function of the committee.** The committee reviews and evaluates available data on the safety and

effectiveness of devices currently in use and makes recommendations for their regulation.

**Agenda—Open public hearing.** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before January 5, 1989, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

**Open committee discussion.** The committee will discuss a status report on silicone mammary prostheses. The committee may also discuss a reclassification petition for suction lipectomy devices and premarket approval applications for surgical glove dusting powder and a nylon surgical suture.

**Closed committee deliberations.** The committee will discuss trade secret or confidential or commercial information regarding the manufacture of surgical glove dusting powder or other devices under review by the committee. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

#### Ophthalmic Devices Panel

**Date, time, and place.** January 26, 1989, 9 a.m., Auditorium, Hubert H. Humphrey Bldg., 200 Independence Ave. SW., Washington, DC.

**Type of meeting and contact person.** Open public hearing, 9 a.m. to 10 a.m.; open committee discussion, 10 a.m. to 3 p.m.; closed committee deliberations, 3 p.m. to 4 p.m.; open committee discussion, 4 p.m. to 5 p.m.; Daniel W. C. Brown, Center for Devices and Radiological Health (HFZ-460), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7320.

**General function of the committee.** The committee reviews and evaluates available data on the safety and effectiveness of devices currently in use and makes recommendations for their regulation. The committee also reviews data on new devices and makes recommendations regarding their safety, effectiveness, and suitability for marketing.

**Agenda—Open public hearing.** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the

contact person before January 2, 1989, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

**Open committee discussion.** The committee will discuss general issues relating to approvals of premarket approval applications (PMA's) for intraocular lenses (IOL's) and contact lenses. The committee will also discuss general issues relating to other ophthalmic devices and requirements for PMA approval.

**Closed committee deliberation.** The committee may discuss trade secret or confidential commercial information relevant to PMA's for IOL's, contact lenses, or other ophthalmic devices. These portions of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

#### Vaccines and Related Biological Products Advisory Committee

**Date, time, and place.** January 30 and 31, 1989, and February 1, 1989, 8:30 a.m., Bldg. 31, Conference Rm. 10, National Institutes of Health, 9000 Rockville Pike, Bethesda, MD.

**Type of meeting and contact person.** Closed committee deliberations, January 30, 1989, 8:30 a.m. to 11 a.m.; open committee discussion, 11 a.m. to 3:15 p.m.; open public hearing, 3:15 p.m. to 4:15 p.m., unless public participation does not last that long; closed committee deliberations, 4:15 p.m. to 5:30 p.m.; closed committee deliberations, January 31, 1989, 8:30 a.m. to 5:30 p.m.; open committee discussion, February 1, 1989, 8:30 a.m. to 1 p.m.; Jack Gertzog, Center for Drug Evaluation and Research (HFD-9), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-5455.

**General function of the committee.** The committee reviews and evaluates available data on the safety and effectiveness of marketed and investigational human drugs for use in the diagnosis, prevention, or treatment of human diseases. The committee also reviews and evaluates the quality and relevance of FDA's research program which provides scientific support for the regulation of these products.

**Agenda—Open public hearing.** Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before January 13, 1989, and submit a brief statement of the general nature of the evidence or

arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

**Open committee discussion.** On January 30, 1989, the committee will discuss *Haemophilus influenzae* Type B Conjugate Vaccine, and on February 1, 1989, influenza vaccine formulation for the 1989-1990 flu season.

**Closed committee deliberations.** On January 30 and 31, 1989, the committee will discuss trade secret or confidential commercial information relevant to pending license applications and investigational new drugs. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (Subpart C of 21 CFR Part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR Part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in the Federal Register notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral

presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

Persons interested in specific agenda items to be discussed in open session may ascertain from the contact person the approximate time of discussion.

Details on the agenda, questions to be addressed by the committee, and a current list of committee members are available from the contact person before and after the meeting. Transcripts of the open portion of the meeting will be available from the Freedom of Information Office (HFI-35), Food and Drug Administration, Rm. 12A-16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting will be available from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA), as amended by the Government in the Sunshine Act (Pub. L. 94-409), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purpose; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in



certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative sessions to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a) (1) and (2) of the Federal Advisory Committee Act (Pub. L. 92-463, 88 Stat. 770-776 (5 U.S.C. App. I)), and FDA's regulations (21 CFR Part 14) on advisory committees.

Dated: December 18, 1988.

Frank F. Young,

Commissioner of Food and Drugs.

[FR Doc. 88-29890 Filed 12-28-88; 8:45 am]

BILLING CODE 4160-01-M

#### Health Care Financing Administration Privacy Act of 1974

**AGENCY:** Department of Health and Human Service (HHS), Health Care Financing Administration (HCFA).

**ACTION:** Notice of proposed new routine use for existing systems of records.

**SUMMARY:** One of the top priorities of the Department of Health and Human Services is to assure high quality and

effective health care while pursuing strategies to contain or moderate health care costs. Progress in cost analysis and in assessing the quality and effectiveness of care has been hampered by the lack of comprehensive data bases that describe patterns of cost of care given to patients. The Health Care Financing Administration (HCFA) presently has routine uses in place which permit release of identifiable data to State Welfare Departments for administration of Medicaid and quality control studies, to State audit agencies to assist in the audit of Medicaid eligibility considerations, and to State Licensing Boards for review of unethical practices or nonprofessional conduct. By providing access to the wealth of data on the Medicare population, HCFA hopes to contribute to the improved methods of assessing health care cost and of measuring the quality of care and comparing the effectiveness of various forms of medical intervention. To meet this goal, HCFA intends to make available to qualified State Agencies the data elements available in our systems needed to assess the cost and quality of care. Disclosures would be subject to safeguards to preserve the confidentiality of information concerning beneficiaries from further disclosure. Therefore, HCFA is adding a new routine use that will permit us to provide Medicare data to State agencies, or agencies established under State law, for use in cost containment and in improving the quality and effectiveness of care. The new routine use would be added to the systems notices for (1) Medicare Bill File (Statistics), HHS/HCFA/BDMS No. 09-70-0005; (2) Carrier Medicare Claims Records, HHS/HCFA/BPO No. 09-70-0501; (3) Health Insurance Master Record, HHS/HCFA/BPO No. 09-70-0502; (4) Intermediary Medicare Claims Records, HHS/HCFA/BPO No. 09-70-0503; (5) End Stage Renal Disease (ESRD) Program Management and Medical Information System (Registry), HHS/HCFA/BDMS No. 09-70-0520; and (6) Common Working File, HHS/HCFA/BPO No. 09-70-0526.

**EFFECTIVE DATES:** The proposed new routine use shall take effect without further notice on or before January 30, 1989, unless comments received on or before that date would warrant changes.

**ADDRESS:** Please address comments to: Richard A. DeMeo, HCFA Privacy Act Officer, Office of Budget and Administration, Health Care Financing Administration, G-M-1 East Low Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207. We will

make comments received available for inspection at this location.

**FOR FURTHER INFORMATION CONTACT:** William A. Grant, Division of Entitlement Requirements, Office of Program Operations Procedures, Bureau of Program Operations, Health Care Financing Administration, G-E-7 Meadows East Building, 6325 Security Boulevard, Baltimore, Maryland 21207, Telephone Number (301) 966-6464.

**SUPPLEMENTARY INFORMATION:** System Notice 09-70-0005, Medicare Bill File (Statistics), contains records on bills for services furnished to persons enrolled in the hospital insurance or supplementary medical benefits part of the Medicare program. Also included are demographic data on beneficiaries, diagnosis and surgery data, and provider characteristics. Data in this file are used primarily for statistical and research purposes.

System Notice 09-70-0501, Carrier Medicare Claims Records, contains records on claims for Supplementary Medical Insurance Benefits including itemized bills to support payment to beneficiaries and to physicians and other suppliers of medical services.

System Notice 09-70-0502, Health Insurance Master Record, contains information on enrollment, entitlement, utilization, query and reply activity, health insurance bill and payment record processing, workers' compensation entitlement information, and entitlement information from the Veterans Administration (VA).

System Notice 09-70-0503, Intermediary Medicare Claims Records, contains records on claims for Medicare benefits submitted by providers for reimbursement on a reasonable cost basis including hospital, skilled nursing facility and home health agency bills.

System notice 09-70-0520, End Stage Renal Disease (ESRD) Program Management and Medical Information System (Registry), contains records on Medicare ESRD bills, demographic enrollment and clinical data on beneficiaries, and data on ESRD facilities.

System Notice 09-70-0526, Common Working File, contains beneficiary specific Medicare entitlement, utilization and claim history information for payment of Medicare benefits to or on behalf of the beneficiary. Data in these files are used to administer the Medicare program and for research and statistical purposes related to evaluating the operation and effectiveness of the Medicare program.

The Privacy Act allows us to disclose information routinely without ar

individual's consent if the information is to be used for a purpose which is compatible with the purposes for which the information was collected. We disclose information for "routine uses" when it is necessary to carry out our programs. We may also routinely disclose information to other Federal, State or local or private agencies or individuals for purposes that are compatible with the purposes of our programs when the benefit of the proposed use outweighs the effect, or risk of any effect, on the privacy of individuals.

In complying with the technical requirements of the Privacy Act, we are proposing to add the routine use below to the above named systems of records:

To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made;

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring, and;

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request, unless the recipient presents an adequate justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under

the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of and willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality, and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

The new routine use is consistent with the Privacy Act, 5 U.S.C. 552a(a)(7), since, as previously noted, it is compatible with the purpose for which the information is collected. Because the addition of this new routine use will not change the purpose for which the information is to be used or otherwise significantly alter the system, we are not preparing a report of altered system of records under 5 U.S.C. 552a(o). Editorial changes and other administrative revisions which have occurred since the last publication of the material are being incorporated at this time. We are publishing these system notices below in their entirety for the convenience of the reader.

**Note.**—In addition to the above, the following system of records is being republished. System No. 09-70-2002, "HCFA Program Integrity/Program Validation Case Files" was scheduled to be transferred to the Office of the Inspector General (OIG) several years ago, but never was. During that time, HCFA has maintained control of the system but never updated it for administrative and technical corrections. Because the OIG will not be transferring this system to their office, we are taking this opportunity to rename, renumber, and republish it below in its entirety. This system will be the "HCFA Utilization Review Investigatory Files, HHS/HCFA/BPO" System No. 09-70-0527.

Date: December 20, 1988.

William L. Roper,

Administrator, Health Care Financing Administration.

09-70-0005

**SYSTEM NAME:**

Medicare Bill File (Statistics) HHS, HCFA, BDMS.

**SECURITY CLASSIFICATION:**

None.

**SYSTEM LOCATION:**

HCFA DATA CENTER, Lyon Building, 7131 Rutherford Road, Baltimore, Maryland 21207.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Persons enrolled in hospital insurance or supplemental medical benefits parts of the Medicare program.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Bill data, demographic data on the beneficiary; diagnosis and surgery codes; provider characteristics and identifying number (including physicians).

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Section 1875 of the Social Security Act (42 U.S.C. 13950).

**PURPOSE(S):**

To study the operation and effectiveness of the Medicare program.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Disclosure may be made: (1) To a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

(2) To the Bureau of Census for use in processing research and statistical data directly related to the administration of Social Security programs.

(3) To the Department of Justice, to a court or other tribunal, or to another party before such tribunal, when

(a) HHS or any component thereof; or

(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components.

is party to litigation or has an interest in such litigation, and HHS determines



that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(4) To an individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease or disability, or the restoration or maintenance of health if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

b. Determines that the purpose for which the disclosure is to be made:

(1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form.

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and

(3) There is reasonable probability that the objective for the use would be accomplished;

c. Requires the information recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the project unless the recipient presents an adequate justification of a research or health nature of retaining such information, and

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual.

(b) For use in another research project, under these same conditions, and with written authorization of HCFA.

(c) For disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit or

(d) When required by law:

d. Secures a written statement attesting to the information recipient's

understanding of and willingness to abide by these provisions.

(5) To entities with a legitimate need for data for statistical analyses bearing on Medicare payment policies for inpatient hospital services. Information disclosed for this purpose will not include a beneficiary's health insurance claim number, race, or Medicare status code; the beneficiary's age will be identified only by age intervals; the beneficiary's residence will be identified only to the extent of stating whether he or she resides in the same State as the provider, the admission and discharge dates will be identified only by calendar quarter; and the date of surgery will be identified only as the number of days after admission.

Each of the Medicare Provider Analysis and Review (MEDPAR) files—short-stay hospital services file, long-term hospital services file, skilled nursing facility services file, and other provider services file—will be modified in accordance with the foregoing provisions for release. The entity must agree:

(a) Not to try to identify individual beneficiaries.

(b) Not to disclose raw data to any persons except contractors for data processing and storage (and it must agree to require any such contractor not to release any data and not to retain any data after performing the contract).

(c) Not to link this information to other beneficiary-specific records.

(d) Not to publish or otherwise disclose data in a form raising unacceptable possibilities that beneficiaries could be identified, and

(e) To safeguard the confidentiality of the data and to try to prevent unauthorized access to it.

(6) To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Data would also be disclosed to contractors incidental to consultation, programming, operation, user assistance, or maintenance for an ADP or telecommunications systems containing or supporting records in the system.

(7) With respect to the QC/MEDPAR file, to entities with a legitimate need for data for the purpose of conducting research on the quality and effectiveness of care provided in hospitals. Research using data released under this routine use must focus on the improvement of measures for determining, validating, and monitoring the quality and effectiveness of hospital care in such areas as access to care, outcomes of care, and effectiveness of

care in improving, restoring, or maintaining the independence and functioning of Medicare beneficiaries. Information disclosed under this routine use will be limited to the data elements described in Appendix A.

The QC/MEDPAR file may be released to an entity if HCFA determines:

a. That the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained.

b. That the purpose for which the disclosure is to be made:

(1) Cannot reasonably be accomplished unless the data are provided in the detailed form described in Appendix A;

(2) Is reasonably likely to be accomplished in view of the capabilities of the requesting entity and other factors; and

(3) Is of sufficient importance to warrant the possible effect on the privacy of the individual that the disclosure of the data might bring.

c. The entity must submit and HCFA must approve:

(1) A research plan specifying the objectives of the research, the manner in which the data will be used, the financial support for the plan, and the date the research will be completed; and

(2) A copy of any report by a panel of recognized experts reviewing the research plan (which such review has been performed).

d. The entity and its contractors, if any, must sign a statement acknowledging that section 1106(a) of the Social Security Act, which prohibits the disclosure of confidential information and imposes criminal penalties, may apply. They must also agree to the following:—

(1) Not to link the data to other beneficiary-specific records to use the data to identify individual beneficiaries;

(2) Not to use the data for purposes that are not related to research on the quality and effectiveness of hospital inpatient care, including but not limited to: marketing (identification and targeting of under- or over-served health service markets primarily for the purposes of commercial benefit), insurance (redlining areas deemed to offer bad health insurance risks), and adverse selection (identifying patients with high risk diagnoses);

(3) Not to disclose the data to any persons unless the data are in aggregated form as described in paragraph 5. The data may be disclosed to a contractor for data processing if:

(a) The entity specified in the research plan submitted to HCFA that the contractor would receive the data for that purpose, or the entity has obtained written authorization from HCFA to make the disclosure to the contractor; and

(b) The contractor has signed a confidentiality statement with HCFA;

(4) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could not be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level where no data cells have ten or fewer beneficiaries);

(5) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication;

(6) To establish appropriate administrative, technical, procedural, and physical safeguards to protect the confidentiality of the data and to prevent unauthorized access to it;

(7) To return all files to HCFA, and destroy any copies that may have been made, at completion of the research plan.

(8) To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made;

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring, and;

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the

purpose of the request, unless the recipient presents an adequate justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of and willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality, and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

#### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

##### STORAGE:

All records are stored on magnetic tape.

##### RETRIEVABILITY:

All records are indexed by health insurance claim number and by hospital provider number.

##### SAFEGUARDS:

For computerized records, safeguards established in accordance with Department standards and National Bureau of Standards guidelines (e.g., security codes) will be used, limiting access to authorized personnel.

##### RETENTION AND DISPOSAL:

Records are maintained with identifiers as long as needed for program research.

##### SYSTEM MANAGERS AND ADDRESS:

Director, Bureau of Data Management and Strategy, Room 2424, Oak Meadows

Building, 6325 Security Boulevard, Baltimore, Maryland 21207.

#### NOTIFICATION PROCEDURE:

For purpose of access, write the systems manager, who will require name of system, health insurance claim number and for verification purposes, name (women's maiden name, if applicable), social security number, address, date of birth and sex; and to ascertain whether the individual's record is in the system, utilization and date of utilization under Part A or Part B of Medicare services, home health agency, hospital (inpatient), hospital (outpatient) or skilled nursing facility.

#### RECORD ACCESS PROCEDURES:

Same as notification procedures. Requesters should also reasonably specify the record contents being sought (These access procedures are in accordance with the Department Regulations (45 CFR 5b.5(a)(2).)

#### CONTESTING RECORD PROCEDURES:

Contact the system manager named above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department Regulations (45 CFR 5b.7).)

#### RECORD SOURCE CATEGORIES:

Medicare enrollment records: Medicare bill records: Medicare provider records for a sample of persons treated as hospital patients (inpatient and outpatient) and skilled nursing facility patients.

#### SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

09-70-0501

#### SYSTEM NAMES:

Carrier Medicare Claims Records. HHS, HCFA, BPO.

#### SECURITY CLASSIFICATIONS:

None.

#### SYSTEM LOCATION:

Carriers under contract to the Health Care Financing Administration and the Social Security Administration (see Appendix A, Section 4.)

Federal Records Centers. Bureau of Quality Control, HCFA. Office of Systems Analysis, 6325 Security Boulevard, Baltimore, Maryland 21207.

BEST COPY AVAILABLE



HHS Parklawn Computer Center, 5600 Fishers Lane, Rockville, Maryland 20857.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Beneficiaries who have submitted claims for Supplementary Medical Insurance (Medicare Part B), or are eligible, or individuals whose enrollment in an employer group health benefits plan covers the beneficiary.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Request for Payment; Provider Billing for Patient services by Physician; Prepayment Plan for Group Medicare Practices dealing through a Carrier, Health Insurance Claim Form, Request for Medical Payment, Patient's Request for Medicare Payment, Request for Medicare Payment—Ambulance, Explanation of Benefits, Summary Payment Voucher, Request for Claim Number Verification; Payment Record Transmittal; Statement of Person Regarding Medicare Payment for Medical Services Furnished Deceased Patient; Report of Prior Period of Entitlement; Itemized bills and other similar documents from beneficiaries required to support payments to beneficiaries and to physicians and other suppliers of part B Medicare services; Medicare secondary payer records containing other party liability insurance information necessary for appropriate Medicare claim payment.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 1842, 1862(b) and 1874 of title XVIII of the Social Security Act (42 U.S.C. 1395u, 1395y(b) and 1395kk).

#### PURPOSE:

To properly pay medical insurance benefits to or on behalf of entitled beneficiaries.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure may be made to: (1) Claimants, their authorized representatives or representatives payees to the extent necessary to pursue claims made under Title XVIII of the Social Security Act (Medicare).

(2) Third-party contacts (without the consent of the individuals to whom the information pertains) in situations where the party to be contacted has, or is expected to have information relating to the individual's capability to manage his or her affairs or to his or her eligibility for or entitlement to benefits under the Medicare program when:

(a) The individual is unable to provide the information being sought (an individual is considered to be unable to

provide certain types of information when any of the following conditions exist: individual is incapable or of questionable mental capability, cannot read or write, cannot afford the cost of obtaining the information, a language barrier exists, or the custodian of the information will not, as a matter of policy, provide it to the individual), or

(b) The data are needed to establish the validity of evidence or to verify the accuracy of information presented by the individual, and it concerns one or more of the following: the individual's eligibility to benefits under the Medicare program; the amount of reimbursement; any case in which the evidence is being reviewed as a result of suspected abuse or fraud, concern for program integrity, or for quality appraisal, or evaluation and measurement of system activities.

(3) Third-party contacts where necessary to establish or verify information provided by representative payees or payee applicants.

(4) The Treasury Department for investigating alleged theft, forgery, or unlawful negotiation of Medicare reimbursement checks.

(5) The U.S. Postal Service for investigating alleged forgery or theft of Medicare checks.

(6) The Department of Justice for investigating and prosecuting violations of the Social Security Act to which criminal penalties attach, or other criminal statutes as they pertain to the Social Security Act programs, for representing the Secretary, and for investigating issues of fraud by agency officers or employees, or violation of civil rights.

(7) The Railroad Retirement Board for administering provisions of the Railroad Retirement and Social Security Acts relating to railroad employment.

(8) Professional Review Organizations in connection with their review of claims, or in connection with studies or other review activities, conducted pursuant to Part B of Title XI of the Social Security Act.

(9) State Licensing Boards for review of unethical practices of nonprofessional conduct.

(10) Providers and suppliers of services (and their authorized billing agents) directly or dealing through fiscal intermediaries or carriers, for administration of provisions of title XVIII.

(11) An individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease or disability, or the restoration or maintenance of health if HCFA:

a. Determines that the use of disclosure does not violate legal

limitations under which the record was provided, collected, or obtained:

b. Determines that the purpose for which the disclosure is to be made:

(1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form.

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and

(3) There is reasonable probability that the objective for the use would be accomplished:

(c) Requires the information recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual.

(b) For use in another research project, under these same conditions, and with written authorization of HCFA.

(c) For disclosure to a properly identified person for the purpose of audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law:

d. Secures a written statement attesting to the information recipient's understanding of and willingness to abide by these provisions.

(12) State welfare departments pursuant to agreements with the Department of Health and Human Services for administration of State supplementation payments for determinations of eligibility for Medicaid, for enrollment of welfare recipients for medical insurance under section 1843 of the Social Security Act, for quality control studies, for determining eligibility of recipients of assistance under titles IV and XIX of the Social Security Act, and for the complete administration of the Medicaid program.

(13) A congressional office from the record of an individual in response to an inquiry from the congressional office at the request of that individual.

(14) State audit agencies in connection with the audit of Medicare eligibility considerations. Disclosures of physicians' customary charge data are made to State audit agencies in order to ascertain the correctness of Title XIX charges and payments.

(15) The Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

(a) HHS, or any component thereof; or

(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components, is a party to litigation or has an interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(16) Peer review groups, consisting of members of State, County, or local medical societies or medical care foundations (physicians), appointed by the medical society or foundation at the request of the carrier to assist in the resolution of questions of medical necessity, utilization of particular procedures or practices, or overutilization of services with respect to Medicare claims submitted to the carrier.

(17) Physicians and other supplies of services who are attempting to validate individual items on which the amounts include in the annual Physician/Supplier Payment List or similar publications are based.

(18) Senior citizen volunteers working in intermediaries' and carriers' offices to assist Medicare beneficiaries in response to beneficiaries' requests for assistance.

(19) A contractor working with Medicare carriers/intermediaries to identify and recover erroneous Medicare payments for which workers' compensation programs are liable.

(20) State and other governmental Workers' Compensation Agencies working with the Health Care Financing

Administration to assure that workers' compensation payments are made where Medicare has erroneously paid and workers' compensation programs are liable.

(21) Release information, without the beneficiary's authorization, to insurance companies, self-insurers, Health Maintenance Organizations, multiple employer trusts and other groups providing protection against medical expenses of their enrollees. Information to be disclosed shall be limited to Medicare entitlements data. In order to receive this information the entity must agree to the following conditions:

a. To certify that the individual on whom the information is being provided is one of its insureds;

b. To utilize the information solely for the purpose of processing the identified individual's insurance claims; and

c. To safeguard the confidentiality of the data and to prevent unauthorized access to it.

(22) To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Data would also be disclosed to contractors incidental to consultation, programming, operation, user assistance, or maintenance for ADP or telecommunications systems containing or supporting records in the system.

(23) To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made;

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring, and;

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical

safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request, unless the recipient presents an adequate justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of and willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

#### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

#### STORAGE:

Records maintained on paper, tape, disc, and punchcards.

#### RETRIEVABILITY:

System is indexed by health insurance claim number. The record is prepared by the beneficiary and is used by carriers to determine amount of Part B benefits. The bills are retained by the carriers.

#### SAFEGUARDS:

Unauthorized personnel are denied access to the records area. Disclosure is limited. Physical safeguards related to the transmission and reception of data



between Rockville and Baltimore are those requirements established by the DHHS ADP Systems Manual, Part 6.

#### RETENTION AND DISPOSAL:

Records are closed at the end of the calendar year in which paid, held two additional years, transferred to Federal Records Center and destroyed after another 2 years.

#### SYSTEM MANAGER(S) AND ADDRESS:

Health Care Financing Administration, Bureau of Program Operations, Director, Division of Carrier Procedures, 6325 Security Boulevard, Baltimore, Md 21207.

#### NOTIFICATION PROCEDURE:

Inquiries and requests for system records should be addressed to the most convenient social security office, the appropriate carrier, the HCFA Regional Office, or to the system manager named above. The individual should furnish his or her health insurance claim number and the name as shown on social security records. An individual who requests notification of or access to a medical record shall at the time the request is made, designate in writing a responsible representative who will be willing to review the record and inform the subject individual of its contents at the representative's discretion.

#### RECORD ACCESS PROCEDURES:

Same as notification procedures. Requesters should also reasonably specify the records contents being sought.

#### CONTESTING RECORD PROCEDURES:

Contact the official at the address specified under notification procedures above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification.

#### RECORD SOURCE CATEGORIES:

The data contained in these records is either furnished by the individual or, in the case of some Medicare secondary payer situations, through third party contacts. In most cases, the identifying information is provided to the physician by the individual. The physician then adds the medical information and submits the bill to the carrier for payment.

#### SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

#### Appendix A—Medicare Carriers

Medicare Coordinator, Blue Cross and Blue Shield of Alabama, 450 Riverchase Parkway East, Birmingham, Alabama 35298

Vice President for Medicare and Medical Services, Arkansas Blue Cross and Blue Shield, Inc., 601 Galnes Street, Little Rock, Arkansas 72203

Medicare Coordinator, California Physicians Service, (d/b/a Blue Shield of California), P.O. Box 7013, No. 2 Northpoint, San Francisco, California 94120

Medicare Coordinator, Transamerica Occidental Life Insurance Company, P.O. Box 54905 Terminal Annex, Los Angeles, California 90054

Assistant Vice President, Rocky Mountain Hospital and Medical Service, (d/b/a Blue Cross and Blue Shield of Colorado), 700 Broadway, Denver, Colorado 80273

Medicare Administrator, Travelers Ins. Co., One Tower Square, Hartford, Connecticut 06183

Medicare Administrator, Aetna Life & Casualty, 151 Farmington Avenue, Hartford, Connecticut 06156

Medicare Coordinator, Blue Cross and Blue Shield of Florida, Inc., P.O. Box 1798, Jacksonville, Florida 32231

Health Care Service Corporation, 233 North Michigan Avenue, Chicago, Illinois 60601  
Associated Insurance Companies, Inc., (d/b/a Blue Cross and Blue Shield of Indiana), 8320 Craig Street, Suite 100, Indianapolis, Indiana 46250-0453

Assistant Executive Director, Blue Shield of Iowa, Ruan Building, 636 Grand Avenue Station 28, Des Moines, Iowa 50309

Medicare Assistant, Blue Cross and Blue Shield of Kansas, Inc., P.O. Box 239, Topeka, Kansas 66601

Blue Cross and Blue Shield of Kentucky, Inc., 100 East Vine Street, 6th Floor, Lexington, Kentucky 40517

Medicare Coordinator, Blue Cross and Blue Shield of Maryland, Inc., 700 E. Joppa Road, Baltimore, Maryland 21204

Medicare Coordinator Part B, Blue Shield of Massachusetts, Inc., 100 Summer Street, Boston, Massachusetts 02110

Assistant Vice President Government, Affairs Department, Blue Cross and Blue Shield of Michigan, 600 Lafayette East, Detroit, Michigan 48226

Blue Cross and Blue Shield of Minnesota, P.O. Box 64357, 3535 Blue Cross Road, St. Paul, Minnesota 55164

Vice President Government Programs, Blue Cross and Blue Shield of Kansas City, P.O. Box 169, Kansas City, Missouri 64141

Director, Medicare Administration, General American Life Insurance Co., P.O. Box 505, St. Louis, Missouri 63166

Blue Cross and Blue Shield of Montana, Inc., P.O. Box 4308, 404 Fuller Avenue, Helena, Montana 59601

Medicare Coordinator, Prudential Insurance Co. of America, Tri-City Office Drawer 471, Millville, New Jersey 08332

Director of Medicare Part B, Blue Shield of Western New York, Inc., 298 Main Street, Buffalo, New York 14202

Medicare Coordinator, Group Health Insurance, Inc., 330 West 42nd Street, New York, New York 10036

Medicare Coordinator, Empire Blue Cross and Blue Shield, 822 Third Avenue, New York, New York 10017

Medicare Coordinator, EQUICOR, Inc., 1285 Avenue of the Americas, New York, New York 10019

Medicare Coordinator, Blue Cross and Blue Shield of North Dakota, 4510 13th Avenue, S.W., Fargo, North Dakota 58121

Medicare System and Processing Division, Nationwide Mutual Insurance Company, P.O. Box 18788, Columbus, Ohio 43216

Medicare Coordinator, Pennsylvania Blue Shield, P.O. Box 65, Camp Hill, Pennsylvania 17011

Chief, Internal Operations, Seguros de Servicio de Salud de Puerto Rico, Inc., G.P.O. Box 3628, San Juan, Puerto Rico, 00936-3628

Medicare Coordinator, Blue Cross and Blue Shield of Rhode Island, 444 Westminster Mall, Providence, Rhode Island 02901

Medicare Coordinator, Blue Cross and Blue Shield of South Carolina, Fontaine Business Center, 300 Arbor Lake Drive, Suite 1300, Columbia, South Carolina 29223

Blue Cross and Blue Shield of Texas, Inc., 901 South Central Expressway, P.O. Box 833815, Richardson, Texas 75083-3815

Manager, Part B, Blue Cross and Blue Shield of Utah, P.O. Box 30270, 2455 Parley's Way, Salt Lake City, Utah 84130

Assistant Administrator, Washington Physicians Service, 4th and Battery Building, 2401 4th Avenue, 6th Floor, Seattle, Washington 98121

Director, Medicare Claims Department, Wisconsin Physicians' Service Insurance, Corp., 1717 West Broadway, Monona, Wisconsin 53713

09-70-0502

#### SYSTEM NAME:

Health Insurance Master Record, HHS/HCFA/BPO

#### SECURITY CLASSIFICATION:

None.

#### SYSTEM LOCATION:

Health Care Financing Administration Bureau of Data Management and Strategy, 6325 Security Blvd., Baltimore, Md. 21207.

Federal Records Centers

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals age 65 or over who have been, or currently are, entitled to health insurance (Medicare) benefits under title XVIII of the Social Security Act; Individuals under age 65 who have been, or currently are, entitled to such benefits on the basis of having been entitled for not less than 24 months to disability benefits under title II of the Act or under the Railroad Retirement Act and individuals who have been, or currently are, entitled to such benefits because they have end-stage renal disease; or individuals whose enrollment in an employer group health benefits plan covers the beneficiary.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains information on enrollment, entitlement, utilization, query and reply activity, health insurance bill and payment record processing, workers' compensation entitlement information, and entitlement information from the Veterans Administration (VA), Health Insurance Master Record maintenance, and Medicare secondary payer records containing other party liability insurance information necessary for appropriate Medicare claim payment.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 1814, 1833 and 1862(b) of title XVIII of the Social Security Act (42 U.S.C. 1396f, 1395l and 1395y(b)).

#### PURPOSE(S):

To maintain information on Medicare beneficiary eligibility and costs in order to reply to inquiries from contractors and intermediaries and to maintain utilization data for health insurance bill and payment record processing.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure may be made to: (1) The Railroad Retirement Board for administering provisions of the Railroad Retirement and Social Security Act relating to railroad employment.

(2) State Welfare Department pursuant to agreements with the Department of Health and Human Services for determining Medicaid and Medicare eligibility for quality control studies, for determining eligibility of recipients of assistance under title IV, XVIII, and XIX of the Social Security Act, and for the complete administration of the Medicaid program.

(3) State audit agencies for auditing State Medicaid eligibility considerations.

(4) Providers and suppliers of services directly or dealing through fiscal intermediaries or carriers for administration of title XVIII.

(5) A congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

(6) An individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease or disability, or the restoration or maintenance of health if HCFA:

a. Determine that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

b. Determines that the purpose for which the disclosure is to be made:

(1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form.

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and

(3) There is reasonable probability that the objective for the use would be accomplished:

c. Requires the information recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual.

(b) For use in another research project, under these same conditions, and with written authorization of HCFA.

(c) For disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law:

d. Secures a written statement attesting to the information recipient(s) understanding of and willingness to abide by these provisions.

(7) The Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

(a) HHS, or any component thereof; or

(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components, is a party to litigation or has an interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective

representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(8) To a contractor when the Department contracts with a private firm for the purpose of collating, analyzing, aggregating, or otherwise refining records in this system. Relevant records will be disclosed to such a contractor. The contractor shall be required to maintain Privacy Act safeguards with respect to such records.

(9) State welfare agencies that require access to the two files which are extracted from the Health Insurance Master Record. These files are the Carrier Alphabetical State File (CASF) and Beneficiary State File (BEST). Most State agencies require access to the CASF and BEST files for improved administration of the Medicaid program. Routine uses of the CASF and BEST files for State agencies are: (a) Obtaining a beneficiary's correct health insurance claim number and (b) screening of prepayment and post-payment Medicaid claims.

(10) Third-party contacts (without the consent of the individual to whom the information pertains) in situations where the party to be contacted has, or is expected to have information relating to the individual's capability or manage his or her affairs or to his or her eligibility for an entitlement to benefits under the Medicare program when:

(a) The individual is unable to provide the information being sought (an individual is considered to be unable to provide certain types of information when any of the following conditions exist: Individual is incapable or of questionable mental capability, cannot read or write, cannot afford the cost of obtaining the information, a language barrier exists, or the custodian of the information will not, as a matter of policy, provide it to the individual); or

(b) The data are needed to establish the validity of evidence or to verify the accuracy of information presented by the individual, and it concerns one or more of the following: the individual's eligibility to benefits under the Medicare program; the amount of reimbursement; any case in which the evidence is being reviewed as a result of suspected abuse or fraud, concern for program integrity, or for quality appraisal, or evaluation and measurement of system activities.

(11) Release information, without the beneficiary's authorization, to insurance companies, self-insurers, Health Maintenance Organizations, multiple employer trusts and other groups



providing protection against medical expenses of their enrollees. Information to be disclosed shall be limited to Medicare entitlement data. In order to receive this information the entity must agree to the following conditions:

a. To certify that the individual about whom the information is being provided is one of its insureds;

b. To utilize the information solely for the purpose of processing the identified individual's insurance claims; and

c. To safeguard the confidentiality of the data and to prevent unauthorized access to it.

(12) To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Data would also be disclosed to contractors, incidental to consultation, programming, operation, user assistance, or maintenance for ADP or telecommunications systems containing or supporting records in the system.

(13) To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made;

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring; and

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request, unless the recipient presents an adequate

justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project subject to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of an willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality, and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

#### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

##### **STORAGE:**

Records maintained on paper, listings, microfilm, magnetic tape disc and punchcards.

##### **RETRIEVABILITY:**

System is sequence by health insurance claim number, and is used to carry out the tasks of enrollment, query/reply activity, and health insurance bill and payment record processing. Copies of selected parts of the records will be used by the Office of Statistics and Data Management.

##### **SAFEGUARDS:**

Unauthorized personnel are denied access to the records areas. Disclosure is limited to routine use. For computerized records electronically transmitted between Central Office and field office locations (including Medicare contractors), systems securities are established in accordance with DHHS ADP Systems Manual, Part 6, "ADP Systems Security." Safeguards

include a lock/unlock passwords system, exclusive use of leased telephone lines, a terminal oriented transaction matrix, and an audit trail.

#### **RETENTION AND DISPOSAL:**

Records are generally added to the file several months prior to entitlement. After the death of a beneficiary, his or her records may be placed in an inactive file following a period of no billing or query activity. The current 5 years of Part B and current 5 spells of Part A utilization data are maintained. All noncurrent data is microfilmed prior to elimination from the system.

#### **SYSTEM MANAGER(S) AND ADDRESS:**

Health Care Financing Administration, Bureau of Program Operations, Director, Division of Entitlement Requirements 6325 Security Boulevard, Baltimore, Md. 21207.

#### **NOTIFICATION PROCEDURE:**

Inquiries and requests for system records should be addressed to the most convenient social security office, the appropriate carrier or intermediary, the HCFA Regional Office, or the system manager named above. The individual should furnish his or her health insurance claim number and name as shown on Medicare records.

#### **RECORD ACCESS PROCEDURE:**

Same as notification procedures. Requesters should also reasonably specify the record contents being sought. (These access procedures are in accordance with Department Regulations (45 CFR 5b.5(a)(2).))

#### **CONTESTING RECORD PROCEDURES:**

Contact the official at the address specified under notification procedures above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department Regulations (45 CFR 5b.7)).

#### **RECORD SOURCE CATEGORIES:**

The data contained in these records are furnished by the individual, or in the case of some Medicare secondary payer situations, through third party contacts. There are cases, however, in which the identifying information is provided to the physician by the individual; the physician then adds the medical information and submits the bill to the carrier for payment. Updating information is also obtained from the Master Beneficiary Record.

#### **SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

#### **90-70-0503**

#### **SYSTEM NAME:**

Intermediary Medicare Claims Records, HHS, HCFA, BPO.

#### **SECURITY CLASSIFICATION:**

None.

#### **SYSTEM LOCATIONS:**

Intermediaries under contract to the Health Care Financing Administration and the Social Security Administration (See Appendix A, Section 3.)

Federal Records Centers  
Bureau of Quality Control, HCFA,  
Office of Systems Analysis, 6325  
Security Boulevard, Baltimore,  
Maryland, HHS Parklawn Computer  
Center, 5600 Fishers Lane, Rockville,  
Maryland 20857.

#### **CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Beneficiaries on whose behalf providers have submitted claims for reimbursement on a reasonable cost basis under Medicare Parts A and B, or are eligible, or individuals whose enrollment in an employer group health benefits plan covers the beneficiary.

#### **CATEGORIES OF RECORDS IN THE SYSTEM:**

Billing for Medical and Other Health Services: Uniform bill for provider services or equivalent data in electronic format, and Medicare secondary payer records containing other party liability insurance information necessary for appropriate Medicare claims payment and other documents used to support payments to beneficiaries and providers of services. These forms contain the beneficiary's name, sex, health insurance claim number, address, date of birth, medical record number, prior stay information, provider name and address, physician's name, and/or identification number, warranty information when pacemakers are implanted or explanted, date of admission and discharge, other health insurance, diagnoses, surgical procedures, and a statement of services rendered for related charges and other data needed to substantiate claims.

The following elements are outpatient data provided to Medicare intermediaries by rehabilitation agencies, skilled nursing facilities, hospital outpatient departments, and home health agencies that provide physical therapy in addition to home health services:

- Outpatient's name
- ICD number

- Admission date to provider
- Place treatment rendered
- Number of visits since start of care
- Diagnosis
- Diagnosis requiring treatment
- Onset of condition for which treatment is being sought
- Dates of previous therapy for same diagnosis
- Other therapy outpatient is currently receiving
- Observations
- Precautions and medical equipment
- Functional status immediately prior to this therapy
- Types of treatment—modalities
- Frequency of treatment
- Expected duration of treatment
- Rehabilitation potential
- Level of communication potential
- Average time per visits
- Goals
- Statement of problem at beginning of billing period
- Changes in problem at end of billing period
- Signature of therapist
- Certification and recertification by physician that services are to be provided from an established plan of care
- Tests results
- Biopsy reports
- Methods of administration, e.g., pill vs. injection
- Physician's orders
- Procedure codes
- Charges
- Weekly progress notes

#### **AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Sections 1816, 1862(b) and 1874 of Title XVIII of the Social Security Act (42 U.S.C. 1395h, 1395y(b) and 1395kk).

#### **PURPOSE(S):**

To process and pay Medicare benefits to or on behalf of eligible individuals.

#### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Disclosure may be made to:

(1) Claimants, their authorized representatives or representative payees to the extent necessary to pursue claims made under title XVIII of the Social Security Act (Medicare).

(2) Third-party contacts without the consent of the individual to whom the information pertains in situations where the party to be contacted has, or is expected to have information relating to the individual's capability to manage his or her affairs or to his or her eligibility for or entitlement to benefits under the Medicare program when:

(a) The individual is unable to provide the information being sought (an individual is considered to be unable to provide certain types of information when any of the following conditions exist: individual is incapable or of

questionable mental capability, cannot read or write, cannot afford the cost of obtaining the information, a language barrier exists, or the custodian of the information will not, as a matter of policy, provide it to the individual) or

(b) The data are needed to establish the validity of evidence or to verify the accuracy of information presented by the individual, and it concerns one or more of the following: the individual's eligibility to benefits under the Medicare program; the amount of reimbursement; any case in which the evidence is being reviewed as a result of suspected abuse or fraud, concern for program integrity, or for quality appraisal, or evaluation and measurement of systems activities.

(3) Third-party contacts where necessary to establish or verify information provided by representative payees or payee applicants.

(4) The Treasury Department for investigating alleged theft, forgery, or unlawful negotiations of Medicare reimbursement checks.

(5) The U.S. Postal Service for investigating alleged forgery or theft of Medicare checks.

(6) The Department of Justice for investigating and prosecuting violations of the Social Security Act to which criminal penalties attach, or other criminal statutes as they pertain to Social Security Act programs, for representing the Secretary, and for investigating issues of fraud by agency officers or employees, or violation of civil rights.

(7) The Railroad Retirement Board for administering provisions of the Railroad Retirement and Social Security Acts relating to railroad employment.

(8) Professional Review Organizations in connection with their review of claims, or in connection with studies or other review activities, conducted pursuant to Part B of Title XI of the Social Security Act.

(9) State Licensing Boards for review of unethical practices or nonprofessional conduct.

(10) Providers and suppliers of services (and their authorized billing agents) directly or dealing through fiscal intermediaries or carriers, for administration of provisions of title XVIII.

(11) An individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease or disability, or the restoration or maintenance of health if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;



b. Determines that the purpose for which the disclosure is to be made:

- (1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form.
- (2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and
- (3) There is reasonable probability that the objective for the use would be accomplished:

c. Requires the information recipient to:

- (1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and
- (2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and
- (3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual.

(b) For use in another research project, under these same conditions, and with written authorization of HCFA.

(c) For disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law:  
d. Secures a written statement attesting to the information recipient's understanding of and willingness to abide by the provisions.

(12) State welfare departments pursuant to agreements with the Department of Health and Human Services for administration of State supplementation payments for determination of eligibility for Medicaid, for enrollment of welfare recipients for medical insurance under Section 1843 of the Social Security Act, for quality control studies, for determining eligibility of recipients of assistance under titles IV and XIX of the Social Security Act, and for the complete administration of the Medicaid program.

(13) A congressional office from the record of an individual in response to an inquiry from the congressional office at the request of that individual.

(14) State audit agencies in connection with the audit of Medicaid eligibility considerations.

(15) The Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

(a) HHS, or any component thereof, or  
(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee, or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components,

is a party to litigation or has an interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(16) Senior citizen volunteers working in the intermediaries' and carriers' offices to assist Medicare beneficiaries' in response to beneficiaries requests for assistance.

(17) A contractor working with Medicare carriers/intermediaries to identify and recover erroneous Medicare payments for which workers' compensation programs are liable.

(18) State and other governmental Workers' Compensation Agencies working with the Health Care Financing Administration to assure that workers' compensation payments are made where Medicare has erroneously paid and workers' compensation programs are liable.

(19) Release information, without the beneficiary's authorization, to insurance companies, self-insurers, Health Maintenance Organizations, multiple employer trusts and other groups providing protection against medical expenses of their enrollees. Information to be disclosed shall be limited to Medicare entitlement data. In order to receive this information the entity must agree to the following conditions:

a. To certify that the individual about whom the information is being provided is one of its insureds;

b. To utilize the information solely for the purpose of processing the identified individual's insurance claims; and

c. To safeguard the confidentiality of the data and to prevent unauthorized access to it.

(20) To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Data would also be disclosed to contractors incidental to consultation, programming, operation, user assistance, or maintenance for ADP or telecommunications systems containing or supporting records in the system.

(21) To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made;

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring, and;

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:  
(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request, unless the recipient presents an adequate justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project subjects to be identified is removed or

destroyed at the earliest opportunity consistent with the purpose of the audit; or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of and willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality, and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

#### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

##### **STORAGE:**

Records maintained on paper forms, magnetic tape and microfilm.

##### **RETRIEVABILITY:**

The system is indexed by health insurance claim number. The record is prepared by the hospital or other provider with identifying information received from the beneficiary to establish eligibility for Medicare and document and support payments to providers by the intermediaries. The bill data are forwarded to the Health Care Financing Administration, Bureau of Data Management and Strategy, Baltimore, Md., where they are used to update the central office records.

##### **SAFEGUARDS:**

Disclosure of records is limited. The file area is closed to unauthorized personnel. Physical safeguards related to the transmission and reception of the data between Rockville and Baltimore are those requirements established by the DHHS ADP Systems Manual, Part 6.

##### **RETENTION AND DISPOSAL:**

Records are closed out at the end of the calendar year in which paid, held 2 more years, transferred to the Federal Records Center and destroyed after another 6 years.

##### **SYSTEM MANAGER(S) AND ADDRESS:**

Health Care Financing Administration Director, Division of Provider Procedures, 6325 Security Boulevard, Baltimore, MD 21207

#### **NOTIFICATION PROCEDURE:**

Inquiries and requests for systems records should be addressed to the social security office nearest the requester's residence, the appropriate intermediary, the HCFA Regional Office, or to the system manager named above. The individual should furnish his or her health insurance number and name as shown on social security records. An individual who requests notification of or access to a medical record shall, at the time the request is made, designate in writing a responsible representative who will be willing to review the record and inform the subject individual of its contents at the representative's discretion.

#### **RECORD ACCESS PROCEDURES:**

Same as notification procedures. Requesters should also reasonably specify the records contents being sought.

#### **CONTESTING RECORD PROCEDURES:**

Contact the official at the address specified under notification procedures above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification.

#### **RECORD SOURCE CATEGORIES:**

The identifying information contained in these records is obtained by the provider from the individual or, in the case of some Medicare secondary payer situations, through third party contacts. The medical information is entered by the provider of medical services.

#### **SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

#### **Appendix A. Health Insurance Claims**

Medicare records are maintained at the HCFA Central Office (see section 1 below for the address). Health insurance records of the Medicare program can also be accessed through a representative of the HCFA Regional Office (see section 2 below for addresses). Medicare claims records are also maintained by private insurance organizations who share in administering provisions of the health insurance program. These private insurance organizations, referred to as carriers and intermediaries, are under contract to the Health Care Financing Administration and the Social Security Administration to perform specific tasks in the Medicare program. See section 3 below for addresses for intermediaries and section 4 addresses for carriers.

1. Central Office Addresses:  
Bureau of Program Operations, HCFA, 6325 Security Boulevard, Baltimore, Maryland 21207. Office Hours: 8:15-4:45.  
Bureau of Data Management and Strategy, HCFA, Office of Health Program Systems,

Room 1705, Equitable Building, 6325 Security Boulevard, Baltimore, Maryland 21207. Office Hours: 8:15-4:45.

2. HCFA Regional Office Addresses:  
BOSTON REGION—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont  
John F. Kennedy Federal Building, Room 1211, Boston, Massachusetts 02203. Office Hours: 8:30-5:00

NEW YORK REGION—New Jersey, New York, Puerto Rico, Virgin Islands  
28 Federal Plaza—Room 715, New York, New York 10007. Office Hours: 8:30-5:00

PHILADELPHIA REGION—Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia  
P.O. Box 8460, Philadelphia, Pennsylvania 19101. Office Hours: 8:30-5:00

ATLANTA REGION—Alabama, North Carolina, South Carolina, Florida, Georgia, Kentucky, Mississippi, Tennessee  
101 Marietta Street, Suite 702, Atlanta, Georgia 30223. Office Hours: 8:00-4:30

CHICAGO REGION—Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin  
Suite A—824, Chicago, Illinois 60604. Office Hours: 8:15-4:45

DALLAS REGION—Arkansas, Louisiana, New Mexico, Oklahoma, Texas  
1200 Main Tower Building, Dallas, Texas. Office Hours: 8:30-4:30

KANSAS CITY REGION—Iowa, Kansas, Missouri, Nebraska  
New Federal Office Building, 601 East 12th Street—Room 436, Kansas City, Missouri 64108. Office Hours: 8:30-4:45

DENVER REGION—Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming  
Federal Office Building, 1961 Stout St—Room 1185, Denver, Colorado 80294. Office Hours: 8:00-4:30

SAN FRANCISCO REGION—American Samoa, Arizona, California, Guam, Hawaii, Nevada

Federal Office Building 10 Van Ness Avenue, 20th Floor, San Francisco, California 94102. Office Hours: 8:00-4:30

SEATTLE REGION—Alaska, Idaho, Oregon, Washington  
1321 Second Avenue—Room 815, Mail Stop 211, Seattle, Washington 98101. Office Hours: 8:00-4:30

3. Intermediary Addresses (Hospital Insurance):

Medicare Coordinator, Blue Cross/Blue Shield of Alabama, 450 Riverchase Parkway East, Birmingham, Alabama 35298

Medicare Coordinator, Blue Cross of Arizona, Inc., P.O. Box 13466, Phoenix, Arizona 85002

Medicare Coordinator, Arkansas Blue Cross/Blue Shield, Inc., 601 Gaines Street, Little Rock, Arkansas 72203

Medicare Coordinator, Blue Cross of Southern California, P.O. Box 700000, Van Nuys, California 91470

Medicare Coordinator, Blue Cross of Northern California, 1950 Franklin Street, Oakland, California 94609

Medicare Coordinator, Kaiser Foundation Health Plan, Inc., 1956 Webster Street, Room 310A Oakland, California 94612



Medicare Coordinator, Rocky Mountain Hospital and Medical Service, 700 Broadway, Denver, Colorado 80203

Medicare Administrator, Aetna Life & Casualty, 151, Farmington Avenue, Hartford, Connecticut 06156

Medicare Coordinator, Blue Cross/Blue Shield Connecticut, 370 Bassett Rd., North Haven, Connecticut 06473

Medicare Administrator, Travelers Ins. Co., One Tower Square, Hartford, Connecticut 06115

Triage, Inc., 719 Middle Street, Bristol, Connecticut 06019

Medicare Coordinator, Blue Cross/Blue Shield of Delaware, Inc., 201 West 14th Street, Wilmington, Delaware 19899

Medicare Coordinator, Group Hospitalization, Inc., 550 12th Street, S.W., Washington, D.C. 20024

Medicare Coordinator, Blue Cross of Florida, Inc., P.O. Box 1798, Jacksonville, Florida 32201

Medicare Coordinator, Blue Cross of Georgia/Columbus, P.O. Box 7368, Columbus, Georgia 31906

Medicare Coordinator, Blue Cross of Georgia/Atlanta, P.O. Box 4445, Atlanta, Georgia 30302

Medicare Coordinator, Hawaii Medical Service Association, P.O. Box 860, Honolulu, Hawaii 96808

Medicare Coordinator, Blue Cross of Idaho, Inc., P.O. Box 7480, Boise, Idaho 83707

Medicare Coordinator, Health Care Service Corp., 233 North Michigan Avenue, Chicago, Illinois 60601

Medicare Coordinator, Mutual Hospital Insurance, Inc., 120 West Market Street, Indianapolis, Indiana 46204

Medicare Coordinator, Blue Cross of Iowa, Ruan Building, 636 Grant Avenue, Station 28, Des Moines, Iowa 50307

Medicare Coordinator, Blue Cross of Western Iowa and S. Dakota, Third and Pierce Street, Sioux City, Iowa 51102

Medicare Administrator, Kansas Hospital Service Association, Inc., P.O. Box 239, Topeka, Kansas 66601

Medicare Coordinator, Blue Cross and Blue Shield of Kentucky, Inc., 9901 Linn Station Road, Louisville, Kentucky 40223

Medicare Coordinator, Louisiana Health Service and Indemnity Company, 2718A Wooddale Blvd., Baton Rouge, Louisiana 70805

Medicare Coordinator, Associated Hospital Service of Maine, 110 Free Street, Portland, Maine 04101

Medicare Coordinator, Maryland Blue Cross, Inc., 700 East Joppa Road, Baltimore, Maryland 21204

Medicare Coordinator, Part A. Blue Cross of Mass., Inc., 100 Summer Street, Boston, Massachusetts 02106

Medicare Coordinator, Blue Cross of Michigan, 600 Lafayette East, Detroit, Michigan 48226

Medicare Coordinator, Blue Cross of Minnesota, 3535 Blue Cross Road, St. Paul, Minnesota 55765

Medicare Coordinator, Blue Cross of Miss., P.O. Box 1043, Jackson, Mississippi 39205

Medicare Coordinator, Blue Cross Hospital Service of Missouri, 4444 Forest Park Boulevard, St. Louis, Missouri 63108

Medicare Coordinator, Blue Cross of Montana, P.O. Box 5017, Great Falls, Montana 59403

Medicare Coordinator, Mutual of Omaha Ins. Co., Box 456 Downtown Station, Omaha, Nebraska 68101

Medicare Coordinator, Blue Cross of Nebraska, P.O. Box 3248, Main Post Office Station, Omaha, Nebraska 68103

Medicare Coordinator, New Hampshire Vermont Health Service, 2 Pillsbury Street, Concord, New Hampshire 03306

Medicare Coordinator, Hospital Service Plan of New Jersey, 33 Washington Street, Newark, New Jersey 07102

Medicare Coordinator, Prudential Ins. Co. of America, Drawer 471, 1 Millville, New Jersey 08332

Medicare Coordinator, New Mexico Blue Cross Inc., 12800 Indiana School Rd., N.E., Albuquerque, New Mexico 87112

Medicare Coordinator, B/C-B/S of New York, 822 Third Avenue, New York, New York 10017

Medicare Coordinator, North Carolina B/C-B/S, P.O. Box 2291, Durham, North Carolina 27702

Medicare Coordinator, Blue Cross of North Dakota, 4510 13th Avenue, S.W., Fargo, North Dakota 58121

Medicare Coordinator, B/C of N.W. Ohio, P.O. Box 943, Toledo, Ohio 43601

Medicare Coordinator, B/C of N.E. Ohio, 2066 East Ninth Street, Cleveland, Ohio 44115

Medicare Coordinator, Hospital Care Corporation, 1851 William Howard Taft Road, Cincinnati, Ohio 45208

Medicare Coordinator, Nationwide Mutual Insurance Co., P.O. Box 1825, Columbus, Ohio 43216

Medicare Coordinator, B/C of Central Ohio, P.O. Box 18528, Columbus, Ohio 43216

Medicare Coordinator, Blue Cross of Oklahoma, 1215 South Boulder, Tulsa, Oklahoma 74119

Medicare Coordinator, Northwest Hospital Service, P.O. Box 1271, Portland, Oregon 97201

Medicare Coordinator, Blue Cross of Greater Philadelphia, 1333 Chestnut Street, Philadelphia, Pennsylvania 19107

Medicare Coordinator, Blue Cross of Western Pennsylvania, One Smithfield Street, Pittsburgh, Pennsylvania 15222

Medicare Coordinator, B/C of N.E. Pennsylvania, 70 North Main Street, Wilkes-Barre, Pennsylvania 18711

Medicare Coordinator, Hospital Service Plan of Lehigh Valley, 1221 Hamilton Street, Allentown, Pennsylvania 18102

Medicare Coordinator, Capital Blue Cross, 100 Pine Street, Harrisburg, Pennsylvania 17101

Cooperative de Seguros de Vida de Puerto Rico, G.P.O. Box 3428, San Juan, Puerto Rico 00936

Blue Cross of Rhode Island, 444 Westminster Mall, Providence, Rhode Island 02901

Medicare Coordinator, Blue Cross of S.C., Columbia, South Carolina 29219

Medicare Coordinator, Blue Cross of Tennessee, Blue Cross Bldg., Chattanooga, Tennessee 37402

Medicare Coordinator, Group Hospital Service, Inc., P.O. Box 22146, Dallas, Texas 75222

Medicare Coordinator, B/C of Utah, P.O. Box 30270, Medicare A, Salt Lake City, Utah 84130

Medicare Coordinator, B/C of S.W. Virginia, P.O. Box 13047, 3959 Electric Rd. Roanoke, Virginia 24045

Medicare Coordinator, Blue Cross of Virginia, P.O. Box 27401, Richmond, Virginia 23261

Medicare Coordinator, B/C of Washington/Alaska, Inc., 15700 Dayton Avenue, North, P.O. Box 327, Seattle, Washington 98111

Medicare Coordinator, Parkersburg Hosp. Serv., Inc., P.O. Box 1948, Parkersburg, West Virginia 26101

Medicare Coordinator, Blue Cross Hospital Service Inc., P.O. Box 1353, City Center West Charleston, West Virginia 25325

Medicare Coordinator, Blue Cross of Northern West Virginia Inc., 20th and Chapline Streets, Wheeling, West Virginia 26003

Medicare Coordinator, Blue Cross/Blue Shield United of Wisconsin, Milwaukee, Wisconsin 53201

Medicare Coordinator, Blue Cross/Blue Shield of Wyoming, P.O. Box 2266, Cheyenne, Wyoming 82000

Health Care Financing Administration, Bureau of Program Operations, Office of Prepaid Operations Staff, 6325 Security Boulevard, Baltimore, Maryland 21207

Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611

**Medicare Carriers**

Medicare Coordinator, Blue Cross and Blue Shield of Alabama, 450 Riverchase Parkway East, Birmingham, Alabama 35296

Vice President for Medicare and Medical Services, Arkansas Blue Cross and Blue Shield, Inc., 601 Gaines Street, Little Rock, Arkansas 72203

Medicare Coordinator, California Physicians Service, (d/b/a Blue Shield of California), P.O. Box 7013, No. 2 Northpoint, San Francisco, California 94120

Medicare Coordinator, Transamerica Occidental Life Insurance Company, P.O. Box 54905 Terminal Annex, Los Angeles, California 90054

Assistant Vice President, Rocky Mountain Hospital and Medical Service, (d/b/a Blue Cross and Blue Shield of Colorado), 700 Broadway, Denver, Colorado 80273

Medicare Administrator, Travelers Ins. Co., One Tower Square, Hartford, Connecticut 06183

Medicare Administrator, Aetna Life & Casualty, 151 Farmington Avenue, Hartford, Connecticut 06156

Medicare Coordinator, Blue Cross and Blue Shield of Florida, Inc., P.O. Box 1798, Jacksonville, Florida 32231

Health Care Service Corporation, 233 North Michigan Avenue, Chicago, Illinois 60601

Associated Insurance Companies, Inc., (d/b/a Blue Cross and Blue Shield of Indiana), 8320 Craig Street, Suite 100, Indianapolis, Indiana 46250-0453

Assistant Executive Director, Blue Shield of Iowa, Ruan Building, 636 Grand Avenue, Station 28, Des Moines, Iowa 50309

Medicare Assistant, Blue Cross and Blue Shield of Kansas, Inc., P.O. Box 239, Topeka, Kansas 66601

Blue Cross and Blue Shield of Kentucky, Inc., 100 East Vine Street, 6th Floor, Lexington, Kentucky 40517

Medicare Coordinator, Blue Cross and Blue Shield of Maryland, Inc., 700 E. Joppa Road, Baltimore, Maryland 21204

Medicare Coordinator Part B, Blue Shield of Massachusetts, Inc., 100 Summer Street, Boston, Massachusetts 02110

Assistant Vice President Government, Affairs Department, Blue Cross and Blue Shield of Michigan, 800 Lafayette East, Detroit, Michigan 48226

Blue Cross and Blue Shield of Minnesota, P.O. Box 64357, 3535 Blue Cross Road, St. Paul, Minnesota 55184

Vice President Government Programs, Blue Cross and Blue Shield of Kansas City, P.O. Box 169, Kansas City, Missouri 64141

Director, Medicare Administration, General American Life Insurance Co., P.O. Box 505, St. Louis, Missouri 63166

Blue Cross and Blue Shield of Montana, Inc., P.O. Box 4309, 404 Fuller Avenue, Helena, Montana 59601

Medicare Coordinator, Prudential Insurance Co. of America, Tri-City Office Drawer 471, Millville, New Jersey 08332

Director of Medicare Part B, Blue Shield of Western New York, Inc., 298 Main Street, Buffalo, New York 14202

Medicare Coordinator, Group Health Insurance, Inc., 330 West 42nd Street, New York, New York 10036

Medicare Coordinator, Empire Blue Cross and Blue Shield, 622 Third Avenue, New York, New York 10017

Medicare Coordinator, EQUICOR, Inc., 1285 Avenue of the Americas, New York, New York 10019

Medicare Coordinator, Blue Cross and Blue Shield of North Dakota, 4510 13th Avenue, S.W., Fargo, North Dakota 58121

Medicare System and Processing Division, Nationwide Mutual Insurance Company, P.O. Box 16788, Columbus, Ohio 43216

Medicare Coordinator, Pennsylvania Blue Shield, P.O. Box 65, Camp Hill, Pennsylvania 17011

Chief, Internal Operations, Seguros de Servicio de Salud de Puerto Rico 00936-3628

Medicare Coordinator, Blue Cross and Blue Shield of Rhode Island, 444 Westminster Mall, Providence, Rhode Island 02901

Medicare Coordinator, Blue Cross and Blue Shield of South Carolina, Fontaine Business Center, 300 Arbor Lake Drive, Suite 1300, Columbia, South Carolina 29223

Blue Cross and Blue Shield of Texas, Inc., 901 South Central Expressway, P.O. Box 833815, Richardson, Texas 75083-3815

Manager, Part B, Blue Cross and Blue Shield of Utah, P.O. Box 30270, 2455 Parley's Way, Salt Lake City, Utah 84130

Assistant Administrator, Washington Physicians Service, 4th and Battery Building, 2401 4th Avenue, 6th Floor, Seattle, Washington 98121

Director, Medicare Claims Department, Wisconsin Physicians' Service Insurance Corp., 1717 West Broadway, Monona, Wisconsin 53713

**09-70-0520****SYSTEM NAME:**

End Stage Renal Disease (ESRD) Program Management and Medical Information System (Registry) HHS, HCFA.

**SECURITY CLASSIFICATION:**

None.

**SYSTEM LOCATION:**

HCFA DATA CENTER, Lyon Building, 7131 Rutherford Road, Baltimore, Maryland 21207.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Persons with end-stage renal disease who receive Medicare benefits.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Health and medical record data; Medicare billing information including charges and amounts reimbursed; physician characteristics; demographic data on beneficiaries; survival characteristics on some successful transplant patients beyond the entitlement period; ESRD facility approval data; ESRD facility demographic characteristics; ESRD facility cost information; and ESRD facility treatment surveys.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Sections 226A, 1875, and 1881 of the Social Security Act (42 U.S.C. 426-1, 1395ll, and 1395rr.).

**PURPOSE:**

To meet and operationalize statutory requirements, of Sec. 2991, Pub. L. 92-603; to support State and local ESRD programs and legislative requirements; and to support Federal research and public service programs and effective State, local and other planning activities.

**ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Disclosure may be made to: (1) A congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of the individual.

(2) Organizations deemed qualified by the Health Care Financing Administration to carry out quality assessment, medical audits of utilization review.

(3) To the Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

(a) HHS or any component thereof; or  
(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employees in his or her individual capacity where the Department of Justice (or HHS where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof, where HHS determines that the litigation is likely to affect HHS or any of its components;

is a party to litigation or has interest in such litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(4) A record from this system of records may be disclosed as a "routine use" to a recipient for a research purpose, if the Department:

a. Determines that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

b. Determines that the research purpose for which the disclosure is to be made—(1) cannot be reasonably accomplished unless the record is provided in individually identifiable form, and (2) warrants the risk to the privacy of the individual that additional exposure of the record might bring;

c. Requires the recipient to—(1) establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and (2) remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and (3) make no further use or disclosure of the record except—(A) in emergency circumstances affecting the health or safety of any individual, (B) for use in another research project, under these same conditions, and with written authorization of the Department, (C) for disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or (D) when required by law;

d. Secures a written statement attesting to the recipient's



understanding of, and willingness to abide by these provisions.

(5) To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Data would also be disclosed to contractor incidental to consultation, programming, operation, user assistance, or maintenance, for ADP or telecommunications systems containing or supporting records in the system.

(8) To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

a. Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made:

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring, and;

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request, unless the recipient presents an adequate justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project subjects to be identified is removed or

destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of and willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality, and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

#### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

##### **STORAGE:**

Electronic medium; selected hard copy backup, and microfilm.

##### **RETRIEVABILITY:**

Data indexed by Health Insurance Claim number, patient name and facility number. Individual patient and statistical data provided to Health Care Financing Administration, the National Institutes of Health and local Medical Review Boards, statistical data provided to other governmental units and the general public.

##### **SAFEGUARDS:**

Restricted access to all areas where data are maintained and processed, hard copy data stored in locked files in secured area, terminal access controlled by user ID and keywords. Access to personal data restricted to those authorized to work with those data. For computerized records, safeguards established in accordance with DHHS ADP Systems Manual, Part 6, "ADP Systems Security," (e.g., security codes) will be used, limiting access to authorized personnel.

##### **RETENTION AND DISPOSAL:**

Hard copy destroyed after 1 year by shredding; all other information maintained indefinitely.

##### **SYSTEM MANAGER(S) AND ADDRESS:**

Health Care Financing Administration, Bureau of Data Management and Strategy, Office of Statistics and Data Management, Division of Information Analysis, ESRD

Systems Branch, 6325 Security Blvd., Baltimore, Maryland 21207.

#### **NOTIFICATION PROCEDURE:**

Same as system manager. An individual who requests notification of or access to a medical/dental record shall, at the time the request is made, designate in writing a responsible representative who will be willing to review the record and inform the subject individual of its contents at the representative's discretion. (These notification and access procedures are in accordance with Department Regulations (45 CFR 5b.6).)

#### **RECORD ACCESS PROCEDURES:**

Same as notification procedures. Requesters should also reasonably specify the record contents being sought. (These access procedures are in accordance with Department Regulations (45 CFR 5b.5(a)(2)).)

#### **CONTESTING RECORD PROCEDURES:**

Contact the official at the address specified under notification procedures above, and reasonably identify the record and specify the information to be contested. State the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department Regulations (45 CFR 5b.7).)

#### **RECORD SOURCE CATEGORIES:**

Applications for Medicare, ESRD medical evidence reports, ESRD transplant information; ESRD beneficiary selection information; patient records at ESRD treatment facilities, death notifications, Health Care Financing Administration Medicare Master Files, aggregate ESRD facility treatment surveys; ESRD facility cost information; and ESRD facility approval characteristics.

#### **SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

09-70-0526

#### **SYSTEM NAME:**

Common Working File (CWF).

#### **SECURITY CLEARANCE:**

None.

#### **SYSTEM LOCATION:**

Contact system manager for location of records.

#### **CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Medicare beneficiaries.

#### **CATEGORIES OF RECORDS IN THE SYSTEM:**

The system contains all information on Medicare Part A and Part B beneficiary enrollment, entitlement, utilization, query and reply activity, worker's compensation, Veterans Administration (VA) entitlement, and Medicare secondary payer records containing other party liability insurance information necessary for appropriate Medicare claim payment. The categories of records are Health Insurance Master Record, Part A Intermediary Medicare Claims Record, Part B Carrier Claims Record, Medicare Secondary Payer Record, Third Party Liability Record, Medicaid Entitlement Record, Health Maintenance Organizations Record, and Hospice Record.

#### **AUTHORITY OF MAINTENANCE OF THE SYSTEM:**

Section 1816 and 1874 of Title XVIII of the Social Security Act (42 U.S.C. 1395h and 1395kk).

#### **PURPOSE OF THE SYSTEM:**

To properly pay medical insurance benefits to or on behalf of entitled beneficiaries.

#### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

Disclosures may be made to:

(1) Claimants, their authorized representatives or representative payees to the extent necessary to pursue claims made under Title XVIII of the Social Security Act (Medicare).

(2) Third-party contacts (without the consent of the individuals to whom the information pertains) in situations where the party to be contacted has, or is expected to have information relating to the individual's capability to manage his or her affairs or to his or her eligibility for or entitlement to benefits under the Medicare program when:

(a) The individual is unable to provide the information being sought (an individual is considered to be unable to provide certain types of information when any of the following conditions exist: individual is incapable or of questionable mental capability, cannot read or write, cannot afford the cost of obtaining the information, a language barrier exists, or the custodian of the information will not, as a matter of policy, provide it to the individual), or

(b) The data are needed to establish the validity of evidence or to verify the accuracy of information presented by the individual, and it concerns one or more of the following: the individual's eligibility to benefits under the Medicare program; the amount of reimbursement; any case in which the evidence is being

reviewed as a result of suspected abuse or fraud, concern for program integrity, or for quality appraisal, or evaluation and measurement of system activities.

(3) Third-party contact where necessary to establish or verify information provided by representative payees or payee applicants.

(4) The Treasury Department for investigating alleged theft, forgery, or unlawful negotiation of Medicare reimbursement checks.

(5) The U.S. Postal Service for investigating alleged forgery or theft of Medicare checks.

(6) The Department of Justice for investigating and prosecuting violations of the Social Security Act to which criminal penalties attach, or other criminal statutes as they pertain to the Social Security Act programs, for representing the Secretary, and for investigating issues of fraud by agency officer or employees, or violation of civil rights.

(7) The Railroad Retirement Board for administering provisions of the Railroad Retirement and Social Security Acts relating to railroad employment.

(8) Peer Review Organizations in connection with their review claims, or in connection with studies of other review activities, conducted pursuant to Part B of Title XI of the Social Security Act.

(9) State Licensing Board for review of unethical practices or nonprofessional conduct.

(10) Providers and suppliers of services (and their authorized billing agents) directly or dealing through fiscal intermediaries of carriers, for administration of provisions of title XVIII.

(11) An individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease or disability; or the restoration or maintenance of health, if HCFA:

(a) Determines that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

(b) Determines that the purpose for which the disclosure is to be made:

(1) Cannot be reasonably accomplished unless the record is provided in individually identifiable form.

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additional exposure of the record might bring, and

(3) There is reasonable probability that the objective for the use would be accomplished;

(c) Requires the information recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purposes of the project, unless the recipient presents an adequate justification of a research or health nature for retaining such information, and

(3) Make no further use for disclosure of the record except for:

(a) In emergency circumstances affecting the health or safety of any individual.

(b) For use in another research project, under these same conditions, and with written authorization of HCFA.

(c) For disclosure to a properly identified person for the purpose of audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law: Secures a written statement attesting to the information recipient's understanding of and willingness to abide by these provisions.

(12) State welfare departments pursuant to agreements with the Department of Health and Human Services for administration of State supplementation payment for determination of eligibility for Medicaid, for enrollment of welfare recipients for medical insurance under section 1843 of the Social Security Act, for quality control studies, for determining eligibility of recipients of assistance under titles IV and XIX of the Social Security Act, and for the complete administration of the Medicaid program.

(13) A congressional office from the record of an individual in response to an inquiry from the congressional office at the request of the individual.

(14) State audit agencies in connection with the audit of Medicare eligibility considerations. Disclosures of physicians' customary charge data are made to State audit agencies in order to ascertain the correctness of title XIX charges and payments.

(15) The Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

(a) HHS, or any component thereof; or

(b) Any HHS employee in his or her official capacity; or

(c) Any HHS employee in his or her individual capacity where the



Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or

(d) The United States or any agency thereof where HHS determines that the litigation is likely to affect HHS or any of its components, is a party to litigation, and HHS determines that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records were collected.

(16) Peer review groups, consisting of members of State, County, or local medical societies or medical care foundations (physicians), appointed by the medical society or foundation at the request of the carrier to assist in the resolution of questions of medical necessity, utilization of particular procedures or practices, or overutilization of services with respect to Medicare claims submitted to the carrier.

(17) Physicians and other suppliers of services who are attempting to validate individual items on which the amounts included in the annual Physician/Supplier Payment List or similar publications are based.

(18) Senior citizen volunteers, working in intermediaries' and carrier's offices to assist Medicare beneficiaries in response to beneficiaries' requests for assistance.

(19) A contractor working with Medicare carriers/intermediaries to identify and recover erroneous Medicare payments for which workers' compensation programs are liable.

(20) State and other governmental Workers' Compensation Agencies working with the Health Care Financing Administration to coordinate benefits payable under the Medicare program with benefits payable under workers' compensation programs.

(21) Insurance companies, self-insurers, Health Maintenance Organizations, multiple employer trusts and other groups providing protection against medical expenses of their enrollees. Information to be disclosed shall be limited to Medicare entitlement data. In order to receive this information the entity must agree to the following conditions:

(a) To certify that the individual on whom the information is being provided is one of its insureds;

(b) To utilize the information solely for the purpose of processing the identified individual's insurance claims; and

(c) To safeguard the confidentiality of the data and to prevent unauthorized access to it.

(22) To a contractor for the purpose of collating, analyzing, aggregating or otherwise refining or processing records in this system or for developing, modifying and/or manipulating ADP software. Date would also be disclosed to contractors incidental to consultation, programming, operation, user assistance, or maintenance for ADP or telecommunications systems containing or supporting records in the system.

(23) To an agency of a State Government, or established by State law, for purposes of determining, evaluating and/or assessing cost, effectiveness, and/or the quality of health care services provided in the State, if HCFA:

(a) Determines that the use or disclosure does not violate legal limitations under which the data were provided, collected, or obtained;

b. Establishes that the data are exempt from disclosure under the State and/or local Freedom of Information Act;

c. Determines that the purpose for which the disclosure is to be made:

(1) Cannot reasonably be accomplished unless the data are provided in individually identifiable form;

(2) Is of sufficient importance to warrant the effect and/or risk on the privacy of the individuals that additional exposure of the record might bring; and

(3) There is reasonable probability that the objective for the use would be accomplished; and

d. Requires the recipient to:

(1) Establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record;

(2) Remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the request, unless the recipient presents an adequate justification for retaining such information;

(3) Make no further use or disclosure of the record except:

(a) In emergency circumstances affecting the health or safety of any individual;

(b) For use in another project under the same conditions, and with written authorization of HCFA;

(c) For disclosure to a properly identified person for the purpose of an audit related to the project, if information that would enable project

subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) When required by law; and

(4) Secure a written statement attesting to the recipient's understanding of and willingness to abide by these provisions. The recipient must agree to the following:

(1) Not to use the data for purposes that are not related to the evaluation of cost, quality, and effectiveness of care;

(2) Not to publish or otherwise disclose the data in a form raising unacceptable possibilities that beneficiaries could be identified (i.e., the data must not be beneficiary-specific and must be aggregated to a level when no data cells have ten or fewer beneficiaries); and

(3) To submit a copy of any aggregation of the data intended for publication to HCFA for approval prior to publication.

#### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:**

##### **STORAGE:**

Magnetic media (Magnetic Tape, Disks, Microfiche).

##### **RETRIEVABILITY:**

Records are retrieved by the Health Insurance Claim Number.

##### **SAFEGUARDS:**

a. Authorized Users: Only agency employees and contractor personnel whose duties require the use of information in the system. In addition, such agency employees and contractor personnel are advised that the information is confidential and of criminal sanctions for unauthorized disclosure of information.

b. Physical Safeguards: Records are stored in locked files or secured areas. Computer terminals are in secured areas.

c. Procedural Safeguards: Employees who maintain records in the system are instructed to grant regular access only to authorized users. Data stored in computers are accessed through the use of passwords known only to authorized personnel.

Contractors who maintain records in this system are instructed to make no further disclosure of the records except as authorized by the system manager and permitted by the Privacy Act. Privacy Act language is included in contracts related to this system.

d. Implementation Guidelines: Safeguards implemented in accordance with all guidelines required by the

Department of Health and Human Services (HHS). Safeguards for automated records have been established in accordance with the HHS' Automated Data Processing Manual, Part 6, "ADP System Security".

##### **RETENTION AND DISPOSAL:**

Records are retained for an indefinite period of time dependent on individual beneficiary coverage.

##### **SYSTEM MANAGER(S) AND ADDRESS:**

Director, Bureau of Program Operations, Health Care Financing Administration, Room 300, Meadows East Building, 6325 Security Boulevard, Baltimore, MD 21207.

##### **NOTIFICATION PROCEDURES:**

Inquiries and requests for system records should be addressed to the system manager at the address above. The requestor must specify the Health Insurance Claim Number.

##### **RECORD ACCESS PROCEDURES:**

Same as notification procedure. Requestors should also reasonably specify the record contents being sought. (The procedures are in accordance with Departmental Regulations (45 CFR 5b.5(a)(2).)

##### **CONTESTING RECORD PROCEDURES:**

Contact the system manager named above and identify the record and specify the information to be contested. State the reason for contesting it (e.g., why it is inaccurate, irrelevant, incomplete or not current). (These procedures are in accordance with Departmental Regulations (45 CFR 5b.7).)

##### **RECORD SOURCE CATEGORY:**

The data contained in these records is furnished by the individual. In most cases, the identifying information is provided to the physician by the individual. The record source categories are the Health Insurance Master Record, Part A Intermediary Medical Claims Record, Part B Carrier Medicare Claims Record, Medicare Secondary Payer Record, Third Party Liability Record, Medicaid Entitlement Record, Health Maintenance Organizations Record, and Hospice Record.

##### **SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

None.

09-70-0527

##### **SYSTEM NAME:**

HCFA Utilization Review Investigatory Files HHS/HCFA BPO.

##### **SECURITY CLASSIFICATION:**

None.

##### **SYSTEM LOCATION:**

See Appendix A.

##### **CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Persons or entities alleged to have violated the provisions of the Social Security Act related to the Medicare (Title XVIII) or Medicaid (Title XIX) program or other criminal statutes as they pertain to Social Security Act programs where substantial basis for criminal prosecution exists, defendants in criminal prosecution cases, or persons or entities alleged to have abused the Medicare or Medicaid program. This last category of individuals would, for example, include persons or entities alleged to have rendered unnecessary services to medicare beneficiaries and/or Medicaid recipients, overutilized services, engaged in improper billing procedures, or breached the assignment agreement. Also included are persons or entities chosen as subjects of a validation review.

##### **CATEGORIES OF RECORDS IN THE SYSTEM:**

Information maintained in each record includes the identity of individual(s) chosen for validation review, the area of service under validation study or the nature of the alleged offense, documentation of the investigation into the alleged offense (including identification of beneficiaries, recipients and witnesses, statements, medical records, payment records, or complaints from beneficiaries recipients and others, correspondence and forms, documentation of complaints, and reports of medical review committees or consultants (including professional review organizations), and the disposition for the case by the HCFA Regional Office, Office of the Inspector General, Medicaid State agency or State Medicaid Fraud Control Unit, or the U.S. Attorney.

##### **AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Sections 205, 1106, 1107, 1815, 1816, 1833, 1842, 1872, 1874, 1876, 1877, and 1902 of the Social Security Act. (42 U.S.C. 405, 1306, 1307, 1395g, 1395h, 1395i, 1395u, 1395j, 1395kk, 1395mm, 1395nn, and 1396a)

##### **PURPOSE OF THE SYSTEM:**

To determine if a violation of a provision of the Social Security Act of related penal or civil provision of the United States Code has been committed; to determine if HHS has made proper payments as prescribed under sections

1815 and 1833 of the Security Act and whether the Medicare or Medicaid programs have been abused; and to coordinate Title XVIII and Title XIX investigations and prevent duplication. HCFA discloses case file material to the HHS Office of the Inspector General when a case is referred for full fraud investigation.

##### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

HCFA uses material in this system as the basis for referral of the case to the HHS Office of the Inspector General or the:

(1) Department of Justice for consideration of criminal prosecution or civil action or to

(2) State or local licensing authorities (including State medical review boards), professional review organizations, peer review groups, medical consultants, or other professional associations for possible administrative action.

(3) HCFA discloses such information to officers or employees of State governments as well as the civilian health and medical program of the Uniformed Services (CHAMPUS) program for use in conducting or directing investigations of possible fraud or abuse against the Title XVIII, XIX, or CHAMPUS programs, as well as State attorneys in connection with State programs involving the Health Care Financing Administration.

(4) HCFA also uses the material to determine the direction of investigation of potential fraud or abuse situations which includes contact with third parties for the purpose of establishing or negating a violation.

(5) HCFA discloses cases involving fraudulent tax returns or forger of Medicare checks to the:

(a) Treasury Department;

(b) To the postal authorities, and to appropriate law enforcement agencies.

(6) HCFA may make disclosures to a congressional office from the record of an individual in response to an inquiry which the congressional office makes at the request of that individual.

(7) To the Department of Justice, to a court or other tribunal, or to another party before such tribunal, when:

a. HHS, or any component thereof; or

b. Any HHS employee in his or her official capacity; or

c. Any HHS employee in his or her individual capacity where the Department of Justice (or HHS, where it is authorized to do so) has agreed to represent the employee; or

d. The United States or any agency thereof where HHS determines that



litigation is likely to affect HHS or any of its components, is a party to litigation or has an interest in such litigation, and HHS determined that the use of such records by the Department of Justice, the tribunal, or the other party is relevant and necessary to the litigation and would help in the effective representation of the governmental party, provided, however, that in each case, HHS determines that such disclosure is compatible with the purpose for which the records were collected.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Paper files maintained in locked file cabinets.

**RETRIEVABILITY:**

The staff indexes and retrieves records by case number or by the name of the subject of the investigation.

**SAFEGUARDS:**

The system is maintained in accordance with the requirements of the DHHS ADP System Manual, Part 6, "Systems Security." HCFA keeps the file cabinets locked in a room that is locked after office hours. No one has access to the files room except HCFA Regional Office staff and other authorized personnel on a need to know basis.

**RETENTION AND DISPOSAL:**

HCFA places the records in an inactive file after final action on the case. It closes out the inactive file at the end of the calendar year in which final action was taken, holds it 2 additional years, transfers it to the Federal Records Center, who destroys it after 3 additional years.

**SYSTEM MANAGER AND ADDRESS:**

Director, Bureau of Program Operations, Health Care Financing Administration, 6325 Security Boulevard, Baltimore, Maryland 21207.

**NOTIFICATION PROCEDURE:**

An individual can determine if this system contains a record pertaining to an active abuse investigation or a closed fraud or abuse investigation of which the individual is/was a subject by requesting such information in writing. He or she should direct inquiries to HCFA, Bureau of Program Operations, Office of Program Validation; 6325 Security Boulevard, Baltimore, MD 21207 or the appropriate HCFA Regional Office (see app. C.2).

Under 5 U.S.C. 552a(k)(2), case files on active fraud investigation cannot

determine if this system contains a record pertaining to an active fraud investigation of which the individual is a subject.

These notifications procedures are in accordance with Department regulations (45 CFR 5b.5).

**RECORD ACCESS PROCEDURES:**

Same as notification procedures. Requestors should also reasonably specify the record contents they seek. As with the notification procedure above, case files on active fraud investigations are exempt from access by the individuals who are the subjects of the investigations pursuant to 5 U.S.C. 552a(k)(2). However, access to information which is a matter of public record or documents which the individual furnished will be permitted. These access procedures are in accordance with Department regulations (45 CFR 5b.5(a)(2).)

**CONTESTING RECORD PROCEDURES:**

Contact the appropriate official at the address specified under notification procedures above, reasonably identify the record and specify the information to be contested. State the corrective action sought and the reason for the correction with supporting justification. (These procedures are in accordance with Department regulations—45 CFR 5b.7.)

**RECORD SOURCE CATEGORIES:**

The information contained in this record systems is the result of a criminal or program abuse investigation and may be derived from such sources as the suspect, beneficiaries, witnesses, professional review organizations, professional or peer view committees, medical consultants, Title XIX State agencies or State Medicaid Fraud Control Units, Social Security Administration, Health Care Financing Administration, carrier or intermediary employees with a knowledge of the case.

**SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:**

HHS claims exemption of certain records (case files on active fraud investigations) in this system from the notification and access procedures under 5 U.S.C. 552a(k)(2) inasmuch as these records are investigatory materials compiled for program (law) enforcement in anticipation of a criminal or administrative proceedings. (See Department Regulations (45 CFR 5b.11))

**Appendix A. Health Insurance Claims**

Medicare records are maintained at the HCFA Central Office (see section 1 below for the address). Health insurance records of the

Medicare program can also be accessed through a representative of the HCFA Regional Office (see section 2 below for addresses). Medicare claims records are also maintained by private insurance organizations who share in administering provisions of the health insurance program. These private insurance organizations, referred to as carriers and intermediaries, are under contract to the Health Care Financing Administration and the Social Security Administration to perform specific tasks in the Medicare program. See section 3 below for addresses for intermediaries and section 4 addresses for carriers.

**1. Central Office Addresses:**

Bureau of Program Operations, HCFA, 6325 Security Boulevard, Baltimore, Maryland 21207. Office Hours: 8:15-4:45.

Bureau of Data Management and Strategy, HCFA, Office of Health Program Systems, Room 1705, Equitable Building, 6325 Security Boulevard, Baltimore, Maryland 21207. Office Hours: 8:15-4:45

**2. HCFA Regional Office Addresses:**

**BOSTON REGION**—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont  
John F. Kennedy Federal Building, Room 1211; Boston, Massachusetts 02203. Office Hours: 8:30-5:00

**NEW YORK REGION**—New Jersey, New York, Puerto Rico, Virgin Islands  
28 Federal Plaza—Room 715, New York, New York 10007. Office Hours: 8:30-5:00

**PHILADELPHIA REGION**—Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia  
P.O. Box 8460, Philadelphia, Pennsylvania 19101. Office Hours: 8:30-5:00

**ATLANTA REGION**—Alabama, North Carolina, South Carolina, Florida, Georgia, Kentucky, Mississippi, Tennessee  
101 Marietta Street, Suite 702, Atlanta, Georgia 30223. Office Hours: 8:00-4:30

**CHICAGO REGION**—Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin  
Suite A—824, Chicago, Illinois 60604. Office Hours: 8:15-4:45

**DALLAS REGION**—Arkansas, Louisiana, New Mexico, Oklahoma, Texas  
1200 Main Tower Building, Dallas, Texas. Office Hours: 8:00-4:30

**KANSAS CITY REGION**—Iowa, Kansas, Missouri, Nebraska  
New Federal Office Building, 601 East 12th Street—Room 436, Kansas City, Missouri 64108. Office Hours: 8:00-4:45

**DENVER REGION**—Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming  
Federal Office Building, 1961 Stout St—Room 1185, Denver, Colorado 80294. Office Hours: 8:00-4:30

**SAN FRANCISCO REGION**—American Samoa, Arizona, California, Guam, Hawaii, Nevada  
Federal Office Building, 10 Van Ness Avenue, 20th Floor, San Francisco, California 94102. Office Hours: 8:00-4:30

**SEATTLE REGION**—Alaska, Idaho, Oregon, Washington  
1321 Second Avenue—Room 815 Mail Stop 211, Seattle, Washington 98101. Office Hours: 8:00-4:30

**3. Intermediary Addresses (Hospital Insurance):**

Medicare Coordinator, Blue Cross/Blue Shield of Alabama, 450 Riverchase Parkway East, Birmingham, Alabama 35298  
Medicare Coordinator, Blue Cross of Arizona, Inc., P.O. Box 13466, Phoenix, Arizona 85002

Medicare Coordinator, Arkansas Blue Cross/Blue Shield, Inc., 601 Gaines Street, Little Rock, Arkansas 72203

Medicare Coordinator, Blue Cross of Southern California, P.O. Box 70000, Van Nuys, California 91470

Medicare Coordinator, Blue Cross of Northern California, 1950 Franklin Street, Oakland, California 94659

Medicare Coordinator, Kaiser Foundation Health Plan, Inc., 1956 Webster Street, Room 310A Oakland, California 94612

Medicare Coordinator, Rocky Mountain Hospital and Medical Service, 700 Broadway, Denver, Colorado 80203

Medicare Administrator, Aetna Life & Casualty, 151 Farmington Avenue, Hartford, Connecticut 06156

Medicare Coordinator, Blue Cross/Blue Shield Connecticut, 370 Bassett Rd., North Haven, Connecticut 06473

Medicare Administrator, Travelers Ins. Co., One Tower Square, Hartford, Connecticut 06115

Triage, Inc., 719 Middle Street, Bristol, Connecticut 06019

Medicare Coordinator, Blue Cross/Blue Shield of Delaware, Inc., 201 West 14th Street, Wilmington, Delaware 19899

Medicare Coordinator, Group Hospitalization, Inc., 550 12th Street, SW., Washington, DC 20024

Medicare Coordinator, Blue Cross of Florida, Inc., P.O. Box 1789, Jacksonville, Florida 32201

Medicare Coordinator, Blue Cross of Georgia/Columbus, P.O. Box 7368, Columbus, Georgia 31908

Medicare Coordinator, Blue Cross of Georgia/Atlanta, P.O. Box 4445, Atlanta, Georgia 30302

Medicare Coordinator, Hawaii Medical Service Association, P.O. Box 860, Honolulu, Hawaii 96808

Medicare Coordinator, Blue Cross of Idaho, Inc., P.O. Box 7480, Boise, Idaho 83707

Medicare Coordinator, Health Care Service Corp., 233 North Michigan Avenue, Chicago, Illinois 60601

Medicare Coordinator, Mutual Hospital Insurance, Inc., 120 West Market Street, Indianapolis, Indiana 46204

Medicare Coordinator, Blue Cross of Iowa, Ruan Building, 636 Grant Avenue, Station 28, Des Moines, Iowa 50307

Medicare Coordinator, Blue Cross of Western Iowa and S. Dakota, Third and Pierce Street, Sioux City, Iowa 51102

Medicare Administrator, Kansas Hospital Service Association, Inc., P.O. Box 239, Topeka, Kansas 66601

Medicare Coordinator, Blue Cross and Blue Shield of Kentucky, Inc., 9901 Linn Station Road, Louisville, Kentucky 40223

Medicare Coordinator, Louisiana Health Service and Indemnity Company, 2718A Wooddale Blvd., Baton Rouge, Louisiana 70805

Medicare Coordinator, Associated Hospital Service of Maine, 110 Free Street, Portland, Maine 04101

Medicare Coordinator, Maryland Blue Cross, Inc., 700 East Joppa Road, Baltimore, Maryland 21204

Medicare Coordinator, Part A, Blue Cross of Mass., Inc., 100 Summer Street, Boston, Massachusetts 02106

Medicare Coordinator, Blue Cross of Michigan, 600 Lafayette East, Detroit, Michigan 48226

Medicare Coordinator, Blue Cross of Minnesota, 3535 Blue Cross Road, St. Paul, Minnesota 55765

Medicare Coordinator, Blue Cross of Miss., P.O. Box 1043, Jackson, Mississippi 39205

Medicare Coordinator, Blue Cross Hospital Service of Missouri, 4444 Forest Park Boulevard, St. Louis, Missouri 63108

Medicare Coordinator, Blue Cross of Montana, P.O. Box 5017, Great Falls, Montana 59403

Medicare Coordinator, Mutual of Omaha Ins. Co., Box 456 Downtown Station, Omaha, Nebraska 68101

Medicare Coordinator, Blue Cross of Nebraska, P.O. Box 3248, Main Post Office Station, Omaha, Nebraska 68103

Medicare Coordinator, New Hampshire Vermont Health Service, 2 Pillsbury Street, Concord, New Hampshire 03306

Medicare Coordinator, Hospital Service Plan of New Jersey, 33 Washington Street, Newark, New Jersey 07102

Medicare Coordinator, Prudential Ins. Co. of America, Drawer 471, Millville, New Jersey 08332

Medicare Coordinator, New Mexico Blue Cross Inc., 12800 Indian School Rd., N.E., Albuquerque, New Mexico 87112

Medicare Coordinator, B/C-B/S of New York, 822 Third Avenue, New York New York 10017

Medicare Coordinator, North Carolina B/C-B/S, P.O. Box 2291, Durham, North Carolina 27702

Medicare Coordinator, Blue Cross of North Dakota, 4510 13th Avenue, S.W., Fargo, North Dakota 58121

Medicare Coordinator, B/C of N.W. Ohio, P.O. Box 943, Toledo, Ohio 43601

Medicare Coordinator, B/C of N.E. Ohio, 2066 East Ninth Street, Cleveland, Ohio 44115

Medicare Coordinator, Hospital Care Corporation, 1851 William Howard Taft Road, Cincinnati, Ohio 45206

Medicare Coordinator, Nationwide Mutual Insurance Co., P.O. Box 1825, Columbus, Ohio 43218

Medicare Coordinator, B/C of Central Ohio, P.O. Box 16526, Columbus, Ohio 43218

Medicare Coordinator, Blue Cross of Oklahoma, 1215 South Boulder, Tulsa, Oklahoma 74119

Medicare Coordinator, Northwest Hospital Service, P.O. Box 1271, Portland, Oregon 97201

Medicare Coordinator, Blue Cross of Greater Philadelphia, 1333 Chestnut Street, Philadelphia, Pennsylvania 19107

Medicare Coordinator, Blue Cross of Western Pennsylvania, One Smithfield Street, Pittsburgh, Pennsylvania 15222

Medicare Coordinator, B/C of N.E. Pennsylvania, 70 North Main Street, Wilkes-Barre, Pennsylvania 18711

Medicare Coordinator, Hospital Service Plan of Lehigh Valley, 1221 Hamilton Street, Allentown, Pennsylvania 18102

Medicare Coordinator, Capital Blue Cross, 100 Pine Street, Harrisburg, Pennsylvania 17101

Cooperative de Seguros de Vida de Puerto Rico, G.P.O. Box 3428, San Juan, Puerto Rico 00938

Blue Cross of Rhode Island, 444 Westminster Mall, Providence, Rhode Island 02901

Medicare Coordinator, Blue Cross of S.C., Columbia, South Carolina 29219

Medicare Coordinator, Blue Cross of Tennessee, Blue Cross Bldg., Chattanooga, Tennessee 37402

Medicare Coordinator, Group Hospital Service, Inc., P.O. Box 22146, Dallas, Texas 75222

Medicare Coordinator, B/C of Utah, P.O. Box 30270, Medicare A, Salt Lake City, Utah 84130

Medicare Coordinator, B/C of S.W. Virginia, P.O. Box 13047, 3959 Electric Rd. Roanoke, Virginia 24045

Medicare Coordinator, Blue Cross of Virginia, P.O. Box 27401, Richmond, Virginia 23261

Medicare Coordinator, B/C of Washington/Alaska, Inc., 15700 Dayton Avenue, North, P.O. Box 327, Seattle, Washington 98111

Medicare Coordinator, Parkersburg Hosp. Serv., Inc., P.O. Box 1948, Parkersburg, West Virginia 26101

Medicare Coordinator, Blue Cross Hospital Service Inc., P.O. Box 1353, City Center, West Charleston, West Virginia 25325

Medicare Coordinator, Blue Cross of Northern West Virginia Inc., 20th and Chapline Streets, Wheeling, West Virginia 26003

Medicare Coordinator, Blue Cross/Blue Shield United at Wisconsin, Milwaukee, Wisconsin 53201

Medicare Coordinator, Blue Cross/Blue Shield of Wyoming, P.O. Box 2266, Cheyenne, Wyoming 8200

Health Care Financing Administration, Bureau of Program Operations, Office of Prepaid Operations Staff, 6325 Security Boulevard, Baltimore, Maryland 21207

Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611

**Medicare Carriers**

Medicare Coordinator, Blue Cross and Blue Shield of Alabama, 450 Riverchase Parkway East, Birmingham, Alabama 35298

Vice President for Medicare and Medical Services, Arkansas Blue Cross and Blue Shield, Inc., 601 Gaines Street, Little Rock, Arkansas 72203

Medicare Coordinator, California Physicians Service, (d/b/a Blue Shield of California), P.O. Box 7013, No. 2 Northpoint, San Francisco, California 94120

Medicare Coordinator, Transamerica Occidental Life Insurance Company, P.O. Box 54905 Terminal Annex, Los Angeles, California 90054

Assistant Vice President, Rocky Mountain Hospital and Medical Service, (d/b/a Blue Cross and Blue Shield of Colorado), 700 Broadway, Denver, Colorado 80273



Medicare Administrator, Travelers Ins. Co., One Tower Square, Hartford, Connecticut 06183

Medicare Administrator, Aetna Life & Casualty, 151 Farmington Avenue, Hartford, Connecticut 06156

Medicare Coordinator, Blue Cross and Blue Shield of Florida, Inc., P.O. Box 1798, Jacksonville, Florida 32231

Health Care Service Corporation, 233 North Michigan Avenue, Chicago, Illinois 60601

Associated Insurance Companies, Inc., (d/b/a Blue Cross and Blue Shield of Indiana), 8320 Craig Street, Suite 100, Indianapolis, Indiana 46250-0453

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Medicare Coordinator Part B, Blue Shield of Massachusetts, Inc., 100 Summer Street, Boston, Massachusetts 02110

Assistant Vice President Government, Affairs Department, Blue Cross and Blue Shield of Michigan, 600 Lafayette East, Detroit, Michigan 48226

Blue Cross and Blue Shield of Minnesota, P.O. Box 64357, 3535 Blue Cross Road, St. Paul, Minnesota 55164

Vice President Government Programs, Blue Cross and Blue Shield of Kansas City, P.O. Box 169, Kansas City, Missouri 64141

Director, Medicare Administration, General American Life Insurance Co., P.O. Box 505, St. Louis, Missouri 63168

Blue Cross and Blue Shield of Montana, Inc., P.O. Box 4308, 404 Fuller Avenue, Helena, Montana 59601

Medicare Coordinator, Prudential Insurance Co. of America, Tri-City Office, Drawer 471, Millville, New Jersey 08332

Director of Medicare Part B, Blue Shield of Western New York, Inc., 298 Main Street, Buffalo, New York 14202

Medicare Coordinator, Group Health Insurance, Inc., 330 West 42nd Street, New York, New York 10036

Medicare Coordinator, Empire Blue Cross and Blue Shield, 622 Third Avenue, New York, New York 10017

Medicare Coordinator, EQUICOR, Inc., 1285 Avenue of the Americas, New York, New York 10019

Medicare Coordinator, Blue Cross and Blue Shield of North Dakota, 4510 13th Avenue, S.W., Fargo, North Dakota 58121

Medicare System and Processing Division, Nationwide Mutual Insurance Company, P.O. Box 16788, Columbus, Ohio 43216

Medicare Coordinator, Pennsylvania Blue Shield, P.O. Box 65, Camp Hill, Pennsylvania 17011

Chief, Internal Operations, Seguros de Servicio de Salud de Puerto Rico, Inc., G.P.O. Box 3628, San Juan, Puerto Rico 00936-3628

Medicare Coordinator, Blue Cross and Blue Shield of Rhode Island, 444 Westminster Mall, Providence, Rhode Island 02901

Medicare Coordinator, Blue Cross and Blue Shield of South Carolina, Fontaine Business Center, 300 Arbor Lake Drive, Suite 1300, Columbia, South Carolina 29223

Blue Cross and Blue Shield of Texas, Inc., 901 South Central Expressway, P.O. Box 833815, Richardson, Texas 75083-3815

Manager, Part B, Blue Cross and Blue Shield of Utah, P.O. Box 30270, 2455 Parley's Way, Salt Lake City, Utah 84130

Assistant Administrator, Washington Physicians Service, 4th and Battery Building, 2401 4th Avenue, 6th Floor, Seattle, Washington 98121

Director, Medicare Claims Department, Wisconsin Physicians' Service Insurance, Corp., 1717 West Broadway, Monona, Wisconsin 53713

[FR Doc. 88-29568 Filed 12-28-88; 8:45 am]  
BILLING CODE 4120-03-M

#### Office of Human Development Services

[Program Announcement No. 13600-883]

#### Administration for Children, Youth and Families; Availability of FY 1989 Funds and Request for Applications; Comprehensive Child Development Program

**AGENCY:** Administration for Children, Youth and Families (ACYF), Office of Human Development Services, (OHDS), Department of Health and Human Services (HHS).

**ACTION:** Announcement of the availability of financial assistance and request for applications for comprehensive child development programs.

**SUMMARY:** The Head Start Bureau of the Administration for Children, Youth and Families announces the availability of funds for competing planning grant and operating grant applications for a new Comprehensive Child Development Program. The purpose of this new program is to plan for and carry out projects for intensive, comprehensive, integrated and continuous supportive services for infants, toddlers and preschoolers from low-income families to enhance their intellectual, social, emotional and physical development and provide support to their parents and other family members.

This announcement contains a grant application process for both planning and operating grants. During the initial stage, up to 30 applicants will be selected competitively to receive planning grants for a three-month period, at a funding level up to \$35,000 each. In the second stage, between 10 and 25 agencies will be selected to receive operating grants based on the

outcome of a competitive review process.

**DATES:** The closing date for receipt of planning grant applications is February 15, 1989. The closing date for receipt of operating grant applications is July 14, 1989.

**ADDRESS:** Address applications to: Comprehensive Child Development Program, Department of Health and Human Services, Office of Human Development Services, Grants and Contracts Management Division, 200 Independence Avenue, SW, Hubert H. Humphrey Building, Room 341-F, Washington, DC 20201.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth S. Ussery (202) 755-7768 or Allen N. Smith (202) 755-7782.

#### SUPPLEMENTARY INFORMATION:

##### I. General Information

##### A. Program Purpose

On April 28, 1988, the President signed the Comprehensive Child Development Act of 1988, Part E of Pub. L. 100-297 (the Act). The overall objectives of the Act are to provide intensive, comprehensive, integrated and continuous support services to low-income children from birth to entrance into elementary school that will enhance their intellectual, social, emotional and physical development and to provide needed support services to parents and other household family members that will enhance their economic and social self-sufficiency.

A third party evaluation contractor will be selected through a competitive process to assess, on a continuing basis, whether the above stated objectives are being achieved and to assess the projects' impact on related programs. The contractor will also examine the relative effectiveness of different staffing and program models for achieving desirable child and family benefits as well as the relative effectiveness of alternative structures and mechanisms for delivering needed services. It is anticipated that control or comparison groups of individuals who are not participating in the project will be compared with individuals who are participating. In addition, a management support contractor will be selected through a competitive process to provide on-going administrative support in the conduct of the project.

##### B. Background

Early intervention in the lives of infants and young children from low-income families is an important factor in overcoming the cognitive, social, emotional and physical risks faced by

these children. Compared with children from middle and upper income families, these children are more likely to experience poor school achievement, low test score performance, higher grade retention and more special education class placements. Intervening successfully, however, is complicated because these children are usually part of families that have many social, economic, physical and educational problems which can hinder their development and prevent their achieving the full benefits of such an intervention.

Evidence is emerging which indicates that high quality intervention programs which serve all family members increase effective and productive family functioning and contribute substantially towards children achieving their full potential. Equally important is the evidence which suggests that intervention for the most needy families should begin as soon after birth as possible, address a broad range of needs and should continue throughout the preschool years. Investing resources early gives parents more opportunity to develop needed skills and confidence for accessing resources and support systems which can facilitate a greater commitment to directly and actively involving themselves in their child's development. Also, children are able to experience growth stimulating experiences at the earliest and the most critical developmental stages of their lives.

##### C. Program Services

Projects funded under the Act must intervene as early as possible in the child's life; involve the whole family; provide comprehensive services to all infants and young children in the household which address their intellectual, social, emotional and physical needs; provide services to parents and other family members which enhance their ability to contribute to the child's healthy development and which enable them to achieve economic and social self sufficiency; and provide continuous services until the child enters elementary school at the kindergarten or first grade level. It is expected that successful applicants under this announcement will provide and/or arrange for all such services.

In the case of infants, toddlers and preschool children, the core services which must be provided under the Act are health services (including screening, immunization, treatment and referral); child care that meets State licensing requirements; early childhood development programs; early intervention services for children with

or at-risk of developmental delay; and nutritional services.

In the case of parents and other household family members the core services which must be provided under the Act are prenatal care; education in infant and child development, health care, nutrition and parenting; referral to education, employment counselling, and vocational training as appropriate; and assistance in securing adequate income support, health care, nutritional assistance and housing.

##### D. Eligible Applicants

The following types of organizations are eligible to apply for planning and operating grants under this announcement:

- A Head Start agency;
- An agency that is eligible to be designated as a Head Start agency under section 641 of the Head Start Act;
- A community-based organization as defined under section 4(5) of the Job Training Partnership Act (29 U.S.C. 1503(5));
- An institution of higher education as defined under section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a));
- A public hospital as defined under 42 U.S.C. 2910(c);
- A community development corporation as defined under section 681(a)(2)(A) of the Community Services Block Grant Act (42 U.S.C. 9910(a)(2)(A)); or
- A public or private non-profit agency or organization specializing in delivering social services to infants or young children (i.e., toddlers and preschoolers).

Eligible agencies located in rural or urban communities are encouraged to apply for planning and operating grants. Organizations can and are encouraged to collaborate with each other in submitting an application. Agencies located in rural communities must enroll a minimum of 45 eligible families for this project (although a minimum of 60 is preferred), while agencies located in urban communities must enroll a minimum of 120 eligible families. Agencies will be expected to recruit at least two times the number of eligible families to be enrolled. Of this number, one-half should be enrolled and one-half placed on a waiting list. In addition, the catchment or recruiting area for the program must contain at least four times the number of eligible families to be enrolled. These figures are needed to assure that the objectives for the comprehensive child development program can be adequately examined over the full five year project period. Agencies must provide adequate

demographic data in their operating grant proposal to assure that these minimums will be met.

Families eligible to receive services from grantees funded under this announcement will only be those families with incomes at or below the poverty line when they are initially enrolled and who have a child either unborn or less than one year old at the time they are initially enrolled. The poverty line is determined in accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)) and is published annually by the Department in the Federal Register. For information purposes, the 1988 Poverty Income Guidelines are reprinted in Appendix I. The Guidelines for subsequent years will be found in the Federal Register.

##### E. Available Funds

In fiscal year 1989, ACYF expects to commit \$19,500,000 to fund planning grants and operating grants. Up to \$1,050,000 will be used to support up to 30 three month planning grants at a funding level of up to \$35,000 each. Planning grants will be awarded only in fiscal year 1989. Between 10 and 25 operating grants will be funded. Contingent on the availability of funds and grantee performance, operating grants will also be made for the project period in subsequent years.

Agencies will be refunded only if (1) there has been documented evidence of satisfactory performance in all operational, fiscal and administrative areas; (2) adequate appropriated funds are available; and (3) refunding is in the best interest of the Government. Continuation funds will be available to serve eligible families who started with the program in fiscal year 1990 and eligible families which replaced starting families (i.e., replacement families) who left the program during any single year. Agencies should serve at least the same number of eligible families each subsequent year as was served in fiscal year 1990. Any increases in these numbers should be documented and supported by the agency in their continuation proposal.

##### F. Timetable

The following is an approximate schedule of major activities under this announcement:

Activity	Deadline
(1) Planning grant applications are due.	February 15, 1989.
(2) Planning grant awards will be made.	April 14, 1989.



Activity	Deadline
(3) Supplementary information kits for operating grants available.	April 14, 1989 through June 14, 1989.
(4) Operating grant applications are due.	July 14, 1989.
(5) Operating grant awards will be made.	September 30, 1989.

## II. Description of the Comprehensive Child Development Program

### A. Grantee Responsibilities

The Comprehensive Child Development Program is intended to enhance the intellectual, social, emotional and physical development of children from low-income families necessary for their long range success as well as to enhance the educational, parenting and vocational skills of low-income parents and other household family members necessary for effective parenting and economic/social self-sufficiency. To accomplish these goals, agencies awarded operating grants will be expected to involve the whole family and to provide comprehensive, relevant and age appropriate services as early as possible in the child's life, continuing the provision of such services to all children in the family until entrance into elementary school.

In each participating family there must either be a woman who is pregnant or a child who is less than one year old at the time the family is initially enrolled in the program. The continual development of the child will be of particular study interest as the demonstration progresses. Other infants, toddlers and preschool children in that family will also receive similar preschool services and their progress will also be of study interest. Services to parents and other household family members will be provided on an individually needed basis during this same time period and their changing economic and educational conditions will be monitored and studied as well.

No single service delivery model or design is prescribed under this announcement. The intent of the Act is to fund and evaluate programs with different structures and mechanisms for delivering services. In addition, the intensity, duration and frequency of required services would be expected to vary from grantee to grantee. Similarly, programs will vary in terms of which services they directly provide and which services they arrange to be provided in coordination with other service providers or organizations.

Also, no single program or staffing model is prescribed under this announcement. Consequently, it is

expected that models with different philosophies or strategies for enhancing the intellectual, social, emotional and physical development of children will be funded and assessed across the different child and family populations served. Similarly, programs will be expected to vary with respect to the emphasis placed on center-based or combination center/home-based models and with the characteristics and intensity of their parent involvement activities.

Agencies are expected to cooperate with the third party evaluation contractor to be funded by the Administration for Children, Youth and Families which will conduct assessments of their program and service delivery models. Such cooperation will involve periodically furnishing needed process-oriented data as required by the evaluation contractor and allowing the contractor reasonable access to obtain child and family impact information. Examples of child impact information which might be collected include age appropriate gross and fine motor development, perceptual skills, cognitive skills, language skills, self-help skills, self-esteem, achievement motivation, social behavior and physical health. Examples of family impact information include welfare dependency, employment history, family income, parenting skills and behavior, child development knowledge, parent expectations, educational attainment, and family stability. All child and family data collected by participating programs and by the third party evaluation contractor will be kept confidential.

All funded projects must provide the core services for children, parents and other family members identified in Part I, Section C. Parents should also be given an opportunity to be involved in decision making about the nature and operation of these services. The level of these services must be consistent with acceptable developmental, health and nutritional practices for children and must meet or exceed the level reflected in the Head Start Program Performance Standards (45 CFR Subchapter B, Part 1304, Subparts B, C, D and E, excluding Appendices A and B). In addition, the requirements of 45 CFR Subchapter B, §§ 1301.11 and 1305.8 are applicable for carrying out this project. Costs shall be 20 percent of the total project costs for each grantee and may be provided in cash or in-kind, fairly evaluated, including equipment and/or services.

### C. Planning Grant Proposals

We expect that both eligible agencies who have experience in conducting projects similar to the projects

authorized by this announcement as well as those agencies who do not have such experience will be interested in applying for an operating grant due on July 14, 1989. To help these latter agencies plan and prepare an operating grant proposal, three month planning grants will be competitively awarded. A three month planning period is considered sufficient time to develop and design such a proposal and will enable operating grants to be funded in fiscal year 1989. The end product of a planning grant will be the design of a comprehensive child development program which will be reflected in an operating grant proposal submitted to the Department of Health and Human Services for competitive consideration. In their application for funding, eligible applicants for planning grants shall:

1. Describe the need to receive a planning grant, considering both fiscal as well as service expansion/coordination factors.
2. Describe the activities that will be carried out during the planning period.
3. Describe the capacity to provide or ensure the availability of intensive and comprehensive services to meet the purposes of the Act and, if relevant, include a description of the capacity of the agency to expand existing services. (Section 670N(b)(2)(A).)
4. Describe the eligible infants, young children (i.e., toddlers and preschoolers), parents and other family members to be served by the project, including the number to be served and information on the population and geographic location to be served. (Section 670N(b)(2)(B).)
5. Describe how the needs of the infants, young children, parents and other family members will be met by the project. (Section 670N(b)(2)(C).)
6. Describe the intensive and comprehensive supportive (core) services that project planners intend to address in the development of the project along with a description of the mechanisms for delivering these services. (Section 670N(b)(2)(D).)
7. Describe the manner in which the project will be operated together with the involvement of other community groups and public agencies and include a description of existing linkages, if any, with these groups and agencies. (Section 670N(b)(2)(E).)
8. Specify the entities that the eligible agency intends to contact and coordinate activities with during the planning phase (Section 670N(b)(2)(F).)
9. Describe the background, experience and training of the key staff to be used during the planning phase.

10. Describe how applicant will provide for a planning phase advisory board which includes:

- (a) Prospective project participants;
- (b) Representatives of the community in which the project will be located; and
- (c) Individuals with expertise in the services to be offered (Section 670N(b)(2)(G).)

Letters of commitment of prospective members must be furnished as part of the application for a planning grant.

11. Describe the capacity of the eligible agency to raise the non-Federal Share of the costs of the project for the full five year authorization period. (Section 670N(b)(2)(H).)

### D. Operating Grant Proposals

Eligible agencies who received a planning grant as well as other eligible agencies who believe they have experience in conducting projects similar to the projects authorized by this announcement will be eligible to compete for an operating grant. To assure that agencies with the most potential for providing quality services participate in this program, applicants for operating grants shall:

1. Identify the population and geographic location to be served by the project and how the population will be recruited and selected for enrollment, assuring that the most needy families will be served, that some enrolled children will be handicapped, and that eligible families will be located at a reasonable distance to all service providing agencies. Also provide assurances by furnishing appropriate demographic data that the minimum numbers of eligible families required in this announcement are in the catchment or recruiting area and can be recruited and enrolled. (Section 670N(b)(2)(B)(i).)
2. Provide assurances and describes how core and other services to be provided are closely related to the assessed needs of the target population and that the needs to be addressed are important for successful child and family functioning and consistent with the objectives of this project. (Section 670N(b)(2)(B)(ii).)
3. Identify and describe how each project will provide directly or arrange for intensive and comprehensive core and other supportive services. Provide assurances, and identify the basis for the assurances, that the level of these services are developmentally appropriate and consistent with established Federal, State and/or local public agency standards. (Section 670N(c)(2)(B)(iii).)
4. Provide assurances and describe how intensive and comprehensive core and other supportive services will be

furnished to parents beginning with prenatal care and will be furnished on a continuous basis to all infants and young children (i.e., toddlers and preschoolers in the enrolled family's household), as well as to other family members. (Section 670N(c)(2)(B)(v).)

5. Identify and describe the specific program model(s) that will be used for assuring the intellectual, social, emotional and physical development of children served, including center or center/home-based combination model configurations, educational philosophy, staffing patterns, staff qualifications, and any other information that clearly describes the model(s) and supports its use.

6. Describe how core and other supportive services will be furnished at off site locations, if appropriate. (Section 670N(c)(2)(B)(vi).)

7. Identify referral providers, agencies and organizations with which the eligible applicant will coordinate in order to carry out the project for which such operating grant is requested. Applicants should furnish relevant letters of commitment indicating which services will be provided to project participants by those provider agencies and/or organizations. Applicants should describe current or previous relationships with these agencies and/or organizations. (Section 670N(c)(2)(B)(iv).)

8. Describe the extent to which the applicant, through its project, will coordinate and expand existing services as well as provide services not available in the area to be served by the project. Applicants must explain if services are already available in the community(ies) to be served but are not considered adequate. Applicants must identify the structure and mechanisms for service delivery. (Section 670N(c)(2)(B)(vii).)

9. Describe how the project will relate to the local educational agency (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965) as well as to State and local agencies providing health, nutritional, education, social and income maintenance services. (Section 670N(c)(2)(B)(viii).)

10. Identify how the project will be administered and managed. Submit a first year timetable for implementing activities and enrolling families. Provide a description of the applicant's previous program, administrative and fiscal experience in providing direct services and in coordinating activities with State and local public or other non-profit agencies and organizations. Provide a resume which includes a description of the training and background of the key project staff, their responsibilities in

connection with this project and the time they will be committing to this project. Applicants should furnish any other staff and organizational information which illustrates their skills and capacity to deliver required services in a timely manner and to implement a quality project which can endure for the required project period.

11. Provide assurances and describe how the eligible agency will pay the non-Federal share of the cost of the project for which such operating grant is requested from non-Federal sources for the full five year authorization period. (Section 670N(c)(2)(B)(ix).)

12. Identify and describe in detail the proposed first year budget for the project and assure that the proposed costs are reasonable in view of the services to be provided.

13. Identify and describe any technical assistance services which will be utilized by the applicant to assure a smooth start-up of the project and to assure the ongoing integrity of the proposed model.

14. Provide assurances that the applicant will cooperate with a third party evaluation contractor hired by ACYF to continually evaluate the effectiveness of the Comprehensive Child Development program in achieving its stated objectives.

15. Provide assurances that, if selected for an operating grant, applicants will collect and provide data on groups of individuals and geographic areas served, including types of services to be furnished, estimated costs of providing comprehensive services on an average per user basis, types and nature of conditions and needs identified and met and such other information as may be required periodically either by ACYF or by the evaluation contractor to assure a sound assessment of project impact. Applicant will address how confidentiality of user data will be maintained. (Section 670N(c)(2)(B)(x).)

16. Describe how applicant will provide for an advisory committee consisting of:

- (a) Participants in the project;
- (b) Individuals with expertise in furnishing services the project provides and in other aspects of child health and child development; and
- (c) Representatives of the community in which the project will be located. (Section 670N(c)(2)(B)(xi).)

Applicant should furnish letters of commitment if not previously furnished (or if changed) in its application for a planning grant.

17. Include such additional assurances and agree to submit such necessary reports as may be reasonably required.



Further information relating to the operating grant application will be provided at a later date (see Part IV-C of this announcement) to eligible agencies which intend to apply and which request the information.

### III. Criteria for Review and Evaluation of Applicants

#### A. Planning Grant Proposals

On considering how the eligible applicant for a planning grant will carry out the responsibilities addressed under Part II of this announcement, applications will be reviewed and evaluated against the following criteria:

1. **Objectives and Need for Assistance.** (40 Points) The extent to which the application pinpoints any relevant physical, economic, social, financial, institutional, or other problems requiring a planning grant; demonstrates the need for the assistance; states the principal and subordinate objectives of the project; and provides supporting documentation or other testimonies from concerned interests other than the applicant.

Information provided in response to Part II, Section C, Numbers 1 and 2 of this announcement, will be used to review and evaluate applicants on the above criteria.

2. **Results or Benefits Expected.** (10 points) The extent to which the application identifies results and benefits to be derived and describes the anticipated contribution to policy, practice, theory and/or research.

Information provided in response to Part II, Section C, Number 5 of this announcement, will be used to review and evaluate applicants on the above criteria.

3. **Approach.** (20 points) The extent to which the application outlines an acceptable plan of action pertaining to the scope of the project which details how the proposed work will be accomplished and lists each organization, consultant, or other key individuals who will work on the project along with a short description of the nature of their effort or contribution.

Information provided in response to Part II, Section C, Numbers 3, 6, 7, 8, 9 and 11 of this announcement, will be used to review and evaluate applicants on the above criteria.

4. **Geographic Location.** (5 points) The extent to which the application gives a precise location of the project and area to be served by the proposed project and describes the families to be served.

Information provided in response to Part II, Section C, Number 4, of this announcement, will be used to review

and evaluate applicants on the above criteria.

5. **Staff Background and Experience** (25 points) The extent to which the resumes of the planning staff (including names, addresses, background and other qualifying experience) demonstrate the ability to successfully carry out this planning phase.

Information provided in response to Part II, Section C, Number 10, of this announcement, will be used to review and evaluate applicants on the above criteria.

#### B. Operating Grant Proposals

In considering how the eligible applicant for an operating grant will carry out the responsibilities addressed under Part II of this announcement, applications will be reviewed and evaluated against the following criteria:

1. **Objectives and Need for Assistance.** (10 Points) The extent to which the application reflects a good understanding of the objectives of the project; pinpoints any relevant physical, economic, social, financial, institutional, or other problems requiring an operating grant; demonstrates the need for the assistance; states the principal and subordinate objectives of the project; and provides supporting documentation or other testimonies from concerned interests other than the applicant. Relevant data based on results of planning studies are included and/or footnoted.

Information provided in response to Part II, Section D, Numbers 1 and 2 of this announcement, will be used to review and evaluate applicants on the above criteria.

2. **Results or Benefits Expected.** (10 points) The extent to which the identified results and benefits to be derived are consistent with the objectives of the proposal and there are clear and important anticipated contributions to policy, practice, theory and/or research indicated.

Information provided in response to Part II, Section D, Number 2 of this announcement, will be used to review and evaluate applicants on the above criteria.

3. **Approach.** (35 points) The extent to which the application outlines a sound and workable plan of action pertaining to the scope of the project and details how the proposed work will be accomplished; cites factors which might accelerate or decelerate the work and gives acceptable reasons for taking this approach as opposed to others; describes and supports any unusual features of the project, such as design or technological innovations, reductions in cost or time, or extraordinary social and

community involvements; provides for each of the core services and gives projections of the accomplishments to be achieved. Application lists the activities to be carried out in chronological order and shows a reasonable schedule of accomplishments and target dates. Application also lists each organization, agency, consultant, or other key individuals or groups who will work on the project along with a description of the activities and nature of their effort or contribution.

Information provided in response to Part II, Section D, Numbers 3, 4, 5, 6, 7, 8, 9, 14, 15, and 16 of this announcement, will be used to review and evaluate applicants on the above criteria.

4. **Geographic Location.** (5 points) The extent to which the application gives a precise location of the project and area to be served by the proposed project and includes maps or other graphic aids. Application describes the families to be recruited and enrolled in terms of characteristics and minimum numbers.

Information provided in response to Part II, Section D, Number 1 of this announcement, will be used to review and evaluate applicants on the above criteria.

5. **Staff Background and Experience.** (25 points) The extent to which the resumes of the program director and key project staff (including names, addresses, training, background and other qualifying experience) and the organization's experience demonstrates the ability to effectively and efficiently administer a project of this size, complexity and scope and reflect the ability to use and coordinate activities with other agencies for the delivery of comprehensive support services. Application describes the relationship between this project and other work planned, anticipated or underway under Federal assistance.

Information provided in response to Part II, Section D, Numbers 10 and 13 of this announcement, will be used to review and evaluate applicants on the above criteria.

6. **Budget Appropriateness** (15 points) The extent to which the project's costs are reasonable in view of the activities to be carried out and the anticipated outcomes. The extent to which assurances are provided that the applicant can and will contribute the non-Federal share of the total project cost.

Information provided in response to Part II, Section D, Numbers 11 and 12 of this announcement, will be used to review and evaluate applicants on the above criteria.

### IV. The Application Process

#### A. Availability of Forms

Agencies and organizations interested in applying for planning grant (applications due by February 15, 1989) and/or operating grant (applications due by July 14, 1989) funds should submit an application(s) on the Standard Form 424 (revised April 1988) included in this announcement (Appendix III).

Each application must be executed by an individual authorized to act on behalf of the applicant agency and to assume responsibility for the obligations imposed by the terms and conditions of the grant award. Applications must be prepared in accordance with the guidance provided in this announcement and the instructions in the attached application package.

#### B. Application Submission

One signed original and two copies of the grant application, including all attachments, are required. Completed applications must be sent to: Comprehensive Child Development Program, Department of Health and Human Services, Office of Human Development Services, Grants and Contracts Management Division, 200 Independence Avenue, SW., HHH Building—Room 341F, Washington, DC 20201.

The program announcement number (13600-883) must be clearly identified on the application.

#### C. Requests for Supplementary Information Kit on Operating Grants

A kit of supplementary information will be sent to eligible organizations that are interested in applying for an operating grant. This kit will include items such as copies of applicable Federal regulations, an additional set of application forms, plus other clarifying information that may help applicants better respond to this announcement. Agencies that are awarded a planning grant will automatically be sent a kit of supplementary information and need not make a separate request.

All other interested organizations that are eligible to apply for an operating grant should request the kit by writing to: Allen N. Smith, Administration for Children, Youth and Families, P.O. Box 1182, Washington, DC 20013.

The kit may be requested by these agencies at any time between April 14, 1989 and June 14, 1989.

#### D. Application Consideration

For both planning grant and operating grant funding, applications will be scored against the criteria outlined in Part III of this announcement. The

review will be conducted in Washington, DC. Reviewers will be persons knowledgeable about early childhood education and development and family service.

The results of the competitive review will be taken into consideration by the Associate Commissioner, Head Start Bureau, who will recommend programs to be funded to the Commissioner of ACYF. The Commissioner of ACYF will make the final selections. Applicants may be funded in whole or in part and the Commissioner will ensure that both urban and rural programs are funded. Consideration will also be given to ensuring that a variety of geographic areas are served, that projects with different auspices are selected and that various project designs and models are represented.

Successful applicants will be notified through a Notice of Financial Assistance Awarded. The award will state the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the grant award, the effective date of the grant, the total project period, the budget period and the amount of the non-Federal matching share.

#### E. Due Date for the Receipt of Applications

Under this announcement the closing date for planning grant applications is February 15, 1989 and for operating grant applications is July 14, 1989.

1. Applications must either be hand delivered or mailed. Applications mailed through the U.S. Postal Service or a commercially delivered service shall be considered as meeting the deadline if they are either:

a. Received on or before the deadline date at the address specified in the application submission section of this announcement; or

b. Sent on or before the deadline date and received in time for the independent review under Chapter 1-62 of HHS Transmittal 88.01 (4/30/88). (Applicants are cautioned to request a legibly dated U.S. Postal Service postmark or to obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

2. **Late Applications.** Applications which do not meet the criteria in the above paragraphs are considered late applications and will not be considered in the current competition.

3. **Extension of deadline.** The Administration for Children, Youth and Families may extend the deadline for all applicants because of acts of God such as floods, hurricanes, etc., or when there

is widespread disruption of the mail. However, if the granting agency does not extend the deadline for all applicants, it may not waive or extend the deadline for any applicant.

#### F. Paperwork Reduction Act of 1980

Under the Paperwork Reduction Act of 1980, Pub. L. 96-511, the Department is required to submit to OMB for review and approval any reporting and record keeping requirements and regulations including program announcements. This program announcement does not contain information collection requirements beyond those approved by OMB.

#### G. Executive Order 12372—Notification Process

This program is covered under Executive Order (E.O.) 12372, "Intergovernmental Review of Federal Program," and 45 CFR Part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." Under the Order, States may design their own processes for reviewing and commenting on proposed Federal assistance under covered programs. All States and territories except Alaska, Idaho, Nebraska, American Samoa, and Palau have elected to participate in the Executive Order process and have established Single Points of Contact (SPOCs). Applicants from these five areas need take on action regarding E.O. 12372. Applications for projects to be administered by Federally-recognized Indian Tribes are also exempt from the requirements of E.O. 12372.

Otherwise, applicants should contact their SPOC as soon as possible to alert them of the prospective application and receive any necessary instructions. Applicants must submit any required material to the SPOC as early as possible so that the program office can obtain and review SPOC comments as part of the award process. It is imperative that the applicant submit all required materials, if any, to the SPOC and indicate the date of this submittal (or date of contact if no submittal is required) on the SF 424, Item 16a.

SPOCs have 60 days from the planning and operating grant application deadline dates to comment on applications for financial assistance under this program. SPOCs are encouraged to eliminate the submission of routine endorsements as official recommendations. Additionally, SPOCs comments and those official State process recommendations which they intend to trigger the "accommodate or explain" rule.



When comments are submitted directly to OHDS, they should be addressed to: Comprehensive Child Development Program, Department of Health and Human Services, Office of Human Development Services, Grants and Contracts Management Division, 200 Independence Avenue, SW., Room 341F, Hubert H. Humphrey Building, Washington, DC 20201. OHDS will notify the State of any application received which has no indication that the State process has had an opportunity for review. A list of single points of contact for each State and territory is included in Appendix II of this announcement.

#### H. Protection of Human Subjects

Department of Health and Human Services policy (45 CFR Part 46, 42 U.S.C. 2891) requires that if any phase of this project will involve subjecting individuals at the risk of physical, psychological, sociological, or other harm, certain safeguards must be instituted and an assurance must be filed. If there is any question about the application of requirements for the protection of human subjects for this project, further information should be requested from Mr. Denis Doyle of the Office for Protection from Research Risks, Building 31-4B09, National Institutes of Health, DHHS, 9000 Rockville Pike, Bethesda, Maryland 20814: (202) 496-7041).

Dated: December 16, 1988.

**Dodie Truman Borup,**

Commissioner, Administration for Children, Youth and Families.

Approved: December 21, 1988.

**Sydney Olson,**

Assistant Secretary for Human Development Services.

#### Appendix I

##### 1988 Poverty Income Guidelines

Poverty Income Guidelines for all States (Except Alaska and Hawaii) and the District of Columbia.

Size of family unit	Poverty guideline
1.....	\$5,770
2.....	7,730
3.....	9,890
4.....	11,650
5.....	13,610
6.....	15,570
7.....	17,530
8.....	19,480

For family units with more than 8 members, add \$1,960 for each additional member.

#### POVERTY INCOME GUIDELINES FOR ALASKA

Size of family unit	Poverty guideline
1.....	\$7,210
2.....	9,660
3.....	12,110
4.....	14,560
5.....	17,010
6.....	19,460
7.....	21,910
8.....	24,360

For family units with more than 8 members, add \$2,450 for each additional member.

#### POVERTY INCOME GUIDELINES FOR HAWAII

Size of family unit	Poverty guideline
1.....	\$6,850
2.....	8,900
3.....	11,150
4.....	13,400
5.....	15,650
6.....	17,900
7.....	20,150
8.....	22,400

For family units with more than 8 members, add \$2,250 for each additional member.

#### Appendix II—Executive Order 12372—State Single Points of Contact

##### ALABAMA

Mrs. Donna J. Snowden, SPOC, Alabama State Clearinghouse, Alabama Department of Economic and Community Affairs, 3465 Norman Bridge Road, Post Office Box 2939, Montgomery, Alabama 36105-0939, Tel. (205) 284-8905

##### ALASKA

None

##### ARIZONA

Department of Commerce, State of Arizona, Janice Dunn, Arizona State Clearinghouse, 1700 West Washington, Fourth Floor, Phoenix, Arizona 85007, Tel. (602) 255-5004

##### ARKANSAS

Joe Gillespie, Manager, State Clearinghouse, Office of Intergovernmental Services, Department of Finance and Administration, P.O. Box 3278, Little Rock, Arkansas 72203, Tel. (501) 371-1074

##### CALIFORNIA

Glenn Stober, Grants Coordinator, Office of Planning and Research, 1400 Tenth Street, Sacramento, California 95814, Tel. (916) 323-7480

##### COLORADO

State Single Point of Contact, State

Clearinghouse, Division of Local Government, 1313 Sherman Street, Rm. 520, Denver, Colorado 80203, Tel. (303) 866-2158

##### CONNECTICUT

Under Secretary, Attn: Intergovernmental Review Coordinator, Comprehensive Planning Division, Office of Policy and Management, Hartford, Connecticut 06106-4459, Tel. (203) 566-3410

##### DELAWARE

Francine Booth, State Single Point of Contact, Executive Department, Thomas Collins Building, Dover, Delaware 19903, Tel. (302) 736-4204

##### DISTRICT OF COLUMBIA

Lovetta Davis, State Single Point of Contact, Executive Office of the Mayor, Office of Intergovernmental Relations, Rm. 416, District Building, 1350 Pennsylvania Avenue, NW., Washington, DC 20004, Tel. (202) 727-9111

##### FLORIDA

George H. Meier, Director of Intergovernmental Coordination, State Single Point of Contact, Executive Office of the Governor, Office of Planning and Budgeting, The Capitol, Tallahassee, Florida 32301, Tel. (904) 488-8114

##### GEORGIA

Charles H. Badger, Administrator, Georgia State Clearinghouse, 270 Washington Street, SW.—Room 608, Atlanta, Georgia 30334, Tel. (404) 656-3855

##### HAWAII

Harold S. Masumoto, Acting Director, Office of State Planning, Department of Planning and Economic Development, Office of the Governor, Honolulu, Hawaii 96813, Tel. (808) 548-3016 or 548-3085

##### IDAHO

None

##### ILLINOIS

Tom Berkshire, Office of the Governor, State of Illinois, Springfield, Illinois 62706, Tel. (217) 782-8639

##### INDIANA

Ms. Peggy Boehm, Deputy Director, State Budget Agency, 212 State House, Indianapolis, Indiana 46204, Tel. (317) 232-5604

##### IOWA

Stephen R. McCann, Division of Community Progress, Iowa Dept. of Economic Development, Division of Community Progress, 200 East Grand Avenue, Tel. (515) 281-3725

##### KANSAS

Martin Kennedy, Intergovernmental Liaison, Department of

Administration, Division of Budget, Room 152-E, State Capitol Building, Topeka, Kansas 66612, Tel. (913) 296-2436

##### KENTUCKY

Robert Leonard, State Single Point of Contact, Kentucky State Clearinghouse, 2nd Floor, Capital Plaza Tower, Frankfort, KY 40601, Tel. (502) 564-2382

##### LOUISIANA

Colby S. La Place, Assistant Secretary, Department of Urban & Community Affairs, Office of State Clearinghouse, P.O. Box 94455, Capitol Station, Baton Rouge, Louisiana 70804, Tel. (504) 342-9790

##### MAINE

State Single Point of Contact, Attn: Joyce Benson, State Planning Office, State House Station #38, Augusta, Maine 04333, Tel. (207) 289-3161

##### MARYLAND

Guy W. Hager, Director, Maryland State Clearinghouse, Department of State Planning, 301 West Preston Street, Baltimore, Maryland 21201-2365, Tel. (301) 225-4490

##### MASSACHUSETTS

State Single Point of Contact, Attn: Beverly Boyle, Executive Office of Communities and Development, 100 Cambridge Street, Rm. 904, Boston, Massachusetts 02202, Tel. (617) 727-3253

##### MICHIGAN

Michelyn Pasteur, Deputy Director, Local Development Services, Department of Commerce, P.O. Box 30225, Lansing, Michigan 48909, Tel. (517) 373-1838

Note: Please direct correspondence and questions to: Manager Federal Project Review System, 6500 Mercantile Way, Suite 2, Lansing, MI 48911 (517) 334-6190

##### MINNESOTA

None

##### MISSISSIPPI

Marlan Baucum, Office of Federal State Programs, Department of Planning and Policy, 2000 Walter Sillers Bldg., 500 High Street, Jackson, Mississippi 39202, Tel. (601) 359-3150

##### MISSOURI

Lois Pohl, Federal Assistance Clearinghouse, Office of Administration, Division of General Services, P.O. Box 809—Room 460, Truman Building, Jefferson City, MO 65102, Tel. (314) 751-4834

##### MONTANA

Deborah Davis, State Single Point of Contact Intergovernmental Review Clearinghouse, c/o Office of the Lieutenant Governor, Capitol Station, Room 210-State Capitol, Helena, MT 59620, Tel. (406) 444-

5522  
NEBRASKA

None

##### NEVADA

Ms. Jean Ford, Director, Nevada Office of Community Services, Capitol Complex, Carson City, Nevada 89710, Tel. (702) 885-4420

Note: Please direct correspondence and questions to: John Walker, Clearinghouse Coordinator, Tel. (702) 885-4420.

##### NEW HAMPSHIRE

John E. Dabuliewicz, Director, New Hampshire Office of State Planning, Attn: Intergovernmental Review Process, 2½ Beacon Street, Concord, New Hampshire 03301, Tel. (603) 271-2155

##### NEW JERSEY

Mr. Barry Skokowski, Director, Division of Local Government Services, Department of Community Affairs, CN 803, 363 West State Street, Trenton, New Jersey 08625-0803, Tel. (609) 292-6613

Note: Please direct correspondence and questions to: Nelson S. Silver, State Review Process, Division of Local Government, Services—CN 803, Trenton, New Jersey 08625-0803, Tel. (609) 292-9025.

##### NEW MEXICO

Dean Olson, Director, Management and Program Analysis Division, Department of Finance and Administration, Room 424, State Capitol Building, Santa Fe, New Mexico 87503, Tel. (505) 827-3885

##### NEW YORK

New York State Clearinghouse, Division of the Budget, State Capitol, Albany, NY 12224 (518) 474-1605

##### NORTH CAROLINA

Mrs. Chrys Baggett, Director, Intergovernmental Relations, North Carolina Department of Administration, 116 West Jones Street, Raleigh, North Carolina 27611, Tel. (919) 733-0499

##### NORTH DAKOTA

William Robinson, State Single Point of Contact, Office of Intergovernmental Affairs, Office of Management and Budget, 14th Floor, State Capitol, Bismarck, North Dakota 58505, Tel. (701) 224-2094

##### OHIO

Larry Weaver, State Single Point of Contact, State/Federal Funds Coordinator, State Clearinghouse Office of Budget and Management, 30 East Broad Street, Columbus, OH 43266-0411, Tel. (614) 466-0698

Note: Please direct correspondence and questions to: Linda E. Wise.

##### OKLAHOMA

Don Strain, State Single Point of Contact, Oklahoma Department of Commerce, Office of Federal Assistance Management, 6601 Broadway Extension, Oklahoma City, Oklahoma 73116, Tel. (405) 843-9770

##### OREGON

Attn: Delores Streete, State Single Point of Contact, Intergovernmental Relations, Division State Clearinghouse, 155 Cottage Street, N.E., Salem, OR 97310, (503) 373-1998

##### PENNSYLVANIA

Laine A. Heltebride, Special Assistant, Pennsylvania Intergovernmental Council, P.O. Box 11880, Harrisburg, Pennsylvania 17108, Tel. (717) 783-3700

##### RHODE ISLAND

Daniel W. Varin, Associate Director, Statewide Planning Program, Department of Administration, Division of Planning, 285 Melrose Street, Providence, Rhode Island 02907, Tel. (401) 277-2656

Note: Please direct correspondence and questions to: Review Coordinator, Office of Strategic Planning.

##### SOUTH CAROLINA

Danny L. Cromer, State Single Point of Contact, Grant Services, Office of the Governor, 1205 Pendleton Street, Rm. 477, Columbia, South Carolina 29201, Tel. (803) 734-0435

##### SOUTH DAKOTA

Susan Comer, State Clearinghouse Coordinator, Office of the Governor, 500 East Capitol, Pierre, South Dakota 57501, Tel. (605) 773-3212

##### TENNESSEE

Charles Brown, State Single Point of Contact, State Planning Office, 500 Charlotte Avenue, 309 John Sevier Building, Nashville, Tennessee 37219, Tel. (615) 741-1876

##### TEXAS

Thomas C. Adams, Office of the Budget and Planning, Office of the Governor, P.O. Box 12427, Austin, Texas 78711, Tel. (512) 463-1778

##### UTAH

Dale Hatch, Director, Office of Planning and Budget, State of Utah, 116 State Capitol Building, Salt Lake City, Utah 84114, Tel. (801) 533-5245

##### VERMONT

Bernard D. Johnson, Assistant Director, Office of Policy Research and Coordination, Pavilion Office Building, 109 State Street, Montpelier, Vermont 05602, Tel. (802) 828-3326

##### VIRGINIA

Nancy Miller, Intergovernmental



Affairs Review Officer, Department of Housing and Community Development, 205 North 4th Street, Richmond, Virginia 23219, Tel. (804) 786-4474

## WASHINGTON

Catherine Townley, Coordinator, Intergovernmental Review Process, Department of Community Development, Ninth and Columbia Building, Olympia, Washington 98504-4151, Tel. (206) 753-4978

## WEST VIRGINIA

Mr. Fred Cutlip, Director, Community Development Division, Governor's Office of Community and Industrial Development, Building #6, Rm. 553, Charleston, West Virginia 25305, Tel. (304) 348-4010

## WISCONSIN

James R. Krauser, Secretary,

Wisconsin Department of Administration, 101 South Webster—CEF 2, P.O. Box 7864, Madison, Wisconsin 53707-7864, Tel. (608) 268-1741.

Note: Please direct correspondence and questions to: Thomas Krauskopf, Federal-State Relations Coordinator, Wisconsin Department of Administration.

## WYOMING

Ann Redman, State Single Point of Contact, Wyoming State Clearinghouse, State Planning Coordinator's Office, Capitol Building, Cheyenne, Wyoming 82002, Tel. (307) 777-7574

## AMERICAN SAMOA

None

## GUAM

Michael J. Reidy, Director, Bureau of

Budget and Management Research, Office of the Governor, P.O. Box 2950, Agana, GU 96910, (671) 472-2285

## VIRGIN ISLANDS

Jose L. George, Director, Office of Management and Budget No. 32 and 33 Kongens Gade, Charlotte Amalie, VI 00802 (809) 774-0750

## PUERTO RICO

Ms. Patricia G. Custodio/Isaël Soto Marrero, Chairman/Director, Minillas Government Center, P.O. Box 41119, San Jan, Puerto Rico 00940-9985, Tel. (809) 727-4444

## NORTHERN MARIANA ISLANDS

State Single Point of Contact, Planning and Budget Office, Office of the Governor, Saipan, CM Northern Mariana Islands 96950

BILLING CODE 4738-01-3

## Appendix III

APPLICATION FOR  
FEDERAL ASSISTANCE

OMB Approval No. 0348-0043

1. TYPE OF SUBMISSION: Application <input type="checkbox"/> Construction <input type="checkbox"/> Non-Construction		2. DATE SUBMITTED		Applicant Identifier	
3. DATE RECEIVED BY STATE		4. DATE RECEIVED BY FEDERAL AGENCY		State Application Identifier	
5. APPLICANT INFORMATION Legal Name:		Organizational Unit:		Name and telephone number of the person to be contacted on matters involving this application (give area code)	
6. EMPLOYER IDENTIFICATION NUMBER (EIN): [ ] [ ] - [ ] [ ] [ ] [ ] [ ] [ ]		7. TYPE OF APPLICANT: (enter appropriate letter in box) <input type="checkbox"/>			
8. TYPE OF APPLICATION: <input type="checkbox"/> New <input type="checkbox"/> Continuation <input type="checkbox"/> Revision If Revision, enter appropriate letter(s) in box(es): <input type="checkbox"/> <input type="checkbox"/> A. Increase Award B. Decrease Award C. Increase Duration D. Decrease Duration Other (specify):		A. State B. County C. Municipal D. Township E. Interstate F. Intermunicipal G. Special District H. Independent School Dist. I. State Controlled Institution of Higher Learning J. Private University K. Indian Tribe L. Individual M. Profit Organization N. Other (Specify):			
9. CATALOG OF FEDERAL DOMESTIC ASSISTANCE NUMBER: [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ] [ ]		10. NAME OF FEDERAL AGENCY:			
11. TITLE:		12. DESCRIPTIVE TITLE OF APPLICANT'S PROJECT:			
13. AREAS AFFECTED BY PROJECT (cities, counties, states, etc.):		14. CONGRESSIONAL DISTRICTS OF: a. Applicant b. Project			
15. ESTIMATED FUNDING:		16. IS APPLICATION SUBJECT TO REVIEW BY STATE EXECUTIVE ORDER 12372 PROCESS?			
a. Federal \$ .00		a. YES. THIS PREAPPLICATION/APPLICATION WAS MADE AVAILABLE TO THE STATE EXECUTIVE ORDER 12372 PROCESS FOR REVIEW ON: DATE			
b. Applicant \$ .00		b. NO. <input type="checkbox"/> PROGRAM IS NOT COVERED BY E.O. 12372			
c. State \$ .00		<input type="checkbox"/> OR PROGRAM HAS NOT BEEN SELECTED BY STATE FOR REVIEW			
d. Local \$ .00		17. IS THE APPLICANT DELINQUENT ON ANY FEDERAL DEBT?			
e. Other \$ .00		<input type="checkbox"/> Yes If "Yes," attach an explanation. <input type="checkbox"/> No			
f. Program Income \$ .00		18. TO THE BEST OF MY KNOWLEDGE AND BELIEF, ALL DATA IN THIS APPLICATION/PREAPPLICATION ARE TRUE AND CORRECT, THE DOCUMENT HAS BEEN ONLY AUTHORIZED BY THE GOVERNING BODY OF THE APPLICANT AND THE APPLICANT WILL COMPLY WITH THE ATTACHED ASSURANCES IF THE ASSISTANCE IS AWARDED			
g. TOTAL \$ .00		a. Typed Name of Authorized Representative		b. Title	
		c. Telephone number		d. Signature of Authorized Representative	
		e. Date Signed			

Previous Editions Not Usable

Standard Form 424 (REV. 4-88)  
Prescribed by OMB Circular A-102

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## INSTRUCTIONS FOR THE SF 424

This is a standard form used by applicants as a required facesheet for preapplications and applications submitted for Federal assistance. It will be used by Federal agencies to obtain applicant certification that States which have established a review and comment procedure in response to Executive Order 12372 and have selected the program to be included in their process, have been given an opportunity to review the applicant's submission.

Item:

Entry:

Item:

Entry:

1. Self-explanatory.
2. Date application submitted to Federal agency (or State if applicable) & applicant's control number (if applicable).
3. State use only (if applicable).
4. If this application is to continue or revise an existing award, enter present Federal identifier number. If for a new project, leave blank.
5. Legal name of applicant, name of primary organizational unit which will undertake the assistance activity, complete address of the applicant, and name and telephone number of the person to contact on matters related to this application.
6. Enter Employer Identification Number (EIN) as assigned by the Internal Revenue Service.
7. Enter the appropriate letter in the space provided.
8. Check appropriate box and enter appropriate letter(s) in the space(s) provided:
  - "New" means a new assistance award.
  - "Continuation" means an extension for an additional funding/budget period for a project with a projected completion date.
  - "Revision" means any change in the Federal Government's financial obligation or contingent liability from an existing obligation.
9. Name of Federal agency from which assistance is being requested with this application.
10. Use the Catalog of Federal Domestic Assistance number and title of the program under which assistance is requested.
11. Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.
12. List only the largest political entities affected (e.g., State, counties, cities).
13. Self-explanatory.
14. List the applicant's Congressional District and any District(s) affected by the program or project.
15. Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate only the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 15.
16. Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process.
17. This question applies to the applicant organization, not the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.
18. To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office. (Certain Federal agencies may require that this authorization be submitted as part of the application.)



# BUDGET INFORMATION — Non-Construction Programs

OMB Approval No. 0348-0044

## SECTION A — BUDGET SUMMARY

Grant Program Function or Activity (a)	Catalog of Federal Domestic Assistance Number (b)	Estimated Unobligated Funds		New or Revised Budget		
		Federal (c)	Non-Federal (d)	Federal (e)	Non-Federal (f)	Total (g)
1.		\$	\$	\$	\$	\$
2.						
3.						
4.						
5. TOTALS		\$	\$	\$	\$	\$

## SECTION B — BUDGET CATEGORIES

6 Object Class Categories	GRANT PROGRAM, FUNCTION OR ACTIVITY				Total (5)
	(1)	(2)	(3)	(4)	
a. Personnel	\$	\$	\$	\$	\$
b. Fringe Benefits					
c. Travel					
d. Equipment					
e. Supplies					
f. Contractual					
g. Construction					
h. Other					
i. Total Direct Charges (sum of 6a - 6h)					
j. Indirect Charges					
k. TOTALS (sum of 6i and 6j)	\$	\$	\$	\$	\$
7. Program Income	\$	\$	\$	\$	\$

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SECTION C - NON-FEDERAL RESOURCES				
(a) Grant Program	(b) Applicant	(c) State	(d) Other Sources	(e) TOTALS
8.	\$	\$	\$	\$
9.				
10.				
11.				
12. TOTALS (sum of lines 8 and 11)	\$	\$	\$	\$

SECTION D - FORECASTED CASH NEEDS					
	Total for 1st Year	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
13. Federal	\$	\$	\$	\$	\$
14. NonFederal					
15. TOTAL (sum of lines 13 and 14)	\$	\$	\$	\$	\$

SECTION E - BUDGET ESTIMATES OF FEDERAL FUNDS NEEDED FOR BALANCE OF THE PROJECT				
(a) Grant Program	FUTURE FUNDING PERIODS (Years)			
	(b) First	(c) Second	(d) Third	(e) Fourth
16.	\$	\$	\$	\$
17.				
18.				
19.				
20. TOTALS (sum of lines 16-19)	\$	\$	\$	\$

SECTION F - OTHER BUDGET INFORMATION (Attach additional Sheets if Necessary)	
21. Direct Charges:	22. Indirect Charges:
23. Remarks	



## INSTRUCTIONS FOR THE SF-424A

**General Instructions**

This form is designed so that application can be made for funds from one or more grant programs. In preparing the budget, adhere to any existing Federal grantor agency guidelines which prescribe how and whether budgeted amounts should be separately shown for different functions or activities within the program. For some programs, grantor agencies may require budgets to be separately shown by function or activity. For other programs, grantor agencies may require a breakdown by function or activity. Sections A, B, C, and D should include budget estimates for the whole project except when applying for assistance which requires Federal authorization in annual or other funding period increments. In the latter case, Sections A, B, C, and D should provide the budget for the first budget period (usually a year) and Section E should present the need for Federal assistance in the subsequent budget periods. All applications should contain a breakdown by the object class categories shown in Lines a-k of Section B.

**Section A. Budget Summary**  
**Lines 1-4, Columns (a) and (b)**

For applications pertaining to a *single* Federal grant program (Federal Domestic Assistance Catalog number) and *not requiring* a functional or activity breakdown, enter on Line 1 under Column (a) the catalog program title and the catalog number in Column (b).

For applications pertaining to a *single* program requiring budget amounts by multiple functions or activities, enter the name of each activity or function on each line in Column (a), and enter the catalog number in Column (b). For applications pertaining to multiple programs where none of the programs require a breakdown by function or activity, enter the catalog program title on each line in Column (a) and the respective catalog number on each line in Column (b).

For applications pertaining to *multiple* programs where one or more programs require a breakdown by function or activity, prepare a separate sheet for each program requiring the breakdown. Additional sheets should be used when one form does not provide adequate space for all breakdown of data required. However, when more than one sheet is used, the first page should provide the summary totals by programs.

**Lines 1-4, Columns (c) through (g.)**

For *new applications*, leave Columns (c) and (d) blank. For each line entry in Columns (a) and (b), enter in Columns (e), (f), and (g) the appropriate amounts of funds needed to support the project for the first funding period (usually a year).

**Lines 1-4, Columns (c) through (g.) (continued)**

For *continuing grant program applications*, submit these forms before the end of each funding period as required by the grantor agency. Enter in Columns (c) and (d) the estimated amounts of funds which will remain unobligated at the end of the grant funding period only if the Federal grantor agency instructions provide for this. Otherwise, leave these columns blank. Enter in columns (e) and (f) the amounts of funds needed for the upcoming period. The amount(s) in Column (g) should be the sum of amounts in Columns (e) and (f).

For *supplemental grants and changes* to existing grants, do not use Columns (c) and (d). Enter in Column (e) the amount of the increase or decrease of Federal funds and enter in Column (f) the amount of the increase or decrease of non-Federal funds. In Column (g) enter the new total budgeted amount (Federal and non-Federal) which includes the total previous authorized budgeted amounts plus or minus, as appropriate, the amounts shown in Columns (e) and (f). The amount(s) in Column (g) should not equal the sum of amounts in Columns (e) and (f).

**Line 5** — Show the totals for all columns used.

**Section B Budget Categories**

In the column headings (1) through (4), enter the titles of the same programs, functions, and activities shown on Lines 1-4, Column (a), Section A. When additional sheets are prepared for Section A, provide similar column headings on each sheet. For each program, function or activity, fill in the total requirements for funds (both Federal and non-Federal) by object class categories.

**Lines 6a-l** — Show the totals of Lines 6a to 6h in each column.

**Line 6j** — Show the amount of indirect cost.

**Line 6k** — Enter the total of amounts on Lines 6i and 6j. For all applications for new grants and continuation grants the total amount in column (5), Line 6k, should be the same as the total amount shown in Section A, Column (g), Line 5. For supplemental grants and changes to grants, the total amount of the increase or decrease as shown in Columns (1)-(4), Line 6k should be the same as the sum of the amounts in Section A, Columns (e) and (f) on Line 5.



## INSTRUCTIONS FOR THE SF-424A (continued)

**Line 7** - Enter the estimated amount of income, if any, expected to be generated from this project. Do not add or subtract this amount from the total project amount. Show under the program narrative statement the nature and source of income. The estimated amount of program income may be considered by the federal grantor agency in determining the total amount of the grant.

**Section C. Non-Federal Resources**

**Lines 8-11** - Enter amounts of non-Federal resources that will be used on the grant. If in-kind contributions are included, provide a brief explanation on a separate sheet.

**Column (a)** - Enter the program titles identical to Column (a), Section A. A breakdown by function or activity is not necessary.

**Column (b)** - Enter the contribution to be made by the applicant.

**Column (c)** - Enter the amount of the State's cash and in-kind contribution if the applicant is not a State or State agency. Applicants which are a State or State agencies should leave this column blank.

**Column (d)** - Enter the amount of cash and in-kind contributions to be made from all other sources.

**Column (e)** - Enter totals of Columns (b), (c), and (d).

**Line 12** - Enter the total for each of Columns (b)-(e). The amount in Column (e) should be equal to the amount on Line 5, Column (f), Section A.

**Section D. Forecasted Cash Needs**

**Line 13** - Enter the amount of cash needed by quarter from the grantor agency during the first year.

**Line 14** - Enter the amount of cash from all other sources needed by quarter during the first year.

**Line 15** - Enter the totals of amounts on Lines 13 and 14.

**Section E. Budget Estimates of Federal Funds Needed for Balance of the Project**

**Lines 16 - 19** - Enter in Column (a) the same grant program titles shown in Column (a), Section A. A breakdown by function or activity is not necessary. For new applications and continuation grant applications, enter in the proper columns amounts of Federal funds which will be needed to complete the program or project over the succeeding funding periods (usually in years). This section need not be completed for revisions (amendments, changes, or supplements) to funds for the current year of existing grants.

If more than four lines are needed to list the program titles, submit additional schedules as necessary.

**Line 20** - Enter the total for each of the Columns (b)-(e). When additional schedules are prepared for this Section, annotate accordingly and show the overall totals on this line.

**Section F. Other Budget Information**

**Line 21** - Use this space to explain amounts for individual direct object-class cost categories that may appear to be out of the ordinary or to explain the details as required by the Federal grantor agency.

**Line 22** - Enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period, the estimated amount of the base to which the rate is applied, and the total indirect expense.

**Line 23** - Provide any other explanations or comments deemed necessary.

OMB Approval No. 0348-0040

## ASSURANCES — NON-CONSTRUCTION PROGRAMS

**Note:** Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

- Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project costs) to ensure proper planning, management and completion of the project described in this application.
- Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.
- Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.
- Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.
- Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§ 4728-4763) relating to prescribed standards for merit systems for programs funded under one of the nineteen statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).
- Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§ 1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.
- Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.
- Will comply with the provisions of the Hatch Act (5 U.S.C. §§ 1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.
- Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7), the Copeland Act (40 U.S.C. § 276c and 18 U.S.C. §§ 874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.



10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is \$10,000 or more.
11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. § 7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).
12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§ 1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.
13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. 469a-1 et seq.).
14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.
15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. 2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.
16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§ 4801 et seq.) which prohibits the use of lead based paint in construction or rehabilitation of residence structures.
17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act of 1984.
18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE	
APPLICANT ORGANIZATION		DATE SUBMITTED

SF 424B (4-88) Back

[FR Doc. 88-29612 Filed 12-28-88; 8:45 am]

BILLING CODE 4130-01-C

## DEPARTMENT OF THE INTERIOR

## Bureau of Indian Affairs

**Intent To Prepare an Environmental Impact Statement for the Proposal To Lease Approximately 1,000 acres of the Ft. Mojave Indian Reservation, Nevada for a Mixed Residential, Commercial and Recreational Project**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice of intent and public scoping meetings.

**SUMMARY:** This notice advises the public that the Bureau intends to gather information necessary for the preparation of an Environmental Impact Statement (EIS) for the proposal to lease approximately 1,000 acres of the Ft. Mojave Indian Reservation, Nevada, for a mixed residential, commercial and recreational project in Clark County. Public scoping meetings will be held to receive input and questions from members of the public regarding this proposal and preparation of this EIS. This notice is being furnished as required by the National Environmental Policy Act (NEPA) Regulations (40 CFR 1501.7) to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the EIS. Comments and participation in this scoping process are solicited.

**DATES:** Written comments should be received on or before January 30, 1989.

Scoping meetings to identify issues and alternatives to be evaluated in the EIS will be held on Tuesday, January 10, 1989, at the Mojave High School, 1414 Hancock Road, Riveria (Bullhead City area) Arizona, at 7:00 pm. and on Wednesday, January 11, 1989, at the Fort Mojave Indian Tribal Chambers, 500 Merriman, Needles, California, at 7:00 pm. Comments and participation in the scoping process are solicited and should be directed to the BIA at the address provided below or to Carter Associates, Inc., Attention: Ms. Leslie J. Stafford, 5080 North 40th Street, Suite 300, Phoenix, Arizona 85018.

Significant issues to be covered during the scoping process include biotic; archeological, cultural and historic sites; socioeconomic conditions; visual and land use; air and water quality; and resource use patterns.

**ADDRESSES:** Comments should be addressed to Mr. Wilson Barber Jr., Area Director, Phoenix Area Office, Bureau of Indian Affairs, P.O. Box 10, Phoenix, Arizona 85001.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Heuslein, Area

Environmental Protection Specialist, Bureau of Indian Affairs, Phoenix Area Office, P.O. Box 10, Phoenix, Arizona 85001, telephone (602) 241-2281 or FTS 281-2281.

**SUPPLEMENTARY INFORMATION:** The Bureau of Indian Affairs, in cooperation with the Ft. Mojave Indian Tribe, will prepare an Environmental Impact Statement (EIS) on a proposed lease site located on the Ft. Mojave Indian Reservation on the Nevada side of the Colorado River north of the junction of Nevada, California and Arizona. The proposed lease would include approximately 1,000 acres of mixed residential, commercial and recreational development. The current proposal is divided into two phases of development. The first phase would include one hotel with approximately 150 rooms, 500 residential units, and an artificial lake of approximately 40 acres. The second phase would include two hotels, one with approximately 300 rooms and one with about 800 rooms, 1,000 residential units, lake expansion to a total of 75 acres, and an 18-hole golf course. The Ft. Mojave Indian Tribe had identified this area as a future new townsite as early as 1955 and more recently adopted land use plans which support this type of development.

Information describing the proposed action will be sent to the appropriate Federal, tribal, state and local agencies and to private organizations and citizens expressing an interest in this proposal.

The principal alternatives identified are to build the project as planned, not to build the project, build a smaller project, use a different location, or use the land for other purposes. Potential Environmental Impacts that may be of concern are to Water Resources, Biological Resources and Transportation.

This notice is published pursuant to § 1501.7 of the Council of Environmental Quality regulations (40 CFR Parts 1500 through 1508) implementing the procedural requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4371 et seq.), Department of the Interior Manual (516 DM 1-6) and is in the exercise of authority delegated by the Secretary of the Interior to the Deputy Assistant Secretary-Indian Affairs by 209 DM 8.

Date: December 20, 1988.

W.P. Ragsdale,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 88-29904 Filed 12-28-88; 8:45 am]

BILLING CODE 4310-02-M

**Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs**

**AGENCY:** Bureau of Indian Affairs, Interior.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the annual update of the list of entities recognized and eligible for funding and services from the Bureau of Indian Affairs is published pursuant to 25 CFR Part 83.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Indian Affairs, Division of Tribal Government Services, 18th & C Streets NW., Washington, DC 20240, telephone number: (202) 343-7445.

**SUPPLEMENTARY INFORMATION:** This notice is published in exercise of authority delegated to the Assistant Secretary-Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

**Indian Tribal Entities\* Within the Contiguous 48 States Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs**

Absentee-Shawnee Tribe of Indians of Oklahoma  
 Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California  
 Ak Chin Indian Community of Papago Indians of the Maricopa, Ak Chin Reservation, Arizona  
 Alabama and Coushatta Tribes of Texas  
 Alabama-Quassarte Tribal Town of the Creek Nation of Oklahoma  
 Alturas Rancheria of Pit River Indians of California  
 Apache Tribe of Oklahoma  
 Arapahoe Tribe of the Wind River Reservation, Wyoming  
 Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana  
 Augustine Band of Cahuilla Mission Indians of the Augustine Reservation, California  
 Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin  
 Bay Mills Indian Community of the Sault Ste. Marie Band of Chippewa Indians, Bay Mills Reservation, Michigan  
 Berry Creek Rancheria of Maidu Indians of California  
 Big Lagoon Rancheria of Smith River Indians of California  
 Big Pine Band of Owens Valley Paiute Shoshone Indians of the Big Pine Reservation, California  
 Big Sandy Rancheria of Mono Indians of California  
 Big Valley Rancheria of Pomo & Pit River Indians of California  
 Blackfeet Tribe of the Blackfeet Indian Reservation of Montana  
 Blue Lake Rancheria of California

\* Includes within its meaning Indian tribes, bands, villages, communities and pueblos as well as Alaska Native entities.



Bridgeport Paiute Indian Colony of California  
Buena Vista Rancheria of Me-Wuk Indians of California  
Burns Paiute Indian Colony, Oregon  
Cabazon Band of Cahuilla Mission Indians of the Cabazon Reservation, California  
Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California  
Caddo Indian Tribe of Oklahoma  
Cahuilla Band of Mission Indians of the Cahuilla Reservation, California  
Cahito Indian Tribe of the Laytonville Rancheria, California  
Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California  
Capitan Grande Band of Diegueno Mission Indians of California:  
Barona Group of the Barona Reservation, California  
Viejas Group of the Viejas Reservation, California  
Cauya Nation of New York  
Cedarville Rancheria of Northern Paiute Indians of California  
Chemehuevi Indian Tribe of the Chemehuevi Reservation, California  
Cher-Ae Heights Indian Community of the Trinidad Rancheria, California  
Cherokee Nation of Oklahoma  
Cheyenne-Arapaho Tribes of Oklahoma  
Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota  
Chickasaw Nation of Oklahoma  
Chicken Ranch Rancheria of Me-Wuk Indians of California  
Chippewa-Cree Indians of the Rocky Boy's Reservation, Montana  
Chitimacha Tribe of Louisiana  
Choctaw Nation of Oklahoma  
Citizen Band Potawatomi Indian Tribe of Oklahoma  
Cloverdale Rancheria of Pomo Indians of California  
Coast Indian Community of Yurok Indians of the Resighini Rancheria, California  
Cocopah Tribe of Arizona  
Coeur D'Alene Tribe of the Coeur D'Alene Reservation, Idaho  
Cold Springs Rancheria of Mono Indians of California  
Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California  
Comanche Indian Tribe of Oklahoma  
Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana  
Confederated Tribes of the Chehalis Reservation, Washington  
Confederated Tribes of the Colville Reservation, Washington  
Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indian of Oregon  
Confederated Tribes of the Goshute Reservation, Nevada and Utah  
Confederated Tribes of the Grand Ronde Community of Oregon  
Confederated Tribes of the Siletz Reservation, Oregon  
Confederated Tribes of the Umatilla Reservation, Oregon  
Confederated Tribes of the Warm Springs Reservation of Oregon  
Confederated Tribes of the Bands of the Yakima Indian Nation of the Yakima Reservation, Washington

Cortina Indian Rancheria of Wintun Indians of California  
Coushatta Tribe of Louisiana  
Covelo Indian Community of the Round Valley Reservation, California  
Cow Creek Band of Umpqua Indians of Oregon  
Coyote Valley Band of Pomo Indians of California  
Creek Nation of Oklahoma  
Crow Tribe of Montana  
Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota  
Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation, California  
Death Valley Timbi-Sha Shoshone Band of California  
Delaware Tribe of Western Oklahoma  
Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota  
Dry Creek Rancheria of Pomo Indians of California  
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada  
Eastern Band of Cherokee Indians of North Carolina  
Eastern Shawnee Tribe of Oklahoma  
Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California  
Elk Valley Rancheria of Smith River Tolowa Indians of California  
Ely Indian Colony of Nevada  
Enterprise Rancheria of Maidu Indian of California  
Flandreau Santee Tribe of South Dakota  
Forest County Potawatomi Community of Wisconsin  
Fort Belknap Indian Community of the Fort Belknap Reservation of Montana  
Fort Bidwell Indian Community of Paiute Indians of the Fort Bidwell Reservation, California  
Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation, California  
Fort McDermitt Paiute and Shoshone Tribes of the Fort McDermitt Indian Reservation, Nevada  
Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Indian Reservation, Arizona  
Fort Mojave Indian Tribe of Arizona  
Fort Sill Apache Tribe of Oklahoma  
Gay Head Wampanoag Indians of Massachusetts  
Gila River Pima-Maricopa Indian Community of the Gila River Indian Reservation of Arizona  
Grand Traverse Band of Ottawa & Chippewa Indians of Michigan  
Greenville Rancheria of Maidu Indians of California  
Grindstone Indian Rancheria of Wintun-Wailaki Indians of California  
Hannahville Indian Community of Wisconsin Potawatomi Indians of Michigan  
Havasupai Tribe of the Havasupai Reservation, Arizona  
Hoh Indian Tribe of the Hoh Indian Reservation, Washington  
Hoopa Valley Tribe of the Hoopa Valley Reservation, California  
Hopi Tribe of Arizona  
Hopland Band of Pomo Indians of the Hopland Rancheria, California

Houlton Band of Maliseet Indians of Maine  
Hualapai Tribe of the Hualapai Indian Reservation, California  
Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California  
Iowa Tribe of Kansas and Nebraska  
Iowa Tribe of Oklahoma  
Jackson Rancheria of Me-Wuk Indians of California  
Jamestown Klamath Tribe of Washington  
Jamul Indian Village of California  
Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation, New Mexico  
Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona  
Kalispel Indian Community of the Kalispel Reservation, Washington  
Karuk Tribe of California  
Kashia Band of Pomo Indians of the Stewart Point Rancheria, California  
Kaw Indian Tribe of Oklahoma  
Keweenaw Bay Indian Community of L'Anse and Ontonagon Bands of Chippewa Indians of the L'Anse Reservation, Michigan  
Kialagee Tribal Town of the Creek Indian Nation of Oklahoma  
Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas  
Kickapoo Tribe of Oklahoma (includes Texas Band of Kickapoo Indians)  
Kiowa Indian Tribe of Oklahoma  
Klamath Indian Tribe of Oregon  
Kootenai Tribe of Idaho  
La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California  
La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California  
Lac Courte Oreilles Band of Lake Superior Chippewa Indians of the Lac Courte Oreilles Reservation of Wisconsin  
Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin  
Lac Vieux Desert Band of Lake Superior Chippewa Indians of Michigan  
Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada  
Los Coyotes Band of Cahuilla Mission Indians of the Los Coyotes Reservation, California  
Lovelock Paiute Tribe of the Lovelock Indian Colony, Nevada  
Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota  
Lower Elwha Tribal Community of the Lower Elwha Reservation, Washington  
Lower Sioux Indian Community of Minnesota  
Mdewakanton Sioux Indians of the Lower Sioux Reservation in Minnesota  
Lummi Tribe of the Lummi Reservation, Washington  
Makah Indian Tribe of the Makah Indian Reservation, Washington  
Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, California  
Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California  
Mashantucket Pequot Tribe of Connecticut  
Menominee Indian Tribe of Wisconsin  
Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California

Mescalero Apache Tribe of the Mescalero Reservation, New Mexico  
Miami Tribe of Oklahoma  
Miccosukee Tribe of Indians of Florida  
Middletown Rancheria of Pomo Indians of California  
Minnesota Chippewa Tribe, Minnesota (Six component Reservations: Bois Forte Band (Nett Lake), Fond du Lac Band, Grand Portage Band, Leech Lake Band, Mille Lac Band, White Earth Band)  
Mississippi Band of Choctaw Indians, Mississippi  
Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada  
Modoc Tribe of Oklahoma  
Mooretown Rancheria of Maidu Indians of California  
Morongo Band of Cahuilla Mission Indians of the Morongo Reservation, California  
Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington  
Narragansett Indian Tribe of Rhode Island  
Navajo Tribe of Arizona, New Mexico and Utah  
Nez Perce Tribe of Idaho  
Niaqually Indian Community of the Nisqually Lake Reservation, Washington  
Nooksack Indian Tribe of Washington  
Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana  
Northfork Rancheria of Mono Indians of California  
Northwestern Band of Shoshoni Indians of Utah (Washakie)  
Ogala Sioux Tribe of the Pine Ridge Reservation, South Dakota  
Omaha Tribe of Nebraska  
Oneida Nation of New York  
Oneida Tribe of Wisconsin  
Onondaga Nation of New York  
Osage Tribe of Oklahoma  
Ottawa Tribe of Oklahoma  
Otoe-Missouria Tribe of Oklahoma  
Paiute Indian Tribe of Utah  
Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California  
Paiute-Shoshone Tribe of the Fallon Reservation and Colony, Nevada  
Paiute-Shoshone Indians of the Lone Pine Community of the Lone Pine Reservation, California  
Pala Band of Luiseno Mission Indians of the Pala Reservation, California  
Pascua Yaqui Tribe of Arizona  
Passamaquoddy Tribe of Maine  
Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California  
Pawnee Indian Tribe of Oklahoma  
Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California  
Penobscot Tribe of Maine  
Peoria Tribe of Oklahoma  
Picayune Rancheria of Chukchansi Indians of California  
Pinoleville Rancheria of Pomo Indians of California  
Pit River Tribe of California (includes Big Bend, Lookout, Montgomery Creek & Roaring Creek Rancheries & XL Ranch)  
Poarch Band of Creek Indians of Alabama  
Ponca Tribe of Indians of Oklahoma  
Port Gamble Indian Community of the Port Gamble Reservation, Washington  
Potter Valley Rancheria of Pomo Indians of California

Prairie Band of Potawatomi Indians of Kansas  
Prairie Island Indian Community of Minnesota  
Mdewakanton Sioux Indians of the Prairie Island Reservation, Minnesota  
Pueblo of Acoma, New Mexico  
Pueblo of Cochiti, New Mexico  
Pueblo of Jemez, New Mexico  
Pueblo of Isleta, New Mexico  
Pueblo of Laguna, New Mexico  
Pueblo of Nambe, New Mexico  
Pueblo of Picuris, New Mexico  
Pueblo of Pojoaque, New Mexico  
Pueblo of San Felipe, New Mexico  
Pueblo of San Juan, New Mexico  
Pueblo of San Ildefonso, New Mexico  
Pueblo of Sandia, New Mexico  
Pueblo of Santa Ana, New Mexico  
Pueblo of Santa Clara, New Mexico  
Pueblo of Santo Domingo, New Mexico  
Pueblo of Taos, New Mexico  
Pueblo of Tesuque, New Mexico  
Pueblo of Zia, New Mexico  
Puyallup Tribe of the Puyallup Reservation, Washington  
Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, Nevada  
Quapaw Tribe of Oklahoma  
Quartz Valley Rancheria of Karok, Shasta & Upper Klamath Indians of California  
Quechan Tribe of the Fort Yuma Indian Reservation, California  
Quileute Tribe of the Quileute Reservation, Washington  
Quinault Tribe of the Quinault Reservation, Washington  
Ramona Band or Village of Cahuilla Mission Indians of California  
Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin  
Red Lake Band of Chippewa Indians of the Red Lake Reservation, Minnesota  
Redding Rancheria of Pomo Indians of California  
Redwood Valley Rancheria of Pomo Indians of California  
Reno-Sparks Indian Colony, Nevada  
Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California  
Robinson Rancheria of Pomo Indians of California  
Rohnerville Rancheria of Bear River or Mattole Indians of California  
Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota  
Rumsey Indian Rancheria of Wintun Indians of California  
Sac & Fox Tribe of the Mississippi in Iowa  
Sac & Fox Tribe of Missouri in Kansas and Nebraska  
Sac & Fox Tribe of Oklahoma  
Saginaw Chippewa Indian Tribe of Michigan, Isabella Reservation  
Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona  
San Carlos Apache Tribe of the San Carlos Reservation, Arizona  
San Manuel Band of Serrano Mission Indians of the San Manuel Reservation, California  
San Pasqual Band of Diegueno Mission Indians of California  
Santa Rosa Indian Community of the Santa Rosa Rancheria, California  
Santa Rosa Band of Cahuilla Mission Indians of the Santa Rosa Reservation, California

Santa Ynez Band of Chumash Mission Indians of the Santa Ysabel Reservation, California  
Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California  
Santee Sioux Tribe of the Santee Reservation of Nebraska  
Sauk-Suiattle Indian Tribe of Washington  
Sault Ste. Marie Tribe of Chippewa Indians of Michigan  
Seminole Nation of Oklahoma  
Seminole Tribe of Florida, Dania, Big Cypress & Brighton Reservations  
Seneca Nation of New York  
Seneca-Cayuga Tribe of Oklahoma  
Shakopee Mdewakanton Sioux Community of Minnesota (Prior Lake)  
Sheep Ranch Rancheria of Me-Wuk Indians of California  
Sherwood Valley Rancheria of Pomo Indians of California  
Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California  
Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington  
Shoshone Tribe of the Wind River Reservation, Wyoming  
Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho  
Shoshone-Paiute Tribes of the Duck Valley Reservation, Nevada  
Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota  
Skokomish Indian Tribe of the Skokomish Reservation, Washington  
Skull Valley Band of Goshute Indians of Utah  
Smith River Rancheria of California  
Soboba Band of Luiseno Mission Indians of the Soboba Reservation, California  
Sokoagon Chippewa Community of the Mole Lake Band of Chippewa Indians, Wisconsin  
Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado  
Spokane Tribe of the Spokane Reservation, Washington  
Squaxin Island Tribe of the Squaxin Island Reservation, Washington  
St. Croix Chippewa Indians of Wisconsin, St. Croix Reservation  
St. Regis Band of Mohawk Indians of New York  
Standing Rock Sioux Tribe of North & South Dakota  
Stockbridge-Mansee Community of Mohican Indians of Wisconsin  
Stillaguamish Tribe of Washington  
Summit Lake Paiute Tribe of Nevada  
Suquamish Indian Tribe of the Port Madison Reservation, Washington  
Susanville Indian Rancheria of Paiute, Maidu, Pit River & Washoe Indians of California  
Swinomish Indians of the Swinomish Reservation, Washington  
Sycuan Band of Diegueno Mission Indians of California  
Table Bluff Rancheria of Wiyot Indians of California  
Table Mountain Rancheria of California  
Te-Moak Tribe of Western Shoshone Indians of Nevada  
Thlopthlocco Tribal Town of the Creek Nation of Oklahoma



Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota  
 Tohono O'odham Nation of Arizona (formerly known as the Papago Tribe of the Sells, Gila Bend & San Xavier Reservation, Arizona)  
 Tonawanda Band of Seneca Indians of New York  
 Tonkawa Tribe of Indians of Oklahoma  
 Tonto Apache Tribe of Arizona  
 Torres-Martinez Band of Cahuilla Mission Indians of California  
 Tule River Indian Tribe of the Tule River Reservation, California  
 Tulalip Tribes of the Tulalip Reservation, Washington  
 Tunica-Biloxi Indian Tribe of Louisiana  
 Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California  
 Turtle Mountain Band of Chippewa Indians of North Dakota  
 Tuscarora Nation of New York  
 Twenty-Nine Palms Band of Luiseño Mission Indians of California  
 United Keetoowah Band of Cherokee Indians, Oklahoma  
 Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California  
 Upper Sioux Indian Community of the Upper Sioux Reservation, Minnesota  
 Upper Skagit Indian Tribe of Washington  
 Ute Indian Tribe of the Uintah & Ouray Reservation, Utah  
 Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah  
 Utu Gwa'itlu Palute Tribe of the Benton Palute Reservation, California  
 Walker River Palute Tribe of the Walker River Reservation, California  
 Washoe Tribe of Nevada & California (Carson Colony, Dresslerville & Washoe Ranches)  
 White Mountain Apache Tribe of the Fort Apache Reservation, Arizona  
 Wichita Indian Tribe of Oklahoma  
 Winnebago Tribe of Nebraska  
 Winnemucca Indian Colony of Nevada  
 Wisconsin Winnebago Indian Tribe of Wisconsin  
 Wyandotte Tribe of Oklahoma  
 Yankton Sioux Tribe of South Dakota  
 Yavapai-Apache Indian Community of the Camp Verde Reservation, Arizona  
 Yavapai-Prentiss Tribe of the Yavapai Reservation, Arizona  
 Yerington Palute Tribe of the Yerington Colony & Campbell Ranch, Nevada  
 Yomba Shoshone Tribe of the Yomba Reservation, Nevada  
 Ysleta Del Sur Pueblo of Texas  
 Yurok Tribe of the Hoopa Valley Reservation, California  
 Zuni Tribe of the Zuni Reservation, New Mexico

#### Native Entities Within the State of Alaska Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs

The following are those Alaska entities which are recognized and eligible to receive funding and services from the Bureau of Indian Affairs. The purpose of this updated list is: (1) To comply with the regulatory requirement

of annual publication pursuant to 25 CFR Part 83, (2) to reflect the Alaska entities which are statutorily eligible for funding and services from the Bureau of Indian Affairs, (3) to make it easier for previously unlisted, but statutorily eligible, entities to receive funding and services, and in so doing, (4) to describe the criteria used for inclusion on the list and for making additions.

All of the entities previously listed in the 1986 Federal Register publication are included in this list. However, the number of entities listed on the Alaska Native Entities section is approximately doubled on the basis of express Congressional recognition of the types of entities in Alaska eligible to receive funding or services from the Bureau of Indian Affairs. The additional entities are included without the necessity of completing the Federal Acknowledgment Process because of more explicit statutory provisions on groups eligible to receive funding and services on behalf of Alaska Natives.

The Federal Acknowledgment Procedures contained in 25 CFR Part 83 set forth a procedure whereby Indian groups may document their existence as tribes with a special relationship to the United States such as to qualify for funding and services as an "Indian tribe, organized band, pueblo or community." Section 83.6(b) requires that the Secretary publish a list of Indian tribes already recognized and receiving funding and services from the Department, groups to which the Federal Acknowledgment Procedures accordingly do not apply. This list is published pursuant to § 83.6(b).

The Department first published a list of Indian Tribal Entities on February 6, 1979, with the notation that "[t]he list of eligible Alaskan entities will be published at a later date." Subsequently, the Department published an updated list on November 24, 1982, to which it appended a list of "Alaska Native Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs." The preamble which described the scope and purpose of the Alaska list stated "[w]hile eligibility for services administered by the Bureau of Indian Affairs is generally limited to historical tribes and communities of Indians residing on reservations, and their members, unique circumstances have made eligible additional entities in Alaska which are not historical tribes. Such circumstances have resulted in multiple, overlapping eligibility of Native entities in Alaska. To alleviate any confusion which might arise from publication of a multiple eligibility listing, the following preliminary list shows those entities to

which the Bureau of Indian Affairs gives priority for purposes of funding and services." 47 FR 53133-53134 (1982). This preamble was inadvertently dropped from the subsequent lists.

A number of Alaska Native Entities have complained to the Department that they were omitted from previous lists despite the fact that they are receiving funding and services from the Bureau of Indian Affairs and qualify for such under the statutes that have established the programs of the Bureau. Some do not believe they should have to submit all of the documentation required of an Indian tribe under Part 83 to continue to receive benefits previously provided. Other departments have also made inquiry about the eligibility for their programs of entities included on or omitted from the 1982 Alaska Native Entities List. In addition, there has been confusion on whether inclusion on or exclusion from the Alaska Native Entities List constitutes an official determination of the United States government as to the governmental powers of particular Alaska villages or entities over non-members or territory.

The Department agrees that Alaska Native entities which satisfy the criteria listed below, and therefore are specifically eligible for the funding and services of the Bureau by statute, should not have to undertake to obtain Federal Acknowledgment pursuant to Part 83. We agree they should be included in the publication required by § 83.6(b) without further review.

However, inclusion on a list of entities already receiving and eligible for Bureau funding and services does not constitute a determination that the entity either would or would not qualify for Federal Acknowledgment under the regulations, but only that no such effort is necessary in order to preserve eligibility. Furthermore, inclusion on or exclusion from this list of any entity should not be construed to be a determination by this Department as to the extent of the powers and authority of that entity.

The principal demand by the Bureau and other federal agencies is for a list of organizations which are eligible for their funding and services based on their inclusion in categories frequently mentioned in statutes concerning federal programs for Indians. General federal Indian statutes provide that the Bureau serve tribes which are usually defined as "any Indian Tribe, band, nation, rancheria, pueblo, colony or community." With respect to Alaska, Congress has provided additional guidance as to whom we should provide services. The 1936 amendments to the Indian Reorganization Act, applicable

only to Alaska, authorized groups to organize as tribes which are not historical tribes and are not residing on reservations. They include groups having a "common bond of occupation or association, or residence within a well-defined neighborhood, community, or rural district." 25 U.S.C. § 473a. More recently, Indian statutes, such as the Indian Self-Determination Act,<sup>1</sup> specifically include Alaska Native villages, village corporations and regional corporations defined or established under the Alaska Native Claims Settlement Act (ANCSA).

Therefore, this list includes all of the Alaska entities meeting any of the following criteria which are used in one or more Federal statutes for the benefit of Alaska Natives:

1. "Tribes" as defined or established under the Indian Reorganization Act as supplemented by the Alaska Native Act.
2. Alaska Native Villages defined in or established pursuant to the Alaska Native Claims Settlement Act (ANCSA).<sup>2</sup>
3. Village corporations defined in or established pursuant to ANCSA.
4. Regional corporations defined in or established pursuant to ANCSA.
5. Urban corporations defined in or established pursuant to ANCSA.
6. Alaska Native groups defined in or established pursuant to ANCSA.
7. Alaska Native group corporations defined in or established pursuant to ANCSA.
8. Alaska Native entities that receive assistance from the Bureau in matters relating to the settlement of claims against the United States government, such as in the Act of June 19, 1935, Pub. L. 74-152, as amended by the Act of August 19, 1965, Pub. L. 89-130 and
9. Tribes which have petitioned to be acknowledged and have been determined to exist as tribes pursuant to 25 CFR Part 83.

Any Alaska village or entity not listed herein may still seek to obtain Federal Acknowledgment by following the procedures in 25 CFR Part 83 or may be

<sup>1</sup> For purposes of the Indian Self-Determination Act, Indian tribe is defined to include "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." This definition includes criteria 1, 2, 3, 4 and 9.

<sup>2</sup> ANCSA defines a Native village as: "any tribe, band, clan, group, village, community or association in Alaska listed in [43 U.S.C. 1610 or 1615], or which meets the requirements of this chapter, and which the Secretary determines was composed of twenty-five or more Natives." 43 U.S.C. 1602(c).

added to the list by demonstrating that they meet one of the nine criteria above.

We are concerned, however, that applying the criteria presently contained in Part 83 to Alaska may be unduly burdensome for the many small Alaska organizations. Alaska, with small pockets of Natives living in isolated locations scattered throughout the state, may not have extensive documentation on its history during the 1800's and early 1900's much less the even earlier periods commonly researched for groups in the lower-48. While it is fair to require groups in the lower-48 states to produce such documentation because they are located in areas where no group could exist without being the subject of detailed written records, insistence on the same formality for those Alaska groups might penalize them simply for being located in an area that was, until recently, extremely isolated.

Consequently, the Bureau, in consultation with Indians and Alaska Natives, will review the present acknowledgment process to determine if a modified process is needed so that Alaska organizations may seek inclusion on the list of entities recognized and eligible for services without using the present procedure which may be unduly burdensome.

Other Federal agencies should be aware that some statutes authorize the government to serve other organizations which are not listed while others specify only some of the criteria listed above. Therefore, each agency must look at its particular statutory authorities to make a final eligibility determination.

Afognak  
 Ahiklok-Kaguyak Native Corp.  
 AHTNA, Inc. (Cantwell, Chistochina, Copper Center, Gakona, Gulkana, Mentasta & Tazlina)  
 AHTNA, Incorporated  
 Akhiok  
 Aklachak, Ltd.  
 Aklachak  
 Aklachek, Aklachak Native Community  
 Akiak  
 Akiak Native Community  
 Akutan Corp.  
 Akutan  
 Alakanuk Native Corp.  
 Alakanuk  
 Alaska Peninsula Corporation (Kokhanok, Newhalen, Port Heiden, South Naknek & Ugashik)  
 Alutna  
 Aleknagik (aka Aleknagik)  
 Aleknagik Natives, Ltd.  
 Aleut Corporation  
 Alexander Creek  
 Alexander Creek, Inc.  
 Allakaket  
 Ambler  
 Anaktuvuk Pass  
 Andreafsey  
 Angoon Community Association

Angoon  
 Aniak  
 Anton Larsen, Inc.  
 Anvik  
 Arctic Village  
 Arctic Slope Regional Corporation  
 ARVIQ, Inc. (Platinum)  
 Askinuk Corp. (Scammon Bay)  
 Atka  
 Atka, Native Village of Atka  
 Atkasook Corp.  
 Atkasook  
 Atmautluak, Ltd.  
 Atmautluak  
 Atxam Corp. (Atka)  
 Ayakulik  
 Ayakulik, Inc.  
 Azachorok, Inc. (Mountain Village)  
 Baan-o-yeel kon Corp. (Rampart)  
 Barrow  
 Bay View, Inc. (Ivanof Bay)  
 Bean Ridge Corp. (Manley Hot Springs)  
 Beaver Kwit'chin Corp.  
 Beaver  
 Becharof Corp. (Egegik)  
 Belkofski Corp.  
 Belkofsky (aka Belkofski)  
 Bella Plats Natives, Inc.  
 Bella Plats  
 Bering Straits Native Corporation  
 Bethel (aka Orutsarmut)  
 Bethel Native Corp.  
 Bill Moore's (aka Bill Moore's Slough)  
 Birch Creek  
 Brevig Mission Native Corp.  
 Brevig Mission  
 Bristol Bay Native Corporation  
 Buckland, Native Village of Buckland  
 Buckland  
 Calista Corporation  
 Candle  
 Cantwell  
 Canyon Village  
 Cape Fox Corporation (Saxman)  
 Caswell Native Association  
 Caswell  
 Central Council of Tlingit and Haida Indian Tribes of Alaska  
 Chalkyitsik  
 Chalkyitsik Native Corp.  
 Chaloonaawick  
 Chaluka Corp. (Nikolski)  
 Chanega, Native Village of Chanega  
 Chanilut  
 Chefarmute, Inc. (Chefornak)  
 Chenega Corporation  
 Chefornak  
 Chevak  
 Chevak Company Corp.  
 Chickaloon  
 Chickaloon Moose Creek Native Association, Inc.  
 Chignik Lagoon Native Corp.  
 Chignik  
 Chignik Lake  
 Chignik Lagoon  
 Chignik River, Limited (Chignik Lake)  
 Chilkat Indian Village of Klukwan  
 Chilkoot Indian Association of Haines  
 Chistochina  
 Chitina  
 Chitina Native Corp.  
 Choggiung, Ltd. (Dillingham, Ekuk, Portage Creek)  
 Chuathbaluk



Chugach Alaska Corporation  
Chuloonawick Corporation  
Circle  
Clark's Point  
Cook Inlet Region, Inc.  
Copper Center  
Council  
Council Native Corporation  
Craig  
Craig Community Association  
Crooked Creek  
Cully Corp. (Point Lay)  
Danzhit Hanlani Corporation (Circle)  
Deering, Native Village of Deering  
Deering  
Deloycheet, Inc. (Holy Cross)  
Dillingham  
Dinega Corporation (Ruby)  
Dinyee Corporation (Stevens)  
Diomed, Native Village of Diomed (aka Inalik)  
Diomed Native Corporation  
Dot Lake  
Dot Lake Native Corporation  
Douglas Indian Association  
Doyon, Limited  
Eagle  
Eek  
Egegik  
Eklutna, Inc.  
Eklutna  
Ekuk  
Ekwo  
Ekwo Natives, Ltd.  
Elim Native Corporation  
Elim  
Elim, Native Village of Elim  
Emmonak Corporation  
Emmonak  
English Bay  
English Bay Corporation  
Evanville  
Evanville, Inc.  
Eyak Corporation  
Eyak  
False Pass  
Far West, Inc. (Chignik)  
Fort Yukon, Native Village of Fort Yukon  
Fort Yukon  
Gakona  
Galena  
Gambell  
Gambell, Native Village of Gambell  
Gana-Yoo, Limited (Galena, Kaltag, Koyukuk & Nulato)  
Georgetown  
Gold Creek-Susitna  
Gold Creek-Susitna, Inc.  
Goldbelt, Inc. (Juneau)  
Golovin Native Corporation  
Golovin  
Goodnews Bay  
Grayling  
Grayling, Organized Village of Grayling (aka Holikachuk)  
Gulkana  
Gwitchyaa Zhee Corporation (Fort Yukon)  
Haide Corporation (Hydaburg)  
Hamilton  
Healy Lake  
Hee-yea-lindge Corporation (Grayling)  
Holy Cross  
Hoonah Indian Association  
Hooper Bay  
Hughes  
Huna Totem (Hoonah)

Hungwitschin Corporation (Eagle)  
Huslia  
Hydaburg  
Hydaburg Cooperative Association  
Igiugig Native Corporation  
Igiugig  
Iliamna Natives, Ltd.  
Iliamna  
Inalik (aka Diomed)  
Ingalik, Inc. (Anvik)  
Inupiat Community of the Arctic Slope  
Iqfijouaq Company (Eek)  
Isanotski Corporation (False Pass)  
Ivanof Bay  
K'oyitl'ots'ina, Ltd. (Alatna, Allakaket, Hughes & Huslia)  
Kaguyak  
Kake, Organized Village of Kake  
Kake Tribal Corporation  
Kake  
Kaktovik Inupiat Corporation  
Kaktovik  
Kalskag  
Kaltag  
Kanatag, Native Village of Kanatag  
Karluk, Native Village of Karluk  
Karluk  
Kasaan, Organized Village of Kasaan  
Kasaan  
Kasigluk, Inc.  
Kasigluk  
Kavilco, Inc. (Kasaan)  
Kenai Native Association, Inc.  
Kenaitze Indian Tribe  
Ketchikan Indian Corporation  
Kiana  
KianT'ree (Canyon Village)  
Kijik Corporation (Nondalton)  
Kikiktatruk Inupiat Corporation (Kotzebue)  
King Island Native Community  
King Island Native Corporation  
King Cove  
King Cove Corporation  
Kipnuk  
Klutsarek, Inc. (Goodnews Bay)  
Kivalina, Native Village of Kivalina  
Kivalina  
Klawock Cooperative Association  
Klawock  
Klawock Heenya  
Klukwan, Inc.  
Knik  
Knikatnu, Inc. (Knik)  
Kobuk  
Kokarmut Corporation (Akiak)  
Kokhanok  
Koliganek  
Koliganek Natives, Ltd.  
Kongiganak  
Kongnikilnomiut Yuita Corporation (Bill Moore's)  
Koniag, Incorporated  
Koniag, Inc. (Karluk & Larsen Bay)  
Kootznoowo, Inc. (Angoon)  
Kotlik Yupik Corporation  
Kotlik  
Kotzebue  
Kotzebue, Native Village of Kotzebue  
Koyuk  
Koyuk Native Corporation  
Koyuk, Native Village of Koyuk  
Koyukuk  
Kugkaktik, Ltd. (Kipnuk)  
Kuskokwim Native Corporation (Aniak, Chuathbaluk, Crooked Creek, Georgetown, Lower Kalska, Red Devil, Napaimute, Sleetmute, Stony River, Upper Kalskag)

Kuugpiik Corporation (Nookseut)  
Kwethluk, Organized Village of Kwethluk  
Kwethluk, Incorporated  
Kwethluk  
Kwigillingok, Native Village of Kwigillingok  
Kwigillingok  
Kwik, Inc. (Kwigillingok)  
Kwinhagak, Native Village of Kwinhagak (aka Quinhagak)  
Larsen Bay  
Leisnoi, Inc. (Woody Island)  
Levelock, Natives, Ltd.  
Levelock  
Lime Village  
Lime Village Company  
Litnik  
Litnik, Inc.  
Lower Kalskag  
Manley Hot Springs  
Manokotak Natives, Ltd.  
Manokotak  
Marshall  
Mary's Igloo  
Mary's Igloo Native Corporation  
Maserculiq, Inc. (Marshall)  
McGrath  
Mekoryuk, Native Village of Mekoryuk, Island of Nunivak  
Mekoryuk  
Mendas Chaag Native Corporation (Healy Lake)  
Mentasta Lake  
Metlakatla Indian Community, Annette Island Reserve  
Minto  
Minto, Native Village of Minto  
Montana Creek Native Association  
Montana Creek  
Mountain Village  
MTNT, Ltd. (McGrath, Nikolai, Takotna & Telida)  
Nagamut  
Nagamut  
Naknek  
NANA Regional Corporation (Ambler, Buckland, Deering, Kiana, Kivalina, Kobuk, Noatak, Noorvik, Selawik, & Shungnak)  
Napaimute  
Napakiak Corporation  
Napakiak Native Village of Napakiak  
Napakiak  
Napakiak  
Napakiak Corporation  
Natives of Kodiak  
Natives of Afognak, Inc. (Afognak & Port Lions)  
Neets' ai Corporation (Arctic Village)  
Nelson Lagoon  
Nelson Lagoon Corporation  
Nenana  
Nerklumute Native Corporation (Andreafski)  
New Stuyahok  
Newhalen  
Newtok  
Newtok Corporation  
NGTA, Inc. (Nightmute)  
Nightmute  
Nikolai  
Nikolski  
Nikolski, Native Village of Nikolski  
Nima Corporation (Mekoryuk)  
Nimilchik  
Nimilchik Native Association  
Noatak  
Noatak, Native Village of Noatak

Nome Eskimo Community  
Nome (aka Nome Eskimo)  
Nondalton  
Nookseut (aka Nuiqsut)  
Noorvik Native Community  
Noorvik  
Northway  
Northway Natives, Inc.  
Nulato  
Nunakauiak Yupik Corporation (Tooksok Bay)  
Nunamiut Corporation (Anaktuvuk Pass)  
Nunapiglluraq Corporation (Hamilton)  
Nunapitchuk  
Nunapitchuk, Ltd.  
Nunapitchuk, Native Village of Nunapitchuk  
Oceanside Corporation (Perryville)  
OHOG, Inc. (Ohogamiut)  
Ohogamiut  
Old Harbor  
Old Harbor Native Corporation  
Olgoonik Corporation (Wainwright)  
Olsonville  
Olsonville  
Oscarville  
Oscarville Native Corporation  
Ounalaahka Corporation (Unalaska)  
Ouzinkie Native Corporation  
Ouzinkie  
Paimiut Corporation  
Paimiut  
Paug-vik, Incorporated, Ltd. (Naknek)  
Pauloff Harbor  
Pedro Bay  
Pedro Bay Native Corporation  
Perryville  
Perryville, Native Village of Perryville  
Petersburg Indian Association  
Pilot Point  
Pilot Station  
Pilot Point Native Corporation  
Pilot Station, Inc.  
Pitka's Point  
Pitka's Point Native Corporation  
Platinum  
Point Hope  
Point Lay  
Point Hope, Native Village of Point Hope  
Point Possession, Inc.  
Point Lay, Native Village of Point Lay  
Point Possession  
Port Heiden (Meshick)  
Port Lions  
Port Graham  
Port Alsworth  
Port Graham Corporation  
Port Williams (Shuyak)  
Portage Creek (Ohgsenakale)  
Pribilof Aleut Communities of St. Paul & St. George Islands  
Qenirtuq, Inc. (Quinhagak aka Kwinhagak)  
Qemirtalek Coast Corporation (Kongiganak)  
Quinhagak (aka Kwinhagak)  
Rampart  
Red Devil  
Ruby  
Russian Mission or Chauthalua (Kuskokwim)  
Russian Mission (Yukon)  
Russian Mission Native Corporation  
Saguyak, Inc. (Clark's Point)  
Salamatof Native Association, Inc.  
Salamatof  
Sanak Corporation (Pauloff Harbor)  
Sand Point  
Savoonga  
Savoonga Native Corporation

Savoonga, Native Village of Savoonga  
Saxman, Organized Village of Saxman  
Saxman  
Scammon Bay  
Sea Lion Corporation (Hooper Bay)  
Selaska Corporation  
Selawik  
Selawik, Native Village of Selawik  
Seldovia Native Association, Inc.  
Seldovia  
Seth-de-ya-ah Corporation (Minto)  
Shaan-Seet, Inc. (Craig)  
Shageluk Native Village  
Shageluk  
Shaktolik, Native Village of Shaktolik  
Shaktolik Native Corporation  
Shaktolik  
Shee Atika, Inc. (Sitka)  
Sheldon's Point  
Shishmaref, Native Village of Shishmaref  
Shishmaref  
Shishmaref Native Corporation  
Shumagin Corporation (Sand Point)  
Shungnak  
Shungnak, Native Village of Shungnak  
Shuyak, Inc. (Port Williams)  
Sitka Community Association  
Sitnasuak Native Corporation (Nome)  
Sleetmute  
Solomon Native Corporation  
Solomon  
South Naknek  
St. George Tanaq Corporation  
St. Mary's Native Corporation  
St. Michael, Native Village of St. Michael  
St. Michael Native Corporation  
St. George  
St. Mary's (aka Algaaciq)  
St. Michael  
St. Paul  
Stebbins Native Corporation  
Stebbins Community Association  
Stebbins  
Stevens Village  
Stevens, Native Village of Stevens  
Stony River  
Stuyahok, Ltd. (New Stuyahok)  
Swan Lake Corporation (Sheldon's Point)  
Takotna  
Tanacross, Inc.  
Tanacross  
Tanacross, Native Village of Tanacross  
Tanadgusix Corporation (St. Paul)  
Tanalian, Inc. (Port Alsworth)  
Tanana  
Tanana, Native Village of Tanana  
Tatitlek  
Tatitlek Corporation  
Tatitlek, Native Village of Tatitlek  
Tazlina  
Telida  
Teller  
Teller Native Corporation  
Tetlin  
Tetlin, Native Village of Tetlin  
Tetlin Native Corporation  
Thirteenth Regional Corporation  
Tigara Corporation (Point Hope)  
Tihiteet'Ali, Inc. (Birch Creek)  
Toghotte Corporation (Nenana)  
Togiak Natives, Ltd.  
Togiak  
Toksook Bay  
Tozitna, Ltd. (Tanana)  
Tulkisarmute, Inc. (Tuluksak)  
Tuluksak Native Community

Tuluksak  
Tuntutuliak  
Tuntutuliak Land, Ltd.  
Tununak  
Tununak, Native Village of Tununak  
Tununmiut Rinit Corporation (Tununak)  
Twin Hills  
Twin Hills Native Corporation  
Tyonek, Native Village of Tyonek  
Tyonek  
Tyonek Native Corporation  
Uganik Natives, Inc.  
Uganik  
Ugashik  
Ukpeagvik Inupiat Corporation (Barrow)  
Umkumiut, Ltd.  
Umkumiut  
Unalakleet  
Unalakleet, Native Village of Unalakleet  
Unalakleet Native Corporation  
Unalaska  
Unga  
Unga Corporation  
Upper Kalskag  
Uyak  
Uyak Natives, Inc.  
Venetie, Native Village of Venetie  
Venetie  
Wainwright  
Wales Native Corporation  
Wales  
Wales, Native Village of Wales  
White Mountain, Native Village of White Mountain  
White Mountain Native Corporation  
White Mountain  
Woody Island  
Wrangell Cooperative Association  
Yak-tat Kwaan, Inc. (Yakutat)  
Yakutat  
Zho-Tse, Inc. (Shageluk)  
Ross O. Swimmer,  
Assistant Secretary, Indian Affairs.  
[FR Doc. 88-29990 Filed 12-28-88; 8:45 am]  
BILLING CODE 4310-02-M

## Bureau of Land Management

[UT-050-09-4132-12]

## Comment Period on Environmental Assessment; Mt. Hillers Tresspass Rehabilitation, UT et al.

AGENCY: Bureau of Land Management, Richfield.

ACTION: Notice of Comment Period.

SUMMARY: The following Environmental Assessments are available for information and review:

- (1) Mt. Hillers Tresspass Rehabilitation EA in WSA UT-050-249.
- (2) Breck Knoll Fences EA in the King Top WSA UT-050-070.
- (3) Brecker Knoll-Pine Valley Fence in the Wah Wah Mountain in WSA UT-050-073.

The comment period will end 30 days from publication in the Federal Register. For further information contact Roy Edmonds at (801) 896-8221. Copies of

BEST COPY AVAILABLE



the EA's are available at the Richfield District Office, 150 East 900 North, Richfield, Utah 84701.

December 20, 1988  
Jerry W. Goodman,  
District Manager.  
[FR Doc. 88-29927 Filed 12-28-88; 8:45 am]  
BILLING CODE 4310-DQ-M

[MT-930-09-4214-10; MTM-37275]

# **Supplemental Notice of Proposed Withdrawal and Opportunity for Public Comment; Montana**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Interior, Bureau of Reclamation, has filed an application to withdraw 338.72 acres of land for multipurpose development in accordance with the Tiber Reservoir management plans of the Pick-Sloan Missouri Basin Program.

**DATE:** Comments and requests for meeting should be received on or before February 27, 1989.

**ADDRESS:** Comments and meeting requests should be sent to the Montana State Director, BLM, P.O. Box 36800, Billings, Montana 59107.

**FOR FURTHER INFORMATION CONTACT:** James Binando, BLM Montana State Office, 406-657-6090.

**SUPPLEMENTARY INFORMATION:** 1. On May 16, 1977, the Bureau of Reclamation filed an application to withdraw the lands listed below from location and entry under the United States mining laws, subject to valid existing rights.

2. Notice of Bureau of Reclamation's application for withdrawal was published in the *Federal Register* on August 26, 1977, Volume 42, No. 166, page 43133, affecting the following described lands:

Principal Meridian, Montana

T. 30 N., R. 1 E.,  
Sec. 2, lot 4.

T. 30 N., R. 1 E.,  
Sec. 17, SE¼NE¼.

T. 30 N., R. 2 E.,  
Sec. 26, NE¼NE¼.

T. 30 N., R. 3 E.,  
Sec. 19, lot 13 and SE¼SW¼; and  
Sec. 30, lot 1.

T. 30 N., R. 4 E.,  
Sec. 13, NW¼NE¼; and  
Sec. 28, N¼NW¼.

The areas described aggregate 338.72 acres in Liberty and Toole Counties.

For a period of 60 days from the date of publication of this notice, all persons

who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the undersigned officer of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the undersigned officer within 60 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of time and place will be published in the *Federal Register* at least 30 days before the scheduled date of the meeting.

The application is being processed in accordance with the regulations set forth in 43 CFR 2300.

John A. Kwiatkowski,  
Deputy State Director, Division of Lands and Renewable Resources.

December 19, 1988.

[FR Doc. 88-29924 Filed 12-28-88; 8:45 am]

BILLING CODE 4310-DN-M

## **National Park Service**

### **Brushy Creek Dam and Reservoir, Iowa; Termination of the Environmental Impact Statement Process**

**SUMMARY:** In Volume 44, Number 185, page 54783 of the *Federal Register* dated September 21, 1979, The Heritage Conservation and Recreation Service announced a notice of intent to prepare an Environmental Impact Statement (EIS) in conjunction with a Land and Water Conservation Fund grant to the State of Iowa, Iowa Conservation Commission for the proposed construction of a 980 acre recreational lake and the development of recreational facilities in Webster County, Iowa. Subsequent to the notice, the request for Federal funding was terminated. Therefore, an EIS will not be prepared and the process has been terminated. The Heritage Conservation and Recreation Service was merged into the National Park Service in 1981.

**FOR FURTHER INFORMATION CONTACT:** Jacob Hoogland, U.S. Department of the Interior, National Park Service,

Environmental Compliance Division, Room 1210, 18th and C Streets, NW., Washington, DC 20240, telephone (202) 343-2163.

December 22, 1988.

Gerald D. Patten,  
Associate Director, Planning and Development, National Park Service.

[FR Doc. 88-29980 Filed 12-28-88; 8:45 am]  
BILLING CODE 4310-70-M

## **INTERSTATE COMMERCE COMMISSION**

[Docket No. AB-290 (Sub-No. 26X)]

### **Central of Georgia Railroad Co.; Abandonment Exemption Between Lafayette and Roanoke, AL**

Applicant has filed a notice of exemption under 49 CFR Part 1152, Subpart F—*Exempt Abandonments* to abandon its 18.76-mile line of railroad between milepost T-339.66 at Lafayette, AL, and milepost T-358.42, at Roanoke, AL. Applicant discontinued service over this line in December 1976 with Commission approval in Docket No. AB-28.

Applicant has certified that: (1) No local or overhead traffic has moved over the line for at least 2 years; and (2) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on January 28, 1989 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,<sup>1</sup>

<sup>1</sup> A stay will be routinely issued by the Commission in those proceedings where an

Continued

## **DEPARTMENT OF JUSTICE**

### **Drug Enforcement Administration**

[Docket No. 88-90]

#### **Nathan Beckman, D.D.S., Miami Beach, FL; Hearing**

Notice is hereby given that on September 6, 1988, the Drug Enforcement Administration, Department of Justice, issued to Nathan Beckman, D.D.S., an Order to Show Cause as to why the Drug Enforcement Administration should not deny your application for a DEA Certificate of Registration.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, January 18, 1989, commencing at 9:30 a.m., at the United States Tax Court, Room 1524, 51 Southwest First Avenue, Miami, Florida.

Dated: December 22, 1988.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 88-29932 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 88-66]

#### **Ruben Calvillo, M.D., Tucson, AZ; Hearing**

Notice is hereby given that on July 14, 1988, the Drug Enforcement Administration, Department of Justice, issued to Ruben Calvillo, M.D., an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, AC1107754, and any pending applications for renewal.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Thursday, January 26, 1989, commencing at 9:30 a.m., in the Bankruptcy Court, Courtroom 212, 110 South Church Avenue, Tucson, Arizona.

Dated: December 22, 1988.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 88-29931 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 88-92]

#### **Kissena Pharmacy, Inc., Flushing, NY; Hearing**

Notice is hereby given that on September 1, 1988, the Drug Enforcement Administration, Department of Justice, issued to Kissena Pharmacy, an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, AK8695148, and deny any pending application of renewal.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, January 18, 1989, commencing at 10:00 a.m., at the United States Claims Court, 717 Madison Place, N.W., Courtroom No. 10, Room 309, Washington, DC.

Dated: December 22, 1988.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 88-29933 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 88-73]

#### **Liberty Discount Drugs, Detroit, MI; Hearing**

Notice is hereby given that on July 22, 1988, the Drug Enforcement Administration, Department of Justice, issued to Liberty Discount Drugs, an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, BL0809523, and deny any pending application for renewal.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Tuesday, January 10, 1989, commencing at 10:00 a.m., at the Federal Building, 200 East Liberty, First Floor Courtroom. Ann Arbor, Michigan.

Dated: December 22, 1988.

John C. Lawn,

Administrator, Drug Enforcement Administration.

[FR Doc. 88-29935 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),<sup>2</sup> and trail use/rail banking statements under 49 CFR 1152.29 must be filed by January 9, 1989.<sup>3</sup> Petitions for reconsideration and requests for public use conditions under 49 CFR 1152.28 must be filed by January 18, 1989 with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any petition filed with the Commission should be sent to applicant's representative: Virginia K. Young, Norfolk Southern Corporation, One Commercial Place, Norfolk, VA 23510-2191.

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by January 3, 1989. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3115, Interstate Commerce Commission, Washington, DC 20423) or by calling Carl Bausch, Chief, SEE at (202) 275-7318. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: December 21, 1988.

By the Commission, Jane F. Mackall,  
Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 88-29753 Filed 12-28-88; 8:45 am]

BILLING CODE 7035-01-M

informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See *Exemption of Out-of-Service Rail Lines*, 4 I.C.C.2d 400 (1988). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

<sup>2</sup> See *Exempt. of Rail Abandonment—Offers of Finon. Assist.*, 4 I.C.C.2d 164 (1987), and final rules published in the *Federal Register* on December 22, 1987 (52 FR 48440-48446).

<sup>3</sup> The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.



[Docket No. 87-74]

**Leonardo V. Lopez, M.D., Southgate, MI; Hearing**

Notice is hereby given that on October 1, 1987, the Drug Enforcement Administration, Department of Justice, issued to Leonardo V. Lopez, M.D., an Order to Show Cause as to why the Drug Enforcement Administration should not deny your application for registration.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Wednesday, January 11, 1989, commencing at 10:00 a.m., at the Federal Building, 200 East Liberty, First Floor Courtroom, Ann Arbor, Michigan.

Dated: December 22, 1988.

**John C. Lawn,**  
Drug Enforcement Administration.

[FR Doc. 88-29934 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 88-55]

**Wayne Nichols, D.V.M., West Liberty, OH; Hearing**

Notice is hereby given that on October 1, 1987, the Drug Enforcement Administration, Department of Justice, issued to Wayne Nichols, D.V.M., an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, AN2871451, and deny any pending application for registration.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Thursday, February 9, 1989, commencing at 9:30 a.m., in the United States Probate Court, Courtroom One, Eighth Floor, 369 South High Street, Columbus, Ohio.

Dated: December 22, 1988.

**John C. Lawn,**  
Administrator, Drug Enforcement Administration.

[FR Doc. 88-29936 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

[Docket No. 88-19]

**Arunkumar J. Shah, M.D., Houston TX; Hearing**

Notice is hereby given that on February 11, 1988, the Drug Enforcement Administration, Department of Justice, issued to Arunkumar J. Shah, M.D., an Order to Show Cause as to why the Drug Enforcement Administration should not revoke your DEA Certificate of Registration, AS9062162, and any pending application for renewal.

Thirty days having elapsed since the said Order to Show Cause was received by Respondent, and written request for a hearing having been filed with the Drug Enforcement Administration, notice is hereby given that a hearing in this matter will be held on Tuesday, January 24, 1989, commencing at 9:30 a.m., in Courtroom #12, Westside Command Center, 3203 S. Dairy Ashford Road, Houston, Texas.

Dated: December 22, 1988.

**John C. Lawn,**  
Administrator, Drug Enforcement Administration.

[FR Doc. 88-29937 Filed 12-28-88; 8:45 am]

BILLING CODE 4410-09-M

**DEPARTMENT OF LABOR****Pension and Welfare Benefits Administration**

[Prohibited Transaction Exemption T88-1; Exemption Application No. T-78401]

**Class Exemptions for Thrift Savings Fund**

**AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.  
**ACTION:** Adoption of Class Exemptions.

**SUMMARY:** This document adopts, for purposes of the prohibited transaction provisions of section 8477(c)(2) of the Federal Employees' Retirement System Act of 1986 (FERSA or the Act), certain prohibited transaction class exemptions (the Class Exemptions) granted pursuant to section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA). Pursuant to the adoption, the prohibited transaction restrictions of section 8477(c)(2) of FERSA or the relevant subsections thereunder will not apply to certain transactions described in the Class Exemptions, provided that the conditions of the exemptions are satisfied. The adoption affects participants and beneficiaries of the Thrift Savings Fund (the Fund), a fund established pursuant to provisions of FERSA, and parties in interest with respect to the Fund.

**EFFECTIVE DATE:** This adoption is effective as of January 1, 1988.

**SUPPLEMENTARY INFORMATION:** Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing the instructions, searching the existing data sources, gathering and maintaining the information needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Director, Office of Information Management, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-1301, Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

On September 29, 1988, notice was published in the *Federal Register* (53 FR 38105) of the pendency before the Department of Labor (the Department) of a proposal to adopt certain class exemptions granted pursuant to section 408(a) of ERISA, for purposes of the prohibited transaction provisions of section 8477(c)(2) of FERSA or relevant sub-sections thereunder.<sup>1</sup> The notice described the Fund, the authority pursuant to which the Class Exemptions were proposed to be adopted and the relief that would be provided under the Class Exemptions. The notice also referred interested persons to the Department's record with respect to each of the Class Exemptions including, but not limited to, applications for such exemptions, notices of the proposal of the Class Exemptions, public comments received by the Department with respect to such proposals, testimony which was part of any public hearing held with regard to any of the Class Exemptions and notices of the granting of the Class Exemptions. This information has been available for public inspection at the Department in Washington, DC. The notice invited interested persons to submit written comments or requests for a hearing on the proposed adoption to the Department. No public comments and no requests for a hearing were received by the Department.

<sup>1</sup> Sections 8401 through 8479 of Title 5, United States Code, (U.S.C.) were enacted by Congress at section 101(a) of FERSA. The Act itself provides no independent numbering system for these provisions, but directly assigns the chapter and section number under which those provisions are to be codified in Title 5 of the U.S.C. For purposes of clarity and convenience, the provisions of FERSA are referenced herein using the U.S.C. section number which Congress assigned to them in the Act. Thus, for example, a reference to "section 8477(c)(2) of FERSA" is to Title 5 U.S.C. 8477(c)(2).

The Class Exemptions are adopted for purposes of section 8477(c)(2) of FERSA or the relevant subsections thereunder pursuant to the authority of the Secretary established in section 8477(c)(3) of FERSA. Subparagraph (E) of section 8477(c)(3) provides that the Secretary may adopt exemptions granted for any class of fiduciaries or transactions under section 408(a) of ERISA, upon publication of notice in the *Federal Register*.<sup>2</sup> The Class Exemptions are adopted only to the extent that they provide exemptive relief from the restrictions of section 408(b) of ERISA or, subsections thereunder, which are parallel to those of section 8477(c)(2) of FERSA. The Department proposed the adoption on its own motion in accordance with the procedures set forth in section 3.01 of ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).<sup>3</sup>

Each of the Class Exemptions adopted herein for purposes of section 8477(c)(2) of FERSA or the relevant subsection thereunder was originally granted for purposes of ERISA pursuant to the provision of section 408(a) of ERISA and the procedures set forth in ERISA Procedure 75-1. Among other things, this required a finding on the record by the Secretary that each of the exemptions was administratively feasible, in the interests of plan participants and beneficiaries, and protective of the rights of plan participants and beneficiaries. Notice of the pendency of each exemption was published in the *Federal Register* and interested persons were afforded the opportunity to present their views and where appropriate, to request a hearing.

**FOR FURTHER INFORMATION CONTACT:** Katherine D. Lewis, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, (202) 523-7901 (not a toll free number) or Daniel J. Maguire, Esq., Plan Benefits Security Division, Office of the Solicitor,

<sup>2</sup> Section 8477(c)(3)(E) of FERSA was added to section 8477(c)(3) of FERSA by section 112 of the FERSA Technical Corrections Act of 1986 (FERSTCA, P.L. 99-558, October 27, 1986).

<sup>3</sup> Proposed regulations prescribing exemption procedures for purposes of both section 408(a) of ERISA and section 8477(c)(3) of FERSA were published in the *Federal Register* on June 28, 1988 (53 FR 24422). However, section III of FERSTCA authorizes the Secretary of Labor to grant exemptions under FERSA section 8477(c)(3) pursuant to the procedures currently applicable to exemption applications under ERISA section 408(a) until the earlier of December 31, 1988, or the date of publication of final regulations adopting a procedure for such exemption applications. The procedures currently applicable to exemptions under section 408(a) of ERISA are set forth in ERISA Procedure 75-1. Section 3.01 of ERISA Procedure 75-1 provides that the Secretary may initiate an exemption proceeding on his or her own motion.

Washington, D.C. 20210, (202) 523-9596 (not a toll free number).

**Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the disclosure provision included in this Adoption of Class Exemptions for purposes of FERSA have been submitted to the Office of Management and Budget (OMB) and assigned control number 1210-0074. The disclosure provisions of the Class Exemptions are reprinted in this document and were also published separately in a December 15, 1988 *Federal Register* notice of Department of Labor information collection activities under review by OMB (52 FR 50472).

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption from the prohibitions of section 8477(c)(2) of FERSA, pursuant to section 8477(c)(3) of FERSA, does not relieve a fiduciary from any other provision of FERSA, including but not limited to any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of section 8477(b) of FERSA. Among other things, this section requires a fiduciary to discharge his duties respecting the Fund solely in the interest of participants and beneficiaries and in a prudent manner.

(2) The Class Exemptions adopted hereby for purposes of section 8477(c)(2) of FERSA or relevant subsections thereunder are supplemental to, and not in derogation of, any of other provisions of FERSA.

(3) The fact that a transaction is the subject of an administrative exemption pursuant to section 8477(c)(3) of FERSA is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The exemptions adopted herein apply to a particular transaction only if the conditions specified in the exemption are satisfied.

**Adoption for purposes of Section 8477(c)(2) of FERSA of Certain Prohibited Transaction Exemptions Granted Pursuant to Section 408(a) of ERISA**

In accordance with the authority of the Secretary as set forth in section 8477(c)(3) of the Federal Employees' Retirement Act of 1986 (FERSA), and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975) and based upon the entire record, the Department adopts the following class exemptions for

purposes of the prohibited transaction provisions of section 8477(c)(2) of FERSA or the relevant subsections thereunder, to the extent that such exemptions provide relief from section 408(b) of ERISA or the relevant subsections thereunder:

(a) Prohibited Transaction Exemption (PTE) 75-1 (40 FR 50845, October 31, 1975);

(b) PTE 78-19 (43 FR 59915, December 22, 1978);

(c) PTE 80-28 (45 FR 28545, April 29, 1980, technically corrected at 45 FR 35040, May 23, 1980);

(d) PTE 80-51 (45 FR 49709, July 25, 1980, technically corrected at 45 FR 52949, August 8, 1980);

(e) PTE 82-63 (47 FR 14804, April 6, 1982, technically corrected at 47 FR 10437, April 16, 1982); and

(f) PTE 86-128 (51 FR 41688, November 18, 1986, amended at 52 FR 8676, March 19, 1987); collectively, the Class Exemptions.<sup>4</sup>

Pursuant to the requirements of section 8477(c)(3)(C) of FERSA, the Department makes the following findings with regard to the Class Exemptions adopted herein for purposes of section 8477(c)(2) of FERSA or the relevant subsections thereunder:

(a) the exemptions are administratively feasible;

(b) the exemptions are in the interests of the Fund and its participants and beneficiaries; and

(c) the exemptions are protective of the rights of the participants and beneficiaries of the Fund.

On April 27, 1987, the Secretary delegated to the Assistant Secretary for Pension and Welfare Benefits the authority to administer section 8477 of FERSA (Secretary's Order 1-87, 52 FR 13139, April 21, 1987).

**I. In General.** The Class Exemptions, as adopted, provide conditional relief only from the prohibitions of section 8477(c)(2) of FERSA or the relevant subsections thereunder, and only to the extent that the Class Exemptions provide parallel relief from the prohibitions of section 408(b) of ERISA or subsections thereunder. Reference should be made to explanatory

<sup>4</sup> The Department recognizes that certain kinds of transactions exempted from section 408(b) of ERISA by the Class Exemptions may not be relevant with respect to the operation of the Fund. For example, both PTE 78-19 and 80-51 provide 408(b) relief for certain transactions involving multiple employer plans and for certain investments by plans in employer securities and employer real property. The prohibited transaction provisions of FERSA do not contain specific restrictions on the acquisition and holding of employer securities and employer real property parallel to those of section 407(a) of ERISA.



information in each of the notices of the granting of the Class Exemptions under ERISA and to other documents referenced therein for further guidance with respect to matters relating to the Class Exemptions.

II. *Specific Terms.* For purposes of applying the Class Exemptions to the prohibitions of section 8477(c)(2) of FERSA, (1) any reference in the Class Exemptions to "section 406", "section 406 of the Act", "section 406(b)" or "section 406(b) of the Act" shall be deemed to apply to section 8477(c)(2) of FERSA. Reference to subsections of section 406(b) of ERISA shall be deemed to apply to the corresponding subsection of section 8477(c)(2) of FERSA. Thus, reference to "section 406(b)(1)" shall mean section 8477(c)(2)(A) of FERSA; reference to "section 406(b)(2)" shall mean section 8477(c)(2)(B) of FERSA; and reference to "section 406(b)(3)" shall mean section 8477(c)(2)(C) of FERSA. (2) The term "fiduciary" as used in the Class Exemptions shall be construed to mean "fiduciary" as defined in section 8477(a)(3) of FERSA. (3) The terms "employee benefit plan(s)" and "plan(s)" shall be construed to mean "Thrift Savings Fund" as established under section 8437 of FERSA. (4) The term "party in interest" shall be construed to mean "party in interest" as defined in section 8477(a)(4) of FERSA. (5) Reference in the Class Exemptions to "section 502(i) of the Act" shall be deemed to apply to section 8477(e)(1)(B) of FERSA. (6) References in the Class Exemptions to "subsections (a)(2) and (b) of section 504 of the Act" shall be deemed to apply to section 8476a of FERSA. (7) References in the Class Exemptions to section 4975 of the Internal Revenue Code (the Code) or subsections thereunder are not applicable with respect to the Fund, pursuant to sections 4975(g) and 414(d) of the Code. (8) For purposes of Section I(b)(2) of PTE 86-128, the term "relative (as defined in section 3(15) of ERISA)" shall mean any spouse, ancestor, lineal descendant, or spouse of a lineal descendant. (9) For purposes of PTE 78-19 and PTE 80-51, the phrase "by reason of a relationship to a service provider described in section 3(14) (F), (G), (H), or (I) of the Act" shall mean "by reason of a relationship to a service provider described in section 8477(a)(4) (F), (G), (H), (I) or (J) of FERSA."

III. For purposes of convenience, the Class Exemptions, as amended and technically corrected, are reprinted below in their entirety, with the exception of Part I of PTE 75-1. Part I of PTE 75-1 provided a temporary exemption, until April 29, 1978, from the

prohibitions of section 406(b) of ERISA for certain agency transactions. This temporary exemption was replaced by a permanent exemption, PTE 79-1 (44 FR 5963, January 30, 1979). PTE 79-1 was subsequently replaced by PTE 86-128, the text of which is set forth below.

#### PTE 75-1

#### Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks (40 FR 50845, October 31, 1975)

##### I. Agency Transactions and Services (Superseded.)

##### II. Principal Transactions Exemption

The restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government ("Governmental securities") and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State, if the following conditions are met:

(a) In the case of such broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) In the case of such reporting dealer or bank, it customarily purchases and sells Government securities for its own account in the ordinary course of its business and such purchase or sale between the plan and such reporting dealer or bank is a purchase or sale of Government securities.

(c) Such transaction is at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and it was not, at the time of such transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

(d) Such broker-dealer, reporting dealer or bank is not a fiduciary with respect to the plan, and such broker-dealer, reporting dealer or bank is a party in interest or disqualified person with respect to the plan solely by reason

of section 3(14)(B) of the Act or section 4975(e)(2)(B) of the Code or a relationship to a person described in such sections. For purposes of this paragraph, a broker-dealer, reporting dealer, or bank shall not be deemed to be a fiduciary with respect to a plan solely by reason of providing securities custodial services for a plan. Neither the restrictions of this paragraph nor (if other conditions of this exemption are met) the restrictions of section 406(b) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (E) and (F) of the Code, shall apply to the purchase or sale by the plan of securities issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), provided that a fiduciary with respect to the plan is not a principal underwriter for, or affiliated with, such investment company within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29) and 80a-2(a)(3)).

(e) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that—

(1) Such broker-dealer, reporting dealer, or bank shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if such records are not maintained or are not available for examination as required by paragraph (f) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(f) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan. For purposes of this exemption, the terms "broker-dealer," "reporting dealer" and "bank" shall include such persons and any affiliates thereof, and the term

"affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

##### III. Underwritings Exemption

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to the purchase or other acquisition of any securities by an employee benefit plan during the existence of an underwriting or selling syndicate with respect to such securities, from any person other than a fiduciary with respect to the plan, when such a fiduciary is a member of such syndicate, provided that the following conditions are met:

(a) No fiduciary who is involved in any way in causing the plan to make the purchase is a manager or such underwriting or selling syndicate, except that this paragraph shall not apply until July 1, 1977. For purposes of this exemption, the term "manager" means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the securities being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(b) The securities to be purchased or otherwise acquired are—

(1) Part of an issue registered under the Securities Act of 1933 or, if exempt from such registration requirement, are (i) issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States, (ii) issued by a bank, (iii) issued by a common or contract carrier, if such issuance is subject to the provisions of section 20a of the Interstate Commerce Act, as amended, (iv) exempt from such registration requirement pursuant to a Federal statute other than the Securities Act of 1933, or (v) are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), and the issuer of which has been subject to the reporting requirements of section 13 of that Act (15 U.S.C. 78m) for a period of at least 90 days immediately preceding the sale of securities and has filed all reports to be filed thereunder with the Securities and

Exchange Commission during the preceding 12 months.

(2) Purchased at not more than the public offering price prior to the end of the first full business day after the final terms of the securities have been fixed and announced to the public, except that—

(i) If such securities are offered for subscription upon exercise of rights, they are purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such securities are debt securities, they may be purchased at a public offering price on a day subsequent to the end of such first full business day, provided that the interest rates on comparable debt securities offered to the public subsequent to such first full business day and prior to the purchase are less than the interest rate of the debt securities being purchased.

(3) Offered pursuant to an underwriting agreement under which the members of the syndicate are committed to purchase all of the securities being offered, except if—

(i) Such securities are purchased by others pursuant to a rights offering; or

(ii) Such securities are offered pursuant to an over-allotment option.

(c) The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless—

(1) Such securities are non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization;

(2) Such securities are issued or fully guaranteed by a person described in paragraph (b)(1)(i) of this exemption; or

(3) Such securities are fully guaranteed by a person who has issued securities described in paragraph (b)(1)(ii), (iii), (iv) or (v) and this paragraph (c).

(d) The amount of such securities to be purchased or otherwise acquired by the plan does not exceed three percent of the total amount of such securities being offered.

(e) The consideration to be paid by the plan in purchasing or otherwise acquiring such securities does not exceed three percent of the fair market value of the total assets of the plan as of the last day of the most recent fiscal quarter of the plan prior to such transaction, provided that if such consideration exceeds \$1 million, it does not exceed one percent of such fair market value of the total assets of the plan.

(f) The plan maintains or causes to be maintained for a period of six years

from the date of such transaction such records as are necessary to enable the persons described in paragraph (g) of this exemption to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(g) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (f) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

If such securities are purchased by the plan from a party in interest or disqualified person with respect to the plan, such party in interest or disqualified person shall not be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the conditions of this exemption are not met. However, if such securities are purchased from a party in interest or disqualified person with respect to the plan, the restrictions of section 406(a) of the Act shall apply to any fiduciary with respect to the plan and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall apply to such party in interest or disqualified person, unless the conditions for exemption of Part II of this notice (relating to certain principal transactions) are met.

For purposes of this exemption, the term "fiduciary" shall include such fiduciary and any affiliates of such fiduciary, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

##### IV. Market-Making Exemption

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any purchase or sale of any securities by an employee benefit plan from or to a market-maker with respect to such securities who is also a fiduciary with



respect to such plan, provided that the following conditions are met:

(a) The issuer of such securities has been in continuous operation for not less than three years, including the operations of any predecessors, unless—

(1) Such securities are non-convertible debt securities rated in one of the four highest rating categories by at least one nationally recognized statistical rating organization;

(2) Such securities are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Such securities are fully guaranteed by a person described in this paragraph (a).

(b) As a result of purchasing such securities—

(1) The fair market value of the aggregate amount of such securities owned, directly or indirectly, by the plan and with respect to which such fiduciary is a fiduciary, does not exceed three percent of the fair market value of the assets of the plan with respect to which such fiduciary is a fiduciary, as of the last day of the most recent fiscal quarter of the plan prior to such transaction, provided that if the fair market value of such securities exceeds \$1 million, it does not exceed one percent of such fair market value of such assets of the plan, except, that this paragraph shall not apply to securities described in paragraph (a)(2) of this exemption; and

(2) The fair market value of the aggregate amount of all securities for which such fiduciary is a market-maker, which are owned, directly or indirectly, by the plan and with respect to which such fiduciary is a fiduciary, does not exceed 10 percent of the fair market value of the assets of the plan with respect to which such fiduciary is a fiduciary, as of the last day of the most recent fiscal quarter of the plan prior to such transaction, except that this paragraph shall not apply to securities described in paragraph (a)(2) of this exemption.

(c) At least one person other than such fiduciary is a market-maker with respect to such securities.

(d) The transaction is executed at a net price to the plan for the number of shares or other units to be purchased or sold in the transaction which is more favorable to the plan than that which such fiduciary, acting in good faith, reasonably believes to be available at the time of such transaction from all other market-makers with respect to such securities.

(e) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six year period.

(f) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

For purposes of this exemption—

(1) The term "market-maker" shall mean any specialist permitted to act as a dealer, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(2) The term "fiduciary" shall include such fiduciary and any affiliates of such fiduciary, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

#### V. Extension of Credit Exemption

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan by a party in interest or a disqualified person with respect to the plan, provided that the following conditions are met:

(a) The party in interest or disqualified person—

(1) Is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) Is not a fiduciary with respect to any assets of such plan, unless no interest or other consideration is received by such fiduciary or any affiliate thereof in connection with such extension of credit.

(b) Such extension of credit—

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

(c) The plan maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (d) of this exemption to determine whether the conditions of this exemption have been met, except that—

(1) If such party in interest or disqualified person is not a fiduciary with respect to any assets of the plan, such party in interest or disqualified person shall not be subject to the civil penalty which may be assessed under section 502(l) of the Act or to the taxes imposed by section 4975 (a) and (b) of the Code, if such records are not maintained, or not available for examination as required by paragraph (d) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the plan fiduciaries, such records are lost or destroyed prior to the end of such six-year period.

(d) Notwithstanding anything to the contrary in subsections (a) (2) and (b) of section 504 of the Act, the records referred to in paragraph (c) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan. For purposes of this exemption, the terms "party in interest" and "disqualified person" shall include such party in interest or disqualified person and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3-21(e) and 26 CFR 54.4975-9(e).

The effective date for exemptions I through IV above is January 1, 1975.

#### PTE 70-19

**Class Exemptions for Certain Transactions Involving Insurance Company Pooled Separate Accounts (43 FR 59915, December 22, 1978)**

#### Section I—Basic Exemption

Effective January 1, 1975, the restrictions of sections 406(a), 406(b)(2)

and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A), (B), (C), or (D) of the Code, shall not apply to transactions described below if the applicable conditions set forth in section III are met.

#### (a) General Exemption

Any transaction between a party in interest with respect to a plan and an insurance company pooled separate account in which the plan has an interest, or any acquisition or holding by the pooled separate account of employer securities or employer real property, if at the time of the transaction, acquisition or holding—

(1) The assets of the plan (together with the assets of any other plans maintained by the same employer or employee organization) in the pooled separate account do not exceed—

(i) 10 percent of the total of all assets in the pooled separate account, if the transaction occurs prior to February 20, 1979; or

(ii) 5 percent of the total of all assets in the pooled separate account, if the transaction occurs on or after February 20, 1979, and

(2) The party in interest is not the insurance company which holds the plan assets in its pooled separate account, any other separate account of the insurance company, or any affiliate for the insurance company.

#### (b) Multiple Employer Plans Exemption

Any transaction between an employer (or an affiliate of an employer) of employees covered by a multiple employer plan and an insurance company pooled separate account in which the plan has an interest, or any acquisition or holding by the pooled separate account of employer securities or employer real property, if at the time of the transaction, acquisition or holding—

(1) In the case of a transaction occurring prior to February 20, 1979, the employer is not a substantial employer with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(2) In the case of a transaction occurring on or after February 20, 1979,

(i) The assets of the multiple employer plan in the pooled separate account do not exceed 10 percent of the total assets in the pooled separate account, and the employer is not a substantial employer with respect to the plan (within the meaning of section 4001(a)(2) of the Act) or

(ii) The assets of the multiple employer plan in the method separate account exceed 10 percent of the total

assets in the pooled separate account, but the employer is not a substantial employer and would not be a substantial employer with respect to the plan within the meaning of section 4001(a)(2) of the Act if "5 percent" were substituted for "10 percent" in that definition.

#### (c) Excess Holding Exemption for Employee Benefit Plans

Any acquisition or holding of qualifying employer securities or qualifying employer real property by a plan (other than through a pooled separate account) if—

(1) The acquisition or holding contravenes the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act solely by reason of being aggregated with employer securities or employer real property held by an insurance company pooled separate account in which the plan has an interest, and

(2) The requirements of either paragraph (a) or paragraph (b) of this section are met.

#### (d) Employer Securities and Employer Real Property

(1) Except as provided in subsection 2 of the paragraph, any acquisition, sale or holding of employer securities and any acquisition, sale, holding or lease of employer real property by the insurance company pooled separate account in which a plan has an interest and which does not meet the requirements of paragraph (a) or (b) of this section, if no commission is paid to the insurance company or to the employer or any affiliate of the employer in connection with the acquisition or sale of employer securities or the acquisition, sale or lease of employer real property, and

(i) In the case of employer real property—

(a) Each parcel of employer real property and the improvements thereon held by the pooled separate account are suitable (or adaptable without excessive cost) for use by different tenants, and

(b) The property of the pooled separate account, which is leased or held for lease to others, in the aggregate, is dispersed geographically.

(ii) In the case of employer securities—

The employer security is (1) stock, or (2) a bond, debenture, note, certificate, or other evidence of indebtedness (the security described in (2) is hereinafter referred to as an "obligation"), and

(b) The insurance company in whose pooled separate account the security is held is not an affiliate of the issuer of the security and, if the security is an obligation of the issuer, either

(c) The pooled separate account already owns the obligation at the time the plan acquires an interest in the separate account and interests in the pooled separate account are offered and redeemed in accordance with valuation procedures of the pooled separate account applied on a uniform or consistent basis, or

(d) Immediately after acquisition of the obligation: (1) not more than 25 percent of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by such plan, and (2) in the case of an obligation which is a restricted security within the meaning of Rule 144 under the Securities Act of 1933, at least 50 percent of the aggregate amount referred to in (1) is held by persons independent of the issuer. The insurance company, its affiliates and any separate account of the insurance company shall be considered persons independent of the issuer if the insurance company is not an affiliate of the issuer.

(2) Provided that, in the case of a plan which is not an eligible individual account plan (as defined in section 407(d)(3) of the Act), immediately after such acquisition the aggregate fair market value of employer securities and employer real property owned by the plan does not exceed 10 percent of the fair market value of the assets of the plan.

(3) For the purposes of the exemption contained in subsection (1) of this paragraph (d), the term "employer securities" shall include securities issued by, and the term "employer real property" shall include real property leased to, a person who is a party in interest with respect to a plan (which has an interest in the separate account) by reason of a relationship to the employer described in section 3(14) (E), (G), (H), or (I) of the Act.

#### Section II—Specific Exemptions

Effective January 1, 1975, the restrictions of section 406(a)(1) (A), (B), (C), and (D) and 406(b) (1) and (2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A), (B), (C), (D) or (E) of the Code shall not apply to the transactions described below provided that the conditions of section III are met.

#### (a) Certain Leases and Goods

The furnishing of goods to an insurance company pooled separate account by a party in interest with respect to the plan, which plan has an interest in the pooled separate account, or the leasing of real property of the pooled separate account to a party in



interest and the incidental furnishing of goods to the party in interest by the insurance company separate account, if—

(1) In the case of goods, they are furnished to or by the pooled separate account in connection with the real property investments of the pooled separate account;

(2) The party in interest is not the insurance company, any other pooled separate account of the insurance company, or an affiliate of the insurance company; and

(3) The amount involved in the furnishing of goods or leasing of real property in any calendar year (including the amount under any other lease or arrangement for the furnishing of goods in connection with the real property investments of the pooled separate account with the same party in interest (or any affiliate thereof), does not exceed the greater of \$25,000 or .025 percent of the fair market value of the assets of the pooled separate account on the most recent valuation date of the account prior to the transaction.

(b) Transactions With Persons Who Are Parties in Interest to the Plan Solely By Virtue of Being Certain Service Providers or Certain Affiliates of Service Providers

Any transaction between an insurance company pooled separate account and a person who is a party in interest with respect to a plan, which plan has an interest in the pooled separate account, if—

(1) The person is a part in interest including a fiduciary by reason of providing services to the plan, or by reason of a relationship to a service provider described in section 3(14) (F) (C), (H) or (I) of the Act, and the person exercised no discretionary authority, control, responsibility, or influence with respect to the investment of plan assets in the pooled separate account and has no discretionary authority, control, responsibility, or influence with respect to the management or disposition of the plan assets held in the pooled separate account; and

(2) The person is not an affiliate of the insurance company.

#### (c) Management of Real Property

Any services provided to an insurance company pooled separate account (in which a plan has an interest) by the insurance company or its affiliate in connection with the management of the real property investments of the pooled separate account, if the compensation paid to insurance company or its affiliate for the services does not exceed

the cost of the services to the insurance company or its affiliate.

#### (d) Transactions Involving Places of Public Accommodation

The furnishing of services, facilities and any goods incidental to such services and facilities by a place of public accommodation owned by an insurance company pooled separate account, to a party in interest with respect to a plan, which plan has an interest in the pooled separate account, if the services, facilities and incidental goods are furnished on a comparable basis to the general public.

#### Section III—General Conditions

(a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent the insurance company, the terms of the transaction are not less favorable to the pooled separate account than the terms generally available in arm's-length transactions between unrelated parties.

(b) The insurance company maintains for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (c) of this section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance company, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest shall be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (c) below.

(c)(1) Except as provided in subsection 2 of this paragraph and notwithstanding any provisions of subsections (a) (2) and (b) of section 504 of the Act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(ii) Any fiduciary of a plan who has authority to acquire or dispose of the interests of the plan in the separate account, or any duly authorized employee or representative of such fiduciary,

(iii) Any contributing employer to any plan which has an interest in the pooled separate account or any duly authorized

employee or representative of that employer,

(iv) Any participant or beneficiary of any plan which has an interest in the pooled separate account or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraph (ii) through (iv) of this paragraph shall be authorized to examine an insurance company's trade secrets or commercial or financial information which is privileged or confidential.

#### Section IV—Definitions and General Rules

For purposes of sections I through III above,

(a) The term "multiple employer plan" means an employee plan which satisfies at least the requirements of section 3(37)(A)(i), (ii) and (v) of the Act and section 414(f)(1)(A), (B), and (E) of the Code.

(b) An "affiliate" of a person includes—

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee (including, in the case of an insurance company, an insurance agent thereof, whether or not the agent is a common law employee of the insurance company) or relative, or partner in, any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

#### (e) General

(i) The time as of which any transaction, acquisition, or holding occurs for the purposes of this exemption is the date upon which the transaction is entered into (or the acquisition is made) and the holding commences. Thus, for purposes of this exemption, if any transaction is entered into, or an acquisition is made, on or after January 1, 1975, or a renewal which requires the consent of the insurance company occurs on or after January 1, 1975, and the requirements of this exemption are satisfied at the time the

transaction is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered into, or holding commencing, prior to January 1, 1975, if either the requirements of this exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975, if the transaction had been entered into, acquisition was made, or if the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a holding exempt by virtue of section I(a) above at such time as the interest of the plan in the pooled separate account exceeds the percentage interest limitation of section I(a), if the excess results solely from an increase in the amount of consideration allocated to the pooled separate account by the plan. (ii) Each plan shall be considered to own the same fractional share of each asset (or portion thereof) in the pooled separate account as its fractional share of total assets in the pooled separate account on the most recent preceding valuation date of the account.

#### PTE 80-26

**Class Exemption for Certain Interest Free Loans to Employee Benefit Plans (45 FR 28545, April 29, 1980, as technically corrected at 45 FR 35040, May 23, 1980);**

Effective January 1, 1975, the restrictions of section 406(a)(1) (B) and (D) and section 406(b)(2) of the Act, and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (B) and (D) of the Code, shall not apply to the lending of money or other extension of credit from a party in interest or disqualified person to an employee benefit plan, nor to the repayment of such loan or other extension of credit in accordance with its terms or written modifications thereof, if:

(a) No interest or other fee is charged to the plan, and no discount for payment in cash is relinquished by the plan, in connection with the loan or extension of credit;

(b) The proceeds of the loan or extension of credit are used only:

- (1) For the payment of ordinary operating expenses of the plan, including the payment of benefits in accordance with the terms of the plan and periodic premiums under an insurance or annuity contract; or
- (2) For a period of no more than three days, for a purpose incidental to the ordinary operation of the plan;
- (c) The loan or extension of credit is unsecured; and
- (d) The loan or extension of credit is not directly or indirectly made by an employee benefit plan.

#### PTE 80-51

**Class Exemption for Certain Transactions Involving Bank Collective Investment Funds (45 FR 49709, July 25, 1980, as technically corrected at 45 FR 52949, August 8, 1980)**

#### Section I. Exemption for Certain Transactions Involving Bank Collective Investment Funds

(a) Effective on January 1, 1975, the restrictions of section 406(a), 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(A), (B), (C) or (D) of the Code, shall not apply to the transactions described below if the applicable conditions set forth in Section III are met.

#### (1) Transactions Between Parties in Interest and Bank Collective Investment Funds: General

Any transaction between a party in interest with respect to a plan and a collective investment fund that is maintained by a bank and in which the plan has an interest, or any acquisition or holding by the collective investment fund of employer securities or employer real property, if the party in interest is not the bank that maintains the collective investment fund, any other collective investment fund maintained by the bank or any affiliate of the bank, and if, at the time of the transaction, acquisition or holding, either

(A) The interest of the plan, together with the interest of any other plans maintained by the same employer or employee organization in the collective investment fund does not exceed—

(i) 10 percent of the total of all assets in the collective investment fund, if the transaction occurs prior to October 23, 1980; or

(ii) 5 percent of the total of all assets in the collective investment fund if the transaction occurs on or after October 23, 1980, or

(B) The collective investment fund is a specialized fund that has a policy of investing, and invests, substantially all

of its assets in short term obligations, including but not necessarily limited to—

- (i) Corporate or governmental obligations or related repurchase agreements;
- (ii) Certificates of deposit;
- (iii) Bankers' acceptances; or
- (iv) Variable amount notes of borrowers of prime credit

having a stated maturity date of one year or less or having a maturity date of one year or less from the date of purchase by such specialized fund.

#### (2) Special Transactions Not Meeting the Criteria of Section I(a)(1)(A) Between Employers of Employees Covered by a Multiple Employer Plan and Collective Investment Funds

Any transaction between an employer (or an affiliate of an employer) of employees covered by a multiple employer plan and a collective investment fund maintained by a bank in which the plan has an interest, or any acquisition or holding by the collective investment fund of employer securities or employer real property, if at the time of the transaction, acquisition or holding—

(A) In the case of a transaction occurring prior to October 23, 1980, the employer is not a "substantial employer" with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(B) In the case of a transaction occurring on or after October 23, 1980:

(i) The interest of the multiple employer plan in the collective investment fund does not exceed 10 percent of the total assets in the collective investment fund, and the employer is not a "substantial employer" with respect to the plan (within the meaning of section 4001(a)(2) of the Act); or

(ii) The interest of the multiple employer plan in the collective investment fund exceeds 10 percent of the total assets in the collective investment fund, but the employer is not a "substantial employer" with respect to the plan and would not be a "substantial employer" within the meaning of section 4001(a)(2) of the Act if "5 percent" were substituted for "10 percent" in that definition.

#### (3) Acquisition, Sales or Holdings of Employer Securities and Employer Real Property

(A) Except as provided in subsection (B) of this section (3), any acquisition, sale or holding of employer securities and any acquisition, sale or holding of employer real property by a collective



investment fund in which a plan has an interest and which does not meet the requirements of paragraphs (a)(1) and (a)(2) of this section, if no commission is paid to the bank or to the employer or any affiliate of the bank or the employer in connection with the acquisition or sale of employer securities or the acquisition, sale or lease of employer real property; and

(i) In the case of employer real property—

(aa) Each parcel of employer real property and the improvements thereon held by the collective investment fund are suitable (or adaptable without excessive cost) for use by different tenants; and

(b) The property of the collective investment fund that is leased or held for lease to others, in the aggregate, is dispersed geographically.

(ii) In the case of employer securities—

(aa) The bank in whose collective investment fund the security held is not an affiliate of the issuer of the security, and

(bb) If the security is an obligation of the issuer, either

1. The collective investment fund owns the obligation at the time the plan acquires an interest in the collective investment fund, and interests in the collective fund are offered and redeemed in accordance with valuation procedures of the collective investment fund applied on a uniform or consistent basis, or

2. Immediately after acquisition of the obligation: (a) Not more than 25 percent of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by such plan, and (b) in the case of an obligation that is a restricted security within the meaning of Rule 144 under the Securities Act of 1933, at least 50 percent of the aggregate amount of obligations issued in the issue and outstanding at the time of acquisition is held by persons independent of the issuer. The bank, its affiliates and any collective investment fund maintained by the bank shall be considered to be persons independent of the issuer if the bank is not an affiliate of the issuer.

(B) In the case of a plan that is not an eligible individual account plan (as defined in section 407(d)(3) of the Act), the exemption provided in subsection (A) of this paragraph (3) shall be available only if, immediately after the acquisition of the securities or real property, the aggregate fair market value of employer real property with respect to which the bank has investment discretion does not exceed 10 percent of the fair market value of all the assets of

the plan with respect to which the bank has such investment discretion.

(C) For the purposes of the exemption contained in subsection (A) of this section (3), the term "employer securities" shall include securities issued by, and the term "employer real property" shall include real property leased to, a person who is a party in interest with respect to a plan (participating in the collective investment fund) by reason of a relationship to the employer described in section 3(14) (E), (G), (H) or (I) of the Act.

(b) Effective January 1, 1975, the restrictions of section 406(a)(1) (A), (B), (C) and (D) and section 4065(b) (1) and (2) of the Act and the taxes imposed on section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A), (B), (C), (D) or (E) of the Code, shall not apply to the transactions described below, if the conditions of Section II are met.

(1) Transactions With Persons Who are Parties in Interest With Respect to the Plan Solely by Virtue of Being Certain Service Providers or Certain Affiliates of Service Providers

Any transaction between a collective investment fund and a person who is a party in interest with respect to a plan that has an interest in the collective investment fund, if—

(A) The person is a party in interest (including a fiduciary) solely by reason of providing services to the plan, or solely by reason of a relationship to a service provider described in section 3(14) (F), (G), (H) or (I) of the Act, or both, and the person neither exercised nor has any discretionary authority, control, responsibility or influence with respect to the investment of plan assets in, or held by, the collective investment fund, and

(B) The person is not an affiliate of the bank maintaining the collective investment fund.

(2) Certain Leases and Goods

The furnishing of goods to a collective investment fund by a party in interest with respect to a plan participating in the collective investment fund, or the leasing of real property owned by the collective investment fund to such party in interest and the incidental furnishing of goods to such party in interest by the collective investment fund, if—

(A) In the case of goods, they are furnished to or by the collective investment fund in connection with real property owned by the collective investment fund;

(B) The party in interest is not the bank maintaining the collective investment fund, or any affiliate of the

bank, or any other collective investment fund maintained by the bank; and

(C) The amount involved in the furnishing of goods or leasing of real property in any calendar year (including the amount under any other lease or arrangement for the furnishing of goods in connection with the real property investments of the collective investment fund with the same party in interest, or any affiliate thereof) does not exceed the greater of \$25,000 or 0.5 percent of the fair market value of the assets of the collective investment fund on the most recent valuation date of the fund prior to the transaction.

(3) Management of Real Property

Any services provided to a collective investment fund in which a plan has an interest by the bank maintaining that fund or by an affiliate of that bank in connection with the management of the real property owned by the collective investment fund, if the compensation paid to the bank or its affiliate does not exceed the cost of the services to the bank or its affiliate.

(4) Transactions Involving Places of Public Accommodation

The furnishing of services, facilities and any goods incidental to such services and facilities by a place of public accommodation owned by a bank collective investment fund, to a party in interest with respect to a plan, which plan has an interest in the collective investment fund, if the services, facilities and incidental goods are furnished on a comparable basis to the general public.

*Section II. Excess Holdings Exemption for Employee Benefit Plans*

(a) Effective January 1, 1975, the restrictions of section 406(a), 406(b)(2) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1) (A), (B), (C) or (D) of the Code shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property (other than through a collective investment fund), if—

(1) The acquisition or holding contravenes the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407(a) of the Act solely by reason of being aggregated with employer securities or employer real property held by a collective investment fund in which the plan has an interest;

(2) The requirements of either paragraph (a)(1) or paragraph (a)(2) of Section I of this exemption are met; and

(3) The applicable conditions set forth in Section III of this exemption are met.

*Section III. General Conditions*

(a) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of the bank, the terms of the transaction are not less favorable to the collective investment fund than the terms generally available in arm's-length transactions between unrelated parties.

(b) The bank maintains for a period of six years from the date of the transaction, the records necessary to enable the persons described in paragraph (c) of this section to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the bank's control, the records are lost or destroyed prior to the end of the six-year period, and (2) no party in interest shall be subject to the civil penalty that may be assessed under 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or not available for examination as required by paragraph (c) below.

(c)(1) Except as provided in subsection 2 of this paragraph and notwithstanding any provisions of subsections (a) (2) and (b) of section 504 of the Act, the records referred to in paragraph (b) of this section are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(B) Any fiduciary of a plan who has authority to acquire or dispose of the interests of the plan in the collective investment fund, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan that has an interest in the collective investment fund or any duly authorized employee or representative of such employer,

(D) Any participant or beneficiary of any plan that has an interest in the collective investment fund, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this paragraph shall be authorized to examine a bank's trade secrets or commercial or financial information which is privileged or confidential.

*Section IV. Definitions and General Rules*

For the purposes of this exemption,

(a) An "affiliate" of a person includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative of, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(b) The term "control" means the power to exercise a controlling influence over the management or policies of an person other than an individual.

(c) The term "party in interest" includes a "disqualified person" as defined in section 4975(e)(2) of the Code.

(d) The term "relative" means a "relative" as that term is defined in section 3(15) of the Act (or a "member of the family" as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or sister.

(e)(1) Except as provided in subparagraph (2) of this paragraph, the term "collective investment fund" means a common or collective trust fund or pooled investment fund maintained by a bank or a trust company.

(2) In the case of a common or collective trust fund or pooled investment fund maintained by a bank or trust company that consists of separate investment accounts, each separate investment account of that fund, rather than the entire fund, shall be considered to be a separate "collective investment fund" for purposes of this exemption.

(f) The term "multiple employer plan" means an employee benefit plan that satisfies at least the requirements of section 3(37)(A) (i), (ii) and (v) of the Act and section 414(f)(1) (A), (B) and (E) of the Code.

(g) The term "obligation" means a bond, debenture, note, certificate, or other evidence of indebtedness.

(h) The time as of which any transaction, acquisition or holding occurs is the date upon which the transaction is entered into, the acquisition is made or the holding commences. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into, or an acquisition is made, on or after January 1, 1975, or a renewal that requires the consent of the bank occurs on or after January 1, 1975, and the requirements of this exemption are satisfied at the time the transaction

is entered into or renewed, respectively, or at the time the acquisition is made, the requirements will continue to be satisfied thereafter with respect to the transaction or acquisition and the exemption shall apply thereafter to the continued holding of the securities or property so acquired. This exemption also applies to any transaction or acquisition entered into, or holding commencing prior to January 1, 1975, if either the requirements of this exemption would have been satisfied on the date the transaction was entered into or acquisition was made (or on which the holding commenced), or the requirements would have been satisfied on January 1, 1975 if the transaction had been entered into, the acquisition was made, or the holding had commenced, on January 1, 1975. Notwithstanding the foregoing, this exemption shall cease to apply to a holding exempt by virtue of section 1(a)(1) at such time as the interest of the plan in the collective investment fund exceeds the percentage interest limitation of section 1(a)(1), unless no portion of such excess results from an increase in the assets allocated to the collective investment fund by the plan. For this purpose, assets allocated do not include the reinvestment of fund earnings. Nothing in this paragraph shall be construed as exempting a transaction entered into by a collective investment fund which becomes a transaction described in section 406 of the Act or section 4975 of the Code while the transaction is continuing, unless the conditions of the exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

(i) Each plan participating in a collective investment fund shall be considered to own the same proportionate undivided interest in each asset of the collective investment fund as its proportionate undivided interest in the total assets of the collective investment fund as calculated on the most recent preceding valuation date of the fund.

(j) Where any of the assets of a collective investment fund are invested in another collective investment fund, the interest of the plan in the second fund arising from its investment in the first fund shall be established by multiplying the percentage interest of the plan in the first fund by the percentage interest of the first fund in the second fund, such computation to be continued similarly in the event that further investments are made by the second investment fund in one or more other collective investment funds.



## PTE 82-63

**Class Exemption to Permit Payment of Compensation to Plan Fiduciaries for the Provision of Securities Lending Services** (47 FR 14804, April 6, 1982, as technically corrected at 47 FR 16437, April 16, 1982)

## I. Transactions

Effective April 6, 1982, the restrictions of section 408(b)(1) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1)(E) of the Code shall not apply to the payment to a fiduciary (the "lending fiduciary") of compensation for services rendered in connection with loans of plan assets that are securities, provided that:

(a) The loan of securities is not prohibited by section 408(a) of the Act;

(b) The lending fiduciary is authorized to engage in securities lending transactions on behalf of the plan;

(c) The compensation is reasonable and is paid in accordance with the terms of a written instrument, which may be in the form of a master agreement covering a series of securities lending transactions;

(d) Except as otherwise provided in paragraph (f), the arrangement under which the compensation is paid (1) is subject to the prior written authorization of a plan fiduciary (the "authorizing fiduciary"), who is (other than in the case of a plan covering only employees of the lending fiduciary or affiliates of such fiduciary) independent of the lending fiduciary and of any affiliate thereof, and (2) may be terminated by the authorizing fiduciary within (i) the time negotiated for such notice of termination by the plan and the lending fiduciary, or (ii) five business days, whichever is lesser, in either case without penalty to the plan;

(e) No such authorization is made or renewed unless the lending fiduciary shall have furnished the authorizing fiduciary with any reasonably available information which the lending fiduciary reasonably believes to be necessary to determine whether such authorization should be made or renewed, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request; and

(f) (Special Rule for Commingled Investment Funds) In the case of a pooled separate account maintained by an insurance company qualified to do business in a state or a common or collective trust fund maintained by a bank or trust company supervised by a state or federal agency, the requirements

of paragraph (d) of this exemption shall not apply: *Provided*, that

(1) The information described in paragraph (e) (including information with respect to any material change in the arrangement) shall be furnished by the lending fiduciary to the authorizing fiduciary described in paragraph (d) with respect to each plan whose assets are invested in the account or fund, not less than 30 days prior to implementation of the arrangement or material change thereto, and, where requested, upon the reasonable request of the authorizing fiduciary;

(2) In the event any such authorizing fiduciary submits a notice in writing to the lending fiduciary objecting to the implementation of, material change in, or continuation of the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the account or fund, without penalty to the plan, within such time as may be necessary to effect such withdrawal in an orderly manner that is equitable to all withdrawing plans and to the nonwithdrawing plans. In the case of a plan that elects to withdraw pursuant to the foregoing, such withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw; and

(3) In the case of a plan whose assets are proposed to be invested in the account or fund subsequent to the implementation of the compensation arrangement and which has not authorized the arrangement in the manner described in paragraphs (f)(1) and (f)(2), the plan's investment in the account or fund shall be authorized in the manner described in paragraph (d)(1).

## II. Definitions

For purposes of this exemption, the term "affiliate" of another person means:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act) of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

## PTE 86-128

**Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers** (51 FR 41686, November 18, 1986, as amended at 52 FR 8676, March 19, 1987)

## Section I. Definitions and Special Rules

The following definitions and special rules apply to this exemption:

(a) The term "person" includes the person and affiliates of the person.

(b) An "affiliate" of a person includes the following:

(1) Any person directly or indirectly controlling, controlled by, or under common control with, the person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of ERISA), brother, sister, or spouse of a brother or sister, of the person;

(3) Any corporation or partnership of which the person is an officer, director or partner.

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) An "agency cross transaction" is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(d) The term "covered transaction" means an action described in section II (a), (b) or (c) of this exemption.

(e) The term "effecting or executing a securities transaction" means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(f) A plan fiduciary is independent of a person only if the fiduciary has no relationship to or interest in such person that might affect the exercise of such fiduciary's best judgment as a fiduciary.

(g) The term "profit" includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(h) The term "securities transaction" means the purchase or sale of securities.

(i) The term "nondiscretionary trustee" of a plan means a trustee or custodian whose powers and duties with respect to any assets of the plan

are limited to (1) the provision of nondiscretionary trust services to the plan, and (2) duties imposed on the trustee by any provision or provisions of the Act or the Code. The term "nondiscretionary trust services" means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

## Section II. Covered Transactions

Effective February 12, 1987, if each condition of section III of this exemption is either satisfied or not applicable under section IV, the restrictions of section 406(b) of ERISA and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (E) or (F) of the Code shall not apply to—

(a) A plan fiduciary's using its authority to cause a plan to pay a fee for effecting or executing securities transactions to that person as agent for the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency;

(b) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transactions; or

(c) The receipt by a plan fiduciary of reasonable compensation for effecting or executing an agency cross transaction to which a plan is a party from one or more other parties to the transaction.

## Section III. Conditions

Except to the extent otherwise provided in section IV of this exemption, section II of this exemption applies only if the following conditions are satisfied:

(a) The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee) or an administrator of the plan, or an employer any of whose employees are covered by the plan.

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each plan whose assets are involved in the transaction, which plan fiduciary is independent of the person engaging in the covered transaction.

(c) The authorization referred to in paragraph (b) of this section is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice of termination. A form expressly providing an election to terminate the authorization described in paragraph (b)

of this section with instructions on the use of the form must be supplied to the authorizing fiduciary not less than annually. The instructions for such form must include the following information:

(1) The authorization is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice from the authorizing fiduciary or other plan official having authority to terminate the authorization; and

(2) Failure to return the form will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the plan.

(d) Within three months before an authorization is made, the authorizing fiduciary is furnished with any reasonably available information that the person seeking authorization reasonably believes to be necessary for the authorizing fiduciary to determine whether the authorization should be made, including (but not limited to) a copy of this exemption, the form for termination of authorization described in section III(c), a description of the person's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

(e) The person engaging in a covered transaction furnishes the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten business days of the securities transaction containing the information described in Rule 10b-10(a)(1-7) under the Securities Exchange Act of 1934, 17 CFR 240.10b-10; or

(2) At least once every three months and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the plan pursuant to subparagraph (e)(1) of this section during the three-month period covered by the report;

(B) The total of all securities transaction related charges incurred by the plan during such period in connection with such covered transactions; and

(C) The amount of the securities transaction-related charges retained by such person and the amount of such charges paid to other persons for execution or other services.

For purposes of this paragraph (e), the words "incurred by the plan" shall be construed to mean "incurred by the pooled fund" when such person engages in covered transactions on behalf of a

pooled fund in which the plan participates.

(f) The authorizing fiduciary is furnished with a summary of the information required under paragraph (e)(1) of this section at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the plan during the period in connection with covered securities transactions.

(2) The amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services.

(3) A description of the person's brokerage placement practices, if such practices have materially changed during the period covered by the summary.

(4)(i) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in discharging its duty of prudence. The requirements of this paragraph (f)(4)(i) will be met if the "annualized portfolio turnover ratio", calculated in the manner described in paragraph (f)(4)(ii), is contained in the summary.

(ii) The "annualized portfolio turnover ratio" shall be calculated as a percentage of the plan assets consisting of securities or cash over which the authorized person had discretionary investment authority, or with respect to which such person rendered, or had any responsibility to render, investment advice (the "portfolio") at any time or times ("management period(s)") during the period covered by the report. First, the "portfolio turnover ratio" (not annualized) is obtained by dividing (A) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (B) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator.



The "annualized portfolio turnover ratio" is then derived by multiplying the "portfolio turnover ratio" by an annualizing factor. The annualizing factor is obtained by dividing (C) the number twelve by (D) the aggregate duration of the management period(s) expressed in months (and fractions thereof).

Examples of the use of this formula are provided in section V of this exemption.

(iii) The information described in this paragraph (f)(4) is not required to be furnished in any case where the authorized person has not exercised discretionary authority over trading in the plan's account during the period covered by the report.

For purposes of this paragraph (f), the words "incurred by the plan" shall be construed to mean "incurred by the pooled fund" when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(g) If an agency cross transaction to which section IV(b) does not apply is involved, the following conditions must also be satisfied.

(1) The information required under section III(d) or IV(d)(1)(B) of this exemption includes a statement to the effect that with respect to agency cross transactions the person effecting or executing the transactions will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under section III(f) of this exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by the person engaging in the transactions in connection with those transactions during the period;

(3) The person effecting or executing the agency cross transaction has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both;

(4) The agency cross transaction is a purchase, or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transactions is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

#### Section IV. Exceptions From Conditions

(a) Certain plans not covering employees

Section III of this exemption does not apply to covered transactions to the extent they are engaged in on behalf of individual retirement accounts meeting the conditions of 29 CFR 2510.3-2(d), or plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3-3.

(b) Certain agency cross transactions

Section III of this exemption does not apply in the case of an agency cross transaction, provided that the person effecting or executing the transaction:

(1) Does not render investment advice to any plan for a fee within the meaning of section 3(21)(A)(ii) of ERISA with respect to the transaction;

(2) Is not otherwise a fiduciary who has investment discretion with respect to any plan assets involved in the transaction, see 29 CFR 2510.3-21(d); and

(3) Does not have the authority to engage, retain or discharge any person who is or is proposed to be a fiduciary regarding any such plan assets.

(c) Recapture of profits

Section III(a) of this exemption does not apply in any case where the person where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.

(d) Special rules for pooled funds

In the case of a person engaging in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one plan (pooled fund):

(1) Section III (b), (c) and (d) of this exemption do not apply if—

(A) The arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (d)(1), of a plan fiduciary with respect to each plan whose assets are invested in the pooled fund who is independent of the person. The requirement that the authorizing fiduciary be independent of the person shall not apply in the case of a plan covering only employees of the person, if the requirements of section IV(d)(2) (A) and (B) are met.

(B) The authorizing fiduciary is furnished with any reasonably available information that the person engaging or proposing to engage in the covered transactions reasonably believes to be

necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the person's brokerage placement practices, and, where requested, any reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, material change in, or continuation of, the arrangement, the plan on whose behalf the objection was tendered is given opportunity to terminate its investment in the pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the nonwithdrawing plans. In the case of a plan that elects to withdraw under this subparagraph (d)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

(D) In the case of a plan whose assets are proposed to be invested in the pooled fund subsequent to the implementation of the arrangement and that has not authorized the arrangement in the manner described in subparagraphs (d)(1) (B) and (C) of this section, the plan's investment in the pooled fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraphs (d)(1)(A).

(2) Section III(a) of this exemption, to the extent that it prohibits the person from being the employer of employees covered by a plan investing in a pool managed by the person does not apply if—

(A) The person is an "investment manager" as defined in section 3(38) of ERISA, and

(B) Either (i) the person returns or credits to the pooled fund all profits earned by the person in connection with all covered transactions engaged in by the person on behalf of the fund, or (ii) the pooled fund satisfies the requirements of paragraph IV(d)(3).

(3) A pooled fund satisfies the requirements of this paragraph for a fiscal year of the fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the pooled

fund during the fiscal year by any plan covering employees of the person, the aggregate fair market value of the interests in such fund of all plans covering employees of the person does not exceed twenty percent of the fair market value of the total assets of the fund; and

(B) The aggregate brokerage commissions received by the person, in connection with covered transactions engaged in by the person on behalf of all pooled funds in which a plan covering employees of the person participates, do not exceed five percent of the total brokerage commissions received by the person from all sources in such fiscal year.

#### Section V. Examples Illustrating the Use of the Annualized Portfolio Turnover Ratio Described in Section III(f)(4)(ii)

(a) A, an investment manager affiliated with a broker-dealer that A uses to effect securities transactions for the accounts that it manages, exercises investment discretion over the account of plan P for the period January 1, 1987, through June 30, 1987, after which the relationship between A and P ceases. The market values of P's account with A at the relevant times (excluding debt securities having a maturity of one year or less at the time of acquisition) are:

Date	Market value (\$ millions)
January 1, 1987.....	10.4
January 31, 1987.....	10.2
February 28, 1987.....	9.9
March 31, 1987.....	10.0
April 30, 1987.....	10.6
May 31, 1987.....	11.5
June 30, 1987.....	12.0
Sum of market values.....	74.6

Aggregate purchases during the 6-month period were \$850,000; aggregate sales were \$1,000,000, excluding in each case debt securities having a maturity of one year or less at the time of acquisition.

For purposes of section III(f)(4) of this exemption, A computes the annualized portfolio turnover as follows:

A = \$850,000 (lesser of purchases or sales)

B = \$10,657,143 (\$74.6 million divided by 7, i.e., the number of valuation dates)

Annualizing factor = C/D = 12/6 = 2

Annualized portfolio turnover ratio = 2 × (850,000/10,657,143) = 0.160 = 16.0 percent

(b) Same facts as (a), except that A manages the portfolio through July 15, 1987 and, in addition, resumes management of the portfolio on November 10, 1987 through the end of

the year. The additional relevant valuation dates and portfolio values are:

Date	Market value (\$ millions)
July 15, 1987.....	12.2
November 10, 1987.....	9.4
November 30, 1987.....	9.6
December 31, 1987.....	9.8
Sum of Market Values.....	41.0

During the periods July 1, 1987 through July 15, 1987, and November 10, 1987 through December 31, 1987, there were an additional \$650,000 of purchases and \$400,000 of sales. Thus, total sales were \$1,500,000 (i.e., \$850,000 + \$650,000) and total sales were \$1,400,000 (i.e., \$1,000,000 + \$400,000 for the management periods).

A now computes the annualized portfolio turnover as follows:

A = \$1,400,000 (lesser of aggregate purchases or sales)

B = \$10,509,091 (\$115.6 million divided by 11)

Annualizing factor = C/D = 12/ (6.5 + 1.67) = 1.47

Annualized portfolio turnover ratio = 1.47 × (1,400,000/10,509,091) = 0.198 = 19.8 percent.

#### Section VI. Effective Dates and Transitional Rule.

(a) This exemption is effective February 12, 1987.

(b) PTE 79-1 and PTE 84-86 are revoked effective June 1, 1987.

#### IV. Effective Date of This Adoption

The adoption herein of the Class Exemptions, for purposes of section 8477(c)(2) of FERSA or the relevant subsection thereunder, is effective as of January 1, 1988.

David M. Walker,  
Assistant Secretary for Pension and Welfare Benefits, U.S. Department of Labor.

[FR Doc. 88-30009 Filed 12-28-88; 8:45 am]  
BILLING CODE 4510-29-M

[Application No. D-6555]

**Employee Benefit Plans; Exemption; First Boston Corporation (First Boston) Located in New York, NY**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from

certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption would exempt transactions relating to the origination and operation of certain asset pool investment trusts (trusts), and the acquisition and holding by employee benefit plans (plans) of certain asset-backed pass-through certificates (certificates) representing interests in those investment trusts. The exemption, if granted, would affect participants and beneficiaries of plans investing in certificates, the sponsors, servicers, trustees and insurers of the trusts, the underwriters of certificates, and obligors with respect to receivables contained in the trusts.

**EFFECTIVE DATE:** If granted, this exemption would be effective November 1, 1985.

**DATES:** Written comments and requests for a public hearing must be received by the Department of Labor by February 13, 1989.

**ADDRESS:** All written comments and requests for a hearing (preferably at least three copies) should be sent to the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5671, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. D-6555. The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Janet Laufer of the Department, telephone (202) 523-8671. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:** Notice is given of the pendency before the Department of an application for exemption from the restrictions of sections 406(a), 406(b) and 407(a) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code. First Boston requested the exemption in an application filed pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor.



Therefore, this notice of pendency is issued solely by the Department.<sup>1</sup>

#### Summary of Facts and Representations

The facts and representations contained in the application are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. First Boston is a wholly-owned subsidiary of First Boston, Inc., a publicly traded New York Stock Exchange listed company. First Boston, a leading international investment banking firm, provides financial advice to, and raises capital for, a broad range of domestic and international clients. First Boston and its affiliates manage and participate in public offerings and arrange direct placements of debt and equity securities in the domestic and international capital markets for both public and private sector issuers. These securities include common stock, preferred stock, tax-exempt securities, non-investment grade high-yield securities, asset-backed securities and mortgage-related securities. Additionally, First Boston underwrites commercial paper as well as other short-term and medium-term securities.

First Boston has been a pioneer in the mortgage-backed and asset-backed securities markets. The firm was the lead manager of the first public offering of collateralized mortgage obligations in 1983 and sole manager of the first public asset-backed securities offering in 1985. First Boston was the leading underwriter of asset-backed securities in 1985 and in each subsequent year.

#### Trust Assets

2. First Boston seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts;<sup>2</sup> (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed

governmental mortgage pool certificate investment trusts.<sup>3</sup>

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.

#### Trust Structure

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assets are receivables which may have been originated by a sponsor or servicer of the trust, an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.

Prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. First Boston Brothers, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. All of the public offerings of Certificates made to date and all of the public offerings of Certificates presently contemplated have been or are to be underwritten on a firm commitment basis. In addition,

<sup>2</sup> Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts are plan assets.

First Boston has privately placed Certificates on both a firm commitment and an agency basis. First Boston may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders are entitled to receive monthly or quarterly installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

5. Some of the certificates will be multi-class certificates. First Boston requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on mortgages is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.<sup>4</sup>

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities. Interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal, and only when that class of certificates have been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing certificates be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less

<sup>4</sup> It is the Department's understanding that where a plan invests in Real Estate Mortgage Investment Conduit (REMIC) "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of ERISA section 404(a)(1)(B) would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

than the amount required to be so distributed, all certificateholders will share in the amount distributed on a pro rata basis.

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a short time after the issuance of trust certificates (within 120 days, except with respect to 30-year obligations, in which case the period may be as long as two years). Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

#### Parties to Transactions

7. The originator of a receivable is the entity that initially lends money to a borrower (obligor), such as homeowner or automobile purchaser, or leases property to the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their business, including finance companies, for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidental part of its operations. Each trust may contain assets of one or more originators. The originators of the receivables may also function as the trust sponsor or servicer.

8. The sponsor will be one of three entities: (i) A special-purpose corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

9. The trustee of a trust is the legal owner of the obligations in the trust. The

trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to First Boston, the trust sponsor or the servicer. First Boston represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which will be paid by the sponsor or servicer.

10. The servicer of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, it is common for the receivables to be "subserviced" by their respective originators and for a single entity to "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

In most cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (though they themselves may be related) will be unrelated to First Boston. In some cases, however, affiliates of First Boston may originate or service receivables included in a trust, or may sponsor a trust.

#### Certificate Price, Pass-Through Rate and Fees

11. Where the sponsor of a trust is not the originator of receivables included in a trust, the sponsor generally purchases the receivables in the secondary market, either directly from the originator or from another secondary market participant. The price the sponsor pays for a receivable is determined by competitive market forces, taking into account payment terms, interest rate, quality, and forecasts as to future interest rates.

As compensation for the receivables transferred to the trust, the sponsor

receives certificates representing the entire beneficial interest in the trust, or the cash proceeds of the sale of such certificates. If the sponsor receives certificates from the trust, the sponsor sells these certificates for cash to investors or securities underwriters. The transfer of the receivables to the trust by the sponsor, the sale of certificates to investors, and the receipt of the cash proceeds by the sponsor generally take place simultaneously.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is equal to the interest rate on receivables included in the trust minus a specified servicing fee.<sup>5</sup> This rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

13. As compensation for performing its servicing duties, the servicer (who may also be the sponsor, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables in the trust and payments payable (at the pass-through rate) to certificateholders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer will be required to pay the administrative expenses of servicing the trust, including the trustee's fee, out of its servicing compensation.

<sup>5</sup> The pass-through rate on certificates representing interests in trust holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.



The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is paid out of the interest income received on the receivables in excess of the pass-through rate.

14. The servicer(s) may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (a) Prepayment fees; (b) late payment and payment extension fees; and (c) fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

15. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts in itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the servicer's own funds, the servicer is required to deposit these payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

16. First Boston will receive a fee in connection with the securities underwriting or private placement of certificates. In a firm commitment underwriting, this fee would consist of the difference between what First Boston receives for the certificates that it distributes and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor.

#### *Purchase of Receivables by the Servicer*

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payment, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase a receivable included in the trust when the balance payable on the receivable is reduced to a specified percentage (usually between 5 and 10 percent) of the initial balance.

The purchase price of a receivable is specified in the pooling and servicing agreement and will be either: (1) The unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer; or (2) the greater of (a) the amount in (1), or (b) the fair market value of such obligations in the case of a Real Estate Mortgage Investment Conduit (REMIC), or the fair market value of the certificates in the case of a trust that is not a REMIC.

#### *Certificate Ratings*

18. The certificates will have received one of the three highest ratings available from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), or, in the case of certificates representing interests in trusts containing multi-family residential mortgages or commercial mortgages, Duff & Phelps Inc. (D&P). Insurance or other credit support (such as surety bonds, letters of credit or guarantees) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

#### *Provision of Credit Support*

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e. act as an insurer). In these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (i) out of late payments by the obligors, (ii) from the credit support provider (which may be itself) or, (iii) in the case of a trust that issues subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. When the Servicer is the provider of the credit

support and provides its own funds to cover delinquent payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism.

If the master servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover delinquent payments, or otherwise fails in its duties, the trustee would be required and would be able to enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the trust estate, including rights under the credit support mechanism. Therefore, the trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

When a master servicer advances funds, the amount so advanced is recoverable by the servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations in the trust as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly or quarterly, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver

to the trustee annually a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee;

(d) The credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur toward the end of the life of the trust, whether due to servicer advances or any other cause. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount becomes a fixed dollar amount, subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, since the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

#### *Disclosure*

20. In connection with the original issuance of certificates, the prospectus or private offering memorandum will be furnished to investing plans. The prospectus or private offering memorandum will contain information material to a fiduciary's decision to invest in the certificates, including:

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates;

(b) A description of the trust as a legal entity and a description of how the trust was formed by the seller/servicer or other sponsor of the transaction;

(c) Identification of the independent trustee for the trust;

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto.

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the pass-through securities by a typical investor;

(i) A description of the underwriters' plan for distributing the pass-through securities to investors; and

(j) Information about the scope and nature of the secondary market, if any, for the certificates.

21. Reports indicating the amount of payments of principal and interest are provided to certificateholders at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many trusts obtain, by application to the Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained, these trusts

normally would continue to have the obligation to file current reports on form 8-K to report material developments concerning the trust and the certificates. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets, payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer. Such report also will be delivered to or made available to the rating agency or agencies that have rated the trust's certificates.

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the trustee summarizing information regarding the trust and its assets. Such statement will include information regarding the trust and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

#### *Secondary Market Transactions*

24. It is First Boston's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter, and it is First Boston's intention to attempt to make a market for any certificates for which First Boston is lead or co-managing underwriter.

#### *Retroactive Relief*

25. First Boston represents that it has engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would not be granted. However, since November 1985, it is possible that some transactions may have occurred that would be prohibited. For example, because many certificates are held in street or nominee name, it is not always possible to identify whether the percentage interest of plans in a

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trust is or is not "significant" for purposes of the Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(f)). These problems are compounded as transactions occur in the secondary market. In addition, with respect to the "publicly-offered security" exception contained in that regulation (29 CFR 2510.3-101(b)), it is difficult to determine whether each purchaser of a certificate is independent of all other purchasers.

#### Summary

26. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 406(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's or D&P. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which First Boston seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) First Boston has made, and anticipates that it will continue to make, a secondary market in certificates.

#### Discussion of Proposed Exemption

The exemptive relief proposed herein is similar to that provided in PTE 81-7 (46 FR 7520, January 23, 1981), Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83-1 (48 FR 895, January 7, 1983).

PTE 83-1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage trust certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such certificates, provided that the conditions set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 406(b)(1) and (b)(2) of ERISA for the above-described transactions when

the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83-1 provides conditional exemptive relief from section 406(a) and (b) of ERISA for transactions in connection with the servicing and operation of the mortgage trust.

Under PTE 83-1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount to less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83-1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's or D&P (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

#### I. Ratings of Certificates

##### A. Rating Process

In connection with the Department's consideration of First Boston's exemption request, representatives of the Department met with representatives of S&P's, Moody's and D&P to discuss the rating process. Set forth below is a summary of the

information supplied to the Department by these rating agencies.

The sponsor of a trust initiates the rating process by requesting a specific rating from the rating agency. The rating agency then analyzes the security for credit risk, structural risk, and legal risk.

In the course of establishing a rating, the rating agency investigates the originators' and servicers' policies and track records in handling defaults and delinquencies as well as their foreclosure procedures and actual loss record. The rating agency evaluates the loan appraisal process and the training of the personnel involved. The rating agency then performs statistical analysis to determine how existing factors correlate with the known default rates. This analysis is performed with respect to loan to value ratios, geographic location, type of asset, and interest rates. The rating agency also considers the economic stability of the entity providing credit support. Furthermore, the rating agency considers any ability of the trust servicer to commingle trust funds with its own, and the extent to which and conditions under which collateral may be substituted.

From its analysis, the rating agency determines the amount of credit support required in order for the issue to receive the requested rating.

Generally, the analyzed degree of investment risk (that is, the overall investment risk, taking into account credit risk, structural risk, and legal risk) associated with a particular rating will be the same regardless of the type of instrument being rated and the nature of the collateral (including credit support) covering the instrument.

Securities rated in one of the four highest generic rating categories by S&P's, Moody's or D&P are considered to be "investment grade" securities.

Both S&P's and Moody's have established refinements to further distinguish among securities within a given rating category. S&P's uses "+" and "-" to designate such refinements. For instance, securities rated in the "AA" category may be rated "AA+", "AA" or "AA-". Likewise, Moody's uses numerals to designate refinements within a rating category, such as "Aa1", "Aa2" or "Aa3".<sup>6</sup>

<sup>6</sup> The proposed exemption conditions exemptive relief upon the certificates in which the plan invests having been rated in one of the three highest "generic" rating categories by S&P's, Moody's, or D&P. The term "generic" is included to make clear that the Department intends the condition to refer to the rating category (such as "AAA", "AA" and "A") without regard to refinements within a rating category.

D&P ratings of 1-7 are assigned to securities rated by D&P in the three highest "generic" rating categories of "Triple A", "Double A" and "Single A". Securities in D&P's generic "Triple A" category receive a D&P rating of "1"; securities in D&P's "Double A" generic category receive a D&P rating ranging from "2" to "4"; securities in D&P's "Single A" generic category receive a D&P rating ranging from "5" to "7".

#### B. Rating Condition

After consideration of the representations of the applicant, and the information provided by S&P's, Moody's and D&P, the Department has decided to condition exemptive relief upon the certificates in which a plan invests having attained a rating in one of the three highest generic rating categories from S&P's, Moody's, or, in the case of certificates representing interests in trust containing multi-family residential mortgages or commercial mortgages, D&P.<sup>7</sup>

The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables, while ensuring that the interests of plans holding certificates are adequately protected. In particular, in rating certificates, S&P's, Moody's and D&P take into account such factors as commingling of funds and conflicts of interest of the trust sponsor and servicer.

However, the Department is not prepared to rely solely on determinations made by these rating agencies in providing exemptive relief. In this regard, the applicant originally requested that exemptive relief apply to trusts containing any type of receivable—secured or unsecured—provided that the rating condition is met.

<sup>7</sup> First Boston's original application for exemptive relief would have conditioned the exemption upon the certificates having received a rating from any "nationally recognized statistical rating agency" that is in one of that agency's three highest rating categories. Although the Department is aware that rating agencies other than S&P's, Moody's and D&P currently qualified as "nationally recognized statistical rating organizations" for purposes of Rule 15c3-1 under the Securities Exchange Act of 1934, the Department has decided to condition the proposed exemption on attainment of the specified ratings from S&P's, Moody's, or, in the case of certificates representing interests in trusts containing multi-family residential mortgages or commercial mortgages, D&P. Currently, it appears that asset-backed securities underwritten by First Boston which are backed by assets other than multi-family residential mortgages or commercial mortgages have been rated by either S&P's or Moody's or both. First Boston represents that D&P has rated significantly more multi-family residential and commercial mortgage pass-through certificates than S&P's or Moody's, and that D&P has expertise with respect to these types of mortgages which is at least as great as that of S&P's and Moody's.

The Department is not prepared at this time to grant such broad exemptive relief. The Department believes that the rating agencies currently have more expertise in rating certificates representing interests in secured, as opposed to unsecured, receivable trusts. Consequently, the Department believes that the ratings are more indicative of the relative safety of the investment when applied to trusts containing secured receivables.

Moreover, First Boston has represented that trusts containing different types of receivables are continuously being developed and rated. While the Department would generally prefer to be more specific as to the types of assets contained in the trusts, the Department recognizes the applicant's need for flexibility. At the same time, the Department believes that it is appropriate to ensure that the rating agencies have developed expertise in rating a particular type of asset-backed security, and that such security has been tested in the marketplace, prior to plan investment pursuant to this exemption. Consequently, the Department has further conditioned the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year, and having been sold to investors other than plans for at least one year.<sup>8</sup>

#### II. Limited Section 406(b) and Section 407(a) Relief for Sales

The applicant represents that in some cases a trust sponsor, trustee, servicer, insurer, an obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.<sup>9</sup> In these cases, a

<sup>8</sup> In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

<sup>9</sup> In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which First Boston or any of its affiliates is either (a) the sole underwriter or manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent.

direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.<sup>10</sup> Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, the applicant represents that a trust sponsor, servicer, trustee, insurer, an obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. The applicant represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, the applicant represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor under receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

The proposed exemption from the restrictions of section 406(a) for the sale of certificates closely follows the exemptive relief provided by PTE 83-1. In particular, (1) the acquisition of certificates by a plan must be on terms that are at least as favorable to the plan as they would be in an arm's length transaction with an unrelated party, and (2) the rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates representing interests in the same trust.

The applicant originally requested broad section 406(b) relief for the sale of certificates. First Boston subsequently amended its application to request substantially more limited section 406(b) relief for the sale of certificates. Under the amendment, First Boston requested section 406(b) relief for sales of certificates by an obligor with respect to 25 percent or less of the fair market value of obligations contained in the trust or an affiliate of such obligor. In requesting this relief, First Boston represented that this 25 percent limitation would function as a "de

<sup>10</sup> The applicant represents that where a trust sponsor is an affiliate of First Boston, sales to plans by the sponsor may be exempt under PTE 75-1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if First Boston is not a fiduciary with respect to plan assets to be invested in certificates.



minimis" test so that First Boston would not be unduly burdened with policing the actions of obligors who are also plan fiduciaries.

In this regard, the Department views a five percent limitation as a more appropriate measure for purposes of a "de minimis" test. Consequently, the proposed exemption provides section 406(b) relief for sales of certificates only where a person exercises its investment discretion to invest a plan's assets in certificates issued by a trust, five percent or less of whose assets consist of obligations of that person or an affiliate.

Additionally, in the case of an acquisition of certificates, section 406(b) exemptive relief would be limited to situations where at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the "restricted group". This "restricted group" consists of the trust sponsor, servicer, or trustee; each provider of credit support; each underwriter of certificates; or any obligor with respect to receivables in the trust constituting more than five percent of the fair market value of all receivables included in the trust.

Section 406(b) relief for sales of certificates also would be subject to the following conditions: (1) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and (2) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the fiduciary has discretionary authority or renders investment advice are invested in certificates representing an interest in trusts containing assets sold or serviced by the same entity.<sup>11</sup>

Also, section 406(a) and (b) relief for sales would apply only to a plan which is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D under the Securities Act of 1933. To be an accredited investor under Rule 501(a)(1), a plan would need to have at least \$5 million in assets, or the decision to invest in certificates would have to be made on behalf of the plan by a bank, insurance company or an investment advisor registered under the Investment Advisers Act of 1940.

Finally, the proposed exemptive relief from the provisions of sections 406(a)(1)(E), 406(a)(2) and 407 of ERISA would not apply to the acquisition or holding of a certificate by a person who has discretionary authority or renders

investment advice with respect to the assets of an "excluded plan". Under the exemption, an "excluded plan" is a plan with respect to which any member of the restricted group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under 406(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act. That section requires, among other things, that a fiduciary discharge its duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent manner in accordance with section 404(a)(1)(B) of the Act. In addition, it does not affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) Before granting an exemption under section 406(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the affected plans and of their participants and beneficiaries, and protective of the rights of those participants and beneficiaries.

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in each application accurately describe all material terms of the transaction which is the subject of the exemption.

#### Proposed Exemption

On the basis of the facts and representations set forth in the application, the Department is considering granting the following exemption under the authority of section

406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the Procedures set forth in ERISA Procedure 75-1:

#### I. Transactions

A. Effective November 1, 1985, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan (plan) when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A(1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate by any person who has discretionary authority or renders investment advice with respect to the assets of an Excluded Plan.

B. Effective November 1, 1985, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates is acquired by persons

independent of the members of the Restricted Group;

(iii) a plan's investment in each class of certificates does not exceed 25 percent of all the certificates of that class outstanding at the time of the acquisition; and

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in trust containing assets sold or serviced by the same entity.<sup>12</sup> For purposes of this subparagraph B(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B(1) or (2).

C. Effective November 1, 1985, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust; provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or fully described in the prospectus or private offering memorandum provided to, investing plans before they purchase certificates issued by the trust.<sup>13</sup>

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a

<sup>12</sup> For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

<sup>13</sup> In the case of a private offering memorandum, such memorandum must contain the same information that would be disclosed in a prospectus if the offering of the certificates was made in a registered public offering under the Securities Act of 1933.

"qualified administrative fee" as defined in section III.S.

D. Effective November 1, 1985, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975(a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14)(F), (G), (H) or (I) of the Act or section 4975(F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

#### II. General Conditions

A. The relief provided under part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating that is in one of the three highest generic rating categories

(a) from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's) or Duff & Phelps Inc., if the certificates represent an interest in a trust containing obligations secured by multi-family residential or commercial real property, or

(b) from either S&P's or Moody's if the certificates represent an interest in a trust containing assets other than obligations secured by multi-family residential or commercial real property;

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and

retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be subject to the civil penalties which may be assessed under section 502(i) of the Act, or to the taxes imposed by sections 4975(a) and (b) of the Code, if the provision of subsection II.A(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A(6) above.

#### III. Definitions

For purposes of this exemption:

A. "Certificate" means a certificate

(1) that represents a beneficial ownership interest in the assets of a trust;

(2) that entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trusts; and

(3) with respect to which First Boston or any of its affiliates is either (a) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent;

<sup>11</sup> This condition effectively imposes a 25 percent limit on plan investment in trusts which have the same sponsor or which have the same servicer.



B. "Trust" means an investment pool, the corpus of which is held in trust and consists solely of:

(1) either;  
(a) secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans);

(b) secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property (including obligations secured by leasehold interest on commercial real property);

(d) obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) "guaranteed governmental mortgage pool certificates," as defined in 29 CFR section 2410.3-101(i)(2);

(f) fractional undivided interests in any of the obligations described in clauses (a)-(e) of this subsection B(1);

(2) property which has secured any of the obligations described in subsection B(1);

(3) undistributed cash; and  
(4) rights under any insurance policies, third-party guarantees, contracts or suretyship and other credit support arrangements with respect to any obligations described in subsection B(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) the investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's or Moody's for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. "Underwriter" means:

(1) First Boston;  
(2) any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with First Boston; or

(3) any member of an underwriting syndicate of which First Boston or a person described in (2) is a manager or co-manager with respect to the certificates.

D. "Sponsor" means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. "Subservicer" means an entity which, under the supervision of and on behalf of the master servicer, services receivables contained in the trust, but is not a party to the pooling and servicing agreement.

G. "Servicer" means any entity which services receivables contained in the trust, including the master servicer and any subservicer.

H. "Trustee" means the trustee of the trust.

I. "Insurer" means the insurer or guarantor of, or provider of other credit support for, a trust.

Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. "Excluded Plan" means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. "Restricted Group" with respect to a class of certificates means:

(1) Each underwriter;  
(2) Each insurer;  
(3) The sponsor;  
(4) The trustee;  
(5) Each servicer;  
(6) Any obligor with respect to obligations or receivable included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or  
(7) Any affiliate of a person described in (1)-(6) above.

M. "Affiliate" of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. "Sale" includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private offering memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. "Forward delivery commitment" means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificate from, the other party).

R. "Reasonable compensation" has the same meaning as that term is defined in 29 CFR section 2550.408c-2.

S. "Qualified Administrative Fee" means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. "Qualified Equipment Note Secured By A Lease" means an equipment note:

(a) Which is secured by equipment which is leased;

(b) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(c) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were secured only by the equipment and not the lease.

U. "Qualified Motor Vehicle Lease" means a lease of a motor vehicle where:

(a) The trust holds a security interest in the lease;

(b) The trust holds a security interest in the leased motor vehicle; and

(c) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

Signed at Washington, DC, this 23rd day of December, 1988.

Robert J. Doyle,  
Director of Regulations and Interpretations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 88-29985 Filed 12-28-88; 8:45 am]  
BILLING CODE 4510-29-M

[Application No. D-7573]

**Employee Benefit Plans; Exemption; Goldman, Sachs & Co. (Goldman Sachs) Located in New York, NY**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of Proposed Exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption would exempt transactions relating to the organization and operation of certain asset pool investment trusts (trusts), and the

acquisition and holding by employee benefit plans (plans) of certain asset-backed pass-through certificates (certificates) representing interests in those investment trusts. The exemption, if granted, would affect participants and beneficiaries of plans investing in certificates, the sponsors, servicers, trustees and insurers of the trusts, the underwriters of certificates, and obligors with respect to receivables contained in the trusts.

**EFFECTIVE DATE:** If granted, this exemption would be effective January 1, 1987.

**DATES:** Written comments and requests for a public hearing must be received by the Department of Labor by February 13, 1989.

**ADDRESS:** All written comments and requests for a hearing (preferably at least three copies) should be sent to the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5671, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Attention: Application No. D-7573. The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Paul Kelly of the Department, telephone (202) 523-8883. This is not a toll-free number.

#### SUPPLEMENTARY INFORMATION:

Notice is given of the pendency before the Department of an application for exemption from the restrictions of sections 406(a), 406(b) and 407(a) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code. Goldman Sachs requested the exemption in an application filed pursuant to section 406(a) of the Act and section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, this notice of pendency is issued solely by the Department.<sup>1</sup>

<sup>1</sup> References in the remainder of the preamble to specific sections of the Act refer also to the corresponding sections of the Code.

#### Summary of Facts and Representations

The facts and representations contained in the application are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. Goldman Sachs is a full-service global banking organization that engages in securities transactions as both a principal and agent and which provides underwriting, research and financial services to institutional, corporate and private investment clients as well as governments, foundations and charitable organizations. Goldman Sachs is one of only a few firms that are members of the New York, London and Tokyo exchanges and are actively involved in the equity and debt markets of those financial centers. The firm is prominent in Eurobond and Euroequity markets and is a major factor in international government securities markets, international research and foreign exchange. Goldman Sachs has extensive experience in underwriting and trading asset-backed pass-through securities such as the certificates.

#### Trust Assets

2. Goldman Sachs seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts; (2) motor vehicles receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.<sup>2</sup>

<sup>2</sup> The Department notes that PTE 83-1 (48 FR 605, January 7, 1983), a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. Goldman Sachs requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure.

<sup>3</sup> Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates, because the certificates in the trusts are plan assets.



3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. In all cases, the term of any ground lease to secure a mortgage will be at least ten years longer than the term of that mortgage.

#### Trust Structure

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assets are receivables which may have been originated by a sponsor or servicer of the trust, by an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.

Prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. Goldman Sachs, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. Most sales will be either firm commitment underwritings or private placements. In connection with a private placement, Goldman Sachs may act either as agent or principal. Goldman Sachs may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders are entitled to receive monthly or quarterly installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

5. Some of the certificates will be multi-class certificates. Goldman Sachs requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on mortgages is split from the flow of principal payments and

separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.\*

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities. Interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal, and only when that class of certificates have been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing certificates be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less than the amount required to be so distributed, all certificateholders will share in the amount distributed on a pro rata basis.

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for substitution of assets by the sponsor only in the event of defects in loan or lease documentation discovered within a relatively short time after issuance of trust certificates (within 120 days, except in the case of 30-year obligations in which case the period may be as long as two years). Goldman Sachs represents that the sponsor's "right of substitution" is in effect a remedy for certificateholders in the event of the sponsor's breach of its warranty or

\* It is the Department's understanding that where a plan invests in Real Estate Mortgage Investment Conduit (REMIC) "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of ERISA section 404(a)(1)(B) would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

representations regarding the assets in a trust. Any obligation so substituted is required to have characteristics substantially similar to those of the original obligation.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

#### Parties to Transactions

7. The originator of a receivable is the entity that initially lends money to a borrower (obligor), such as a homeowner or automobile purchaser, or leases property to the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be businesses experienced in the origination of receivables of the types included in a trust. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer.

8. The duties of a trust sponsor are typically limited to depositing receivables in a trust in exchange of certificates issued by the trust that are then sold to investors. The sponsor of a trust typically selects the trustee.

9. The trustee of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to Goldman Sachs, the trust sponsor or the servicer. Goldman Sachs represents that the trustee will be a substantial financial institution experienced in trust activities. The trustee receives a fee for its services, which will be paid by the servicer.

10. The servicer of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, it is common for the receivables to be "subserviced" by their respective originators and for a single entity to "master service" the pool of receivables on behalf of the owners of the related

series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

In most cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (though they themselves may be related) will be unrelated to Goldman Sachs. In some cases, however, affiliates of Goldman Sachs may originate or service receivables included in a trust, or may sponsor a trust.

#### Certificate Price, Pass-Through Rate and Fees

11. In some cases, the sponsor will obtain the receivables from various originators pursuant to existing contracts with such originators under which the sponsor continually buys receivables. In other cases, the sponsor will purchase the receivables at fair market value from the originator or a finance company pursuant to a purchase and sale agreement related to the specific offering of certificates.

As compensation for the receivables transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust. The sponsor sells these certificates for cash to investors or securities underwriters.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is generally equal to the interest rate on receivables included in the trust minus a specified servicing fee.\* This rate is generally determined by the same market forces that determine the price of a certificate. There is a direct relationship between the price of certificates and the pass-through rate. For example, if certificates backed by

\* The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

comparable pools of mortgages are sold at different pass-through rates, the certificates having the higher pass-through rate would have a higher purchase price.

13. As compensation for performing its servicing duties, the servicer (who may also be the sponsor, and receive fees for acting in that capacity) will typically retain most or all of the difference between payments received on the receivables and payments payable (at the pass-through rate) to certificateholders. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer will be required to pay the administrative expenses of servicing the trust, including the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is paid out of the payments received on the receivables in excess of the pass-through payments made to certificateholders.

14. The servicer(s) may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (a) Prepayment fees; (b) late payment and payment extension fees and other fees related to the modification of the terms of an obligation as permitted by the provisions of the pooling and servicing agreement (including the partial release of collateral to the extent provided therein); and (c) fees and charges associated with foreclosure or repossession, the management of foreclosed or repossessed property, or any conversion of a secured obligation into cash proceeds, upon default of an obligation held by a trust.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

15. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest

bearing accounts in itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In the event that payments on receivables are held in non-interest bearing accounts or commingled with the servicer's funds, the servicer will be required to make deposits attributable to such payments by a date specified in the pooling and servicing agreement into an account from which payments are made to certificateholders.

16. Goldman Sachs will receive a fee in exchange for its services in connection with the securities underwriting or private placement of certificates. In a securities underwriting, this fee would normally consist of the difference between what Goldman Sachs receives for the certificates that it distributes and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor.

#### Purchase of Receivables by Servicer

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payment or repurchase, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase a receivable included in the trust when the balance payable on the receivable is reduced to a specified percentage (usually 5 or 10 percent) of the initial balance.

The repurchase price for such an option is set at a level such that the certificateholders will receive the full amount on all of the receivables held by the trust plus the accrued interest at the pass-through rate plus the full amount of property, if any, that has been acquired by the trust through collections on or liquidations of the receivables.

#### Certificates Ratings

18. The certificates will have received one of the three highest ratings available from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), or, in the case of certificates representing interests in trusts containing multi-family residential mortgages or commercial mortgages,



Duff & Phelps Inc. (D&P). Insurance or other credit support (such as surety bonds, letters, of credit, reserve funds or guarantees) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of credit support is set by the rating agencies at a level that is a multiple of the very worst historical credit loss experience for obligations of the type included in the issuing trust.

#### Provision of Credit Support

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e., act as an insurer). In these cases, the master servicer will first advance funds in a timely manner to cover any delinquent payments to the extent that it expects to recover those moneys out of future payments, or the master servicer, as the provider of the credit support, will be called upon (by itself on behalf of the trustee or directly by the trustee) to provide funds in such capacity to cover such payments to the full extent of its obligations under the credit support mechanism.

If the master servicer, fails to advance funds and fails to call upon the credit support mechanism to provide funds to cover delinquent payments, the trustee may exercise its rights as beneficiary of the credit support to obtain funds under the credit support mechanism. Therefore, in all cases, the independent trustee will be ultimately responsible for deciding when to exercise its rights as beneficiary of that credit support.

When the master servicer, advances funds, the amounts so advanced is recoverable by the servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer, provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the dollar limit on the credit support declines as payments on receivables included in the trust are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer, has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer, to follow its normal servicing guidelines

and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly or quarterly, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee annually a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountant's review are delivered to the trustee;

(d) The credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur towards the end of the life of the trust, whether due to servicer advances or any other cause. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount becomes a fixed dollar amount, subject to reduction only for actual draws. From the time that the floor amount is effective until the end of life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, since the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

#### Disclosure

20. In connection with the original issuance of certificates, the prospectus or private offering memorandum will be furnished to investing plans. The prospectus or private offering memorandum will contain information

pertinent to a plan's decision to invest in the certificates, including:

(a) Information concerning the certificates, including payment terms, tax consequences of owning and selling certificates, the legal investment status and rating of the certificates, and any risk factors with respect to the certificates;

(b) Information about the underlying receivables, including the types of receivables, the diversification of the receivables, their payment terms, and legal aspects of the receivables;

(c) Information about the servicing of the receivables, including the identity of the master servicer and servicing compensation;

(d) Information about the sponsor of the trust;

(e) A full description of all material provisions of the pooling and servicing agreement; and

(f) Information about the scope and nature of the secondary market, if any, for such certificates.

21. Certificateholders will be provided with information concerning the amount of principal and interest to be paid on certificates at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the status of the trust.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the master servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many trusts obtain, by application to the Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained these trusts normally would continue to have the obligation to file current reports on form 8-K to report material developments concerning the trust and the certificates. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the

status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets, payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer.

Such report will also be delivered or made available to the rating agencies or agencies that have rated the trust's certificates. Such report will be available to investors and its availability will be made known to potential investors. In addition, promptly after each distribution date, certificateholders will receive a statement summarizing information regarding the trust and its assets, including underlying obligations.

#### Secondary Market Transactions

24. Goldman Sachs normally attempts to make a market for securities for which it is leading or co-managing underwriter. It is also Goldman Sachs' policy to facilitate sales by investors who purchase certificates if Goldman Sachs has acted as agent or principal in the original placement of the certificates and if such investors request Goldman Sachs' assistance.

#### Retroactive Relief

25. Goldman Sachs represents that it has engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would not be granted. However, since January 1987, it is possible that some transactions may have occurred that arguably would be prohibited. For example, because many certificates are held in street or nominee name, it is not always possible to identify whether the percentage interest of plans in a trust is or is not "significant" for purposes of the Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(f)). In addition, with respect to the "publicly-offered security" exception contained in that regulation (29 CFR 2510.3-101(b)), Goldman Sachs represents that it is difficult to determine whether each purchaser of a certificate is independent of all other purchasers.

#### Summary

26. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The trust contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's or D&P. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which Goldman Sachs seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) Goldman Sachs has made, and anticipates that it will continue to make, a secondary market in certificates.

#### Discussion of Proposed Exemption

The exemptive relief proposed herein is similar to that provided in PTE 81-7 (46 FR 7520, January 23, 1981), Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83-1 (48 FR 895, January 7, 1983).

PTE 83-1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such certificates, provided that the conditions set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 406(b)(1) and (b)(2) of ERISA for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83-1 provides conditional exemptive relief from section 406(a) and (b) of ERISA for transactions in connection

with the servicing and operation of the mortgage trust.

Under PTE 83-1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83-1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's or D&P (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

#### 1. Ratings of Certificates

##### A. Rating Process

Representatives of the Department have met with representatives of S&P's, Moody's and D&P to discuss the rating process. Set forth below is a summary of the information supplied to the Department by these rating agencies.

The sponsor of a mortgage pool initiates the rating process by requesting a specific rating from the rating agency. The rating agency then analyzes the security for credit risk, structural risk, and legal risk.

In the course of establishing a rating, the rating agency investigates the originators' and servicers' policies and track records in handling defaults and delinquencies as well as their foreclosure procedures and actual loss record. The rating agency evaluates the loan appraisal process and the training of the personnel involved. The rating agency then performs statistical analysis to determine how existing factors correlate with the known default



rates. This analysis is performed with respect to loan to value ratios, geographic location, type of asset, and interest rates. The rating agency also considers the economic stability of the entity providing credit support. Furthermore, the rating agency considers any ability of the trust servicer to commingle trust funds with its own, and the extent to which and conditions under which collateral may be substituted.

From its analysis, the rating agency determines the amount of credit support required in order for the issue to receive the requested rating.

Generally, the analyzed degree of investment risk (that is, the overall investment risk, taking into account credit risk, structural risk, and legal risk) associated with a particular rating will be the same regardless of the type of instrument being rated and the nature of the collateral (including credit support) covering the instrument.

Securities rated in one of the four highest generic rating categories by S&P's, Moody's or D&P are considered to be "investment grade" securities.

Both S&P's and Moody's have established refinements to further distinguish among securities within a given rating category. S&P's uses "+" and "-" to designate such refinements. For instance, securities rated in the "AA" category may be rated "AA+", "AA-" or "AA-". Likewise, Moody's uses numerals to designate refinements within a rating category, such as "Aa1", "Aa2" or "Aa3".<sup>6</sup>

D&P ratings of 1-7 are assigned to securities rated by D&P in the three highest "generic" rating categories of "Triple A", "Double A" and "Single A". Securities in D&P's generic "Triple A" category receive a D&P rating of "1"; securities in D&P's "Double A" generic category receive a D&P rating ranging from "2" to "4"; securities in D&P's "Single A" generic category receive a D&P rating ranging from "5" to "7".

#### B. Rating Condition

After consideration of the representations of the applicant, and the information provided by S&P's, Moody's and D&P, the Department has decided to condition exemptive relief upon the certificates in which a plan invests having attained a rating in one of the

<sup>6</sup> The proposed exemption conditions exemptive relief upon the certificates in which the plan invests having been rated in one of the three highest "generic" rating categories by S&P's, Moody's, or D&P. The term "generic" is included to make clear that the Department intends the condition to refer to the rating category (such as "AAA", "AA" and "A") without regard to refinements within a rating category.

three highest generic rating categories from S&P's, Moody's, or, in the case of certificates representing interests in trust containing multi-family residential mortgages or commercial mortgages, D&P.<sup>7</sup>

The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables, while ensuring that the interests of plans holding certificates are adequately protected. In particular, in rating certificates, S&P's, Moody's and D&P take into account such factors as commingling of funds and conflicts of interest of the trust sponsor and servicer (including conflicts of interests that may arise where the servicer or an affiliate of the servicer provides credit support to a trust).

However, the Department is not prepared to rely solely on determinations made by these rating agencies in providing exemptive relief. In this regard, the applicant originally requested that exemptive relief apply to trusts containing any type of receivable—secured or unsecured—provided that the rating condition is met. The Department is not prepared at this time to grant such broad exemptive relief. The Department believes that the rating agencies currently have more expertise in rating certificates representing interests in secured, as opposed to unsecured, receivables trusts. Consequently, the Department believes that the ratings are more indicative of the relative safety of the investment when applied to trusts containing secured receivables.

The Department believes that it is appropriate to ensure that the rating agencies have developed expertise in rating a particular type of asset-backed security, and that such security has been tested in the marketplace, prior to plan investment pursuant to this exemption. Consequently, the Department has

<sup>7</sup> Although the Department is aware that rating agencies other than S&P's, Moody's and D&P currently qualify as "nationally recognized statistical rating organizations" for purposes of Rule 15c3-1 under the Securities Exchange Act of 1934, the Department has decided to condition the proposed exemption on attainment of the specified ratings from S&P's, Moody's, or, in the case of certificates representing interests in trusts containing multi-family residential mortgages or commercial mortgages, D&P. Currently, it appears that asset-backed securities underwritten by Goldman Sachs which are backed by assets other than multi-family residential mortgages or commercial mortgages have been rated by either S&P's or Moody's or both. Goldman Sachs represents that D&P has rated significantly more multi-family residential and commercial mortgage pass-through certificates than S&P's or Moody's, and that D&P has expertise with respect to these types of mortgages which is at least as great as that of S&P's and Moody's.

further conditioned the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year, and having been sold to investors other than plans for at least one year.<sup>8</sup>

#### II. Limited Section 406(b) and Section 407(a) Relief for Sales

The applicant represents that in some cases a trust sponsor, trustee, servicer, insurer, an obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.<sup>9</sup> In these cases, a direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.<sup>10</sup> Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, the applicant represents that a trust sponsor, servicer, trustee, insurer, an obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. The applicant represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1),

<sup>8</sup> In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's or Moody's) and purchased by investors other than plans for at least one year prior to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

<sup>9</sup> In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which Goldman Sachs or any of its affiliates is either (a) the sole underwriter or manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent.

<sup>10</sup> The applicant represents that where a trust sponsor is an affiliate of Goldman Sachs, sales to plans by the sponsor may be exempt under PTE 75-1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if Goldman Sachs is not a fiduciary with respect to plan assets to be invested in certificates.

and in some cases section 406(b)(2), of the Act.

Moreover, the applicant represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor with respect to receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

The proposed exemption from the restrictions of section 406(a) for the sale of certificates closely follows the exemptive relief provided by PTE 83-1. In particular, (1) the acquisition of certificates by a plan must be on terms that are at least as favorable to the plan as they would be in an arm's length transaction with an unrelated party, and (2) the rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates representing interests in the same trust.

Goldman Sachs has requested section 406(b) relief for sales of certificates by an obligor with respect to 25 percent or less of the fair market value of obligations contained in the trust or an affiliate of such obligor. The Department views a five percent limitation as a more appropriate measure for purposes of a "de minimis" test. Consequently, the proposed exemption provides section 406(b) relief for sales of certificates only where a person exercises its investment discretion to invest a plan's assets in certificates issued by a trust, five percent or less of whose asset consist of obligations of that person or an affiliate.

Additionally, in the case of an acquisition of certificates, section 406(b) exemptive relief would be limited to situations where at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the "restricted group". This "restricted group" consists of the trust sponsor, servicer, or trustee; each provider of credit support; each underwriter of certificates; or any obligor with respect to receivables included in the trust constituting more than five percent of the fair market value of all receivables included in the trust.

Section 406(b) relief for sales of certificates also would be subject to the following conditions: (1) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and (2) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the fiduciary has discretionary authority or renders investment advice are invested in certificates representing

an interest in trusts containing assets sold or serviced by the same entity.<sup>11</sup>

Also, section 406 (a) and (b) relief for sales would apply only to a plan which is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D under the Securities Act of 1933. To be an accredited investor under Rule 501(a)(1), a plan would need to have at least \$5 million in assets, or the decision to invest in certificates would have to be made on behalf of the plan by a bank, insurance company or an investment advisor registered under the Investment Advisers Act of 1940.

Finally, the proposed exemptive relief from the provisions of sections 406(a)(1)(E), 406(a)(2), and 407 of ERISA would not apply to the acquisition or holding of a certificate by a person who has discretionary authority or renders investment advice with respect to the assets of an "excluded plan". Under the exemption, an "excluded plan" is a plan with respect to which any member of the restricted group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975 of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act. That section requires, among other things, that a fiduciary discharge its duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent manner in accordance with section 404(a)(1)(B) of the Act. In addition, it does not affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) Before granting an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the affected plans and of their participants and beneficiaries, and protective of the rights of those participants and beneficiaries.

<sup>11</sup> This condition effectively imposes a 25 percent limit on plan investment in trusts which have the same sponsor or which have the same servicer.

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in each application accurately describe all material terms of the transaction which is the subject of the exemption.

#### Proposed Exemption

On the basis of the facts and representations set forth in the application, the Department is considering granting the following exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the Procedures set forth in ERISA Procedure 75-1:

#### I. Transactions

A. Effective January 1, 1987, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan (plan) when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A. (1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407 for the acquisition or holding of a certificate by any person who has discretionary authority or renders investment advice with respect to the assets of an Excluded Plan.



B. Effective January 1, 1987, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan; (ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates is acquired by persons independent of the members of the Restricted Group;

(iii) a plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in trust containing assets sold or serviced by the same entity.<sup>12</sup> For purposes of this subparagraph B(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection LB (1) or (2).

C. Effective January 1, 1987, the restrictions of sections 406(a), 406(b), and 407(a) of the Act, and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing,

management, and operation of a trust; provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or is fully described in the prospectus or private offering memorandum provided to, investing plans before they purchase certificates issued by the trust.<sup>13</sup>

Notwithstanding the foregoing, section 1.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective January 1, 1987, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1) (A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14) (F), (G), (H), or (I) of the Act or section 4975 (F), (G), (H), or (I) of the Code), solely because of the plan's ownership of certificates.

## II. General Conditions

A. The relief provided under part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificates price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating that is in one of the three highest generic rating categories:

(a) From either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), or Duff & Phelps Inc., if the certificates represent an

interest in a trust containing obligations secured by multi-family residential or commercial real property, or

(b) From either S&P's or Moody's if the certificates represent an interest in a trust containing assets other than obligations secured by multi-family residential or commercial real property;

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with the respect to the plan assets used by a plan to acquire certificates, shall be subject to the civil penalties which may be assessed under section 502(i) of the Act, or to the taxes imposed by sections 4975 (a) and (b) of the Code, if the provision of subsection II.A(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee

of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A(6) above.

## III. Definitions

For purposes of this exemption:

A. "Certificate" means a certificate (1) That represents a beneficial ownership interest in the assets of a trust;

(2) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; and

(3) With respect to which Goldman Sachs or any of its affiliates is either (a) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent;

B. "Trust" means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans);

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property, (including obligations secured by leasehold interests on commercial real property);

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) "Guaranteed governmental mortgage pool certificates," as defined in 29 CFR section 2510.3-101(i)(2);

(f) Fractional undivided interests in any of the obligations described in clauses (a)-(e) of this subsection B(1);

(2) Property which had secured any of the obligations described in subsection B(1);

(3) Undistributed cash; and

(4) Rights under any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in subsection B(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's or Moody's for at least one year prior to the plan's acquisition of certificates purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. "Underwriter" means:

(1) Goldman Sachs;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Goldman Sachs; or

(3) Any member of an underwriting syndicate of which Goldman Sachs or a person described in (2) is a manager or co-manager with respect to the certificates

D. "Sponsor" means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. "Subservicer" means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. "Servicer" means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. "Trustee" means the trustee of the trust.

I. "Insurer" means the insurer or guarantor of, or provider of other credit support for, a trust.

Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease

securing an obligation included in the trust.

K. "Excluded Plan" means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. "Restricted Group" with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)-(6) above.

M. "Affiliate" of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. "Sale" includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private offering memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

<sup>12</sup> For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

<sup>13</sup> In the case of a private offering memorandum, such memorandum must contain the same information that would be disclosed in a prospectus if the offering of the certificates was made in a registered public offering under the Securities Act of 1933.



Q. "Forward delivery commitment" means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term included both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificate from, the other party).

R. "Reasonable compensation" has the same meaning as that term is defined in 29 CFR section 2550.408c-2.

S. "Qualified Administrative Fee" means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. "Qualified Equipment Note Secured By A Lease" means an equipment note:

(a) Which is secured by equipment which is leased;

(b) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(c) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were secured only by the equipment and not the lease.

U. "Qualified Motor Vehicle Lease" means a lease of a motor vehicle where:

(a) The trust holds a security interest in the lease;

(b) The trust holds a security interest in the leased motor vehicle; and

(c) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

Signed at Washington, DC, this 23rd day of December, 1988.

Robert J. Doyle,

Director of Regulations and Interpretations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 88-29987 Filed 12-28-88; 8:45 am]

BILLING CODE 4510-29-M

[Application No. D-6446]

**Salomon Brothers, Inc. (Salomon)  
Located in New York, New York**

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code). The exemption would exempt transactions relating to the origination and operation of certain asset pool investment trusts (trusts), and the acquisition and holding by employee benefit plans (plans) of certain asset-backed pass-through certificates (certificates) representing interests in those investment trusts. The exemption, if granted, would affect participants and beneficiaries of plans investing in certificates, the sponsors, servicers, trustees and insurers of the trusts, the underwriters of certificates, and obligors with respect to receivables contained in the trusts.

**EFFECTIVE DATE:** If granted, this exemption would be effective November 1, 1985.

**DATES:** Written comments and requests for a public hearing must be received by the Department of Labor by February 13, 1989.

**ADDRESS:** All written comments and requests for a hearing (preferably at least three copies) should be sent to the Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Room N-5671, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. D-6446. The application for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:** Janet Laufer of the Department, telephone (202) 523-8671. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:**

Notice is given of the pendency before the Department of an application for exemption from the restrictions of sections 408(a), 408(b) and 407(a) of the Act and from the sanctions resulting from the application of section 4975 of

the Code, by reason of section 4975(c)(1) (A) through (E) of the Code. Salomon requested the exemption in an application filed pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, this notice of pendency is issued solely by the Department.<sup>1</sup>

**Summary of Facts and Representations**

The facts and representations contained in the application are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. Salomon is an international investment banking firm which makes markets in securities as both principal and agent, and provides a broad range of underwriting, research and financial services to institutional investors, corporations and governmental entities. Salomon manages or co-manages the underwriting and distribution of new corporate issues and new issues of asset-backed securities, and also acts as an agent or principal in private placements. Salomon trades in a wide range of equity securities as both dealer and broker. As a dealer in fixed-income securities, Salomon trades obligations issued or guaranteed by domestic and foreign governments, agencies, corporations and financial institutions in the U.S. and major foreign capital markets. These range from long-term bonds to medium-term notes and include securities backed by residential and commercial mortgages, receivables and other assets. Salomon also provides brokerage services in fixed-income securities. Salomon was a pioneer in the field of asset-backed securities, and is a leader in the mortgage-backed securities market.

**Trust Assets**

2. Salomon seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts;<sup>2</sup> (2) motor vehicle

<sup>1</sup> References in the remainder of the preamble to specific sections of the Act refer to the corresponding sections of the Code.

<sup>2</sup> The Department notes that PTE 83-1 (46 FR 695, January 7, 1983), a class exemption for mortgage

Continued

receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.<sup>3</sup>

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. In all cases, the term of any ground lease to secure a mortgage will be at least ten years longer than the term of that mortgage.

**Trust Structure**

4. Each trust is established under a pooling and servicing agreement between a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assets are receivables which may have been originated by a sponsor or servicer of the trust, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.

Prior to the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. Salomon

pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. Salomon requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, Salomon has stated that it may still avail itself of the exemptive relief provided by PTE 83-1.

<sup>3</sup> Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts are plus assets.

Brothers, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. Most sales will be either firm commitment underwritings or private placements. In connection with a private placement, Salomon may act either as agent or principal. Salomon may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders are entitled to receive monthly or quarterly installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable.

5. Some of the certificates will be multi-class certificates. Salomon requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on mortgages is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.<sup>4</sup>

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities. Interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal, and only when that class of certificates have been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all the certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing certificates be subordinated to the rights of another

<sup>4</sup> It is the Department's understanding that where a plan invests in Real Estate Mortgage Investment Conduit (REMIC) "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of ERISA section 404(a)(1)(B) would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less than the amount required to be so distributed, all certificateholders will share in the amount distributed on a pro rata basis.

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for substitution of assets by the sponsor only in the event of defects in loan or lease documentation discovered within a relatively short time after issuance of trust certificates (within 120 days, except in the case of obligations having an original term of 30 years in which case the period will not exceed two years). Salomon represents that the sponsor's "right of substitution" is in effect a remedy for certificateholders in the event of the sponsor's breach of its warranty or representations regarding the assets in a trust (for example, where a defect in title to an asset is discovered after its inclusion in the trust). The pooling and servicing agreement will impose restrictions on substituted receivables to ensure that the substituted receivables have payment characteristics substantially similar to those of the replaced receivables and are at least as creditworthy as the replaced receivables.

In some cases, the affected receivable would be repurchased, with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

**Parties to Transactions**

7. The originator of a receivable is the entity that initially lends money to a borrower (obligor), such as a homeowner or automobile purchaser, or leases property to the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be financial institutions experienced in the origination of receivables of the type included in a trust. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer.

8. The duties of a trust sponsor are typically limited to depositing receivables in a trust in exchange for certificates issued by the trust that are then sold to investors. The sponsor of a trust typically selects the trustee.



9. The trustee of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to Salomon, the trust sponsor or the servicer. Salomon represents that the trustee will be a substantial financial institution experienced in trust activities. The trustee receives a fee for its services, which will be paid by the servicer.

10. The servicer of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, it is common for the receivables to be "subserviced" by their respective originators and for a single entity to "master service" the pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

In most cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (though they themselves may be related) will be unrelated to Salomon. In some cases, however, affiliates of Salomon may originate or service receivables included in a trust, or may sponsor a trust.

#### *Certificate Price, Pass-Through Rate and Fees*

11. Where the sponsor of a trust is not the originator of receivables included in the trust, the sponsor generally purchases the receivables in the secondary market, either directly from the originator or from another secondary market participant. The price the sponsor pays for a receivable is determined by competitive market forces, taking into account payment terms, interest rate, quality, and forecasts as to future interest rates.

As compensation for the receivables transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust. The sponsor sells these certificates for cash to investors or securities underwriters.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificates is generally equal to the interest rate on receivables included in the trust minus a specified servicing fee.<sup>8</sup> This rate is generally determined by the same market forces that determines the price of a certificate. There is a direct relationship between the price of certificates and the pass-through rate. For example, if certificates backed by comparable pools of mortgages are sold at different pass-through rates, the certificates having the higher pass-through rate would have a higher purchase price.

13. As compensation for performing its servicing duties, the servicer (who may also be the sponsor, and receive fees for acting in that capacity) will typically retain most or all of the difference between payments received on the receivables and payments payable (at the pass-through rate) to certificateholders. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer pays the administrative expenses of servicing the trust, including the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is paid out of the payments received on the receivables in excess of the pass-through payments made to certificateholders.

<sup>8</sup> The pass-through rate on certificates representing interests in trusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

14. The servicer(s) may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (a) Prepayment fees; (b) late payment and payment extension fees and other fees related to the modification of the terms of an obligation as permitted by the provisions of the pooling and servicing agreement (including the partial release of collateral to the extent provided therein); and (c) fees and charges associated with foreclosure or repossession, the management of foreclosed or repossessed property, or any conversion of a secured obligation into cash proceeds, upon default of an obligation held by a trust.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

15. Payments on receivables may be made to obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts in itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy. In the event payments on receivables are held in a non-interest bearing account or are commingled with the servicer's own funds, the servicer will be required to deposit such payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

16. Salomon will receive a fee in connection with the securities underwriting or private placement of certificates. In a firm commitment underwriting, this fee would consist of the difference between what Salomon receives for the certificates that it distributes and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor.

#### *Purchase of Receivables by Servicer*

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payment or repurchase, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase a receivable included in the trust when the balance payable on the receivable is reduced to a specified percentage (usually 10 percent) of the initial balance.

The purchase price of a receivable is specified in the pooling and servicing agreement and will be at least equal to the unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer.

#### *Certificate Ratings*

18. The certificates will have received one of the three highest ratings available from either Standard & Poor's Corporation (S&P's) Moody's Investors Service, Inc. (Moody's), or, in the case of certificates representing interests in trusts containing multi-family residential mortgages or commercial mortgages, Duff & Phelps Inc. (D&P). Insurance or other credit support (such as surety bonds, letter of credit, reserve funds or guarantees) will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of the credit support is set by the rating agencies at a level that is a multiple of the very worst historical credit loss experience for receivables of the type included in the trust.

#### *Provision of Credit Support*

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e. act as an insurer). In these cases, the master servicer, in its capacity as servicer, will first advance funds in a timely manner and to the full extent required by the pooling and servicing agreement if it determines that such advances will be recoverable out of late payments by the obligors or, in the case of a trust which issued subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates. Otherwise, the master servicer, as the provider of credit support, will be called upon (by itself as servicer acting on behalf of the trustee, or directly by the trustee) to provide funds to cover such payments to the full extent of its obligations as insurer.

If the master servicer fails to advance funds and fails to call upon the credit

support mechanism to provide funds to cover delinquent payments, the trustee may exercise its rights as beneficiary of the credit support to obtain funds under the credit support mechanism. Therefore, in all cases, the independent trustee will be ultimately responsible for deciding when to exercise its rights as beneficiary of that credit support.

When a master servicer advances funds, the amount so advanced is recoverable by the servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the dollar limit on the credit support declines as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly or quarterly, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amounts of all servicer advances, along with other current information as to collections, on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee annually a certificate or an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the

master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee;

(d) The credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur toward the end of the life of the trust, whether due to servicer advances or and other cause. Once the floor amount has been reached the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount becomes a fixed dollar amount, subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, since the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

#### *Disclosure*

20. In connection with the original issuance of certificates, the prospectus or private offering memorandum will be furnished to investing plans. The prospectus of private offering memorandum will contain information material to a fiduciary's decision to invest in the certificates, including:

(a) Information concerning the certificates, including payment terms, tax consequences of owning and selling certificates, the legal investment status and rating of the certificates, and the material risk factors with respect to an investment in the certificates;

(b) Information about the underlying receivables, including the types of receivables, the diversification of the receivables, their payment terms, and legal aspects of the receivables;

(c) Information about the servicing of the receivables, including the identity of the master servicer and servicing compensation;

(d) Information about the sponsor of the trust;

(e) The material terms of the pooling and servicing agreement; and

(f) Information about the scope and nature of the secondary market, if any, for the certificates.

21. Certificateholders will be provided with information concerning the amount of principal and interest to be paid on certificates at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth



material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many trusts obtain, by application to the Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on form Form 8-K to report material developments concerning the trust and the certificates. While the Securities and Exchange Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report on operation of the trust, including information on any delinquencies or advances by servicers, will be made to the trustee and rating agencies. These reports will be available to investors and the availability of the reports will be made known to potential investors. In addition, promptly after each distribution date, certificateholders will receive a statement summarizing information regarding the trust and its assets. Such statement will include information regarding payments and prepayments, delinquencies and foreclosures.

#### Secondary Market Transactions

24. Salomon has historically made a market in mortgage-backed and asset-backed securities of the type described in the exemption request. Salomon anticipates that it will continue to make such a market in the future, subject to market conditions and applicable law.

#### Retroactive Relief

25. Salomon represents that it has engaged in transactions related to mortgage-backed and asset-backed securities based on the assumption that retroactive relief would not be granted. However, since November 1985, it is possible that some transactions may

have occurred that arguably would be prohibited. For example, because many certificates are held in street or nominee name, it is not always possible to identify whether the percentage interest of plans in a trust is or is not "significant" for purposes of the Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(f)). In addition, with respect to the "publicly-offered security" exception contained in that regulation (29 CFR 2510.3-101(b)), Salomon represents that it is difficult to determine whether each purchaser of a certificate is independent of all other purchasers.

#### Summary

26. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 406(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's or D&P. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which Salomon seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) Salomon has made, and anticipates that it will continue to make, a secondary market in certificates.

#### Discussion of Proposed Exemption

The exemptive relief proposed herein is similar to that provided in PTE 81-7 (46 FR 7520, January 23, 1981), Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83-1 (48 FR 895, January 7, 1983).

PTE 83-1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such certificates, provided that the conditions

set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 406(b)(1) and (b)(2) of ERISA for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transactions by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83-1 provides conditional exemptive relief from section 406(a) and (b) of ERISA for transactions in connection with the servicing and operation of the mortgage trust.

Under PTE 83-1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83-1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's or D&P (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

#### I. Ratings of Certificates

##### A. Rating Process

In connection with the Department's consideration of Salomon's exemption

request, representatives of the Department met with representatives of S&P's, Moody's and D&P to discuss the rating process. Set forth below is a summary of the information supplied to the Department by these rating agencies.

The sponsor of a mortgage pool initiates the rating process by requesting a specific rating from the rating agency. The rating agency then analyzes the security rating agency then analyzes the security for credit risk, structural risk, and legal risk.

In the course of establishing a rating, the rating agency investigates the originators' and servicers' policies and track records in handling defaults and delinquencies as well as their foreclosure procedures and actual loss record. The rating agency evaluates the loan appraisal process and the training of the personnel involved. The rating agency then performs statistical analysis to determine how existing factors correlate with the known default rates. This analysis is performed with respect to loan to value ratios, geographic location, type of asset, and interest rates. The rating agency also considers the economic stability of the entity providing credit support. Furthermore, the rating agency considers any ability of the trust servicer to commingle trust funds with its own, and the extent to which and conditions under which collateral may be substituted.

From its analysis, the rating agency determines the amount of credit support required in order for the issue to receive the requested rating.

Generally, the analyzed degree of investment risk (that is, the overall investment risk, taking into account credit risk, structural risk, and the legal risk) associated with a particular rating will be the same regardless of the type of instrument being rated and the nature of the collateral (including credit support) covering the instrument.

Securities rated in one of the four highest generic rating categories by S&P's, Moody's or D&P are considered to be "investment grade" securities.

Both S&P's and Moody's have established refinements to further distinguish among securities within a given rating category. S&P's uses "+" and "-" to designate refinements. For instance, securities rated in the "AA" category may be rated "AA+", "AA" or "AA-". Likewise, Moody's uses numerals to designate refinements within a rating category, such as "Aa1", "Aa2" or "Aa3".\*

\* The proposed exemption conditions exemptive relief upon the certificates in which the plan invests having been rated in one of the three highest

D&P ratings of 1-7 are assigned to securities rated by D&P in the three highest "generic" rating categories of "Triple A", "Double A" and "Single A". Securities in D&P's generic "Triple A" category receive a D&P rating of "1"; securities in D&P's "Double A" generic category receive a D&P rating ranging from "2" to "4"; securities in D&P's "Single A" generic category receive a D&P rating ranging from "5" to "7".

#### B. Rating Condition

After consideration of the representations of the applicant, and the information provided by S&P's, Moody's and D&P, the Department has decided to condition exemptive relief upon the certificates in which a plan invests having attained a rating in one of the three highest generic rating categories from S&P's, Moody's, or, in the case of certificates representing interests in trust containing multi-family residential mortgages or commercial mortgages, D&P.<sup>7</sup>

The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables, while ensuring that the interests of plans holding certificates are adequately protected. In particular, in rating certificates, S&P's, Moody's and D&P take into account such factors as commingling of funds and conflicts of interest of the trust sponsor and servicer (including conflicts of interest that may arise where the servicer or an affiliate of the servicer provides credit support to a trust).

<sup>7</sup> "generic" rating categories by S&P's, Moody's, or D&P. The term "generic" is included to make clear that the Department intends the condition to refer to the rating category (such as "AAA", "AA" and "A") without regard to refinements within a rating category.

<sup>8</sup> Salomon's original application for exemptive relief would have conditioned the exemption upon the certificates having received a rating from any "nationally recognized statistical rating agency" that is in one of that agency's three highest rating categories. Although the Department is aware that rating agencies other than S&P's, Moody's and D&P currently qualify as "nationally recognized statistical rating organizations" for purposes of Rule 15c3-1 under the Securities Exchange Act of 1934, the Department has decided to condition the proposed exemption on attainment of the specified ratings from S&P's, Moody's, or, in the case of certificates representing interests in trusts containing multi-family residential mortgages or commercial mortgages, D&P. Currently, it appears that asset-backed securities underwritten by Salomon which are backed by assets other than multi-family residential mortgages or commercial mortgages have been rated by either S&P's or Moody's or both. Salomon represents that D&P has rated significantly more multi-family residential and commercial mortgage pass-through certificates than S&P's or Moody's, and that D&P has expertise with respect to these types of mortgages which is at least as great as that of S&P's and Moody's.

However, the Department is not prepared to rely solely on determinations made by these rating agencies in providing exemptive relief. In this regard, the applicant originally requested that exemptive relief apply to trusts containing any type of receivable—secured or unsecured—provided that the rating condition is met. The Department is not prepared at this time to grant such broad exemptive relief. The Department believes that the rating agencies currently have more expertise in rating certificates representing interests in secured, as opposed to unsecured, receivables trusts. Consequently, the Department believes that the ratings are more indicative of the relative safety of the investment when applied to trusts containing secured receivables.

Moreover, Salomon has represented that trusts containing different types of receivables are continuously being developed and rated. While the Department would generally prefer to be more specific as to the types of assets contained in the trusts, the Department recognizes the applicant's need for flexibility. At the same time, the Department believes that it is appropriate to ensure that the rating agencies have developed expertise in rating a particular type of asset-backed security, and that such security has been tested in the marketplace, prior to plan investment pursuant to this exemption. Consequently, the Department has further conditioned the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at least one year, and having been sold to investors other than plans for at least one year.<sup>9</sup>

#### II. Limited Section 406(b) and Section 407(a) Relief for Sales

The applicant represents that in some cases a trust sponsor, trustee, servicer,

<sup>9</sup> In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).



insurer, an obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.<sup>9</sup> In these cases, a direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.<sup>10</sup> Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, the applicant represents that a trust sponsor, servicer, trustee, insurer, an obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. The applicant represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, the applicant represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor with respect to receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

The proposed exemption from the restrictions of section 406(a) for the sale of certificates closely follows the exemptive relief provided by PTE 83-1. In particular, (1) the acquisition of certificates by a plan must be on terms that are at least as favorable to the plan as they would be in an arm's length transaction with an unrelated party, and (2) the rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates representing interests in the same trust.

The applicant originally requested broad section 406(b) relief for the sale of certificates. Salomon subsequently amended its application to request substantially more limited section 406(b) relief for the sale of certificates. Under

<sup>9</sup> In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which Salomon or any of its affiliates is either (a) the sole underwriter or manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent.

<sup>10</sup> The applicant represents that where a trust sponsor is an affiliate of Salomon, sales to plans by the sponsor may be exempt under PTE 75-1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if Salomon is not a fiduciary with respect to plan assets to be invested in certificates.

the amendment, Salomon requested section 406(b) relief for sales of certificates by an obligor with respect to 25 percent or less of the fair market value of obligations contained in the trust or an affiliate of such obligor. In requesting this relief, Salomon represented that this 25 percent limitation would function as a "de minimis" test so that Salomon would not be unduly burdened with policing the actions of obligors who are also plan fiduciaries.

In this regard, the Department views a five percent limitation as a more appropriate measure for purposes of a "de minimis" test. Consequently, the proposed exemption provides section 406(b) relief for sales of certificates only where a person exercises its investment discretion to invest a plan's assets in certificates issued by a trust, five percent or less of whose assets consists of obligations of that person or an affiliate.

Additionally, in the case of an acquisition of certificates, section 406(b) exemptive relief would be limited to situations where at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the "restricted group." This "restricted group" consists of the trust sponsor, servicer, or trustee; each provider of credit support; each underwriter of certificates; or any obligor with respect to receivables included in the trust constituting more than five percent of the fair market value of all receivables included in the trust.

Section 406(b) relief for sales of certificates also would be subject to the following conditions: (1) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and (2) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the fiduciary has discretionary authority or renders investment advice are invested in certificates representing an interest in trusts containing assets sold or serviced by the same entity.<sup>11</sup>

Also, section 406(a) and (b) relief for sales would apply only to a plan which is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D under the Securities Act of 1933. To be an accredited investor under Rule 501(a)(1), a plan would need to have at least \$5 million in assets, or the decision to invest in certificates would have to be made on behalf of the plan by a bank,

<sup>11</sup> This condition effectively imposes a 25 percent limit on plan investment in trusts which have the same sponsor or which have the same servicer.

insurance company or an investment advisor registered under the Investment Advisers Act of 1940.

Finally, the proposed exemptive relief from the provisions of sections 406(a)(1)(E), 406(a)(2) and 407 of ERISA would not apply to the acquisition or holding of a certificate by a person who has discretionary authority or renders investment advice with respect to the assets of an "excluded plan." Under the exemption, an "excluded plan" is a plan with respect to which any member of the restricted group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 406(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act. That section requires, among other things, that a fiduciary discharge its duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent manner in accordance with section 404(a)(1)(B) of the Act. In addition, it does not affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) Before granting an exemption under section 406(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the affected plans and of their participants and beneficiaries, and protective of the rights of those participants and beneficiaries.

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in each

application accurately describe all material terms of the transaction which is the subject of the exemption.

#### Proposed Exemption

On the basis of the facts and representations set forth in the application, the Department is considering granting the following exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code), and in accordance with the Procedures set forth in ERISA Procedure 75-1:

#### I. Transactions

A. Effective November 1, 1985, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan (plan) when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A(1) or (2).

Notwithstanding the foregoing, section I.A. does not provide an exemption from the restrictions of section 406 (a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate by any person who has discretionary authority or renders investment advice with respect to the assets of an Excluded Plan.

B. Effective November 1, 1985, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market

value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan; (ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates is acquired by persons independent of the members of the Restricted Group;

(iii) a plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in trust containing assets sold or serviced by the same entity.<sup>12</sup> For purposes of this subparagraph B(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely a subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.B(1) or (2).

C. Effective November 1, 1985, the restrictions of sections 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code, shall not apply to transactions in connection with the servicing, management and operation of a trust; provided:

(1) such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) the pooling and servicing agreement is provided to, or fully described in the prospectus or private offering memorandum provided to, investing plans before they purchase certificates issued by the trust.<sup>13</sup>

<sup>12</sup> For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as is proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

<sup>13</sup> In the case of a private offering memorandum, such memorandum must contain the same information that would be disclosed in a prospectus if the offering of the certificates was made in a registered public offering under the Securities Act of 1933.

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective November 1, 1985, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1) (A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14) (F), (G), (H) or (I) of the Act or section 4975 (F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates

#### II. General Conditions

A. The relief provided under part I is available only if the following conditions are met:

(1) The acquisition of certificates by a plan is on terms (including the certificate price) that are at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating that is in one of the three highest generic rating categories

(a) From either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), or Duff & Phelps Inc., if the certificates represent an interest in a trust containing obligations secured by multi-family residential or commercial real property, or

(b) From either S&P's or Moody's if the certificates represent an interest in a trust containing assets other than obligations secured by multi-family residential or commercial real property;

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession



upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be subject to the civil penalties which may be assessed under section 502(i) of the Act, or to the taxes imposed by sections 4975(a) and (b) of the Code, if the provision of subsection II.A(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A(6) above.

### III. Definitions

For purposes of this exemption:

A. "Certificate" means a certificate (1) That represents a beneficial ownership interest in the assets of a trust;

(2) That entitles the holder to pass-through payments of principal, interest,

and/or other payments made with respect to the assets of such trust; and

(3) With respect to which Salomon or any of its affiliates is either (a) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (b) a selling or placement agent;

B. "Trust" means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans);

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property, (including obligations secured by leasehold interests on commercial real property);

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) "Guaranteed governmental mortgage pool certificates," as defined in 29 CFR 2510.3-101(i)(2);

(f) Fractional undivided interests in any of the obligations described in clauses (a)-(e) of this subsection B(1);

(2) Property which had secured any of the obligations described in subsection B(1);

(3) Undistributed cash; and

(4) Rights under any insurance policies, third-party guarantees, contracts of suretyship and other credit support arrangements with respect to any obligations described in subsection B(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (i) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's or Moody's for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. "Underwriter" means:

(1) Salomon;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Salomon; or

(3) Any member of an underwriting syndicate of which Salomon or a person described in (2) is a manager or co-manager with respect to the certificates.

D. "Sponsor" means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. "Master Servicer" means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. "Subservicer" means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. "Servicer" means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. "Trustee" means the trustee of the trust.

I. "Insurer" means the insurer or guarantor of, or provider of other credit support for, a trust.

Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. "Obligor" means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any securing an obligation included in the trust.

K. "Excluded Plan" means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. "Restricted Group" with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized

principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) any affiliate of a person described in (1)-(6) above.

M. "Affiliate" of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person;

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. "Control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) such person is not an affiliate of that other person; and

(2) the other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders advice with respect to any assets of such person.

P. "Sale" includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private offering memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. "Forward delivery commitment" means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificate from, the other party).

R. "Reasonable compensation" has the same meaning as that term is defined in 29 CFR 2550.408c-2.

S. "Qualified Administrative Fee" means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. "Qualified Equipment Note Secured By A Lease" means an equipment note:

(a) Which is secured by equipment which is leased;

(b) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(c) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were secured only by the equipment and not the lease.

U. "Qualified Motor Vehicle Lease" means a lease of a motor vehicle where:

(a) The trust holds a security interest in the lease;

(b) The trust holds a security interest in the leased motor vehicle; and

(c) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract.

Signed at Washington, DC, this 23rd day of December, 1988.

Robert J. Doyle,

Director of Regulations and Interpretations,  
Pension and Welfare Benefits Administration,  
U.S. Department of Labor.

[FR Doc. 88-29986 Filed 12-28-88; 8:45 am]

BILLING CODE 4510-29-M

## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-425]

### Georgia Power Co. et al.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an exemption from the requirements of 10 CFR 50.54(w)(5)(i) to Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, and City of Dalton, Georgia (the licensee) for the Vogtle Electric Generating Plant, Unit 2,

located at the licensee's site in Burke County, Georgia.

### Environmental Assessment

#### Identification of Proposed Action

On August 5, 1987, the NRC published in the Federal Register a final rule amending 10 CFR 50.54(w). The rule increased the amount of on-site property damage insurance required to be carried by NRC's power reactor licensees. The rule also required these licensees to obtain by October 4, 1988 insurance policies that prioritized insurance proceeds for stabilization and decontamination after an accident and provided for payment of proceeds to an independent trustee who would disburse funds for decontamination and cleanup before any other purpose. Subsequent to publication of the rule, the NRC has been informed by insurers who offer nuclear property insurance that, despite a good faith effort to obtain trustees required by the rule, the decontamination priority and trusteeship provisions will not be able to be incorporated into policies by the time required in the rule. In response to these comments and related petitions for rulemaking, the Commission has proposed a revision of 10 CFR 50.54(w)(5)(i) extending the implementation schedule for 18 months (53 FR 36338, September 19, 1988). Because a facility operating license may be issued for Vogtle 2 before the rulemaking action is completed, the Commission would issue as part of the license a temporary exemption from the requirements of 10 CFR 50.54(w)(5)(i) until completion of the pending rulemaking extending the implementation date specified in 10 CFR 50.54(w)(5)(i). Upon completion of such rulemaking, the licensee shall comply with the provisions of such rule.

#### The Need for the Proposed Action

The exemption is needed because insurance complying with requirements of 10 CFR 50.54(w)(5)(i) is unavailable and because the temporary delay in implementation allowed by the exemption and associated rulemaking action will permit the Commission to reconsider on its merits the trusteeship provision of 10 CFR 50.54(w)(4).

#### Environmental Impacts of the Proposed Action

With respect to radiological impacts on the environment, the proposed exemption does not in any way affect the operation of licensed facilities. Further, as noted by the Commission in the Supplementary Information accompanying the proposed rule, there



are several reasons for concluding that delaying for a reasonable time the implementation of the stabilization and decontamination priority and trusteeship provisions of Section 50.54(w) will not adversely affect protection of public health and safety. First, during the period of delay, the licensee will still be required to carry \$1.06 billion insurance. This is a substantial amount of coverage that provides a significant financial cushion to licensees to decontaminate and clean up after an accident even without the prioritization and trusteeship provisions. Second, nearly 75% of the required coverage already is prioritized under the decontamination liability and excess property insurance language of the Nuclear Electric Insurance Limited-II policies. Finally, there is only an extremely small probability of a serious accident occurring during the exemption period. Even if a serious accident giving rise to substantial insurance claims were to occur, NRC would be able to take appropriate enforcement action to assure adequate cleanup to protect public health and safety and the environment.

The proposed exemption does not affect radiological or nonradiological effluents from the site and has no other nonradiological impacts.

#### Alternatives to the Proposed Action

It has been concluded that there is no measurable impact associated with the proposed exemption; any alternatives to the exemption will have either no environmental impact or greater environmental impact.

#### Alternative Use of Resources

This action does not involve the use of any resources beyond the scope of resources used during normal plant operation.

#### Agencies and Persons Consulted

The staff did not consult other agencies or persons in connection with the proposed exemption.

#### Finding of No Significant Impact

Based upon the foregoing environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed exemption.

For information concerning this action, see the proposed rule (53 FR 36338). A copy of the facility operating license will be available for public inspection at the Commission's Public

Document Room, 2120 L Street, NW., Washington, DC, and at the Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30630.

Dated at Rockville, Maryland, this 22nd day of December, 1988.

For the Nuclear Regulatory Commission,

David B. Matthews,

Director, Project Directorate II-3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 88-29999 Filed 12-28-88; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-260]

#### Tennessee Valley Authority; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC/the Commission) is considering issuance of a temporary exemption from certain requirements of General Design Criterion 17 of Appendix A to 10 CFR 50 to the Tennessee Valley Authority (TVA/the licensee), for the Browns Ferry Nuclear Power Plant, Unit 2, located at the licensee's site near Decatur, Alabama.

#### Environmental Assessment

**Identification of Proposed Action:** The licensee would be temporarily exempted from the electrical separation requirements of General Design Criterion (GDC) 17 of Appendix A to 10 CFR Part 50. As relevant to TVA's request, GDC 17 requires that, "... The onsite electric power supplies, including the batteries, and the onsite electric distribution system, shall have sufficient independence, redundancy, and testability to perform their safety functions assuming a single failure ..."

**The Need for the Proposed Action:** The proposed exemption is needed on a temporary basis in order to allow TVA Browns Ferry, Unit 2, to load fuel and perform hydro testing. The modifications necessary to bring the plant into compliance with GDC 17 will be made prior to Unit 2 restart.

**Environmental Impact of the Proposed Action:** The licensee has indicated that approximately 250 cables have been discovered that do not meet the cable separation criterion of GDC 17. Due to the extended Unit 2 outage, there is very little decay heat in the fuel and Krypton 85 is the only significant fission product left. The licensee's analysis of design basis accidents shows that any potential radiological releases would not be greater than previously determined nor would the temporary exemption otherwise affect radiological effluents.

The staff has reviewed the licensee's environmental analysis and concurs with its findings. The proposed action does not affect the probability or consequences of any accident. In addition, the proposed action does not change the types of effluents that may be released offsite and does not increase the allowable individual or cumulative occupational radiation exposure. The Commission concludes that there are no significant radiological impacts associated with this proposed exemption.

With regard to potential nonradiological impacts, the proposed exemption does not affect nonradiological plant effluents and has not other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological impacts associated with the proposed exemption.

**Alternative Use of Resources:** This action does not involve any use of resources not previously considered in the September 1, 1972 Final Environmental Statement (construction permit and operating license) for the Browns Ferry Nuclear Plant.

**Alternatives to the Proposed Action:** Since the Commission has concluded that there is no measurable environmental impact associated with the proposed exemption, alternatives to the proposed action need not be evaluated. The principal alternative, however, to the exemption would be to deny the exemption requested by the licensee from the requirements of 10 CFR Part 50 Appendix A, GDC 17. Such action would not enhance the protection of the environment.

**Agencies and Persons Consulted:** The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

#### Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed exemption.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the request for exemption dated December 15, 1988, which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC, and at the NRC's Local Public Document Room located at the Athens Public Library, South Street, Athens, Alabama 35611.

Dated at Rockville, Maryland this 22nd day of December, 1988.

For the Nuclear Regulatory Commission,

Suzanne C. Black,

Assistant Director for Projects, TVA Projects Division, Office of Special Projects.

[FR Doc. 88-29994 Filed 12-28-88; 8:45 am]

BILLING CODE 7590-01-M

#### Public Workshop on the Individual Plant Examinations

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Workshop.

**SUMMARY:** On November 23, 1988 the NRC Staff issued Generic Letter No. 88-20, INDIVIDUAL PLANT EXAMINATION FOR SEVERE ACCIDENT VULNERABILITIES. The Generic Letter requires all licensees holding operating licenses and construction permits for nuclear power reactor facilities to perform an individual plant examination for severe accident vulnerabilities. A document that provides additional licensee guidance for reporting the results of the Individual Plant Examination (IPE) and describes the review evaluation process that the NRC will use for assessing the submittals will be issued in draft form on or about January 27, 1989. In order to discuss the IPE objectives and solicit questions and points for clarification on the draft NUREG-1335, "Individual Plant Examination: Submittal Guidance and Staff Review Requirements", the NRC plans to conduct a workshop.

**DATES:** February 28, 1989 and March 1-March 2, 1989.

**ADDRESS:** The Worthington Hotel, 200 Main Street, Fort Worth, Texas 76102.

**FOR FURTHER INFORMATION CONTACT:** John H. Flack, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone (301) 492-3979. For hotel room reservations, request the IPE Workshop Conference room rates at the Worthington Hotel, telephone (817) 870-1000 no later than January 27, 1989.

**SUPPLEMENTARY INFORMATION:** The following items will be discussed during the workshop: Generic Letter 88-20, Preparing for External Events in the IPE, IPE Submittal Guidance and NRC Staff Review Requirements on the Front and Back end Submittals. The workshop will also be used to discuss NRC plans on Accident Management.

Those members of the public who wish to attend the workshop should notify the contact listed above. In addition, those members of the public who wish to make a concise

presentation at the workshop, should indicate their desire to do so to the contact listed above, so that they can be added to the agenda. Early notification is recommended since requests will be processed as they are received. Written comments will also be accepted up to and during the workshop time period.

Dated in Rockville, Maryland, this 22nd day of December, 1988.

For the Nuclear Regulatory Commission,

William Beckner,

Chief, Severe Accident Issues Branch, Office of Nuclear Regulatory Research.

[FR Doc. 88-29996 Filed 12-28-88; 8:45 am]

BILLING CODE 7500-01-M

[Docket No. 50-344]

#### Portland General Electric Co.; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. NPF-1 issued to Portland General Electric Company (the licensee), for operation of the Trojan Nuclear Plant, located in Columbia County, Oregon. The request for amendment was submitted by letter dated May 9, 1988.

The proposed amendment would revise the license for Trojan to reflect that Pacific Power and Light Company has merged with Utah Power and Light Company to become a new corporation named PC/UP&L Merging Corporation which will change its name to PacifiCorp, but will operate under the assumed business name of Pacific Power and Light Company. Pacific Power and Light Company has a 2.5 ownership interest in Trojan. The other owners are Portland General Electric Company (67.5 percent) and Eugene Water and Electric Board (30 percent). Portland General Electric Company is responsible for the operation of Trojan.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or

consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Comments should be addressed to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to Room P-216, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 8:15 a.m. to 4:00 p.m. Copies of written comments may be examined at the NRC Public Document Room, 2120 L Street NW., Washington, DC 20555. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 27, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license, and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules and Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted



with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. A person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene becomes parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Servicing Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-8700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to George W. Knighton: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Leonard A. Girard, Esq., Portland General Electric Company, 121 SW. Salmon Street, Portland, Oregon 97204, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714 (a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC 20555, and at the Portland State University Library, 731 SW. Harrison Street, Portland, Oregon 97297.

Dated at Rockville, Maryland, this 21st day of December, 1988.

For the Nuclear Regulatory Commission  
George W. Knighton,

Project Director, Project Directorate V  
Division of Reactor Projects—III, IV, V and  
Special Projects Officer of Nuclear Reactor  
Regulation.

[FR Doc. 88-29995 Filed 12-28-88; 8:45 am]

BILLING CODE 7590-01-M

## OFFICE OF MANAGEMENT AND BUDGET

### Cost Comparison Studies; Circular No. A-76

AGENCY: Office of Management and Budget.

ACTION: Publication of Schedules for OMB Circular No. A-76 cost comparison studies.

SUMMARY: This Notice contains the schedules of cost comparisons for FY 1989 for the Department of Defense. Executive Order 12815, Performance of Commercial Activities, dated November 19, 1987, requires OMB to publish the schedules as they become available. This is the initial submission for DOD; additions to these schedules, where the goals required by the Executive Order have not been met, and schedules from other agencies will be forthcoming.

The department goal and number of positions scheduled for study are listed below:

Agency: DOD  
Goal: 29,664  
Scheduled: 27,146

General questions relating to the cost comparisons should be referred to the following individuals:

Air Force, Colonel Dave Held, (202) 695-7076

Army, Edward Breland, (202) 694-9046

Navy, Charlie Maca, (202) 697-0750

Defense Logistics Agency, Billie Blackman, (202) 274-5050

Defense Mapping Agency, Richard Tanzillo, (202) 653-1450

Office of Federal Procurement Policy,

David Muzio, (202) 395-3300

Joseph R. Wright, Jr.,

Director.

## DEPARTMENT OF THE ARMY.—LIST OF COST COMPARISONS THAT WILL BE COMPLETED IN FY 1989

UNITS	COMMERCIAL ACTIVITY	LOCATION	FTE, CIV	FTE, MIL
AMC	INSTALLATION SUPPORT	ANNISTON ARMY DEPOT, AL	287	0
AMC	INSTALLATION SUPPORT	RED RIVER ARMY DEPOT, TX	331	0
AMC	INSTALLATION SUPPORT	US ARMAMENT RES DEV & ENG, NJ	407	0
COE	ADP SERVICES	NAN, NY NY	1	16
COE	MOTOR VEHICLE OPERAT	NORFOLK, VA	11	2
COE	GRAPHIC ARTS	HUNTSVILLE, AL	1	3
COE	ADMIN SERVICES	NAN, NY	0	9
FORSCOM	MAINT	FT. CAMPBELL, KY	5	11
FORSCOM	DOL PACKAGE	FT. CARSON, CO	406	58
FORSCOM	DPTM PACKAGE	FT. CARSON, CO	57	3
FORSCOM	DPTM (TASC) PACKAGE	FT. DEVENS, MA	35	0
FORSCOM	DEH PACKAGE	FT. DEVENS, MA	233	0
FORSCOM	DOL (SUPPLY)	FT. DEVENS, MA	21	9
FORSCOM	AUDIOVISUAL	FT. DRUM, NY	29	5
FORSCOM	LAUNDRY/DRY CLEANING	FT. HOOD, TX	77	0
FORSCOM	DEH HOUSING	FT. HOOD, TX	20	0
FORSCOM	AUDIOVISUAL	FT. LEWIS, WA	57	2
FORSCOM	LAUNDRY/DRY CLEANING	FT. LEWIS, WA	25	0
FORSCOM	DPTM (TASC) PACKAGE	FT. MCCOY, WI	23	0
FORSCOM	AUDIOVISUAL	FT. McPHERSON, GA	35	2
FORSCOM	DOL	FT. McPHERSON, GA	74	17
FORSCOM	FOOD SERVICE	FT. BUCHANAN, PR	7	12
FORSCOM	AUDIOVISUAL	FT. BUCHANAN, PR	13	4
FORSCOM	DOL PACKAGE	FT. BUCHANAN, PR	40	3
FORSCOM	AUDIOVISUAL	FT. MEADE, MD	344	0
FORSCOM	DEH PACKAGE	FT. MEADE, MD	267	13
FORSCOM	DOL PACKAGE	FT. INDIANTOWN GAP, PA	8	1
FORSCOM	PUBLICAT DISTRIB CTR	FT. INDIANTOWN GAP, PA	58	0
FORSCOM	DEH PACKAGE	FT. INDIANTOWN GAP, PA	54	0
FORSCOM	DOL PACKAGE	FT. ORD, CA	28	11
FORSCOM	DPTM (TASC) PACKAGE	FT. POLK, LA	16	2
FORSCOM	DPTM (RANGE MAIN)	FT. HOOD, TX	33	0
FORSCOM	RANGE OPER MAIN	FT. RILEY, KS	28	0
FORSCOM	AUDIOVISUAL INFORMAT	FT. CARSON, CO	44	6
HSC	NUTRITIONAL CARE	FT. MONMOUTH, NJ	16	2
HSC	NUTRITIONAL CARE	TOOELE ARMY DEPOT, UT	34	2
HSC	CLINIC/DISPENSARY	NATICK LAB, MA	4	3
HSC	CLINIC/DISPENSARY	SENECA ARMY DEPOT	8	8
HSC	CLINIC/DISPENSARY	WATERVLIET ARSENAL	9	0
HSC	CLINIC/DISPENSARY	RED RIVER ARMY DEPOT, TX	15	0
HSC	CLINIC/DISPENSARY	FT. MCCOY, WI	2	1
HSC	CLINIC/DISPENSARY	ROCK ISLAND, IL	14	6
HSC	CLINIC/DISPENSARY	SAVANNA ARMY DEPOT, GA	2	1
HSC	CLINIC/DISPENSARY	SELFRIDGE AIR NG, MI	10	12
HSC	CLINIC/DISPENSARY	DETROIT ARSENAL, MI	11	0
HSC	CLINIC/DISPENSARY	DEFENSE GEN SUPPORT CENTER, VA	4	0
HSC	CLINIC/DISPENSARY	TOBYHANNA ARMY DEPOT, PA	14	1
HSC	CLINIC/DISPENSARY	PINE BLUFF ARSENAL, AK	7	8
HSC	CLINIC/DISPENSARY	SACRAMENTO ARMY DEPOT, CA	13	0
HSC	CLINIC/DISPENSARY	SHARPE ARMY DEPOT, CA	12	0
HSC	CLINIC/DISPENSARY	SIERRA ARMY DEPOT, CA	11	18
HSC	CLINIC/DISPENSARY	TRACY ARMY DEPOT, CA	7	2
HSC	CLINIC/DISPENSARY	UMATILLA ARMY DEPOT, OR	1	6
HSC	CLINIC/DISPENSARY	ARLINGTON HALL, VA	2	3
HSC	CLINIC/DISPENSARY	CAMERON STATION, VA	3	2
HSC	ELECTRONIC COMMO EQUIP	FITZSIMONS AMC, CO	21	0
HSC	CUSTODIAL SERVICE	FT. BEN HARRISON, IN	7	0
HSC	CUSTODIAL SERVICE	FT. BENNING, GA	44	0
HSC	CUSTODIAL SERVICE	FT. HUACHUCA, AZ	15	0
HSC	CUSTODIAL SERVICE	FT. RILEY, KS	23	0
HSC	CUSTODIAL SERVICE	CARLISLE BARRACKS, PA	3	0
HSC	CUSTODIAL SERVICE	WEST POINT, NY	8	0
HSC	CUSTODIAL SERVICE	WALTER REED AMC, DC	141	0
HSC	FOOD SERVICE	FT. DETRICK, MD	0	6
HSC	OFFICE EQUIP REPAIR	WALTER REED AMC, DC	7	0
HSC	WATER PLANTS	FT. DETRICK, MD	11	0
HSC	STORAGE & WAREHOUSING	ABERDEEN, MD	3	0
HSC	VISUAL INFORMATION	FT. GORDON, GA	6	0
HSC	VISUAL INFORMATION	FT. DETRICK, MD	4	0
HSC	VISUAL INFORMATION	PRESIDIO, SAN FRANCISCO, CA	4	3
HSC	VISUAL INFORMATION	FT. LEWIS, WA	5	0
HSC	VISUAL INFORMATION	TRIPLER AMC, HI	0	4
HSC	VISUAL INFORMATION	FITZSIMONS AMC, CO	1	1
HSC	VISUAL INFORMATION	WALTER REED AMC, DC	28	13
MDW	MILITARY CLOTHING	FT. MYER, VA	1	8
MDW	MAIL & DISTRIB SERV	FT. McNAIR, DC	5	8
MDW	COMMUNICAT & ELECTRON	FT. McNAIR, DC	0	10
MTMC	VEHICLE PREPARATION	OARB	17	0
MTMC	INSTALLATION SUPPLY	SUNNY POINT, NC	11	0



## DEPARTMENT OF THE ARMY.—LIST OF COST COMPARISONS THAT WILL BE COMPLETED IN FY 1989—Continued

UNITS	COMMERCIAL ACTIVITY	LOCATION	FTE, CIV	FTE, MIL
TRADOC	FACILITY ENGINEER	FT. BENNING, GA	853	5
TRADOC	INDUSTRIAL OPERATIONS	FT. BENNING, GA	840	82
TRADOC	OPERATION RANGE & AVIAT	FT. BENNING, GA	135	138
TRADOC	TASC	FT. BENNING, GA	101	19
TRADOC	INSTALLATION SUPPORT	FT. BLISS, TX	1,138	59
TRADOC	FACILITY ENGINEERS	FT. DIX, NJ	511	7
TRADOC	TASC	FT. EUTIS, NJ	93	4
TRADOC	ADMIN SUPPORT	FT. EUTIS, NJ	16	16
TRADOC	ADMIN SUPPORT	FT. EUTIS, NJ	42	72
TRADOC	DOL	FT. KNOX, KY	705	10
TRADOC	FOOD SERVICE	FT. KNOX, KY	30	216
TRADOC	FACILITY ENGINEERS	FT. KNOX, KY	523	4
TRADOC	FACILITY ENGINEERS	FT. LEAVENWORTH, KS	297	8
TRADOC	INDUSTRIAL OPERAT	FT. LEAVENWORTH, KS	72	3
TRADOC	FACILITY ENGINEERS	FT. LEE, VA	260	0
TRADOC	ADP	FT. LEE, VA	15	12
TRADOC	PRINTING & REPRODUCT	FT. LEE, VA	24	3
TRADOC	INDUSTRIAL OPERAT	FT. RUCKER, AL	445	113
TRADOC	FACILITY ENGINEERS	FT. RUCKER, AL	378	5
TRADOC	AUDIOVISUAL	FT. RUCKER, AL	59	3
TRADOC	FOOD SERVICE	FT. RUCKER, AL	29	25
TRADOC	LOG PACKAGE	REDSTONE, AL	15	133
TSA	COMMISSARY SHELF STOCK	FT. IRWIN, CA	13	0
TSA	COMMISSARY SHELF STOCK	FT. McNAIR, DC	15	0
TSA	COMMISSARY SHELF STOCK	FT. DRUM, NY	6	0
TSA	COMMISSARY SHELF STOCK	CAMERON STATION, VA	59	0
TSA	COMMISSARY SHELF STOCK	FT. BRAGG, NC	84	0
TSA	COMMISSARY SHELF STOCK	FT. ORD, CA	50	0
TSA	COMMISSARY SHELF STOCK	FT. BENNING, GA	50	0
TSA	COMMISSARY SHELF STOCK	FT. LEWIS, WA	70	0
TSA	COMMISSARY SHELF STOCK STORAGE & ISSUE	FT. LEE, VA	8	0
TSA	STORAGE & ISSUE	FT. RICHARDSON, AK	2	0
TSA	STORAGE & ISSUE	FT. BELVOIR, VA	16	0
TSA	STORAGE & ISSUE	FT. MEADE, MD	20	0
TSA	STORAGE & ISSUE	REDSTONE ARSENAL AL	13	0
TSA	STORAGE & ISSUE	TOBYHANNA ARMY DEPOT, PA	2	0
TSA	STORAGE & ISSUE	FT. BLISS, TX	26	0
TSA	STORAGE & ISSUE	FT. LEAVENWORTH, KS	7	0
TSA	STORAGE & ISSUE	FITZSIMONS AMC, CO	3	0
TSA	STORAGE & ISSUE	FT. MONROE, VA	4	0
WESTCOM	FACILITY ENGINEERS	OAHU, HI	597	0
WESTCOM	DOL	OAHU, HI	536	133
WESTCOM	PACIFIC TRAIN FACILITY	HAWAII, HI	44	24

## AIR FORCE.—LIST OF COST COMPARISONS THAT WILL BE COMPLETED IN FY 1989

COMMERCIAL ACTIVITY	LOCATION	FTE, CIV	FTE, MIL
COMMISSARY WAREHOUSE	SCOTT AFB, IL	14	0
COMMISSARY WAREHOUSE	MATHER AFB, CA	13	0
COMMISSARY WAREHOUSE	TRAVIS AFB, CA	13	0
COMMISSARY WAREHOUSE	RANDOLPH AFB, TX	16	0
COMMUNICATION FUNCTIONS	WILLOW GROVE AFRES FAC, PA	17	0
COMMUNICATION FUNCTIONS	GEN BILLY MITCHELL FLD, WI	13	0
DATA PROCESSING	NORTON AFB, CA	3	3
FUELS MANAGEMENT	KELLY AFB, TX	70	0
FURNISHINGS MANAGEMENT	DOVER AFB, DE	3	2
FURNISHINGS MANAGEMENT	ANDREWS AFB, MD	1	2
FURNISHINGS MANAGEMENT	NORTON AFB, CA	2	1
FURNISHINGS MANAGEMENT	MCCHORD AFB, WA	4	0
FURNISHINGS MANAGEMENT	MCGUIRE AFB, NJ	4	1
FURNISHINGS MANAGEMENT	TRAVIS AFB, CA	1	6
FURNISHINGS MANAGEMENT	SCOTT AFB, IL	1	4
GROUND RADIO MAINTENANCE	KIRTLAND AFB, NM	3	2
GROUNDS MAINTENANCE	EIELSON AFB, AK	2	12
GROUNDS MAINTENANCE	ELMENDORF AFB, AK	2	3
GROUNDS MAINTENANCE	COLUMBUS AFB, MS	17	0
GROUNDS MAINTENANCE	KELLY AFB, TX	2	0
GROUNDS MAINTENANCE	WRIGHT-PATTERSON AFB, OH	48	0
GROUNDS MAINTENANCE	HILL AFB, UT	35	0
GROUNDS MAINTENANCE	TINKER AFB, OK	20	0
GROUNDS MAINTENANCE	CHARLESTON AFB, SC	13	2
GROUNDS MAINTENANCE	DOVER AFB, DE	9	1
GROUNDS MAINTENANCE	TRAVIS AFB, CA	16	0
GROUNDS MAINTENANCE	NORTON AFB, CA	19	0
GROUNDS MAINTENANCE	SCOTT AFB, IL	13	0
GROUNDS MAINTENANCE	POPE AFB, NC	8	5

## AIR FORCE.—LIST OF COST COMPARISONS THAT WILL BE COMPLETED IN FY 1989—Continued

COMMERCIAL ACTIVITY	LOCATION	FTE, CIV	FTE, MIL
GROUNDS MAINTENANCE	KIRTLAND AFB, NM	29	1
GROUNDS MAINTENANCE	HANSCOM AFB, MA	6	3
LABORATORY SUPPLY SUPPORT	EDWARDS AFB, CA	13	5
LABORATORY SUPPLY SUPPORT	EGLIN AFB, FL	9	5
LABORATORY SUPPLY SUPPORT	WRIGHT-PATTERSON AFB, OH	46	1
LABORATORY SUPPLY SUPPORT	KIRTLAND AFB, OH	22	6
LINE	HICKAM AFB, HI	1	2
LOGISTICS MATL CONTROL ACTIVITY	HILL AFB, UT	3	3
MB 26 SIMULATOR MAINT	MULTIPLE INSTALL	0	165
MIL FAMILY HOUSING MAINT	DOVER AFB, DE	8	0
MIL FAMILY HOUSING MAINT	MCCHORD AFB, WA	16	0
MIL FAMILY HOUSING MAINT	TRAVIS AFB, CA	41	0
MIL FAMILY HOUSING MAINT	LITTLE ROCK AFB, AR	29	0
MIL FAMILY HOUSING MAINT	CANNON AFB, NM	13	0
MIL FAMILY HOUSING MAINT	HOMESTEAD AFB, FL	21	0
MIL FAMILY HOUSING MAINT	MOODY AFB, GA	5	0
MIL FAMILY HOUSING MAINT	MYRTLE BEACH AFB, SC	9	0
OCCUPATIONAL MEDICINE	WRIGHT-PATTERSON AFB, OH	27	0
OCCUPATIONAL MEDICINE	KELLY AFB, TX	12	0
PICK UP & DELIVERY	MCCELLAN AFB, CA	51	0
PRECISION MEASUREMENT EQUIP LAB	HANSCOM AFB, MA	8	12
POSTAL SERVICE CENTER	ROBINS AFB, GA	0	2
POSTAL SERVICE CENTER	MCCELLAN AFB, CA	1	0
POSTAL SERVICE CENTER	TINKER AFB, OK	1	0
PROTECTIVE COATING	ELMENDORF AFB, AK	15	13
PROTECTIVE COATING	MCCELLAN AFB, CA	16	0
PROTECTIVE COATING	NORTON AFB, CA	12	3
PROTECTIVE COATING	TRAVIS AFB, CA	18	5
PROTECTIVE COATING	HICKAM AFB, HI	13	10
PROTECTIVE COATING	PATRICK AFB, FL	12	0
RANGE MAINT	HILL AFB, UT	28	0
REFUSE COLLECTION	EIELSON AFB, AK	7	0
COMMISSARY SHELF STOCK CUSTODIAL/WAREHOUSE	LOS ANGELES AFS, CA	18	0
SOFTWARE PROGRAMMING	RANDOLPH AFB, TX	0	10
TAPE LIBRARY	RANDOLPH AFB, TX	1	9
TRANSIENT AIRCRAFT MAINT	DOVER AFB, DE	19	44
TRANSIENT AIRCRAFT MAINT	HURLBURT FIELD, FL	0	5
TRANSIENT AIRCRAFT MAINT	POPE AFB, NC	2	11
TRANSIENT AIRCRAFT MAINT	MCGUIRE AFB, NJ	14	15
TRANSIENT AIRCRAFT MAINT	MCCHORD AFB, WA	21	12
TRANSIENT AIRCRAFT MAINT	WRIGHT-PATTERSON AFB, OH	25	3
TRANSIENT AIRCRAFT MAINT	GILA BEND, AZ	0	5
TRANSIENT AIRCRAFT MAINT	MOODY AFB, GA	7	0
TV ORDINANCE SCORING SYSTEM	MACDILL AFB, FL	0	18
UNDRGRAD PILOT TRAIN AIRCRAFT	LAUGHLIN AFB, TX	126	853
VEHICLE OPER & MAINT	HILL AFB, UT	177	0
VEHICLE OPER & MAINT	MCCELLAN AFB, CA	89	0
WATERCRAFT	HOMESTEAD AFB, FL	0	46
WEATHER SERVICES	MULTIPLE INSTALL	44	36
AUTO CMD/CONTROL EXEC SUPPORT SYS	OFFUTT AFB, NE	2	21
ADMIN SUPPORT/POSTAL SVC CTR	HANSCOM AFB, MA	4	9
ADMIN SWITCHBOARD	TRAVIS AFB, CA	16	0
ADMIN SUPPORT	LACKLAND AFB, TX	22	0
ADMIN SUPPORT	TRAVIS AFB, CA	7	0
ADMIN SUPPORT	HICKAM AFB, HI	15	0
AUDIOVISUAL	HOMESTEAD AFB, FL	4	5
AUDIOVISUAL	HILL AFB, UT	19	0
AUDIOVISUAL	MCCELLAN AFB, CA	19	0
BASE OPER SUPPORT	MINN/ST PAUL IAP MN	113	0
BASE OPER SUPPORT	GREATER PITTSBURGH, PA	99	0
BASE OPER SUPPORT	NIAGARA FALLS, NY	117	0
BASE OPER SUPPORT	CHICAGO O'HARE, IL	130	0
BASE OPER SUPPORT	NEWARK AFB, OH	96	0
BASE OPER SUPPORT	RICKENBACKER ANGB, OH	70	0
BASE OPER SUPPORT	OTIS ANGB, MA	67	0
BASE OPER SUPPORT	BUCKLEY ANGB, CO	83	0
BASE INFO TRANSFER CTR/POSTAL SVC	KELLY AFB, TX	17	0
BASE INFO TRANSFER CTR/POSTAL SVC	SHEPPARD AFB, TX	8	0
BOX MFG & LUMBER RECLAM	KELLY AFB, TX	21	0
BOX MFG & LUMBER RECLAM	TINKER AFB, OK	33	0
BOX MFG & LUMBER RECLAM	ROBINS AFB, GA	19	0
BOX MFG & LUMBER RECLAM	MCCELLAN AFB, CA	22	0
BOX MFG & LUMBER RECLAM	HILL AFB, UT	19	0
C-141 SIMULATOR MAINT	MULTIPLE INSTALL	45	121
CHAMBER OPER	BROOKS AFB, TX	2	7
CIVIL ENGINEER	OTIS ANGB, MA	87	0
CIVIL ENGINEER	BUCKLEY ANGB, CO	31	0
CIVIL ENGINEER	RICKENBACKER ANGB, OH	73	0



## AIR FORCE.—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989—Continued

COMMERCIAL ACTIVITY	LOCATION	FTE CIV	FTE MIL
COMMISSARY WAREHOUSE	MC GUIRE AFB, NJ	18	0
COMMISSARY WAREHOUSE	MULTIPLE INSTALL	21	0
COMMISSARY WAREHOUSE	LITTLE ROCK AFB, AR	12	0
COMMUNICATION FUNCTIONS	MINN/ST PAUL, MN	27	0

## NAVY.—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989

UNITS	COMMERCIAL ACTIVITY	LOCATION	FTE CIV	FTE MIL
ASO	BUILD/STRUC	PHILADELPHIA	101	0
BRHOSP	CUSTODIAL SERVICES	GULFPORT	4	0
COMNAVSEA	AUDIOVISUAL/VISUAL	WASHINGTON	7	0
SYS COM	INFO SERVICES	WASHINGTON	6	0
COMNAVSEA	ADMIN SUPPORT SERV	WASHINGTON	8	0
SYS COM	REFERENCE AND TECH	WASHINGTON	22	0
COMNAVSEA	LIBRARIES	WASHINGTON	198	0
SYS COM	INTERNAL MAIL	WASHINGTON	4	0
COMNAVSEA	MESSENGER SERVICES	POINT MAGU	1	0
SYS COM	BUILD/STRUC	BAYONNE	8	0
COMPACMIS	MOTOR POOL OPER	BAYONNE	12	84
TESTCEN	AUDIOVISUAL/VISUAL INFO SERVICES	OAKLAND	19	4
COMSCLANT	BASE SUPPLY OPER	CORRY STATION	1	0
COMSCLANT	TRAIN DEVICES	NEW ORLEANS	1	0
COMSPAC	SIMULATORS	NORFOLK	1	0
CRYP TRA	ADMIN SPT SERVICES	NORFOLK	79	0
TECHTRA	ADMIN SPT SERVICES	VIRGINIA BEACH	3	3
EPMAC	BUILD/STRUC	CHARLESTON	7	3
FASWTRA CENLANT	WORD PROCESS CENTER	NORFOLK	0	1
FASWTRA CENLANT	TRAINING DEVELOP	CHASN	10	131
FCTLAN	INTERNAL MAIL	MILLINGTON	1	0
FLEMINWARTRACEN	TRAINING DEVELOP	MILLINGTON	0	1
FLTRACEN	PRINT/REPRO	MILLINGTON	0	1
FMWTC	WORD PROCESSING CENTERS	DAM NECK	0	58
GEN SKILL TRA AMTG	TRAINING DEVICES SIMULATORS	NORFOLK	1	0
GEN SKILL TRA TTC	CUSTODIAL SERVICES	ALAMEDA	2	0
GUIDED MSL	BUILD/STRUC	BROOKLYN	1	0
GUIDED MSL	BUILD/STRUC	PORTLAND	1	0
N&MC	CUSTODIAL SERVICES	RICHMOND	1	0
N&MC	BUILD/STRUC	SAN BERNADINO	1	0
N&MC	CUSTODIAL SERVICES	TACOMA	29	0
N&MC	BUILD/STRUC	ANDREWS AFB, WASH	0	3
NAF	DATA TRANSCRIPTION	MAYPORT	13	0
NAF	CUSTODIAL SERVICES	ATLANTA	6	6
NAS	BASE SUPPLY OPER	ATLANTA	2	3
NAS	DATA PROCESS SERVICES	ATLANTA	30	0
NAS	BUILD/STRUC	ATLANTA	17	0
NAS	BASE SUPPLY OPER	BRUNSWICK	7	0
NAS	DATA TRANSCRIPTION	BRUNSWICK	29	26
NAS	BASE SUPPLY OPER	CHASE FIELD	144	5
NAS	BASE SUPPLY OPER	CORPUS CHRISTI	32	3
NAS	AIR COND/REF PLANTS	DALLAS	7	2
NAS	DATA PROCESS SERVICES	DALLAS	15	9
NAS	MOTOR VEHICLE OPER	GLENVIEW	42	9
NAS	BUILD/STRUC	GLENVIEW	3	0
NAS	PEST MGT	JACKSONVILLE	47	0
NAS	MOTOR VEH MAINT	JACKSONVILLE	27	0
NAS	MOTOR VEH MAINT	KEY WEST	14	0
NAS	DATA PROCESS SERVICES	KEY WEST	8	2
NAS	ADMIN SPT SERVICES	MEMPHIS	224	66
NAS	BUILD/STRUC	MIRAMAR	199	15
NAS	BUILD/STRUC	MOFFETT FIELD	2	4
NAS	TRAINING DEVICES	NEW ORLEANS	47	5
NAS	BUILD/STRUC	NEW ORLEANS	184	83
NAS	BASE SUPPLY OPER	NORTH ISLAND	49	14
NAS	AIR CONDIT/REF PLANTS	WEYMOUTH	8	2
NAS	DATA PROCESS SERVICES	WEYMOUTH	66	0
NAS	BUILD/STRUC	WILLOW GROVE	7	3
NATTC	BASE SUPPLY OPER	MILLINGTON	0	11
NATTC	ADMIN SPT SERVICES	MILLINGTON	108	0
NAVIAIR ENG CEN	HEATING PLANTS	LAKEHURST	13	3
NAVIAIR ENG CEN	AUDIOVISUAL/VISUAL	LAKEHURST	1	0
NAVIAIRES	TRNG DEVICES/AV EQUIP	SAN DIEGO	1	0
NAVIAIRES	CUSTODIAL SERVICES	SAN DIEGO	36	6
NAVIAIR TESTCEN	OTHER NONMANUFAC OPS	PATUXENT RIVER	89	0
NAVIAIR ICEN	BUILD/STRUC	INDIANAPOLIS		

## NAVY.—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989—Continued

UNITS	COMMERCIAL ACTIVITY	LOCATION	FTE CIV	FTE MIL
NAVAVN DEPOT	INDUSTRIAL PLANT EQUIP	ALAMEDA	15	0
NAVAVN DEPOT	MOTOR VEH OPER	ALAMEDA	52	0
NAVAVN DEPOT	BASE SUPPLY OPER	ALAMEDA	5	0
NAVAVN DEPOT	OTHER INSTALL SERVICES	ALAMEDA	1	0
NAVAVN DEPOT	ENGINEER & TECH SERV	ALAMEDA	2	0
NAVAVN DEPOT	INDUS PLANT EQUIP	CHERRY POINT	6	0
NAVAVN DEPOT	MOTOR VEH OPER	JACKSONVILLE	19	0
NAVAVN DEPOT	BASE SUPPLY OPER	JACKSONVILLE	27	0
NAVAVN DEPOT	BASE SUPPLY OPER	NORFOLK	8	0
NAVAVN DEPOT	AUDIOVISUAL/VISUAL INFO	NORFOLK	7	0
NAVAVN DEPOT	FINANCIAL/PAYROLL	PENSACOLA	8	0
NAVAVN DEPOT	MOTOR VEH OPER	PENSACOLA	10	0
NAVAVN DEPOT	BASE SUPPLY OPER	PENSACOLA	8	0
NAVAVN DEPOT	OTHER NONMANUFAC OPS	PENSACOLA	11	0
NAVAVN DEPOT	BASE SUPPLY OPER	SAN DIEGO	7	0
NAVAVN DEPOT	ADMIN SPT SERV	SAN DIEGO	9	0
NAVAVN DEPOT	OTHER PROO MANUF FAB IN HOUSE	SAN DIEGO	49	0
NAVAVN DEPOT	OTHER VEH OPS	PANAMA CITY	17	0
NAVAVN DEPOT	TELECOMMUNICATION CENTERS	PUGET SOUND	24	1
NAVAVN DEPOT	CUSTODIAL SERVICES	SAN DIEGO	6	0
NAVAVN DEPOT	OTHER INSTALL SERVICES	SAN DIEGO	5	0
NAVAVN DEPOT	ADMIN SPT SERVICES	STOCKTON	8	0
NAVAVN DEPOT	BUILD/STRUC	STOCKTON	77	0
NAVAVN DEPOT	MOTOR VEH OPER	CHELTHAM	4	0
NAVAVN DEPOT	GROUPS/SURFACED AREAS	CHELTHAM	3	0
NAVAVN DEPOT	AUDIOVISUAL	NORFOLK	71	42
NAVAVN DEPOT	DATA PROCESS SERVICES	NORFOLK	2	0
NAVAVN DEPOT	ADMIN TELEPHONE SVC	CENTERVILLE BEACH	11	40
NAVAVN DEPOT	DATA PROCESS SVC	CLEVELAND	107	17
NAVAVN DEPOT	REFERENCE AND TECH LIBRARIES	DAM NECK	5	3
NAVAVN DEPOT	BUILD/STRUC	BEAUFORT	34	0
NAVAVN DEPOT	DATA PROCESS SVC	BETHESDA	12	0
NAVAVN DEPOT	MATERIEL SVC	BREMERTON	12	0
NAVAVN DEPOT	CLINICS & DISPEN	BREMERTON	30	12
NAVAVN DEPOT	MOTOR VEH OPER	BREMERTON	2	0
NAVAVN DEPOT	SYS DESIGN/DEVELOP	BREMERTON	7	0
NAVAVN DEPOT	MEDICAL RECORDS TRANSCRIPTION	CAMP LEJUNE	7	0
NAVAVN DEPOT	DATA PROCESS SVC	CAMP LEJUNE	7	1
NAVAVN DEPOT	BUILD/STRUC	CAMP LEJUNE	54	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	CAMP LEJUNE	10	0
NAVAVN DEPOT	CUSTODIAL SERVICES	CAMP PENDLETON	50	2
NAVAVN DEPOT	MOTOR VEH OPER	CAMP PENDLETON	6	0
NAVAVN DEPOT	DATA PROCESS SVC	CAMP PENDLETON	12	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	CHARLESTON	8	0
NAVAVN DEPOT	DATA PROCESS SVC	CHARLESTON	8	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	CHERRY POINT	5	0
NAVAVN DEPOT	BUILD/STRUC	CHERRY POINT	4	0
NAVAVN DEPOT	DATA PROCESS SVC	CORPUS CHRISTI	4	0
NAVAVN DEPOT	SYS DESIGN/DEVELOP	GREAT LAKES	2	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	JACKSONVILLE	9	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	LEMOORE	1	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	LONG BEACH	17	0
NAVAVN DEPOT	CUSTODIAL SVC	LONG BEACH	43	0
NAVAVN DEPOT	MOTOR VEH OPER	LONG BEACH	18	0
NAVAVN DEPOT	DATA PROCESS SVC	LONG BEACH	0	2
NAVAVN DEPOT	CUSTODIAL SVC	MILLINGTON	19	0
NAVAVN DEPOT	DATA PROCESS SVC	MILLINGTON	6	0
NAVAVN DEPOT	SYS DESIGN/DEVELOP	MILLINGTON	3	0
NAVAVN DEPOT	NUTRITIONAL CARE	NEWPORT	22	2
NAVAVN DEPOT	DATA PROCESS SVC	NEWPORT	7	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	OAK HARBOR	5	3
NAVAVN DEPOT	MATERIEL SERVICES	OAKLAND	4	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	OAKLAND	20	19
NAVAVN DEPOT	MED RECORDS TRANSCRIP	ORLANDO	6	0
NAVAVN DEPOT	DATA PROCESS SERVICES	ORLANDO	5	0
NAVAVN DEPOT	CUSTODIAL SERVICES	ORLANDO	18	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	PENSACOLA	10	0
NAVAVN DEPOT	CUSTODIAL SERVICES	PENSACOLA	33	0
NAVAVN DEPOT	SYS DESIGN/DEVELOP	PENSACOLA	12	0
NAVAVN DEPOT	CLINICS AND DISPENSAR	PHILADELPHIA	33	3
NAVAVN DEPOT	MED RECORDS TRANSCRIP	PHILADELPHIA	8	0
NAVAVN DEPOT	DATA PROCESS SVC	PHILADELPHIA	9	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	PORTSMOUTH	23	0
NAVAVN DEPOT	NUTRITIONAL CARE	ROOSEVELT ROADS	21	3
NAVAVN DEPOT	MED RECORDS TRANSCRIP	ROOSEVELT ROADS	5	0
NAVAVN DEPOT	CUSTODIAL SVC	ROOSEVELT ROADS	8	0
NAVAVN DEPOT	MED RECORDS TRANSCRIP	SAN DIEGO	14	0
NAVAVN DEPOT	CUSTODIAL SVC	SAN DIEGO	81	0
NAVAVN DEPOT	MOTOR VEH OPER	SAN DIEGO	7	0
NAVAVN DEPOT	OPER OF ADP EQUIP	NORFOLK	16	14



## NAVY.—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989—Continued

UNITS	COMMERCIAL ACTIVITY	LOCATION	FTE CIV	FTE MIL
NAVMED ATASERVEN	SYS DESIGN/DEVELOP	BETHESDA	35	0
NAVMED CLINIC	FOUNDATIONS AND SURFACED AREAS	QUANTICO	2	0
NAVMED CLINIC	CLINICS AND DISPEN	SAN FRANCISCO	32	0
NAVMEDCOM	DATA PROCESS SVC	NORFOLK	27	0
NAVMEDCOM	OTHER MAINT/REP REAL PROPERTY	BETHESDA	189	4
NAVMEDCOM	MOTOR VEH OPER	OAKLAND	7	0
NAVMEDCOM	DATA PROCESS SVC	OAKLAND	22	0
NAVMEDCOM	DATA PROCESS SVC	JACKSONVILLE	13	0
NAVMEDCOM	DATA PROCESS SVC	SAN DIEGO	4	0
NAVOCEAN SYSCEN	OTHER TEST/MEAS DIAGNOSTIC EQUIP	SAN DIEGO	9	0
NAVOCEAN SYSCEN	INTERNAL MAIL MESSENGER SVC	SAN DIEGO	10	0
NAVORDSTA	DATA PROCESS SVC	LOUISVILLE	19	0
NAVPHI BASE	MOTOR VEH MAINT	LITTLE CREEK	85	0
NAVPHI BASE	BASE SUPPLY ORDER	LITTLE CREEK	22	0
NAVPHIB SCOL	TRAINING DEVELOP	LITTLE CREEK	2	9
NAVPHIB SCOL	INTERNAL MAIL MESSENGER SVC	LITTLE CREEK	37	1
NAVRES PERSCEN	MICROFILMING	NEW ORLEANS	6	0
NAVSCSCOL	TRAINING DEVEL SUPPORT	ATHENS	6	5
NAVSEC GRUACT	MESS HOUSEKEEPING	NORTHWEST CHESAPE	5	0
NAVSHIP	MOTOR VEH OPER	PORT HUENE	7	0
NAVSHIPYD	WATERWAYS	CHARLESTON	22	0
NAVSHIPYD	OTHER INSTALL SVC	LONG BEACH	4	0
NAVSHIPYD	CARE/REWAREHOUSE	LONG BEACH	8	0
NAVSHIPYD	OTHER ADP OPS	LONG BEACH	3	0
NAVSHIPYD	BUILD/STRUC	LONG BEACH	31	0
NAVSHIPYD	ELEC PLANTS	MARE ISLAND	3	0
NAVSHIPYD	CARE/REWAREHOUSE	MARE ISLAND	4	0
NAVSHIPYD	OTHER STORAGE	MARE ISLAND	4	0
NAVSHIPYD	BUILD/STRUC	MARE ISLAND	50	0
NAVSHIPYD	WATERWAYS	MARE ISLAND	4	0
NAVSHIPYD	STORAGE/WAREHOUSE	PEARL HARBOR	8	0
NAVSHIPYD	OTHER MAINT/REP REAL PROPERTY	PHILADELPHIA	55	0
NAVSTA	ADMIN TELEPHONE SVC	CHARLESTON	14	0
NAVSTA	BUILD/STRUC	MAYPORT	104	0
NAVSTA	BUILD/STRUC	NEW YORK	68	11
NAVSTA	OPER OF BULK LIQUID STORAGE	ROOSEVELT ROADS	19	0
NAVSUB	DATA PROCESS SVC	NEW LONDON	2	0
NAVSUB SCOL	ADMIN SPT SVC	GROTON	9	1
NAVSUB	TRAINING DEVICES	PEARL HARBOR	2	4
NAVSUB	TRAINING DEVICES	SAN DIEGO	0	10
NAVUP	STORAGE/WAREHOUSING	NEW ORLEANS	0	7
NAVSWC	MOTOR VEH OPER	DAHLGREN	162	5
NAVSWC	MAINT OF ADP EQUIP	DAHLGREN	8	0
NAVSWC	BUILD/STRUC	DAHLGREN	121	0
NAVSWC	PEST MGT	SILVER SPRING	1	0
NAVSWC	TELECOMMUNICATION	SILVER SPRING	5	1
NAVSWC	DATA PROCESS SVC	SILVER SPRING	9	0
NAVSWC	BUILD/STRUC	SILVER SPRING	104	0
NAVTRAGRU	ADMIN SPT SVC	MILLINGTON	3	3
NAVTRASTA	PEST MGT	ORLANDO	6	0
NAVUSEA	HEATING PLANTS	KEYPORT	7	0
NAVWARCOL	CUSTODIAL	NEWPORT	31	0
NETC	BUILD/STRUC	NEWPORT	219	0
NETPMSA	OPER OF ADP EQUIP	MEMPHIS	14	4
NETPMSA	BASE SUPPLY OPER	PENSACOLA	15	2
NRL	BUILD/STRUC	WASHINGTON	152	0
NSC	PACKING AND CRATING	CHARLESTON	76	1
NSC	OTHER STORAGE/WAREHOUSING	CHARLESTON	17	0
NSC	MOTOR VEH MAINT	NORFOLK	64	0
NSC	DATA TRANSCRIP	NORFOLK	4	0
NSC	BUILD/STRUC	NORFOLK	33	0
NSC	PRESERVATION AND PACKAGING	OAKLAND	147	0
NSC	MOTOR VEH OPER	PEARL HARBOR	12	0
NSC	PACKING AND CRATING	PEARL HARBOR	31	0
NSC	PACKING AND CRATING	PENSACOLA	52	0
NSC	PACKING AND CRATING	PUGET SOUND	43	0
NSC	PACKING AND CRATING	SAN DIEGO	119	0
NSC	OTHER STORAGE/WAREHOUSE	SAN DIEGO	10	0
NTC	AUDIOVISUAL	GREAT LAKES	5	9
NTCC	TELECOMMUNICATION	NORFOLK	23	0
SEASYSMD	CUSTODIAL SVC	RESERVE CENTER AVOCA	1	0
SFC WARF	CUSTODIAL SVC	RESERVE CENTER PERTH AMBOY	1	0
SFC WARF	BUILD/STRUC	RESERVE CENTER SEATTLE	1	0
SPCC	DATA PROCESS SVC	INDIAN HD	7	0
SUBASE	ADMIN SPT SVC	NEWPORT	6	12
SUBASE	TRAINING DEVELOP	CORONADO	4	2
SUBASE	OTHER MAINT/REAL PROPERTY	MECHANICSBURG	167	0
SUBASE	BASE SUPPLY OPER	KINGS BAY	5	0
SUBASE	MOTOR VEH OPER	NEW LONDON	47	0
SUBASE	BUILD/STRUC	NEW LONDON	104	0

## NAVY.—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989—Continued

UNITS	COMMERCIAL ACTIVITY	LOCATION	FTE CIV	FTE MIL
SUBBASE	ELECTRICAL PLANTS	BANGOR	48	6
SWOSCOL COM	TRAINING DEVELOP	NEWPORT	2	12
	ELECTRONIC AND COMM EQUIP	CHASE FIELD	50	127
	FLIGHT TRAINING	CHASE FIELD	5	0
	AUDIOVISUAL	CORPUS	10	44
	AIRCRAFT	KINGSVILLE	173	901
USNA	AUDIOVISUAL	MERIDIAN	0	6
USNS	MOTOR VEH OPER	ANNAPOLIS	48	0
USNS	WATER TRANS SVC	MERCURY AFR 10	31	0
USNS	TUG OPER	MOHAWK ATR 170	149	0
WPNSTA	AIR CONDIT/REF PLANTS	CHARLESTON	11	0
WPNSTA	BUILD/STRUC	CHARLESTON	21	0
WPNSTA	BASE SUPPLY OPER	EARLE	11	0
WPNSTA	MOTOR VEH OPER	SEAL BEACH	26	0
WPNSTA	DATA PROCESS SVC	YORKTOWN	27	0
WPNSTA	SYS DESIGN/DEVELOP	YORKTOWN	10	0
WPNSTA	BUILD/STRUC	YORKTOWN	195	0
TTC	TRAINING DEVELOP	MERIDIAN	0	6
NAVSTA	ADMIN TELEPHONE SVC	ROOSEVELT ROADS	17	1
NAVSTA	OPER OF ADP EQUIP	ROOSEVELT ROADS	12	8
NSC	PRESERVATION	NORFOLK	279	0

## DEFENSE LOGISTICS AGENCY—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989

Commercial Activity	FTE CIV	FTE MIL
Printing	2	0
Travel Office	2	0
Reproduction/Audiovisual SVC	16	0
Pub Dist Mail	14	0
Travel Office	1	0
Mail Messenger SVC	13	0
Box Assembly	6	0
Transportation	2	0
Install SPT SVC	91	0
Facil Maint	50	0
Audiovisual SVC	28	0
Audiovisual & Library	7	0
Motor Veh Oper	10	0
Mail Messenger	11	0
Base Supply	11	0
Install/Admin SPT SVC	13	0
Build/Struc	3	0
Install Supp Serv	32	0

## DEFENSE MAPPING AGENCY—LIST OF COST COMPARISONS THAT WILL BE COMPETED IN FY 1989

Commercial activity	FTE CIV
Insect and Rodent Ctrl	2
Insect and Rodent Ctrl	1
Custodial	53
Custodial	31
Motor Veh Oper	10
Motor Veh Oper	11
Audio Visual Produc	26
Mail/Messenger	5
Grounds	7
Grounds	6

[FR Doc. 88-29923 Filed 12-28-88; 8:45 am]

BILLING CODE 3110-01-M

## Office of Federal Procurement Policy Solicitation of Views; Federal Procurement Data System

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: Request for public comments regarding the review and evaluation of the Federal Procurement Data System (FPDS).

SUMMARY: The Office of Federal Procurement Policy Act, Pub. L. 93-400, as amended, 41 U.S.C. 401, specifies that the functions of the Administrator for Federal Procurement Policy shall include:

• • • providing for and directing the activities of the Federal Procurement Data System • • • in order to adequately • • • collect, develop, and disseminate procurement data;

This statutory requirement was first implemented in 1978 with the establishment of the FPDS which is operated by the General Services Administration. The data elements collected by the FPDS have been changed several times since 1978 in response to policy and legislation. The most recent changes were made in October 1988. A number of additional changes, however, have now been proposed (see Senate Report 100-424, page 18, July 8, 1988).

The Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. 100-679, requires that the Administrator for Federal Procurement Policy, in consultation with the Comptroller General, conduct a study and submit a report no later than April 1, 1989 to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of

Representatives with respect to (1) the extent to which the data collected by the FPDS are adequate for the management, oversight and evaluation of Federal Procurement; and (2) any appropriate recommendations for improvements of the FPDS.

DATE: Comments regarding the required study and any suggested changes to the FPDS must be received on or before January 20, 1989.

ADDRESS: Comments should be submitted to Mrs. Linda Williams, Office of Federal Procurement Policy, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Anyone wishing to obtain additional information regarding this request for comments should contact Mr. Charles W. Clark or Mrs. Linda Williams of the OFPP staff at (202) 395-8803.

Allan V. Burman,  
Deputy Administrator and Acting  
Administrator.

[FR Doc. 88-29928 Filed 12-28-88; 6:45 am]

BILLING CODE 3110-01-M

## OFFICE OF MANAGEMENT AND BUDGET

Office of Federal Procurement Policy  
SMALL BUSINESS ADMINISTRATION  
Interim Policy Directive

AGENCY: Office of Federal Procurement Policy (OFPP), Small Business Administration (SBA).

ACTION: Notice of interim policy directive.

SUMMARY: The OFPP and SBA are issuing, on an interim basis, a policy directive that implements Title VII of the



"Business Opportunity Development Reform Act of 1988", Pub. L. 100-656, which establishes the Small Business Competitiveness Demonstration Program.

**DATES:** Effective Date: January 1, 1989.

**COMMENT DATE:** Comments on the interim policy directive and the information collection requirements should be submitted to the addresses shown below on or before February 15, 1989, to be considered for formulation of the final policy directive.

**ADDRESSES:** Comments on the policy directive: Interested persons are invited to submit comments on the interim policy directive to: Allan Burman, Deputy Director and Acting Administrator, Office of Federal Procurement Policy 725 17th Street, NW.—Room 9001, Washington, DC 20418.

Comments on the information collections requirements contained in attachment A of the policy directive should be submitted both to the OFPP Administrator at the above address and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention: Desk Officer for the Federal Acquisition Regulation.

**FOR FURTHER INFORMATION CONTACT:** Karen Maris, Deputy Associate Administrator, (202) 395-3300; or William Coleman, Deputy Associate Administrator, (202) 395-3501.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

Section 15(a) of the Small Business Act mandates that small businesses achieve a fair share of Federal procurements. To achieve this goal, Subpart 19.5 of the Federal Acquisition Regulation (FAR) requires that Federal agencies reserve, or set aside, procurements for exclusive small business participation when two or more small businesses are capable of providing the goods or services at a reasonable price.

Title VII of the "Business Opportunity Development Reform Act of 1988", (Pub. L. 100-656), alters this requirement and seeks to test the effectiveness of eliminating set-asides in certain industries through the establishment of a new program, entitled the "Small Business Competitiveness Demonstration Program". The program has two primary objectives: (1) to demonstrate whether small business firms in certain industry groups can compete successfully on an unrestricted basis for Federal contracts; and (2) to demonstrate whether targeted goaling and management techniques can expand federal contract opportunities for small

business in industry categories where such opportunities historically have been low despite adequate numbers of small business contractors in the economy. OFPP and SBA have developed the following policy directive to implement this policy change.

##### **B. Regulatory Flexibility Act**

These interim procedures may have a significant economic impact on a substantial number of small businesses, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and an Initial Regulatory Flexibility Analysis is necessary. Each of the major elements of the Small Business Competitiveness Demonstration Program, as enacted and as proposed to be implemented, contains features intended either to directly result in increases in the small business share of Federal contract opportunities, or to ensure that the small business share of Federal contract opportunities, or to ensure that the small shares of contract opportunities are maintained at a significant level. However, data adequate for performance of an initial analysis will not be available until completion of the first quarterly review under the Program, which is to be completed by May 30, 1989. An initial analysis will be prepared based on this review and will be provided to the Chief Counsel for Advocacy, U.S. Small Business Administration. Notice of availability of the results of the first quarterly review and of the initial analysis will be published in the Federal Register. Comments are invited.

The Program seeks to demonstrate whether expanded use of full and open competition in the four designated industry groups adversely affects small business participation in those industry groups. This element of the Program contains two protective features to ensure that any possible adverse impacts on small business participation in these industry groups are limited. First, the Program sets a small business participation goal of 40 percent in each of these groups. Second, the Program sets a goal for participation by emerging small businesses of 15 percent in each of these groups. For example, in Fiscal Year 1987, the overall total small business share of Federal contract dollars in actions over \$25,000 in construction was approximately 51 percent. The overall emerging small business share of award dollars in construction is presently unknown, but is likely to be somewhat in excess of 15 percent. The first quarterly review under the Program will provide baseline data to be used in performing an initial

analysis of the likely effects of these provisions in the designated industry categories.

Also, the Program directs each of the participating agencies to identify ten procurement categories that represent products and services purchased in substantial quantities by the agency that historically have had a small business participation rate of less than 10 percent by category, and in which there is a significant amount of small business productive capacity that has not been utilized by the Government. Each agency, in consultation with the SBA, will develop a plan for expanding small business participation in these categories. Successful implementation of this aspect of the program would have a significant beneficial impact on a substantial number of small businesses. The first quarterly review under the program will also provide baseline data to be used in performing the initial analysis of this portion of the program.

##### **C. Executive Order 12291**

For the purposes of E.O. 12291, OFPP and SBA have determined that this interim policy directive is a major rule because it will have an annual effect on the economy of \$100 million or more. In FY 1987, the total amount of Federal contract dollars set-aside for small businesses in the four designated industries groups affected by this directive was approximately \$6.9 billion. We assume that the figures will be comparable for FY 1989. Most of these contracts will not longer be set aside for small businesses. This is expected to have a substantial impact on the small businesses in the four designated industry groups; however, the net effect on the economy is expected to be positive due to the increased level of competition for Federal contracts, by all sizes of firms, and the resulting reduction in Federal contract costs. This estimate does not include the portion of the program covering the ten industries categories. Since each agency will have the discretion to select the ten industry categories it will target, estimates of the economic impact for this portion of the program cannot be developed here and instead must be developed by the respective agencies.

The statutory deadline for implementation of January 1, 1989 and the lack of available economic data will not allow us to publish a regulatory analysis at this time. We, therefore, requested and received from OMB a waiver from the requirements of section 3 of E.O. No. 12291 regarding the preparation and consideration of a Regulatory Impact Analysis at this time. We will publish in the Federal Register a

notice of availability of the results of the regulatory analysis upon its completion.

##### **D. Paperwork Reduction Act**

The statutory deadline does not allow OFPP and SBA to solicit and consider public comments prior to implementation of the Demonstration Program. Therefore, the reporting requirements of attachment A of the policy directive have been submitted for expedited approval to the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). The information collection requirements are essential to the program's operations and must be approved prior to January 1, 1989. OFPP and SBA have requested OMB's approval of the information collection requirements not later than December 30, 1988. When the final policy directive is published, it will contain the approval numbers for these sections.

##### **List of Subjects**

Government procurement, Small business procurement.

Allan V. Burman,

Deputy Administrator and Acting Administrator, Office of Federal Procurement Policy.

December 22, 1988.

Memorandum For: The Secretary of Agriculture; The Secretary of Defense; The Secretary of Energy; The Secretary of Health and Human Services; The Secretary of Transportation; The Administrator of the Environmental Protection Agency; The Administrator of the General Services; The Administrator of the National Aeronautics and Space Administration; The Administrator of the Veterans Administration.

Subject: The Small Business Competitiveness Demonstration Program.

**1. Purpose.** This memorandum provides policy direction to the participating agencies for implementation of Title VII of the "Business Opportunity Development Reform Act of 1988", Pub. L. 100-656, that establishes the Small Business Competitiveness Demonstration Program.

**2. Authority.** This memorandum is issued pursuant to Sec. 715 of Pub. L. 100-656 which requires that the Office of Federal Procurement Policy (OFPP) and the Small Business Administration (SBA) issue a policy directive to ensure consistent government-wide implementation of Title VII in the Federal Acquisition Regulation (FAR).

**3. Background.** Section 15(a) of the Small Business Act mandates that small businesses receive a fair proportion of Federal procurements. To achieve this goal Subpart 19.5 of the FAR requires that Federal agencies reserve, or set

aside, procurements for exclusive small business participation when a contracting officer determines that two or more small businesses are capable of providing the goods or services at reasonable prices. While restricting procurements for exclusive small business participation has been very effective in assuring a small business share of Federal contracts, one unintended result is a concentration of awards in certain industries often dominated by small businesses. A further result is that agencies expend resources in those industries that are conducive to high levels of small business participation rather than expand the base of small business contracting not traditionally obtain a significant share of procurement awards.

**4. Policy.** The Small Business Competitiveness Demonstration Program is designed to provide for enhanced goals for small businesses in certain industry groups and to expand small business participation in a broader range of industry categories. The program is to be conducted under the authority of section 15 of the Office of Federal Procurement Policy Act which provides for the test of unique and innovative procurement procedures and techniques. The goal of the program is to test the ability of small businesses in certain designated industry groups to retain a fair proportion of procurement awards in unrestricted competition in those industry groups. The Act designates the SBA to act as the executive agent for OFPP in conducting the test. The procedures for implementing the test required by the Small Business Competitiveness Demonstration Program are set forth in the attached test plan.

**5. Implementation.** The participating agencies are required to implement the Small Business Competitiveness Demonstration Program and test set forth in this policy directive and the attached test plan commencing on January 1, 1989. This policy directive shall be implemented in the FAR. Such implementation shall be by a reference to this policy directive and the attached test plan which will be included in FAR Part 19. Pursuant to sec. 714(a) of Pub. L. 100-656, provisions of the FAR that are inconsistent with this policy directive and the attached test plan are hereby waived.

**6. Expiration Date.** The Small Business Competitiveness

Demonstration Program and this policy will expire on December 31, 1992.

Allan V. Burman,

Deputy Administrator and Acting Administrator, Office of Federal Procurement Policy.

Monika Edwards Harrison,

Associate Administrator for Procurement Assistance, Small Business Administration.

#### **Small Business Competitiveness Demonstration Program Test Plan**

##### **I. Purpose**

This document implements Title VII of the "Business Opportunity Development Reform Act of 1988," which establishes the Small Business Competitiveness Demonstration Program (the Program). There are three primary purposes for this Program. First, the Program seeks to demonstrate whether the competitive capabilities of small business firms in certain industry groups will enable them to successfully compete on an unrestricted basis for Federal contracts. Second, the Program attempts to demonstrate whether the use of targeted goaling and management techniques by procuring agencies, in conjunction with the Small Business Administration (SBA), will expand small business participation in Federal contracting opportunities that have been historically low despite adequate numbers of qualified small business contractors in the economy. Finally, the Program seeks to demonstrate whether expanded use of full and open competition adversely affects small business participation in certain industry groups, taking into consideration the numerical dominance of small firms, the size and scope of most contracting opportunities, and the competitive capabilities of small firms.

##### **II. Authority**

The Program is established pursuant to Title VII of the Business Opportunity Development Reform Act of 1988 (Pub. L. 100-656) and Section 15 of the Office of Federal Procurement Policy Act, 41 U.S.C. 413, which provides for the testing of innovative procurement methods and procedures.

##### **III. Program Requirements**

###### **A. Applicability**

1. The Program shall be conducted over a period of four (4) years, from January 1, 1989, through December 31, 1992. The Program will consist of two major components: (1) Four Designated Industry Groups, which test unrestricted competition, and (2) ten Targeted Industry Categories, which test enhanced small business participation. Solicitations issued from January 1, 1989



through December 31, 1992 are covered by this Program.

2. Contract awards in the following designated industry groups are covered by this Program:

a. Construction under standard industrial classification (SIC) codes that comprise major groups 15, 16, and 17 (excluding dredging—Federal Procurement Data System (FPDS) service codes Y216 and Z216);

b. Refuse systems and related services under SIC codes 4212 or 4953, limited to FPDS service code S205;

c. Architectural and engineering (A&E) services (including surveying and mapping) under SIC codes 7389, 8711, 8712, or 8713 (limited to FPDS service codes C111 through C219, T002, T004, T008, T009, T014, and R404); and

d. Non-nuclear ship repair. (Currently, non-nuclear ship repair is not individually segmented from the shipbuilding and repair industry. However, SBA will segment the industry to clearly identify nuclear and non-nuclear ship repair, and will publish such segmentation. OFPP will provide an appropriate FPDS service code.)

3. Targeted industry categories for enhanced participation will be determined by each participating agency, in conjunction with the SBA.

4. Contract awards under the Federal Schedule Program are not covered by the Program.

#### B. Participating Agencies

The following agencies are participants in the Program:

1. The Department of Agriculture.
2. The Department of Defense, except the Defense Mapping Agency.
3. The Department of Energy.
4. The Department of Health and Human Services.
5. The Department of Health and Human Services.
6. The Department of Transportation.
7. The Environmental Protection Agency.
8. The General Services Administration.
9. The National Aeronautics and Space Administration, and
10. The Veterans' Administration.

#### C. Agency Goals for the Four Designated Industry Groups

1. Each participating agency shall have a small business participation goal that is 40 percent of the agency's total contract dollars awarded for each of the four designated industry groups. In addition, each participating agency must make a good faith effort to assure that emerging small businesses receive not less than 15 percent of the agency's total

contract dollars awarded for each of the four designated industry groups.

2. The Business Opportunity Development Reform Act of 1988 defines an emerging small business as one whose size is no greater than 50 percent of the numerical size standard applicable to the SIC Code assigned to the procurement. Subject to the requirements of paragraph D.3 below, contract opportunities in the four designated industry groups, which have an estimated award value equal to or less than the reserve amount established for emerging small businesses, are reserved for such businesses.

3. Contract awards made to fulfill the 15 percent goal for emerging small businesses also count toward attainment of the 40 percent goal. All prime contract awards to small businesses, including awards under section 8(a) of the Small Business Act, section 1207 of the FY 87 National Defense Authorization Act, and sole source awards, count toward attainment of goals.

#### D. Procurement Procedures for the Four Designated Industry Groups

Participating agencies shall use the following procedures for procurements in the four designated industry groups.

1. Full and Open Competition for Contracts in Excess of the Emerging Small Business Reserve Amount.

Subject to the requirements of the Competition in Contracting Act of 1984, participating agencies are required to use full and open competition for all solicitations issued on or after January 1, 1989, in the four designated industry groups, if the anticipated award value exceeds the dollar amount reserved for emerging small businesses (unless the procurement is placed under section 8(a) of the Small Business Act or set aside under Section 1207 of the FY 87 National Defense Authorization Act). Each participating agency shall continue to use full and open competition as long as quarterly reviews show that the agency's 40 percent goals are being attained. The continued use of full and open competition is not affected by an agency's failure to meet its 15 percent award goals for emerging small businesses.

2. Restricted Competition for Contracts in Excess of the Emerging Small Business Reserve Amount.

a. If any participating agency's quarterly review of its awards to small businesses in the four designated industry groups shows that the agency has failed to attain its 40 percent goals for any of the groups, subsequent contracting opportunities, in excess of the amount reserved for emerging small

businesses, shall be solicited through competition restricted to eligible small businesses to the extent necessary for the agency to attain its goals for that industry. Such solicitations (unless placed under section 8(a) of the Small Business Act or set aside under section 1207 of the FY 87 National Defense Authorization Act) shall be in accordance with section 15(a) of the Small Business Act and Subpart 19.5 of the Federal Acquisition Regulation (FAR).

b. Agencies shall be responsible for determining the extent to which restricted competition shall be employed in order to attain their small business participation goals; successive failures to meet small business participation goals warrant more aggressive measures. (For example, if any agency only misses a goal by five percent, the agency may conclude that it can attain its goal by restricting competition for a portion of its procurements, rather than all of them. Agencies are expected to exercise this discretion judiciously, and make appropriate adjustments if they miss their goal again.) Agencies shall return to the use of full and open competition upon determining that their contract awards to small business concerns meet the required goals.

c. Modifications to agency solicitation practices (instituting restricted competition and reinstituting full and open competition) shall be made as soon as practicable, but no later than the beginning of the quarter following completion of the review indicating the need for such change.

3. Reserve Program for Emerging Small Businesses.

a. The emerging small business reserve amount is \$25,000, or such higher amount as OFPP sets in the event that emerging small business concerns are not receiving 15 percent of the total dollar value of contract awards in one or more of the four designated industry groups. Any required adjustments to the emerging small business reserve amount will be made semi-annually by industry group.

b. Competition for all contract opportunities in the four designated industry groups with an estimated award value that is equal to or less than the emerging small business reserve amount shall be restricted to emerging small businesses, provided that the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible emerging small businesses that will be competitive in terms of market price, quality, and delivery. If no such reasonable expectation exists,

requirements will be processed in accordance with FAR Subpart 13.105 or in accordance with FAR Subpart 19.5 or 19.8. However, if no such reasonable expectation exists where OFPP has raised the small business reserve amount to a level over \$25,000, requirements over \$25,000 will be processed in accordance with paragraphs D.1 and D.2, above.

c. The use of small purchase procedures is not required under the reserve program; any competitive source selection method may be used. The reserve program applies only to new awards within the emerging small business reserve threshold. Modifications within the scope of work of contracts having an initial award value in excess of the emerging small business reserve amount are not subject to the reserve program.

#### 4. Solicitation Provisions for Procurements in the Four Designated Industry Groups.

a. The provision set forth in Attachment A entitled "Small Business Concern Representation For The Small Business Competitiveness Demonstration Program (NOV 1988)" shall be inserted in full text in all solicitations issued by the participating agencies under the Small Business Competitiveness Demonstration Program for the four designated industry groups.

b. The clause set forth in Attachment A entitled "Notice of Emerging Small Business Set-Aside" shall be inserted in full text in all solicitations and resulting contracts restricted to emerging small businesses pursuant to paragraph III.D.3.

c. Each Solicitation under the Program that utilizes small purchase procedures shall include the applicable SIC code and size standard for the procurement. The exception for small purchases in FAR subpart 19.303(a) is hereby waived for the Program.

d. The face of each award issued by a participating agency under the Small Business Competitiveness Demonstration Program for the four designated industry groups shall contain a statement that the award is being issued pursuant to such Program.

#### E. Agency Programs For Targeted Industry Categories With Limited Small Business Participation

1. Each participating agency is required to select ten industry categories (four-digit SIC Code or some segmented portion(s) of such code(s), as identified by FPDS product or service code) as targeted categories for expansion of small business participation.

2. In order to achieve such expanded participation, agencies shall select

categories that represent products and services purchased in substantial quantities by the agency; that historically have had a small business participation rate of less than 10 percent by category; and, in which there is a significant amount of small business productive capacity that has not been utilized by the Government.

3. Each participating agency shall consult with the Administrator of SBA in selecting the ten targeted categories, developing the plan for expanded small business participation, and establishing the goals for the Program. Upon completion of their consultation with SBA, participating agencies shall publish in the Federal Register, an announcement soliciting public comment on that agency's program for expansion of small business participation in the targeted categories.

4. Each plan shall be submitted to the Administrator of SBA and shall contain a detailed time-phased strategy with incremental goals, including reporting on goal attainment. To the extent practicable, provisions that encourage and promote teaming and joint ventures shall be included. These provisions should permit small business firms to effectively compete for contracts that individual small businesses would be ineligible to compete for because of lack of production capacity or capability. Such joint ventures or teams shall comply with the applicable small business guidelines. (See 13 CFR § 121.3(a)(vii)(C) and 121.5(a)).

5. Participating agencies shall report on the results of the expansion program regarding the ten targeted categories on the same quarterly schedule as required for the four designated industry groups.

6. Goal attainment for the ten targeted industry categories shall be determined on the basis of awards to U.S. business firms.

7. The provision set forth in Attachment A entitled "Small Business Size Representation For Targeted Industry Categories Under The Small Business Competitiveness Demonstration Program (NOV 1988)" shall be inserted in full text in any solicitation issued in each of the ten targeted industry categories under the Small Business Competitiveness Demonstration Program that is expected to result in a contract award in excess of \$25,000.

8. The face of each award issued in any of ten targeted industry categories under the Small Business Competitiveness Demonstration Program shall contain a statement that the award is being issued pursuant to such Program.

#### IV. Monitoring and Reporting for Four Designated Industry Groups

A. Monitoring of Goals for the Four Designated Industry Groups

1. Each participating agency shall monitor its attainment of its small business participation goals on a quarterly basis. Written reports must be made to OFPP and SBA as to whether goals have been attained for each industry group, as specified in paragraph IV.A.3. below. The Department of Defense shall submit a report that separately identifies performance by the Army, Air Force, Navy and the Defense Agencies. The report submitted by the General Services Administration shall separately identify performance by the Public Building Service. Reports shall be submitted within 60 days after the end of each quarter.

2. Agencies shall monitor their goal attainment for the first three quarters based on aggregate data for the following time periods:

a. First quarterly review: 1/1/89-3/31/89.

b. Second quarterly review: 1/1/89-6/30/89.

c. Third quarterly review: 1/1/89-9/30/89.

Thereafter, monitoring is to be based on aggregate data for the four preceding quarters.

3. Attainment of goals for the four designated industry groups will be monitored by each participating agency based on awards in the individual codes comprising the industry, as goals (instituting restricted competition or reinstituting full and open competition) will be accomplished by adjusting each of the industry groups as follows:

- a. Construction (excluding dredging)—
  - i. Major Group 15.
  - ii. Major Group 16.
  - iii. Major Group 17.
- b. Refuse Systems and related services.

c. Architectural and engineering services (including surveying and mapping).

d. Non-nuclear ship repair.

4. Agencies shall monitor goal attainment in the four designated industry groups by reviewing total prime contract award dollars to (a) all U.S. business firms (b) small U.S. business concerns and (c) emerging small U.S. business concerns.

5. OFPP and SBA will closely monitor the Program using data from the FPDS to ensure that each participating agency makes a consistent effort to achieve goals evenly across all individual codes that comprise a designated industry



group. Data shall be retrieved in the format set forth at Attachment B. In the event that goal achievement for any individual code falls below 35 percent, the agency will be required to reinstitute set-asides for the individual code, even if overall goal achievement in the industry group is 40 percent or more.

6. All prime contract awards to small businesses, including awards under section 8(a) of the Small Business Act, Section 1207 of the FY 87 National Defense Authorization Act, and sole source awards, count toward attainment of goals.

#### B. Codes for Monitoring and Reporting Goal Attainment For The Four Designated Industry Groups

##### 1. Refuse and Related Systems.

The Business Opportunity Development Reform Act of 1988 outlines the SICs that are included in the designated industry groups. However, in the area of refuse systems and related services, SICs 4212.

##### 1. Refuse and Related Systems.

The Business Opportunity Development Reform Act of 1988 outlines the SICs that are included in the designated industry groups. However, in the area of refuse systems and related services, SICs 4212 and 4953 include services that should not be included in the Program. The Program is designed to test small firms' competitiveness generally in procurements for the collection, transportation, and disposal of residential and nonhazardous commercial garbage, refuse and waste materials. For example, contracts for the regular collection and disposal at publicly or privately operated landfills of residential and nonhazardous commercial solid waste, garbage, debris, or other refuse from military installations, federal office buildings, and other federal facilities, and garbage processing and recycling activities, should be included. Contracts for the operation of those facilities, collection and disposal of acid, radioactive, or other hazardous waste should not be included. Therefore, participating agencies shall use FPDS service code S205 (trash/garbage collection services) to monitor goal attainment for refuse systems and related services.

##### 2. Architectural and Engineering Services.

a. The statute designates SICs 8711, 8712, 8713, and 7389 (if identified as mapping), as the codes for tracking architectural and engineering services, which includes surveying and mapping. Since SIC 7389 includes many more services than mapping, participating agencies shall use the following FPDS

service codes to monitor goal attainment for mapping services:

C217 Mapping Incidental to A&E services  
T002 Cartography services  
T004 Charting services  
T008 Photogrammetry services  
T009 Aerial photographic services  
T014 Topography services

b. Participating agencies shall use the following FPDS services codes to monitor A&E services under SICs 8711 and 8712:

C111 Administrative and Service Buildings  
C112 Airfield, Communication and Missile Facilities  
C113 Educational Buildings  
C114 Hospital Buildings  
C115 Industrial Buildings  
C116 Residential Buildings  
C117 Warehouse Buildings  
C118 Research and Development Facilities  
C119 Other Buildings  
C121 Conservation and Development  
C122 Highways, Roads, Streets and Bridges

C123 Electric Power Generation (EPG)  
C124 Utilities  
C129 Other Non-Building Structures  
C130 Restoration  
C211 Architect-Engineer Services (non-construction)  
C212 Engineering Drafting Services  
C213 A&E Inspection Services (non-construction)  
C214 A&E Management Engineering Services  
C215 A&E Production Engineering Services

C216 Marine Architect-Engineering Services  
C219 Other Architect and Engineering Services

c. Since SIC 8713 includes all surveying, participating agencies shall identify surveying by using FPDS code C218 (surveying incidental to A&E services) or R404 (land surveys, cadastral services—non-construction).

3. Non-nuclear Ship Repair.  
Goal attainment for non-nuclear ship repair shall be monitored using an appropriate FPDS service code to be provided by OFPP.

##### 4. Construction.

Goal attainment for construction shall be monitored through the use of the SIC codes identified in Attachment B.

#### V. Data Collection Requirements

Participating agencies shall maintain and report procurement data to the FPDS in order to determine the level of small business participation in the four designated industry groups and the ten targeted industry categories for the small business expansion program.

#### A. Awards in Excess of \$25,000

For contract awards in excess of \$25,000, the FPDS (1) has information on the SIC code of the procurement and (2) can distinguish awards to small business concerns. However, the FPDS reporting requirements are being revised to:

1. Distinguish awards resulting from solicitations issued under the Program from awards resulting from solicitations issued prior to January 1, 1989, in the four designated industry groups. A distinction must be made between contract actions awarded from solicitations issued under the Program and contract actions awarded from solicitations issued prior to January 1, 1989.

2. Distinguish emerging small business firms from other small businesses. Participating agencies must make a good faith effort to award not less than 15 percent of the dollar value of awards in the four designated industry groups to emerging small businesses.

3. Distinguish awards to emerging small business firms in the small business reserve program. Participating agencies must reserve for exclusive competition among emerging small business concerns all contracts of \$25,000 or less in the four designated industry groups or a greater amount set by OFPP if the 15 percent goal is not attained. Emerging small businesses can also receive awards above the small business reserve threshold.

4. Provide the size of the small business concern in terms of number of employees or dollar volume of sales for awards in the four designated industry groups and the ten targeted industry categories. Section 714(c) of the Business Opportunity Development Reform Act of 1988 requires each participating agency to collect data pertaining to the size of the small business concern receiving any award for services in the four designated industry groups and products or services in the ten targeted industry categories.

5. The number of employees will be based on the average of the pay periods for the last twelve months. The volume of sales will be based on the average annual gross revenue for the last three fiscal years (See FAR 19.101).

6. Specific details outlining the FPDS changes will be included in an amendment to the October 1988 FPDS Reporting Manual.

#### B. Awards of \$25,000 or Less

During the term of the Program, each award of \$25,000 or less made by a participating agency for the procurement

of a service in the four designated industry groups shall be reported to the Federal Procurement Data Center in the same manner as if the award was in excess of \$25,000. This means that all applicable data collected in the FPDS via the Individual Contract Action Report (SF 279), or agencies' equivalent computer-generated format, shall be reported for these purchases. It should be noted that awards of \$500 or less are not reportable to the FPDS.

#### C. Subcontracting Activity

1. The OFPP Administrator must devise and implement, during the Program, a simplified system to test the collection, reporting, and monitoring of data on subcontract awards to small business concerns and small disadvantaged business concerns for services in the four designated industry groups and products or services in the ten targeted industry categories. The Test Subcontracting Reporting System must, even if limited to only a small number of buying activities or products or services, effectively capture the full range of small businesses participation at all tiers.

2. The simplified system should be implemented the beginning of FY 1990 (October 1989). OFPP will be working with officials from participating agencies' Small and Disadvantaged Business Utilization Office to develop the requirements for the simplified subcontracting system.

#### Attachment A—Clause No. 1

Insert the following provision (clause no. 1) in full text in all solicitations issued by the participating agencies under the Small Business Competitiveness Demonstration Program for the four designated industry groups. Insert this clause as Alternate 1 in addition to the clause at FAR 52.219-1.

*Small Business Concern Representation for the Small Business Competitiveness Demonstration Program (Dec. 1988)*

(a) *Definition.* "Emerging small business", as used in this solicitation,

means a small business concern whose size is no greater than 50 percent of the numerical size standard applicable to the standard industrial classification code assigned to a contracting opportunity.

(b) (Complete only if Offeror has certified itself under the clause at FAR 52.219-1 as a small business concern under the size standards of this solicitation.)

The Offeror represents and certifies as part of its offer that it — is, — is not an emerging small business.

(c) (Complete only if the Offeror is a small business or an emerging small business, indicating its size range.)

Offeror's number of employees for the past twelve months or Offeror's average annual gross revenue for the last three fiscal years. (Check one of the following.)

#### No. of Employees

— 50 or fewer  
— 51-100  
— 101-250  
— 251-500  
— 501-750  
— 751-1,000  
— over 1,000

#### Ave. annual gross revenues

— \$1 million or less  
— \$1,000,001-\$2 million  
— \$2,000,001-\$3.5 million  
— \$3,500,001-\$5 million  
— \$5,000,001-\$10 million  
— \$10,000,001-\$17 million  
— Over \$17 million

#### Clause No. 2

A. Insert the following provision (clause no. 2) in full text in all solicitations and resulting contracts restricted to emerging small businesses pursuant to paragraph III.D.3.

*Notice of Emerging Small Business Set-Aside (Dec 1988)*

Offers or quotations under this acquisition are solicited from emerging small business concerns only. Offers that are not from an emerging small business shall not be considered and shall be rejected.

B. When using other than small purchase procedures, insert the clause at 52.219-14 in all solicitations and resulting contracts restricted to emerging small businesses.

#### Clause No. 3

Insert the following provision (clause no. 3) in full text in all solicitations issued in each of the ten targeted industry categories under the Small Business Competitiveness Demonstration Program that is expected to result in a contract award in excess of \$25,000. Insert this clause as Alternate II in addition to the clause at FAR 52.219-1.

*Small Business Size Representation for Targeted Industry Categories Under the Small Business Competitiveness Demonstration Program (Dec 1988)*

(Complete only if the Offeror has certified itself under the clause at FAR 52.219-1 to be a small business concern under the size standards of this solicitation.)

Offeror represents and certifies as follows:

Offeror's number of employees for the past twelve months or Offeror's average annual gross revenue for the last three fiscal years. (Check one of the following.)

#### No. of employees

— 50 or fewer  
— 51-100  
— 101-250  
— 251-500  
— 501-750  
— 751-1,000  
— over 1,000

#### Ave. annual gross revenues

— \$1 million or less  
— \$1,000,001-\$2 million  
— \$2,000,001-\$3.5 million  
— \$3,500,001-\$5 million  
— \$5,000,001-\$10 million  
— \$10,000,001-\$17 million  
— Over \$17 million

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## Attachment B

## REPORT ON SMALL BUSINESS PARTICIPATION UNDER THE SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM FOR DESIGNATED INDUSTRY GROUPS

(Fiscal Year — Quarter —)

Designated groups	Total U.S. business actions/dollars	Small business actions/dollars*	Percentage of dollars	Emerging small business actions/dollars	Percentage of dollars
Agency:					
Subagency (if applicable):					
I. Construction (excluding dredging):					
SIC Group 15:					
1521					
1522					
1531					
1541					
1542					
SIC Group 16:					
1611					
1622					
1623					
1629					
SIC Group 17:					
1711					
1721					
1731					
1741					
1742					
1743					
1751					
1752					
1761					
1771					
1781					
1791					
1793					
1794					
1795					
1796					
1799					
II. Refuse Systems and Related Services:					
PSC S205					
SIC 7389:					
PSC C217					
PSC T002					
PSC T004					
PSC T008					
PSC T009					
PSC T014					
SIC 8711 or SIC 8712:					
PSC C111					
PSC C112					
PSC C113					
PSC C114					
PSC C115					
PSC C116					
PSC C117					
PSC C118					
PSC C119					
PSC C121					
PSC C122					
PSC C123					
PSC C124					
PSC C129					
PSC C130					
PSC C211					
PSC C212					
PSC C213					
PSC C214					
PSC C215					
PSC C216					
PSC C219					
SIC 8713:					
PSC C218					
PSC R404					
IV. Non-nuclear Ship Repair					

\*Small business dollars include dollars to emerging small businesses.

(FR Doc. 88-29989 Filed 12-28-88; 8:45 am)

BILLING CODE 3110-01-M

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

## Implementation of Modifications in Specialty Steel Import Relief

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

**SUMMARY:** This notice converts to the Harmonized System product definitions for imports of certain specialty steel subject to increased tariffs or quotas and makes modifications to the Harmonized Tariff schedule of the United States to implement such conversion.

EFFECTIVE DATE: January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Robert Cassidy, Office of the United States Trade Representative, (202) 395-4510 or Michael Rollin, Office of Agreements Compliance, Import Administration, Department of Commerce, (202) 377-4037.

**SUPPLEMENTARY INFORMATION:** Presidential Proclamation 5679 of July 16, 1987 (58 FR 27308) provided for the temporary imposition of increased tariffs and quantitative restrictions on certain stainless steel and alloy tool steel imported into the United States, pursuant to section 203 of the Trade Act of 1974. Proclamation 5679 authorizes the U.S. Trade Representative to take such actions and perform such functions for the United States as may be necessary to administer and implement the relief, including negotiating orderly marketing agreements and allocating quota quantities on a country-by-country basis. The U.S. Trade Representative is also authorized to make modifications in the TSUS headnote of items proclaimed by the President in order to implement such actions.

On January 1, 1989, the TSUS will be replaced by the Harmonized Tariff Schedule of the United States (HTS). Accordingly, the U.S. Trade Representative has determined that the following revisions to Chapter 99, subchapter III, of the HTS are required for continued implementation of Proclamation 5679 after December 31, 1988.

Replace the entire text of U.S. note 4(a)(ii) with the following:

The term "razor blade steel of the type described in U.S. note 4(a)(ii) to this subchapter" refers to products of stainless steel of the type described in U.S. note 4(a)(ix) to this subchapter, which are flat rolled, not over 0.254mm in thickness and not over 2.286cm in width—and, when cold rolled, are over 1.27cm in width—contain by weight not less than 11.5 percent, and not

over 14.7 percent chromium, and are certified at the time of entry to be used in the manufacture of razor blades. The terms "concrete reinforcing bars and rods," "chipper knife steel" and "ball bearing steel" are defined as provided in additional U.S. notes 1(c), 1(f) and 1(h), respectively, the chapter 72:

Replace the entire text of U.S. note 4(a)(vi) with the following:

The term "flapper valve steel" refers products of stainless steel of the type described in U.S. note 4(a)(ix) to this subchapter, which are flat rolled, not over 1.27mm in thickness and not over 30.48 cm in width—and, when cold rolled, are over 1.27cm in width—and are certified by the importer of record or the ultimate consignee at the time of entry for use in the manufacture of stainless steel flapper valves for compressors;

Replace the entire text of U.S. note 4(a)(vii) with the following:

The term "rotor steel for hysteresis motors" refers to products of tool steel of the type described in U.S. note 4(a)(xi) to this subchapter, which are flat rolled, not over 1.27mm in thickness and not over 30.48cm in width—and, when cold rolled, are over 1.27cm in width—contain by weight not less than 0.5 percent carbon and not less than 5.5 percent tungsten, and are certified by the importer of record or the ultimate consignee at the time of entry for use in the manufacture of rotor rings or cups for hysteresis motors;

Replace the period (".") at the end of U.S. note 4(a)(ix) with a semicolon (";"). Insert the following new U.S. notes after U.S. note 4(a)(ix):

4(a)(x) The term "alloy steel of the type described in U.S. note 4(a)(x) to this subchapter" refers to steel which contains one or more of the following elements in the quantity, by weight, respectively indicated:

over 1.65 percent manganese, or  
over 0.25 percent phosphorus, or  
over 0.35 percent sulfur, or  
over 0.60 percent silicon, or  
over 0.60 percent copper, or  
over 0.30 percent aluminum, or  
over 0.20 percent chromium, or  
over 0.30 percent cobalt, or  
over 0.35 percent lead, or  
over 0.50 percent nickel, or  
over 0.30 percent tungsten, or  
over 0.10 percent of any other metallic element;

4(a)(xi) The term "tool steel of the type described in U.S. note 4(a)(xi) to this subchapter" refers to alloy steel of the type described in U.S. note 4(a)(x) to this subchapter containing the following combination of elements in the quantity, by weight, respectively indicated:

(A) Not less than 1.0 percent carbon and over 11.0 percent chromium; or  
(B) Not less than 0.3 percent carbon and 1.25 percent of 11.0 percent inclusive chromium; or  
(C) Not less than 0.85 percent carbon and 1.0 percent to 1.8 percent inclusive manganese; or

(D) 0.9 percent to 1.2 percent inclusive chromium and 0.9 percent to 1.4 percent inclusive molybdenum; or  
(E) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or  
(F) not less than 0.5 percent carbon and not less than 5.5 percent tungsten;

4(a)(xii) The term "high speed tool steel of the type described in U.S. note 4(a)(xii) to this subchapter" refers to all tool steel of the type described in U.S. note 4(a)(xi) to this subchapter containing by weight not less than 0.5 percent carbon and not less than 3.5 percent molybdenum, or not less than 0.5 percent carbon and not less than 5.5 percent tungsten;

4(a)(xiii) The term "plate of the type described in U.S. note 4(a)(xiii) to this subchapter" refers to products which are flat rolled, whether or not corrugated or crimped, 4.7625mm or more in thickness and over 20.32cm in width when hot rolled or over 30.48cm in width when cold rolled;

4(a)(xiv) The term "sheet of the type described in U.S. note 4(a)(xiv) to this subchapter" refers to products which are flat rolled, whether or not corrugated or crimped, less than 4.7625mm in thickness and over 30.48cm in width;

4(a)(xv) The term "strip of the type described in U.S. note 4(a)(xv) to this subchapter" refers to products which are flat rolled, whether or not corrugated or crimped, less than 4.7625mm in thickness, not over 30.48cm in width and, if cold rolled, over 1.27cm in width;

4(a)(xvi) The term "wire of the type described in U.S. note 4(a)(xvi) to this subchapter" refers to products which are either cold drawn, in coils, of any cross-sectional configuration and not over 17.8562mm in maximum cross-sectional dimension; or in coils with a cold rolled finish, of solid rectangular cross section, not over 6.35mm in thickness and not over 1.27cm in width.

4(a)(xvii) The term "wire rod of the type described in U.S. note 4(a)(xvii) to this subchapter" refers to products which are hot rolled, in coils, approximately round in cross section, and at least 5.08mm but not exceeding 16.796mm in diameter.

Replace the entire text of subheading 9903.72.00 with the following:

Flat rolled products and bars and rods which have been flat rolled, all the foregoing of stainless steel of the type described in U.S. note 4(a)(ix) to this subchapter, under 4.7625mm in thickness and, if cold rolled, over 1.27mm in width (except when: over 30.48cm in width and coated, plated or clad with metal; 30.48cm or under in width and electrolytically coated or plated with base metal other than tin, lead or zinc; cut, pressed or stamped to nonrectangular shape; worked after rolling other than by corrugation or crimping; as provided for in U.S. note 4(g)(i) to this subchapter; razor blade steel of the type described in U.S. note 4(a)(ii) to this subchapter; cladding grade 434 stainless steel flat-rolled products over 30.48cm in width; cold-rolled flat-rolled products of stainless steel over 100.34cm in width; stainless steel of the type described in U.S. note 4(a)(v) to



this subchapter; and flapper valve steel) provided for in subheading 7219.12, 7219.13, 7219.14, 7219.22, 7219.23, 7219.24, 7219.31, 7219.32, 7219.33, 7219.34, 7219.35, 7219.90, 7220.11, 7220.12.10, 7220.12.50, 7220.20.10, 7220.20.60, 7220.20.70, 7220.20.90, 7220.90, 7222.10, 7222.20, 7222.30 or 7223.00.50, all the foregoing, whether or not entitled to duty-free treatment under subheading 9808.00.30.

Replace the entire text of subheading 9903.72.01 with the following:

Flat-rolled products and bars and rods which have been flat-rolled, all the foregoing of stainless steel of the type described in U.S. note 4(a)(ix) to this subchapter, 4.7625mm or more in thickness, over 20.32cm in width if hot rolled or over 30.48cm in width if cold

rolled (except if: coated, plated or clad with metal; cut, pressed or stamped to nonrectangular shape; worked after rolling other than by corrugation or crimping; as provided for in U.S. note 4(g)(i) to this subchapter; and stainless steel of the type described in U.S. note 4(a)(v) to this subchapter) provided for in subheading 7219.11, 7219.12, 7219.21, 7219.22, 7219.31, 7219.90, 7220.11, 7220.20.10, 7220.90, 7222.10, 7220.20 or 7222.30, all the foregoing, whether or not entitled to duty-free treatment under subheading 9808.00.30.

Replace the entire text of the superior heading, at the first indentation, to subheadings 9903.72.10, 9903.72.12 and 9903.72.14 with the following:

Bars and rods, flat-rolled products and wire, all the foregoing of stainless steel of the type described in U.S. note 4(a)(ix) to this subchapter (except if: worked after rolling other than by corrugation or crimping; plate, sheet, strip, wire and wire rod of the type described in U.S. notes 4(a)(xiii), 4(a)(xiv), 4(a)(xv), 4(a)(xvi) and 4(a)(xvii), respectively, to this subchapter; concrete reinforcing bars and rods; and stainless steel of the type described in U.S. note 4(a)(v) to this subchapter) provided for in subheading 7220.11, 7220.20.10, 7220.20.60, 7220.90, 7221.00, 7220.10, 7222.20, 7222.30, 7223.00.10, 7223.00.50 or 7223.00.90:

Replace all quota quantities for subheadings 9903.72.10, 9903.72.12, and 9903.72.14 with the following:

Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.10	If entered during the period from October 20, 1987, through July 19, 1988 inclusive:		
	Austria.....	n/a	97,977
	Canada.....	250,366	501,878
	Japan.....	3,213,281	6,427,470
	Korea.....	439,989	880,885
	Mexico.....	25,401	51,710
	Spain.....	997,913	1,995,827
	Sweden.....	308,446	616,892
	Taiwan.....	22,680	45,360
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter.....	99,791	97,070
9903.72.12	If entered during the period from July 20, 1988, through July 19, 1989 inclusive:		
	Austria.....	97,070	97,977
	Canada.....	512,565	512,565
	Japan.....	6,572,621	6,572,621
	Korea.....	891,772	882,679
	Mexico.....	58,060	58,968
	Spain.....	2,041,187	2,041,187
	Sweden.....	630,500	631,407
	Taiwan.....	46,267	47,174
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter.....	107,958	104,327
9903.72.14	If entered during the period from July 20, 1989, through September 30, 1989 inclusive:		
	Austria.....	39,009	( <sup>1</sup> )
	Canada.....	211,376	( <sup>1</sup> )
	Japan.....	2,707,974	( <sup>1</sup> )
	Korea.....	367,414	( <sup>1</sup> )
	Mexico.....	24,494	( <sup>1</sup> )
	Spain.....	840,969	( <sup>1</sup> )
	Sweden.....	259,457	( <sup>1</sup> )
	Taiwan.....	18,051	( <sup>1</sup> )
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter.....	44,453	( <sup>1</sup> )

Replace the entire text of the superior heading, at the first indentation, to subheadings 9903.72.20, 9903.72.22 and 9903.72.24 with the following:

Bars and rods of stainless steel of the type described in U.S. note 4(a) (ix) to this subchapter, approximately round in cross-section, at least 5.08mm but not exceeding 18.796mm in diameter (except concrete reinforcing bars and rods and stainless steel

of the type described in U.S. note 4(a)(v) to this subchapter) provided for in subheading 7221.00:

Replace all quota quantities for subheadings 9903.72.20, 9903.72.22, and 9903.72.24 with the following:

Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.20	If entered during the period from October 20, 1987, through July 19, 1988 inclusive:		
	Austria.....	n/a	25,401
	Japan.....	1,439,717	2,879,434
	Korea.....	238,592	476,277
	Spain.....	421,845	844,598
	Sweden.....	899,936	1,799,873
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter.....	87,998	151,501
9903.72.22	If entered during the period from July 20, 1988, through July 19, 1989 inclusive:		
	Austria.....	48,988	25,401
	Japan.....	2,944,752	2,944,752
	Korea.....	489,885	490,792
	Spain.....	862,742	863,649
	Sweden.....	1,840,897	1,840,897
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter.....	129,729	151,501
9903.72.24	If entered during the period from July 20, 1989, through September 30, 1989 inclusive:		
	Austria.....	9,979	( <sup>1</sup> )
	Japan.....	1,212,918	( <sup>1</sup> )
	Korea.....	355,620	( <sup>1</sup> )
	Spain.....	355,620	( <sup>1</sup> )
	Sweden.....	758,414	( <sup>1</sup> )
	Other, except as provided in U.S. note 4(g) (ii) to this subchapter.....	63,504	( <sup>1</sup> )

Replace the entire text of the superior heading, at the first indentation, to subheadings 9903.72.30, 9903.72.32 and 9903.72.34 with the following:

Flat-rolled products, bars and rods and wire, all the foregoing of tool steel of the type described in U.S. note 4(a)(xi) to this subchapter (except if: worked after rolling other than by corrugation or crimping; plate of the type described in U.S. note 4(a)(xiii) to this subchapter which has been coated, plated or clad with metal or cut, pressed or stamped to nonrectangular shape; sheet of the type described in U.S. note 4(a)(xiv) to this subchapter which has been coated, plated or clad with metal or cut, pressed or stamped to nonrectangular shape; strip of the type described in U.S. note 4(a)(xv) to this subchapter which has been coated or plated with base metal other than tin, lead or zinc or cut, pressed or stamped to nonrectangular shape; concrete reinforcing bars and rods; wire of the type described in U.S. note 4(a)(xvi) to this subchapter other than round wire of high speed tool steel as described in

U.S. note 4(a)(xii) to this subchapter; chipper knife steel; band saw steel; ball bearing steel; rotor steel for hysteresis motors; and tool steel of the type described in U.S. note 4(a)(viii) to this subchapter) provided for in subheading 7208.11, 7208.12, 7208.13.10, 7208.13.50, 7208.14.10, 7208.14.50, 7208.21.10, 7208.21.50, 7208.22.10, 7208.22.50, 7208.23.10, 7208.23.50, 7208.24.10, 7208.24.50, 7208.31, 7208.32, 7208.33.10, 7208.33.50, 7208.34.10, 7208.34.50, 7208.35.10, 7208.35.50, 7208.41, 7208.42, 7208.43, 7208.44, 7208.45, 7208.90, 7209.11, 7209.12, 7209.13, 7209.14, 7209.21, 7209.22, 7209.23, 7209.24.50, 7209.31, 7209.32, 7209.33, 7209.34, 7209.41, 7209.42, 7209.43, 7209.44, 7209.90, 7210.70.30, 7210.90.90, 7211.11, 7211.12, 7211.19.10, 7211.19.50, 7211.21, 7211.22, 7211.29.10, 7211.29.30, 7211.29.50, 7211.29.70, 7211.30.10, 7211.30.30, 7211.30.50, 7211.49.10, 7211.49.30, 7211.49.50, 7211.90, 7212.10, 7212.21, 7212.29, 7212.30.10, 7212.30.30, 7212.30.50, 7212.40.10, 7212.40.50, 7212.50, 7212.60, 7213.20, 7213.41.30, 7213.41.60, 7213.49, 7213.50, 7214.10, 7214.30, 7214.50, 7214.60, 7215.10, 7215.30, 7215.40, 7215.90.10, 7215.90.30, 7215.90.50, 7217.21.10,

7217.21.30, 7217.21.50, 7217.22.10, 7217.22.50, 7217.23.10, 7217.23.50, 7217.29.10, 7217.29.50, 7217.31.10, 7217.31.30, 7217.31.50, 7217.32.10, 7217.32.50, 7217.33.10, 7217.33.50, 7217.39.10, 7217.39.50, 7219.11, 7219.12, 7219.13, 7219.14, 7219.21, 7219.22, 7219.23, 7219.24, 7219.31, 7219.32, 7219.33, 7219.34, 7219.35, 7219.90, 7220.11, 7220.12.10, 7220.12.50, 7220.20.10, 7220.20.60, 7220.20.70, 7220.20.80, 7220.20.90, 7220.90, 7221.00, 7222.10, 7222.20, 7222.30, 7223.00.10, 7223.00.50, 7223.00.90, 7225.20, 7225.30.10, 7225.30.30, 7225.30.50, 7225.30.70, 7225.40.10, 7225.40.30, 7225.40.50, 7225.40.70, 7225.50.10, 7225.50.60, 7225.50.70, 7225.50.80, 7225.90, 7226.20, 7226.91.10, 7226.91.30, 7226.91.50, 7226.91.70, 7226.91.80, 7226.92.10, 7226.92.30, 7226.92.50, 7226.92.70, 7226.92.80, 7226.99, 7227.10, 7227.90.10, 7227.90.20, 7227.90.60, 7228.10, 7228.30.60, 7228.30.80, 7228.40, 7228.50.10, 7228.50.50, 7228.60.10, 7228.60.60, 7228.60.80, 7229.10, 7229.90.10, 7229.90.50, 7229.90.90:

Change all quota quantities for subheadings 9903.72.30, 9903.72.32, and 9903.72.34 to the following:



Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.30	If entered during the period from October 20, 1987, through July 19, 1988 inclusive:		
	Canada .....	* 360,156	719,405
	Japan .....	* 1,048,718	2,098,340
	Korea .....	* 345,641	691,282
	Mexico .....	* 58,060	117,935
	Poland .....	* 77,111	155,130
	Spain .....	* 40,824	83,482
	Sweden .....	* 1,879,497	3,958,995
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter .....	* 78,204	147,873
9903.72.32	If entered during the period from July 20, 1988, through July 19, 1989 inclusive:		
	Canada .....	735,734	736,642
	Japan .....	2,144,607	2,145,514
	Korea .....	713,055	712,147
	Mexico .....	126,100	126,100
	Poland .....	151,501	152,409
	Spain .....	85,276	85,276
	Sweden .....	4,048,807	4,048,807
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter .....	148,780	147,873
9903.72.34	If entered during the period from July 20, 1988, through September 30, 1989 inclusive:		
	Canada .....	303,003	( <sup>1</sup> )
	Japan .....	883,607	( <sup>1</sup> )
	Korea .....	293,831	( <sup>1</sup> )
	Mexico .....	51,710	( <sup>1</sup> )
	Poland .....	82,596	( <sup>1</sup> )
	Spain .....	35,381	( <sup>1</sup> )
	Sweden .....	1,667,423	( <sup>1</sup> )
	Other, except as provided in U.S. note 4(g)(ii) to this subchapter .....	81,689	( <sup>1</sup> )

Change all quota quantities for subheadings 9903.72.40, 9903.72.42, and 9903.72.44 to the following:

Item	Articles	Quota Quantity (in kilograms)	
		If entered during the restraint period:	
		July 20 through January 19	January 20 through July 19
9903.72.40	If entered during the period from November 20, 1987, through July 19, 1988 inclusive:		
	Canada .....	997,913	1,995,827
9903.72.42	If entered during the period from July 20, 1988, through July 19, 1989 inclusive:		
	Canada .....	1,995,827	1,995,827
9903.72.44	If entered during the period from July 20, 1989, through September 30, 1989 inclusive:		
	Canada .....	798,331	( <sup>1</sup> )

I have determined that the above changes in the import relief are appropriate to carry out the authority granted by the President to the United States Trade Representative and the obligations of the United States, with due consideration to the interests of the domestic producers of such specialty steel. This action is subject to further modification.

Judith Hippler Bello,  
Acting United States Trade Representative.  
[FR Doc. 88-29943 Filed 12-28-88; 8:45 am]  
BILLING CODE 3190-01-M

#### PENSION BENEFIT GUARANTY CORPORATION

##### Request for Approval Under the Paperwork Reduction Act of Collection of Information Contained in a Proposed Rule

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for OMB approval.

**SUMMARY:** The Pension Benefit Guaranty Corporation has requested approval by the Office of Management and Budget for the recordkeeping requirement contained in the PBGC's proposed regulation on payment of premiums, published on October 5, 1988 (53 FR 39200). The preamble to that proposed rule failed to mention that OMB approval was being sought for the recordkeeping requirement. Therefore, the effect of this notice is to advise the public of the PBGC's request for OMB approval.

**ADDRESSES:** All written comments (at least three copies) should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Pension Benefit Guaranty Corporation, 3208 New Executive Office Building, Washington, DC 20503. The request for approval will be available for public inspection at the PBGC Communications and Public Affairs Department, Suite 7100, 2020 K Street, NW., Washington, DC 20006, between the hours of 9:00 a.m. and 4:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Ronald Goldstein, Senior Counsel, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006, 202-778-8850 (202-778-8859 for TTY and TDD). (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:** Pursuant to the Pension Benefit Guaranty Corporation's Payment of Premiums regulation (29 CFR Part 2610), all

premium payers are required to file a PBGC Form 1 with their premium payments. Single-employer plans are also required to submit Schedule A to Form 1, which deals with the computation of the variable rate portion of the single-employer plan premium. Because the Form 1 and Schedule A require the reporting of only the summary data on which the premium computation is based, the PBGC cannot rely solely on the form for verifying whether a plan has paid the correct premium. In particular, it is not possible to determine whether a plan's unfunded vested benefits (the basis for computing the variable rate portion of the single-employer plan premium) have been correctly determined or whether a plan has properly claimed one of the regulatory exemptions from the calculation of the variable rate premium.

Accordingly, the PBGC has established a recordkeeping requirement incident to premium payments, § 2610.11 of the proposed revision to Part 2610 published on October 5, 1988 (53 FR 39200). Pursuant to this provision, plan administrators must retain for a period of six years after the premium due date all records and data necessary to validate or support the plan's premium payment. These records must be available to the PBGC at its request for audit purposes. The record retention period is six years because that is the statute of limitations applicable to suits by PBGC for unpaid premiums under section 4003(e) of the Employee Retirement Income Security Act of 1974, as amended.

Under proposed § 2610.11, the recordkeeping requirement is imposed on the plan administrator, although the plan administrator need not keep physical custody of the pertinent records. Actuarial records, for example, may be retained at the office of the plan's actuary, as long as the plan administrator can obtain these records if requested to do so by PBGC.

The PBGC estimates that the annual burden of this recordkeeping requirement will be approximately 37,125 hours. This is based on 112,500 plans that pay annual premiums to PBGC, and 1/2 of an hour per plan needed to comply with the recordkeeping provision. The PBGC estimates that the total annual cost to the public will be no more than \$3,712,500, assuming a cost of \$100/hour for professional time. (In practice, it is likely that a portion of the burden hours will be attributable to clerical, rather than professional staff time.)

Issued at Washington, DC, this 22nd day of December, 1988.

Kathleen P. Utgoff,  
Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 88-30008 Filed 12-28-88; 8:45 am]  
BILLING CODE 7700-01-M

#### PROSPECTIVE PAYMENT ASSESSMENT COMMISSION

##### Meetings

Notice is hereby given of meetings of the Prospective Payment Assessment Commission on Tuesday, January 10, 1989, at the Hyatt Regency Crystal City at Washington National Airport, 2799 Jefferson Davis Highway, Arlington, Virginia.

The Subcommittee on Diagnostic and Therapeutic Practices will be meeting in Regency Room F, First Concourse, at 7:30 a.m. The Subcommittee on Hospital Productivity and Cost-Effectiveness will convene its meeting also at 7:30 a.m. in Regency Room A. The Full Commission will convene at 10:00 a.m. in Regency Room F.

All meetings are open to the public.  
Donald A. Young,

Executive Director.

[FR Doc. 88-30137 Filed 12-28-88; 8:45 am]  
BILLING CODE 8820-SW-M

#### SECURITIES AND EXCHANGE COMMISSION

(Rel. No. 34-26388; File No. SR-OCC-88-2)

##### Self-Regulatory Organization; Proposed Rule Change By The Options Clearing Corp. Relating to Index Participations; Amendment No. 2

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1) ("Act"), notice is hereby given that on December 19, 1988, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission an amendment to a proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

##### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

File No. SR-OCC-88-2 proposes Rules pursuant to which OCC would issue, clear and settle "Index Participations" or "IPs." The Philadelphia Stock



Exchange, Inc. ("PHLX") and the American Stock Exchange, Inc. ("Amex") have amended their respective IP filings, and the Chicago Board Options Exchange, Inc. ("CBOE") has filed proposed IP rules with the Commission, since OCC filed its Amendment No. 1 to SR-OCC-88-2. This amendment to SR-OCC-88-2 conforms OCC's proposed IP rules to the proposed rules filed by the three Exchanges. In addition, OCC is filing with this amendment the form of a proposed Agreement between it and the three Exchanges that would govern certain aspects of the relationship between OCC and the Exchanges with respect to IPs.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The primary purposes of this amendment are to make OCC's proposed IP rules consistent with the proposed rules of PHLX, Amex, and CBOE, and to file with the Commission the form of a proposed Agreement governing certain aspects of the relationship between OCC and the three Exchanges with respect to IPs.

#### 1. Changes to Conform OCC's Rules to Rules Proposed by PHLX and CBOE

PHLX has amended its proposed IP rules to provide that the "cash-out privilege"—the right of a holder of IPs to receive an amount in cash determined by reference to the index on which the IPs are based—will be available to holders of IPs on any business day. CBOE's proposed IP rules provide that the cash-out privilege will be available on one business day every six months. (Amex's proposed IP rules continue to provide that the cash-out privilege will be available on one business day every calendar quarter.) Changes are made to OCC's By-Laws and Rules to accommodate this diversity. The days

on which the cash-out privilege is available for IPs traded on each Exchange are stated in Interpretations added to OCC's Rules.

PHLX has also amended its filing to provide that exercise of the cash-out privilege would entitle an exercising holder to an "aggregate cash-out value" computed in a somewhat different manner depending on the day of exercise. If the exercise is effected on the business day before an "IP dividend equivalent day" (the third Friday in March, June, September and December, or such other day as the Exchange may specify, formerly called the "IP cash-out day" in OCC's proposed By-Laws and Rules, and given a new name since this is not longer the only day on which the cash-out privilege may be exercised), PHLX's filing provides that the aggregate cash-out value will be based on the opening values on the IP dividend equivalent day of the stocks in the underlying index. If the exercise is effected on any other business day, PHLX's filing provides that the aggregate cash-out value will be based on the closing index value on the business day following the exercise, reduced by one-half of one percent. OCC's proposed By-Laws are amended to accommodate this difference.

CBOE has provided in its filing that, for each class of IPs traded on it, each writer as well as each holder would be entitled to a cash-out privilege. (These IPs are therefore referred to in OCC's proposed rules as "two-way IPs.") The writer's cash-out privilege would entitle the writer to pay the cash-out value for a short position and thereby to extinguish the short position. Holders of two-way IPs would have a corresponding obligation, upon assignment of a writer's exercise notice, to extinguish long IP positions in exchange for payment of the cash-out value. Changes are made to OCC's By-Laws and Rules to implement this concept.

#### 2. Changes to Conform OCC's Rules to Rules Proposed by Amex

The special feature of the IPs proposed for trading by Amex is that a holder of one or more "delivery units" of the IPs would be entitled to exercise a "delivery privilege" in lieu of exercising the cash-out privilege. Amex states in its filing that it anticipates that, at least initially, a delivery unit for IPs based on the S&P 500 would be 500 minimum trading units (i.e., 50,000 IPs), and that a delivery unit for IPs based on the Major Market Index would be 250 minimum trading units (i.e., 25,000 IPs). These figures are reflected in an Interpretation added to OCC's By-Laws. As described in Amex's proposed rules, exercise of

the delivery privilege would entitle the exercising holder to receive the basket of stocks in the index underlying the class of IPs, in the proportions that the stocks are represented in the index, but excluding fractional shares, any stock as to which the exercising holder would receive less than ten shares per delivery unit, and any stock that does not open for trading on the trading day following the day of the exercise. A holder that exercises the delivery privilege would be obligated to pay a "delivery fee" to the person making delivery of the stocks (either a writer or the "physical delivery facilitator," as described below). In OCC's proposed rules, IPs for which the delivery privilege is available are referred to as "physical IPs"; the basket of stock to be delivered upon exercise of the delivery privilege is referred to as the "deliverable stock"; and the amount of cash that the exercising holder would receive in lieu of receiving fractional shares, stocks with less than ten deliverable shares, and stocks that do not open on the trading day following the day of the exercise is referred to as the "cash differential."

Amex also provides in its filing that a writer of one or more delivery units of physical IPs may volunteer to make delivery of stock (i.e., may become a "physical assignment volunteer") by submitting a "physical assignment volunteer notice." On the night following the day in each calendar quarter when delivery privilege exercise notices and physical assignment volunteer notices could be submitted to OCC (that day being referred to herein as "T"), OCC would compare the number of delivery units for which exercise notices were submitted with the number of delivery units for which physical assignment volunteer notices were submitted. If the number of delivery units for which physical assignment volunteer notices were submitted was larger, OCC would (using the same procedures that it uses for random allocation of assignments) reject the excess physical assignment volunteer notices. If the number of delivery units for which physical assignment volunteer notices were submitted was smaller, OCC would accept all of the submitted physical assignment volunteer notices, and would require non-volunteering physical IP writers (selected using OCC's random allocation procedures) to extinguish enough short positions to make up the imbalance. These writers would be required to pay the aggregate cost-out value (i.e., the same amount of money required upon assignment of a cash-out privilege exercise) to OCC in respect of the extinguished positions.

OCC would, before the opening of trading on the business day after T (i.e., "T+1") notify a "physical delivery facilitator" of the amount of the imbalance. The physical delivery facilitator for each class of IPs would be an OCC Clearing Member, designated by Amex, and, at least initially, the specialist on the Amex floor for that class. The physical delivery facilitator would, at the opening in each of the stocks in the underlying index on T+1, buy the necessary shares to make up the baskets of deliverable stock. (The physical delivery facilitator would buy at the opening because the aggregate cash-out value paid by the non-volunteering physical IP writers would be based on the value of the underlying index calculated using the opening values.) The physical delivery facilitator would be required to put up "additional margin" as defined in OCC's Rules—margin to cover OCC's exposure to an adverse market move during the day—on the morning of T+1 with respect to the delivery units for which it was required to buy deliverable stock on that morning.<sup>1</sup>

After the close of business on T+1, OCC would report the net amount of each of the deliverable stocks to be delivered or received by each Clearing Member to the designated stock clearing corporation of the Clearing Member. (This report cannot be made earlier because, as noted above, only stocks that open for trading on T+1 are to be delivered.) OCC will match delivering and receiving Clearing Members and report the matched deliveries and receives to the stock clearing corporations as buy and sell stock trades with a zero trade price. These trades would clear through the stock clearing corporations in the ordinary five business day settlement cycle, so that final settlement of a delivery privilege exercise would take place on the sixth business day after the exercise (i.e., "T+6"). OCC has in effect with each of the stock clearing corporations an "Option Exercise Settlement Agreement" governing the relationship between OCC and that stock clearing corporation with respect to the settlement of options. A side letter extending the terms of these Agreements to IPs will be necessary, and OCC will

<sup>1</sup> The physical delivery facilitator would not be required on T+1 to put up "premium margin"—margin to cover the value of the delivery units as of the close on T—because the assigned non-volunteering writers would be obligated to OCC for that amount, and that obligation would be secured by the margin deposits of those writers. The margin requirements for assigned non-volunteering writers on T+1 would continue to include additional margin in order to cover OCC's exposure to an adverse market move in the opening prices on that day.

provide the Commission with the form of that side letter in the near future.

On the second business day after T (i.e., "T+2"), the assigned non-volunteering writers would pay OCC the aggregate cash-out value at the same time that writers assigned exercisers of the cash-out privilege would pay the same value. (An assigned non-volunteering writer of physical IPs, in other words, would be subject to exactly the same obligation regardless of whether the assigned exercise as an exercise of a cash-out privilege or a exercise privilege.) Following receipt of the aggregate cash-out value, OCC would release the margin held in respect of these positions. However, OCC would continue to require margin from Clearing Members with the obligation to deliver stock until the business day after T+6. (The physical delivery facilitator, however, would be entitled to a margin credit equal to the sum of the aggregate cash-out values paid to OCC minus the sum of the cash differentials to be paid out of such aggregate cash-out values, since OCC would be holding that amount pending settlement with the physical delivery facilitator on T+6.)

On T+6, settlement of the deliverable stock would be effected at the designated stock clearing corporations as described above. In addition, the cash differentials and delivery fees would be netted together with other payments owned by or to OCC and settled at 9:00 a.m., if a net amount were owed to OCC, or 10:00 a.m. if a net amount were owned by OCC.

In order to implement the procedures described above, definitions of the terms "physical IP," "delivery privilege," "delivery unit," "physical assignment volunteer," "physical assignment volunteer notice," and "physical delivery facilitator" are added to OCC's By-Laws. OCC's margin rules are amended to reflect the margin requirements described above. A reference to IPs is added to OCC's Rule on designated Stock clearing corporations, since physical IPs will be settled through stock clearing corporations.

References to the delivery privilege are added throughout OCC's Rules. In particular, a new paragraph (b) is added to proposed Rule 1903 to describe the procedure for physical assignment volunteers, and a new paragraph (c) is added to proposed Rule 1905 to describe the procedures for accepting or rejecting physical assignment volunteer notices described above. In addition, a new paragraph (b) in Rule 1906 defines the exercise settlement date for exercises of the delivery privilege, and a new

paragraph (b) in Rule 1907 describes the procedures for settlement of delivery privilege exercises described above.

Two new paragraphs in Rule 1908 describe the close-out procedures relating to delivery privilege exercises. The first paragraph provides that, if a delivering Clearing Member defaults, one or more receiving Clearing Members designated by OCC would buy in the deliverable stock for the account and liability of OCC. The second paragraph provides that, if a receiving Clearing Member is suspended, one or more delivering Clearing Members designated by OCC would sell out the deliverable stock and pay the proceeds of the sale to OCC. Both paragraphs provide that settlements of cash differentials and delivery fees would occur in accordance with OCC's usual settlement procedures.

#### 3. The Supplemental Agreement

OCC is also filing with this amendment the form of a proposed Agreement that would be entered into by OCC and the three Exchanges that have filed proposed IP rules. The Agreement supplements the Restated Participant Exchange Agreement (the "RPEA") between OCC and each of the Exchanges that provides for trading in options, in that it would govern the same aspects of the relationship in respect of IPs that the RPEA governs in respect of options, and is therefore called the "Supplemental Agreement." The Supplemental Agreement, among other things, expresses the commitment of OCC to issue all IPs in respect of opening transactions accepted by it in accordance with its By-Laws and Rules, contains indemnification provisions, and describes the information required by OCC on a daily basis in respect of IPs. The Supplemental Agreement provides that any Exchange that is a party to the RPEA may become a party to the Supplemental Agreement by executing a Declaration of Endorsement and Adoption of Supplemental Agreement substantially in the form attached to the Supplemental Agreement.

#### 4. Statutory Basis for the Proposed Rule Change

The proposed changes to OCC's Rules and By-Laws are consistent with the purposes and requirements of Section 17A of the Securities Exchange Act of 1934, as amended (the "Act") because they make more precise the application of OCC's By-Laws and Rules to IPs proposed for trading on PHLX, Amex and CBOE. The proposed Supplemental Agreement is consistent with the purposes and requirements of the Act because it structures the relationship



between OCC and the various Exchanges on which IPs will be traded in parallel with the existing relationship between OCC and the various Exchanges on which options are traded.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited by OCC with respect to the proposed rule change and none have been received by OCC.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve such proposed rule change, or,
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 19, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Dated: December 22, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29968 Filed 12-28-88; 8:45 am]  
BILLING CODE 8010-01-M

[Rel. No. 34-26386; File No. SR-PHLX-88-35]

#### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Filing and Order Granting Temporary Accelerated Approval to Proposed Rule Change Relating to Market Circuit Breaker Proposal

Pursuant to 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that, on November 10, 1988, the Philadelphia Stock Exchange, Inc. ("PHLX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change adds the following new rule that will be effective for a pilot period ending on October 31, 1989. The text of the rule change is as follows:

##### Trading Halts Due to Extraordinary Market Volatility

Rule 133. If the Dow Jones Industrial Average reaches a value 250 or more points below its closing value on the previous trading day, trading in stocks shall halt on the Exchange and may not reopen for one hour. If, on the same day, the average subsequently reaches a value 400 or more points below that closing value, trading in stocks shall halt on the Exchange and may not reopen for two hours.<sup>1</sup>

<sup>1</sup> The PHLX also commits to halt trading in equity related options contemporaneous with a halt in stock trading resulting from the implementation of the Exchange's circuit breaker proposal. The PHLX will file a formal rule change specifically providing for a halt of trading in equity related options in connection with activation of the Exchange's circuit breaker trading halt policy. Letter from William W. Uchimoto, General Counsel, PHLX, to Joseph Furey, Esq., Branch Chief, Division of Market Regulation, Commission, dated December 20, 1988.

#### \* \* \* Supplementary Material:

.10 The restrictions in this Rule shall apply whenever the Dow Jones Industrial Average reaches the trigger values notwithstanding the fact that, at any given time, the calculation of the value of the average may be based on the prices of less than all of the stocks included in the average.

.20 The reopening of trading following a trading halt under this Rule shall be conducted pursuant to procedures adopted by the Exchange.

.30 If the 250-point trigger is reached within one hour of the scheduled close of trading for a day, or if the 400-point trigger is reached within two hours of the scheduled close of trading for a day, trading in stocks shall halt for the remainder of the day; provided, however, that if the 250-point trigger is reached between one hour and one-half hour before the scheduled closing, or the 400-point trigger is reached between two hours and one hour before the scheduled closings, the Exchange may use abbreviated reopening procedures either to permit trading to reopen before the scheduled closing or to establish closing prices.

.40 Nothing in this Rule should be construed to limit the ability of the Exchange to otherwise halt or suspend the trading in any stock or stocks traded on the Exchange pursuant to any other Exchange rule or policy.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections (A), (B) and (C) below, of the most significant aspects of such statements.

##### (A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to coordinate with the other securities and relevant futures self-regulatory organizations ("SROs") to provide a mechanism to address periods of extreme downward volatility in the stock market. The rule change is in response to a substantially identical rule adopted by the New York Stock

Exchange ("NYSE") which, among other things, conditioned its effectiveness on the adoption of companion rule changes by other SROs, including the PHLX. Accordingly, the PHLX specifically conditions the effectiveness of this rule change on the effectiveness of the NYSE's proposed rule change relating to this matter, SR-NYSE-88-23. In particular, PHLX specifically ties the effectiveness of the pilot period of its rule change to the pilot period that the NYSE's parallel rule change is effective. This rule change is based on a view that the trading halts required by the rule will promote stability in the stock market by allowing market participants time to reestablish an equilibrium between buying and selling interest and to help ensure that all market participants have a reasonable opportunity to become aware of and respond to significant downward market price movements.

The proposal is consistent with the requirements of the Act and the rules and regulations thereunder. Specifically, the proposal is consistent with § 6(b)(5) of the Act in that it is calculated to promote just and equitable principles of trade, and, in general, will protect investors and the public interest.

##### (B) Self-Regulatory Organization's Statement on Burden on Competition

The PHLX does not believe that the proposed rule change will impose any inappropriate burden on competition.

##### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

#### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange requests that the Commission grant accelerated effectiveness to the proposed rule change pursuant to Section 19(b)(2) of the Act.<sup>2</sup> The Exchange's request is based on its desire to have the proposed rule change take effect concurrently with similar rule changes adopted by the NYSE and other self-regulatory organizations. The Commission finds that the proposed rule change filed by the PHLX is consistent with the requirements of the Act and the rules and regulations thereunder applicable to

<sup>2</sup> Letter from William W. Uchimoto, Acting General Counsel, PHLX, to Mary Revell, Esq., Division of Market Regulation, Commission, dated November 25, 1988.

a national securities exchange, and, in particular, the requirements of section 6<sup>3</sup> and the rules and regulations thereunder. The proposal will permit the Exchange to coordinate with the other securities self-regulatory organizations and futures exchanges in providing a mechanism to address periods of extreme downward volatility in the stock market. The Commission finds good cause for approving the PHLX proposed rule change prior to the thirtieth day after the date of publication of the proposal in the Federal Register. The proposal is substantially identical to the NYSE circuit breaker proposal contained in File No. SR-NYSE-88-23 that was published for the full thirty-day period and was approved by the Commission in Securities Exchange Act Release No. 26198 (October 19, 1988), 53 FR 41637. In light of the absence of any adverse comments on the NYSE's filing and the Commission's view of the benefits that may accrue from adoption of coordinated circuit breakers that respond to stock market volatility and that may increase investor confidence in the markets, the Commission believes a good cause finding is justified.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing also will be available for inspection and copying at the principal office of the above-referenced self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 19, 1989.

It is therefore ordered, pursuant to

<sup>3</sup> 15 U.S.C. 78f (1982).

section 19(b)(2) of the Act,<sup>4</sup> that the proposed rule change is approved for a pilot period ending October 31, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

Dated: December 22, 1988.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29969 Filed 12-28-88; 8:45 am]  
BILLING CODE 8010-01-M

[Rel. No. 34-26387; File No. PHLX 88-41]

#### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Immediate Effectiveness of Proposed Rule Change Relating to Signature Guarantee Fee Changes

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on December 5, 1988 the Philadelphia Stock Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Philadelphia Stock Exchange, Inc. ("PHLX" or the "Exchange"), pursuant to Rule 19b-4 of the Securities Exchange Act of 1934 ("Act"), submits a proposed rule change amending the PHLX's Signature Guarantee Fee Schedule from a fixed rate of \$250.00 annually per participant to an allocated schedule based upon monthly deposit volume by participant at Philadelphia Depository Trust Co. The amended fee schedule is necessary to recover increased administrative and insurance costs. The fee schedule is allocated on a monthly deposit volume basis as indicated in the table below.

Monthly deposits	Monthly rate
0 to 20 .....	\$21
20 to 100 .....	50
Over 100 .....	100

<sup>4</sup> 15 U.S.C. 78s(b)(2) (1982).

<sup>5</sup> 17 CFR 200.30-3(a)(12) (1988).



## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

The purpose of the proposed rule change is to amend the Signature Guarantee Minimum Fee Schedule. The schedule allocated costs amongst all participants at a flat rate of \$250.00 annually since 1975. Since that time Exchange insurance and administrative costs have risen dramatically. In order to equitably allocate a reasonable rate amongst member organizations participating in the Signature Guarantee Program, the Exchange is proposing a rate increase allocated on a monthly deposit volume basis. The minimum rate on an annualized basis would be raised to \$252.00 with a maximum rate of \$1,200.00 annually.

The proposed rule change is consistent with Section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities.

### B. Self-Regulatory Organizations' Statement on Burden on Competition

The PHILX does not believe that the proposed rule change will impose any inappropriate burden on competition.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Securities Exchange Act of 1934 and subparagraph (e) of Securities Exchange Act Rule 19b-4. At any time within 60 days of the filing of such proposed rule

change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 19, 1989.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

December 22, 1988.

[FR Doc. 88-29967 Filed 12-28-88; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. 35-24789]

### Filings Under the Public Utility Holding Company Act of 1935 ("Act")

December 22, 1988.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 17, 1989 to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

#### Holdings, Inc. (70-7541)

Holdings, Inc. ("Holdings"). One Quality Street, Lexington, Kentucky 40507, a newly organized Kentucky corporation, has filed an application pursuant to sections 3(a)(1), 9(a)(2), and 10 of the Act.

Holdings requests an order of the Commission (i) approving the acquisition by Holdings of all the outstanding shares of common stock of Kentucky Utilities Company ("KU"), a Kentucky corporation, and the indirect acquisition of 100% of the outstanding shares of capital stock of Old Dominion Power Company ("ODP"), a Virginia corporation, and 20% of the outstanding shares of capital stock of Electric Energy, Inc. ("EEI"), an Illinois corporation, through the ownership by KU of said shares and (ii) granting Holdings and its subsidiary companies, upon consummation of the proposed transaction, an exemption under section 3(a)(1) of the Act from all provisions of the Act except section 9(a)(2). The application states that the proposed reorganization is a reasonable response to the changing business environment in the electric utility industry and will improve opportunities for investment in non-utility activities, while ensuring that there will be no adverse impact on KU's customers.

Holdings was recently incorporated for the purpose of accomplishing a proposed share exchange pursuant to an Agreement and Plan of Exchange (the "Agreement"). Holdings does not own any utility assets and currently is not a holding company under the Act.

KU is an exempt holding company and a public-utility company engaged in producing and selling electric energy in central, southeastern, and western

Kentucky. At December 31, 1987, it furnished electric service to about 375,400 customers in over 600 communities and adjacent suburban and rural areas located in 77 counties in those areas of Kentucky, and also to 26 customers in Claiborne County, Tennessee. KU's total consolidated operating revenues for 1987 were \$553.2 million.

ODP is a public-utility company which furnishes electric service in five counties in southwestern Virginia. At December 31, 1987, it furnished electric service to about 28,500 customers in 54 communities and adjacent rural areas located in those five counties. ODP's total operating revenues for 1987 were \$39.5 million.

KU owns 20% (accounted for under the equity method) of EEI, which owns a 1,000,000 KW generating station at Joppa, Illinois. EEI was organized by KU and other utility companies (the "Sponsoring Companies") in 1950 for the primary purpose of supplying a substantial portion of the electric energy requirements of an installation of the Department of Energy ("DOE") at Paducah, Kentucky. All of the electricity sold by EEI is sold to DOE and the Sponsoring Companies. EEI does not sell electricity to private consumers and does not have any equity securities outstanding in the hands of the public. EEI had outstanding at December 31, 1987, \$31.8 million in short-term notes under two revolving credit agreements with banks.

As of and for the year ended December 31, 1987, ODP represented about 7.1% of consolidated operating revenues of KU, 0.8% of consolidated net income, 4.3% of consolidated total assets.

KU's investment of \$2,141,000 in its 20% stock interest in EEI was less than 1% of KU's consolidated total assets, exclusive of such investment, as of March 31, 1988. During the year ended December 31, 1987, KU received \$403,000 for its share of the equity in EEI's net income, which amounted to less than 0.5% of KU's net income for said period.

Holdings and KU intend that, as a result of the corporate reorganization, Holdings will own all the outstanding common stock of KU. KU will continue to own 100% of the capital stock of ODP and 20% of the capital stock of EEI. Holders of KU preferred stock and first mortgage bonds will continue as security holders of KU. KU proposes to submit the corporate reorganization to its shareholders for their approval at their next annual meeting, scheduled for April 25, 1989. The Kentucky Public Service Commission and the Tennessee Public Service Commission have

approved the proposed corporate reorganization. KU has submitted an application to the Federal Energy Regulatory Commission seeking its approval of the corporate reorganization.

KU is exempt from the provisions of the Act by reason of an order entered under Section 3(a)(2). *Kentucky Utilities Co.*, 29 S.E.C. 289 (1949). KU's acquisition of the common stock of EEI was approved by the Commission in *Central Illinois Public Service Co.*, 32 S.E.C. 202, 204, (1951) and *Electric Energy, Inc.*, 28 S.E.C. 858, 660 (1958). KU states that it has maintained its exemption from the provisions of the Act through the annual filing of a Form U-3A-2. Holdings believes that it and its subsidiary companies will meet the requirements for an exemption under Section 3(a)(1) of the Act following the proposed corporate reorganization.

#### Public Service Company of Oklahoma (70-7601)

Public Service Company of Oklahoma ("PSO"), 212 East 6th Street, Tulsa, Oklahoma 74102, an electric utility subsidiary company of Central and South West Corporation, a registered holding company has filed an application pursuant to Sections 9(a) and 10 of the Act.

PSO is requesting approval of its proposal to purchase power-conditioning products and to market such products to its residential, commercial, and industrial customers. PSO proposes to enter into an agreement (the "License Agreement") for the purchase of power-conditioning products and services from The Bayboro Corporation ("Bayboro"), a subsidiary of Talquin Corporation, which is a subsidiary of Florida Progress Corporation. Bayboro was formed in 1986 to market power-conditioning products and services to commercial businesses and electric utility companies, and developed the first successful full-service, utility, power-conditioning program in the United States. Bayboro markets its power-conditioning program under the trade names "Flash Warden," developed for residential customers, and "Stedi-State," developed for commercial and industrial customers. The power-conditioning products comprising the Flash Warden and Stedi-State systems consist of surge suppressors and standby-power supplies which maintain the integrity of power supply in the event of lightning or other power surges, or power failures. The Stedi-State system also includes power-line conditioners that protect sensitive electronic equipment from various wave-shape distortions.

Pursuant to the License Agreement, PSO would purchase power conditioning products directly from Bayboro on an as-needed basis. In addition, Bayboro would provide PSO additional resources and services such as program implementation support marketing materials, marketing training for PSO employees, and technical consulting services during the term of the License Agreement.

PSO anticipates that marketing of the Flash Warden and Stedi-State systems will be conducted by current PSO employees in PSO's Marketing and Sales Department. PSO currently anticipates that it will make expenditures of approximately \$550,000 (including startup expenses), \$890,000, and \$950,000 during the first three years of the power conditioning program. In addition, PSO estimates revenue from the sales of Flash Warden and Stedi-State system of \$1,534,000, \$2,773,000, and \$3,033,000, while the cost of merchandise sold is estimated to be \$813,000, \$1,470,000, and \$1,630,000, during the first three years of the power-conditioning program.

PSO believes that implementation of the proposed power-conditioning program will enable it to provide systems and services to solve its customers' power quality problems. In addition, PSO believes that the proposed power-conditioning program can be operated at margins that will provide PSO with a positive cash flow and a reasonable rate of return.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

[FR Doc. 88-29968 Filed 12-28-88; 8:45 am]

BILLING CODE 8010-01-M

## DEPARTMENT OF TRANSPORTATION

[Order 88-12-44; Docket 46034]

### Order Instituting U.S.-Australia Service Proceeding

**AGENCY:** Department of Transportation.  
**ACTION:** Institution of the U.S.-Australia Service Proceeding to award new certificate authority to operate scheduled combination service between the United States and Australia, Order 88-12-44, Docket 46034.

**SUMMARY:** The Department has decided to institute the U.S.-Australia Service Proceeding to select a primary and a backup carrier for certification to engage in scheduled foreign air transportation



of persons, property and mail between the United States and Australia. Under the terms of the United States-Australia Air Transport Agreement and related *ad referendum* Memoranda, the United States may designate only one additional carrier during the next three years to provide scheduled combination service to Australia. Four U.S. carriers have applied for certificate authority to serve Australia. In the face of these competitive and mutually exclusive applications, the Department has decided to institute an oral evidentiary proceeding before an Administrative Law Judge to select a primary and a backup carrier to provide new U.S.-Australia service. All other U.S. carriers interested in serving Australia are invited to file applications for the certificate authority at issue in the proceeding.

**DATES:** Applications, motions to consolidate, petitions for leave to intervene, and petitions for reconsideration are due not later than January 9, 1989. Answers are due not later than January 17, 1989.

**ADDRESS:** Applications, motions to consolidate, petitions for leave to intervene, and petitions for reconsideration should be filed in Docket 46034, addressed to the Documentary Services Division, U.S. Department of Transportation, 400 Seventh Street, SW., Room 4107, Washington, DC 20590, and should be served on all parties in Docket 46034, the Department's Office of Administrative Law Judges and Mr. Robert Goldner, P-7, at the same address.

Dated: December 23, 1988.

Gregory S. Dole,  
Assistant Secretary for Policy and International Affairs.  
[FR Doc. 88-29971 Filed 12-28-88; 8:45 am]  
BILLING CODE 4910-02-M

#### Office of the Secretary

#### Electronic Tariff Filing System Advisory Committee; Reestablishment

**SUMMARY:** OST announces the reestablishment of the Electronic Tariff Filing System Advisory Committee.

The purpose of the Committee is to make continuing recommendations on the technical, operational, and policy issues involved in the implementation of the proposed automated tariff filing and information system.

**FOR FURTHER INFORMATION CONTACT:** Thomas G. Moore, Chief, Tariffs Division, Office of International Aviation, P-44, Department of

Transportation, 400 7th St. SW., Washington, DC 20590, telephone (202) 366-2414.

Dated: December 22, 1988.

Douglas V. Leister,  
Executive Director, ETS Advisory Committee,  
Office of International Aviation.  
[FR Doc. 88-29898 Filed 12-28-88; 8:45 am]  
BILLING CODE 4910-02-M

#### Privacy Act of 1974

The Department of Transportation (DOT) herewith publishes a proposal to alter a system of records.

Any person of agency may submit written comments on the proposed altered system to the U.S. Coast Guard (G-PS), ATTN: Mr. Herbert Levin, 2100 Second Street, SW., Washington, DC 20593-0001. Comments must be received within 30 days to be considered.

If no comments are received, the proposed changes will become effective 30 days from the date of issuance. If comments are received, the comments will be considered and where adopted, the document will be republished with the changes.

Issued in Washington, DC, December 16, 1988.

Jon H. Seymour,  
Assistant Secretary for Administration.

**Narrative Statement; Department of Transportation; Office of the Secretary; on Behalf of the United States Coast Guard for Alteration of the Family Advocacy Case Record System**

The Office of the Secretary, on behalf of the Coast Guard, proposes to amend the Family Advocacy Case Record System, DOT/CG-631, to cover all records maintained by the Coast Guard pertaining to the Family Advocacy Program for Coast Guard active duty, reserve, and retired personnel.

The purpose of this notice is to revise the system to include decentralized locations for Family Advocacy Program records at the District, Maintenance and Logistics Command (MLC), or Headquarters Unit Social Worker's office. Additional locations include the duty station of the District, MLC, or Headquarters Unit Family Advocacy Representative under whose jurisdiction an incident occurred. This revision will also allow individuals under contract to the Coast Guard to use the records in the performance of their official duties relating to family support programs.

The changes include amendment to: System location and Routine uses of records maintained in the system, including categories of users and the purposes of such uses.

Since this proposal is an amendment of an existing record system, the probable or potential effect of this proposal on the privacy of the general public is minimal.

A description of the steps taken by the Department to safeguard these records is given under the appropriate heading in the attached Federal Register system of records notice.

The purpose of this report is to comply with the Office of Management and Budget Circular, A-130, Appendix I, dated December 24, 1985.

**DOT/CG 631**

#### SYSTEM NAME:

Family Advocacy Case Record System.

#### SYSTEM LOCATION:

Commandant (G-PS), U.S. Coast Guard Headquarters, 2100 2nd St. SW., Washington, DC 20593.

Decentralized segments may be maintained at the District, Maintenance and Logistics Command (MLC), or Headquarters Unit Social Worker's office, at the duty station of the sponsor, and at selected medical facilities. Decentralized segments may also be maintained at the duty station of the District, MLC, or Headquarters Unit Family Advocacy Representative (FAR) under whose jurisdiction an incident occurred.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty, reserve and retired personnel and dependents entitled to care at Coast Guard or any other military medical and dental facility whose abuse or neglect is brought to the attention of appropriate authorities, and persons suspected of abusing or neglecting such beneficiaries.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Medical records of suspected and confirmed cases of family member abuse or neglect, investigative reports, correspondence, family advocacy committee reports, follow up and evaluation reports, and any other supportive data assembled relevant to individual family advocacy program files.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

a. To Federal, State and Local government or private agencies for coordination of family advocacy programs, medical care, mental health treatment, civil or criminal law enforcement, and research into the

causes and prevention of family domestic violence.

b. To individuals or organizations providing family support program care under contract to the Federal Government.

c. See Prefatory Statement of General Routine Uses.

#### POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

##### STORAGE:

Records may be stored in file folders, microfilm, magnetic tape, punched cards, machine lists, discs, and other computerized or machine readable media.

##### RETRIEVABILITY:

Records are retrieved through indices and cross indices of all individuals and relevant incident data. Types of indices used, but not limited to include: name, social security number, and types of incidents.

##### SAFEGUARDS:

Records are maintained in various kinds of locked filing equipment in specified monitored or controlled access rooms or areas. Records are accessible only to authorized personnel. Computer terminals are located in supervised areas, with access controlled by password or other user code system.

##### RETENTION AND DISPOSAL:

a. Records will be maintained at a decentralized location until the case is closed or the sponsor is separated.

b. Upon case closure or separation of the sponsor, the record will be transferred to Commandant (G-PS). The record will be retained for 5 years from case closure or date of last action. At the end of 5 years the record will be destroyed, except for information concerning certain minor Coast Guard dependents. Information concerning minor Coast Guard dependents who were victims or suspected victims of child abuse, neglect or sexual abuse will be retained until the dependent attains majority.

##### SYSTEM MANAGER AND ADDRESS:

Chief, Office of Personnel and Training (G-P); Department of Transportation, U.S. Coast Guard Headquarters, 2100 2nd Street, SW., Washington, DC 20593-0001.

##### NOTIFICATION PROCEDURE:

a. Central location: Notarized written requests should contain the full name and social security number of the member and be addressed to Commandant (G-TIS), U.S. Coast

Guard, 2100 Second Street, SW., Washington, DC 20593-0001.

b. Decentralized locations: Notarized written request should contain the full name and social security number of the member and be addressed to the MLC, district, or unit where the individual is assigned.

##### RECORD ACCESS PROCEDURES:

Access may be obtained by writing to Commandant (G-TIS) at the address in Notification Procedure.

##### CONTESTING RECORD PROCEDURES:

Same as "Record Access Procedures".

##### RECORD SOURCE CATEGORIES:

Reports from medical personnel, educational institutions, law enforcement agencies, public and private health and welfare agencies, Coast Guard personnel and private individuals.

##### SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Part of this system may be exempt under 5 U.S.C. 552a(k) (2) and (5) which provide in part the exemption of investigatory material compiled for law enforcement purposes or solely for the purposes of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure would reveal the identity of a source who furnished information to the Government under an express promise of confidentiality.

[FR Doc. 88-29972 Filed 12-28-88; 8:45 am]

BILLING CODE 4910-02-M

#### Federal Aviation Administration

[Summary Notice No. PE-88-50]

#### Petition for Exemption; Summary of Dispositions of Petitions Issued

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of dispositions of prior petitions.

**SUMMARY:** Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of the dispositions of certain petitions previously received. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended

to affect the legal status of any petition or its final disposition.

**FOR FURTHER INFORMATION CONTACT:** The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-10), Room 915G, FAA Headquarters Building (FOB-10A), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3132.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on December 22, 1988.

Deborah E. Swank,  
Acting Manager, Program Management Staff.

#### Docket No. 045CE

**Petitioner:** Fairchild Aircraft Corporation

**Regulations Affected:** 14 CFR 23.53(c)(6), 23.53(c)(7), and 23.67(e)(1)(i)

**Description of Relief Sought/Disposition:** To allow petitioner to certificate their Model SA227-CC METRO IIIC airplane in the commuter category based, in part, on previous FAA approval of compliance with the ICAO Annex 8 provisions of SFAR 41. *Denial, August 5, 1988, Exemption No. 4935*

#### Docket No. 046CE

**Petitioner:** British Aerospace

**Regulations Affected:** 14 CFR 23.471, 23.473, 23.477, 23.479, 23.481, 23.483, 23.485, 23.493, 23.497, 23.499, 23.505, 23.509, 23.511, 23.721, 23.723, 23.725, 23.726, 23.727, 23.729, 23.731, 23.733, 23.735, and 23.737

**Description of Relief Sought/Disposition:** Petitioner requested an exemption from certain ground load and landing gear requirements of Part 23 to permit certification of their Jetstream 3200 Series airplanes in the commuter category while meeting certain transport category ground load and landing gear requirements. *Grant, August 24, 1988, Exemption No. 4927*

[FR Doc. 88-29891 Filed 12-28-88; 8:45 am]

BILLING CODE 4910-13-M

#### Radio Technical Commission for Aeronautics (RTCA); Special Committee 160; 406 MHz Emergency Locator Transmitters (ELT); Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given for the twelfth meeting of



RTCA Special Committee 160 on 406 MHz emergency locator transmitters (ELT) to be held January 17-19, 1989, in the RTCA Conference Room, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005, commencing at 9:30 a.m.

The agenda for this meeting is as follows: (1) Introductory remarks; (2) approval of prior meeting's minutes, RTCA Paper No. 444-88/SC160-137; (3) review and discuss EUROCAE WG-29 activities; (4) report on problems of frequency interference in the 406 MHz band; (5) review of task assignments from last meeting; (6) review of seventh draft of the MOPS, RTCA Paper No. 446-88/SC160-138; (7) task assignments; (8) other business; and (9) date and place of next meeting.

Attendance is open to the interested public but limited to space available. With the approval of the Chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the RTCA Secretariat, One McPherson Square, 1425 K Street, NW., Suite 500, Washington, DC 20005; (202) 682-0266. Any member of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on December 21, 1988.

Geoffrey R. McIntyre,  
Acting Designated Officer.

[FR Doc. 88-29892 Filed 12-28-88; 8:45 am]

BILLING CODE 4910-13-M

#### National Highway Traffic Safety Administration

[Docket No. IP88-; Notice 1]

#### Receipt of Petition for Determination of Inconsequential Noncompliance; Firestone Tire and Rubber Co.

Firestone Tire and Rubber Company (Firestone) of Akron, Ohio, has petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 et seq.) for apparent noncompliance with 49 CFR 571.109, Federal Motor Vehicle Safety Standard (FMVSS) No. 109, "New Pneumatic Tires", on the basis that it is inconsequential as it relates to motor vehicle safety.

This Notice of receipt of a petition is published under section 157 of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1417) and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Paragraph S4.3(f) of Federal Motor Vehicle Safety Standard No. 109 "New Pneumatic Tires", requires the words "tubeless" or "tube type" to be permanently molded into or onto both sidewalls of tires as applicable. Firestone manufactured 19,231 P235/60R 14 Daytona Radial WSW tires without the word "tubeless" stamped on the non serial sidewalls of the tires. However, Firestone impounded 111 of these tires, so the total number effected by this petition is 19,120. These tires were produced during 1987 through November 18, 1988.

Firestone supports its petition for inconsequential noncompliance with the following:

All tires manufactured in the affected size/type are tubeless. Firestone does not manufacture this tire in a tube type configuration; therefore, they would be sold as tubeless.

If a consumer made a decision to utilize any affected tire as tube type, and mount the tire using a tube, the tire would perform satisfactorily.

Interested persons are invited to submit written data, views and arguments on the petition of Firestone Tire and Rubber Company, described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, SW., Washington, DC, 20590. It is requested but not required that five copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, the Notice will be published in the *Federal Register* pursuant to the authority indicated below.

Comment closing date: January 30, 1989.

(Sec. 102, Pub. L. 93-492, 88 Stat. 1470 (15 U.S.C. 1417); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8.)

Issued on December 22, 1988.

Barry Felrice,

Associate Administrator for Rulemaking.  
[FR Doc. 88-29897 Filed 12-28-88; 8:45 am]  
BILLING CODE 4910-59-M

#### DEPARTMENT OF THE TREASURY

#### Public Information Collection Requirements Submitted to OMB for Review

Date: December 22, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

#### Internal Revenue Service

OMB Number: 1545-0022.

Form Number: IRS Form 712.

Type of Review: Extension.

Title: Life Insurance Statement.

Description: Form 712 is used to establish the value of life insurance policies for estate and gift tax purposes. The tax is based on the value of these policies. The form is completed by life insurance companies.

Respondents: Businesses or other for-profit.

Estimated Number of Respondents/Recordkeepers: 50,000.

Estimated Average Burden Hours Per Response:

Recordkeeping—18 hours and 25 minutes

Preparing the form—18 minutes

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 935,500 hours.

Clearance Officer: Garrick Shear, (202) 535-4297, Internal Revenue Service, Room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,  
Departmental Reports Management Officer.  
[FR Doc. 88-29899 Filed 12-28-88; 8:45 am]  
BILLING CODE 4810-25-M

#### Public Information Collection Requirements Submitted to OMB for Review

Date: December 22, 1988.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511. Copies of the

submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2224, 15th and Pennsylvania Avenue NW., Washington, DC 20220.

#### Alcohol, Tobacco and Firearms

OMB Number: 1512-0082.

Form Number: ATF F 5120.24 (1582-A).

Type of Review: Extension.

Title: Drawback on Wine Exported.

Description: When proprietors export wines that have been produced, packaged, manufactured or bottled in the U.S., they file a claim for a drawback or refund for the taxes that have already been paid on the wine. This form notifies ATF that the wine was in fact exported and helps to protect the revenue and prevent fraudulent claims.

Respondents: Individuals or households, Businesses or other for-profit, and Small businesses or organizations.

Estimated Number of Recordkeepers: 900.

Estimated Burden Hours Per Response: 1 hour and 8 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 2,025 hours.

OMB Number: 1512-0144.

Form Number: ATF F 5100.12 (2736).

Type of Review: Extension.

Title: Specific Transportation Bond—Distilled Spirits or Wines Withdrawn for Transportation to Manufacturing Bonded Warehouse—Class Six.

Description: ATF F 5100.12 (2736) is a specific bond which protects the tax liability on distilled spirits and wine while in transit from one type of bonded facility to another. The bond describes the customs bonded warehouse, the surety company, amount of bond and coverage, specific shipment of spirits or wine to be covered.

Respondents: Businesses or other for-profit, and Small businesses or organizations.

Estimated Number of Recordkeepers: 25.

Estimated Burden Hours Per Response: 1 hour.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 1,000 hours.

Clearance Officer: Robert Masarsky, (202) 566-7077, Bureau of Alcohol, Tobacco and Firearms, Room 7011, 1200 Pennsylvania Avenue NW., Washington, DC 20226.

OMB Reviewer: Milo Sunderhauf, (202) 395-6880, Office of Management and

Budget, Room 3208, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,  
Departmental Reports Management Officer.  
[FR Doc. 88-29900 Filed 12-28-88; 8:45 am]  
BILLING CODE 4810-25-M

#### Office of the Secretary

[Department Circular—Public Debt Series—No. 33-88]

#### Treasury Notes of December 31, 1990, Series AJ-1990

Washington, December 22, 1988.

#### 1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of Chapter 31 of Title 31, United States Code, invites tenders for approximately \$9,000,000,000 of United States securities, designated Treasury Notes of December 31, 1990, Series AJ-1990 (CUSIP No. 912827 WZ 1), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes may be issued to Government accounts and Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

#### 2. Description of Securities

2.1. The Notes will be dated January 3, 1989, and will accrue interest from that date, payable on a semiannual basis on June 30, 1989, and each subsequent 6 months on December 31 and June 30 through the date that the principal becomes payable. They will mature December 31, 1990, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in denominations of \$5,000, \$10,000, \$100,000, and \$1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR Part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in 51 FR 18280, et seq. (May 18, 1986), apply to Notes offered in this circular.

#### 3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, D.C. 20239-1500, prior to 1:00 p.m., Eastern Standard time, Wednesday, December 28, 1988. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, December 27, 1988, and received no later than Tuesday, January 3, 1989.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is \$5,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than \$1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of



customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; Federal Reserve Banks; and Government accounts. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yields will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a 1/8 of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.750. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Government accounts and Federal Reserve Banks will be accepted at the price equivalent

to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

#### 4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

#### 5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to others whose tenders are accompanied by a guarantee as provided in Section 3.5, must be made or completed on or before Tuesday, January 3, 1989. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Thursday, December 29, 1988. In addition, Treasury Tax and Loan Note Option Depositories may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Tuesday, January 3, 1989. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payments has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

#### 6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Marcus W. Page,  
Acting Fiscal Assistant Secretary.  
[FR Doc. 88-30027 Filed 12-28-88; 10:56 am]  
BILLING CODE 4810-40-M

#### (Department Circular—Public Debt Series—No. 34-88)

#### Treasury Notes of December 31, 1992, Series Q-1992

Washington, December 22, 1988.

#### I. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of Chapter 31 of Title 31, United States Code, invites tenders for approximately \$7,250,000,000 of United States securities, designated Treasury Notes of December 31, 1992, Series Q-1992 (CUSIP No. 912827 XA 5), hereafter referred to as Notes. The Notes will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the yield of each accepted bid. The interest rate on the Notes and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of the Notes

may be issued to Government accounts and Federal Reserve Banks for their own account in exchange for maturing Treasury securities. Additional amounts of the Notes may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities.

#### 2. Description of Securities

2.1. The Notes will be dated January 3, 1989, and will accrue interest from that date, payable on a semiannual basis on June 30, 1989, and each subsequent 6 months on December 31 and June 30 through the date that the principal becomes payable. They will mature December 31, 1992, and will not be subject to call for redemption prior to maturity. In the event any payment date is a Saturday, Sunday, or other nonbusiness day, the amount due will be payable (without additional interest) on the next business day.

2.2. The Notes are subject to all taxes imposed under the Internal Revenue Code of 1954. The Notes are exempt from all taxation now or hereafter imposed on the obligation or interest thereof by any State, any possession of the United States, or any local taxing authority, except as provided in 31 U.S.C. 3124.

2.3. The Notes will be acceptable to secure deposits of Federal public monies. They will not be acceptable in payment of Federal taxes.

2.4. The Notes will be issued only in book-entry form in denominations of \$1,000, \$5,000, \$10,000, \$100,000, and \$1,000,000, and in multiples of those amounts. They will not be issued in registered definitive or in bearer form.

2.5. The Department of the Treasury's general regulations governing United States securities, i.e., Department of the Treasury Circular No. 300, current revision (31 CFR Part 306), as to the extent applicable to marketable securities issued in book-entry form, and the regulations governing book-entry Treasury Bonds, Notes, and Bills, as adopted and published as a final rule to govern securities held in the TREASURY DIRECT Book-Entry Securities System in 51 FR 18260, *et seq.* (May 16, 1986), apply to the Notes offered in this circular.

#### 3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, D.C. 20239-1500, prior to 1:00 p.m., Eastern Standard time, Thursday, December 29, 1988. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Wednesday,

December 28, 1988, and received no later than Tuesday, January 3, 1989.

3.2. The par amount of Notes bid for must be stated on each tender. The minimum bid is \$1,000, and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.10%. Fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield.

3.3. A single bidder, as defined in Treasury's single bidder guidelines, shall not submit noncompetitive tenders totaling more than \$1,000,000. A noncompetitive bidder may not have entered into an agreement, nor make an agreement to purchase or sell or otherwise dispose of any noncompetitive awards of this issue prior to the deadline for receipt of tenders.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and are on the list of reporting dealers published by the Federal Reserve Bank of New York, may submit tenders for accounts of customers if the names of the customers and the amount for each customer are furnished. Others are permitted to submit tenders only for their own account.

3.5. Tenders for their own account will be received without deposit from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; Federal Reserve Banks; and Government accounts. Tenders from all others must be accompanied by full payment for the amount of Notes applied for, or by a guarantee from a commercial bank or a primary dealer of 5 percent of the par amount applied for.

3.6. Immediately after the deadline for receipt of tenders, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at

the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, an interest rate will be established, at a 1/8 of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.250. That stated rate of interest will be paid on all of the Notes. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Government accounts and Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance of their bids. Those submitting noncompetitive tenders will be notified only if the tender is not accepted in full, or when the price at the average yield is over par.

#### 4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of Notes specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

#### 5. Payment and Delivery

5.1. Settlement for the Notes allotted must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on Notes allotted to institutional investors and to other whose tenders are accompanied by a guarantee as provided in Section 3.5, must be made or completed on or before Tuesday, January 3, 1989. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately



available to the Treasury; in Treasury bills, notes, or bonds maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Thursday, December 29, 1988. In addition, Treasury Tax and Loan Note Option Depositories may make payment for the Notes allotted for their own accounts and for accounts of customers by credit to their Treasury Tax and Loan Note Accounts on or before Tuesday, January 3, 1989. When payment has been submitted with the tender and the purchase price of the Notes allotted is over par, settlement for the premium must be completed timely, as specified above. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the par amount of Notes allotted shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered definitive securities tendered in payment for the Notes allotted and to be held in TREASURY DIRECT are not required to be assigned if the inscription on the registered definitive security is identical to the registration of the note being purchased. In any such case, the tender form used to place the Notes allotted in TREASURY DIRECT must be completed to show all the information required thereon, or the TREASURY DIRECT account number previously obtained.

#### 6. General provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized, as directed by the Secretary

of the Treasury, to receive tenders, to make allotments, to issue such notices as may be necessary, to receive payment for, and to issue, maintain, service, and make payment on the Notes.

6.2. The Secretary of the Treasury may, at any time, supplement or amend provisions of this circular if such supplements or amendments do not adversely affect existing rights of holders of the Notes. Public announcement of such changes will be promptly provided.

6.3. The Notes issued under this circular shall be obligations of the United States, and, therefore, the faith of the United States Government is pledged to pay, in legal tender, principal and interest on the Notes.

Marcus W. Page,  
Acting Fiscal Assistant Secretary.  
[FR Doc. 88-30028 Filed 12-28-88; 10:56 am]  
BILLING CODE 4810-40-M

## Sunshine Act Meetings

Federal Register

Vol. 53, No. 250

Thursday, December 29, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

### EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**DATE AND TIME:** 2:00 p.m. (eastern time) Monday, January 9, 1989.

**PLACE:** Clarence M. Mitchell, Jr., Conference Room, No. 200-C on the Second Floor of the Columbia Plaza Office Building, 2401 "E" Street, NW., Washington, DC 20507.

**STATUS:** Part of the meeting will be open to the public and part will be closed to the public.

#### MATTERS TO BE CONSIDERED:

##### Open Session

1. Announcement of Notation Vote(s)
2. Notice of Proposed Rulemaking Concerning ADEA Statute of Limitations Tolling for Private Litigants

##### Closed Session

Litigation Authorization: General Counsel Recommendations

**Note.**—Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the Federal Register, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 634-6748 at any time for information on these meetings.)

#### CONTACT PERSON FOR MORE INFORMATION:

Frances M. Hart,  
Executive Officer on (202) 634-6748.

Date: December 27, 1988.

Frances M. Hart,  
Executive Officer, Executive Secretariat.

This Notice Issued December 27, 1988.

[FR Doc. 88-30103 Filed 12-27-88; 3:56 pm]

BILLING CODE 6750-06-M

### INTERNATIONAL TRADE COMMISSION

#### USITC SE-89-01

**TIME AND DATE:** Wednesday, January 4, 1989 at 2:00 p.m.

**PLACE:** Room 101, 500 E Street, SW., Washington, DC 20436.

**STATUS:** Open to the public.

#### MATTERS TO BE CONSIDERED:

1. Agenda.
2. Minutes.
3. Ratifications.
4. Petitions and complaints:  
Certain grain oriented silicon steel (Docket No. 1479).
5. Inv. No. 731-TA-390 (F) (Digital Readout Systems and Subassemblies thereof from Japan)—briefing and vote.
6. Any items left over from previous agenda.

#### CONTACT PERSON FOR MORE INFORMATION:

Kenneth R. Mason,  
Secretary (202) 252-1000.

Kenneth R. Mason,  
Secretary.

December 22, 1988.

[FR Doc. 88-30042 Filed 12-27-88; 11:03 am]

BILLING CODE 7020-02-M

### NATIONAL LABOR RELATIONS BOARD

**TIME AND DATE:** 9:30 a.m., Wednesday, December 21, 1988.

**PLACE:** Board Conference Room, Sixth Floor, 1717 Pennsylvania Avenue, NW., Washington, DC 20570.

**STATUS:** Part of this meeting will be open to the public. The remainder of the meeting will be closed to the public.

#### MATTERS TO BE CONSIDERED:

- Portion open to the public  
Proposed changes in casehandling procedures  
Portion closed to the public  
Personnel matters  
Board cases

#### CONTACT PERSON FOR MORE INFORMATION:

John C. Truesdale,  
Executive Secretary, National Labor Relations Board, Washington, DC.

Dated, Washington, DC, December 23, 1988.

By direction of the Board.

John C. Truesdale,  
Executive Secretary.

[FR Doc. 88-30037 Filed 12-27-88; 11:03 am]

BILLING CODE 7445-01-M

### OVERSEAS PRIVATE INVESTMENT CORPORATION

Meeting of the Board of Directors

**TIME AND DATE:** 1:30 p.m. (closed portion), 3:00 p.m. (open portion), Thursday, January 12, 1989.

**PLACE:** Offices of the Corporation, fourth floor Board Room, 1615 M Street, NW., Washington, DC.

**STATUS:** The first part of the meeting from 1:30 p.m. to 3:00 p.m. will be closed to the public. The open portion of the meeting will commence at 3:00 p.m. (approximately).

#### MATTERS TO BE CONSIDERED:

Closed to the Public 1:30 P.M. to 3:00 P.M.

1. Proposed Guidelines Under Pilot Equity Program
2. Delegations of Authority
3. Claims Report
4. FY 1989 and FY 1990 Budget Negotiations
5. Operating Results and New Directions
6. Finance and Insurance Reports
7. President's Report

#### FURTHER MATTERS TO BE CONSIDERED:

Open to the Public 3:00 P.M.

1. Approval of the Minutes of the Previous Board Meeting
2. Scheduling of Future Meetings of the Board
3. Treasurer's Report
4. Information Reports

#### CONTACT PERSON FOR INFORMATION:

Information with regard to the meeting may be obtained from the Secretary of the Corporation, on (202) 457-7079.

Margaret A. Kole,

OPIC Corporate Secretary.

December 27, 1988.

[FR Doc. 88-30124 Filed 12-27-88; 4:03 pm]

BILLING CODE 3210-01-M

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# federal register

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Thursday  
December 29, 1988

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## Part II

### Department of Transportation

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Federal Railroad Administration

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49 CFR Parts 209, 213 through 229, and  
231 through 236  
Amendments to Railroad Safety  
Regulations to Increase Standard Civil  
Penalty Assessment Amounts; Final Rule  
and Statements of Policy

LIBRARY OF CONGRESS



# DEPARTMENT OF TRANSPORTATION Federal Railroad Administration

49 CFR Parts 209, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 231, 232, 233, 234, 235, and 236

[FRA Docket No. RSEP-3, Notice No. 2]

RIN 2130-AA47

## Amendments To Railroad Safety Regulations To Increase Standard Civil Penalty Assessment Amounts

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule and statements of policy.

**SUMMARY:** FRA issues a final rule and statements of policy to conform its railroad safety regulations to certain provisions of the Rail Safety Improvement Act of 1988. Specifically, the rule amends the regulations to revise the schedules of civil penalties (which are statements of agency policy) to reflect the higher penalty amounts available under the amended rail safety statutes by increasing the initial assessment amounts for violation of specific regulations. FRA also issues a general statement of policy explaining the civil penalty process and the agency's policy on exercising its expanded enforcement authority over individuals.

**DATE:** The final rule and policy statements will become effective January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Daniel C. Smith, Deputy Assistant Chief Counsel for Safety, FRA, Washington, DC 20590 (Telephone: 202-368-0628); or Edward English, Chief, Maintenance Programs Division, Office of Safety, FRA, Washington, DC 20590 (Telephone: 202-368-9186).

### SUPPLEMENTARY INFORMATION:

#### Changes Effected by the Rail Safety Improvement Act of 1988

The Rail Safety Improvement Act of 1988 ("RSIA") (Pub. L. No. 100-342), enacted on June 22, 1988, made many basic changes, two of which are pertinent here, to the federal railroad safety statutes. (Those statutes include the Federal Railroad Safety Act of 1970, 45 U.S.C. 421 *et seq.*, and a group of statutes enacted prior to 1970 referred to collectively herein as the "older safety statutes": The Safety Appliance Acts, 45 U.S.C. 1-16; the Locomotive Inspection Act, 45 U.S.C. 22-34; the Accident Reports Act, 45 U.S.C. 38-43; the Hours of Service Act, 45 U.S.C. 61-64b; and the Signal Inspection Act, 49 App. U.S.C. 28.)

The first relevant change brought about by the RSIA was the amendment of the safety statutes to authorize the assessment of civil penalties against individuals who willfully violate the rail safety statutes or regulations, and to permit the Federal Railroad Administration to suspend or disqualify an individual whose violation of the safety laws is shown to make that individual unfit for performance of safety-sensitive functions in the rail industry. (Only the civil penalty aspects of this change are addressed here.)

Second, the RSIA raised the maximum civil penalty that FRA may assess under the safety laws. Under the Hours of Service Act, the penalty was changed from a flat \$500 to a penalty of "up to \$1,000, as the Secretary of Transportation deems reasonable." Under all the other statutes, the maximum penalty was raised from \$2,500 to \$10,000 per violation, except that, "where a grossly negligent violation or pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury," a penalty of up to \$20,000 per violation may now be assessed.

#### The Effect of the Interim Rule and Policy Statements

Section 3(b) of the RSIA provides:

Within 30 days after enactment of this Act the Secretary of Transportation . . . shall issue interim rules, regulations, orders, or standards containing penalty schedules applicable to railroads and individuals reflecting the changes made by the amendments in subsection (a). The Secretary shall issue final rules, regulations, orders, or standards with respect to such penalty schedules within six months after such date of enactment.

On July 22, 1988, FRA issued the first notice in this docket (53 FR 28594, July 28, 1988), effective August 1, 1988, which: (i) Amended the rail safety regulations to make them applicable to individuals as well as railroads; (ii) amended the schedules of civil penalties to increase the maximum penalties to \$20,000; and (iii) issued an Interim Statement of Agency Policy explaining how the civil penalty process works and how FRA intended to administer its new enforcement authority over individuals. FRA stated in that notice that, within the six months allotted by the RSIA, it would issue another notice providing line-by-line revisions of the penalty schedules to reflect the higher penalty ceiling now in place and would, at the same time, make any necessary changes to its interim rule and statements of policy.

#### Public Participation

In this notice, FRA issues those detailed penalty schedules and revisions to the interim rule and policy statements as promised in the first notice. Because these amendments, like the earlier ones, do no more than mirror statutory changes, notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest" within the meaning of section 4(a)(3)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). Given the obvious Congressional intent to require prompt implementation of the RSIA provisions authorizing higher penalties and sanctions against individuals, any delay necessitated by notice and comment procedures would be contrary to the public interest. For similar reasons, there is good cause for not publishing this rule at least 30 days before its effective date, as is ordinarily required by 5 U.S.C. 553(d). All interested parties have had notice of the relevant provisions of the RSIA since its enactment on June 22, 1988, more than 30 days prior to the effective date of this rule (January 1, 1989).

In addition to the reasons just stated, notice and comment procedures are unnecessary with regard to the revisions to the penalty schedules and statement of policy issued by this notice because the schedules themselves are statements of agency policy that, like the general statement of policy, are excepted from notice and comment procedure by virtue of 5 U.S.C. 553(b)(3)(A). Statements of policy are also an exception to the general requirement of publication at least 30 days prior to the effective date. See 5 U.S.C. 553(d)(2). Moreover, in reporting out the bill that was enacted as the RSIA, the conference committee stated: "The conferees view these penalty schedules as a matter committed to agency discretion by law." H.Rep. No. 100-637, 100th Cong., 2d Sess. at 21 (1988). Although not required by law to do so, FRA invited public comment on its interim rule and policy statements. Only one comment (discussed below) was received.

Of course, in the future FRA could provide notice of and opportunity to comment on any or all of its schedules. The Federal Railroad Safety Act of 1970 makes this option available; it provides that FRA "shall include in, or make applicable to," each regulation a civil penalty within the statutory range. 45 U.S.C. 438(b). Where the notice and comment option is followed, the schedules ultimately adopted would be regulatory law rather than statements of policy.

#### Effect of This Notice

This notice amends the penalty schedules and, where necessary, the text of the railroad safety regulations (seventeen separate parts are amended here) to give effect to the full range of civil penalties now permitted to be assessed for violation of specific regulations.

The penalty schedules are statements of agency policy that specify the civil penalty that FRA will ordinarily assess for the violation of a particular regulation and reserve FRA's right to assess a penalty up to the statutory maximum where circumstances warrant. The rail safety statutes, of course, authorize FRA to adjust the penalty initially assessed after considering any defenses and a wide variety of mitigating factors. Accordingly, the penalty actually collected may range from the \$250 minimum set by the safety statutes to the amount initially assessed (and, where a valid defense is shown to exist during negotiations, the claim would be terminated and no amount would be collected). Nevertheless, the schedules provide members of the regulated community with some idea of the amount they are likely to be assessed for a given violation.

Given the complexity of amending the hundreds of individual entries in FRA's penalty schedules, combined with the desire to promptly give effect to the expanded authority granted by the RSIA, Congress required that the penalty schedules be amended in a two-stage process. Section 3(b) of the RSIA required FRA to issue interim penalty schedules within 30 days of enactment and final penalty schedules within six months of enactment. Notice No. 1 of this docket accomplished the first task. The changes effected by this notice constitute the detailed penalty schedules discussed in section 3(b). Like the interim schedules, these schedules reserve FRA's right to assess a penalty up to \$20,000 per violation in appropriate circumstances. These schedules contain different penalties for two categories of violations: Normal and willful. The normal penalties apply only to railroads, while the willful column applies to willful violations by railroads or individuals.

Most of the penalty schedules list the CFR section or subsection with the corresponding penalties listed in columns next to it. However, in Part 231, the section listed in the left-hand column of the schedule is taken not directly from the CFR but from the FRA "defect code" for that CFR Part. Defect codes were developed by FRA to facilitate computerization of inspection data by

providing a digital format for every CFR citation. The CFR uses the normal method for distinguishing subparagraphs and further breakdowns of text, i.e., sequential letters and numbers. Also, in a regulatory text, a number of specific requirements may be contained in a single paragraph without internal subdivision. In a defect code, each possible type of noncompliance is assigned a two- or three-digit identifier in place of its CFR text identifier. Thus, a defect code citation may provide greater precision and differentiation than a CFR citation. Of course, the defect codes are coextensive with the CFR, so the actual offense charged would be a violation of the relevant CFR provision; there is no attempt to make conduct illegal unless the CFR specifically so provides.

Part 231 is a special case. There, the penalty schedule uses a defect code that, although no more expansive than Part 231 itself, does not track the CFR in terms of section numbers. The reason is simple: FRA is not content with the organization of Part 231, which remains largely as drafted decades ago. It states safety appliance requirements by type of car, with repetitious incorporation by reference of the requirements for other car types. The defect code (like the amended safety appliance regulations FRA hopes to issue in the future) is organized by the type of safety appliance, making it far easier to use. In this part only, then, the penalty citation will track the defect code and not the CFR. However, as always, every defect code citation is based on and, if necessary, can be traced to a specific regulatory and/or statutory provision. For the sake of convenience and clarity, however, the charging documents will contain the defect code citation.

This notice also issues as an appendix to Part 209 a final Statement of Policy that addresses FRA's exercise of its authority to collect penalties from individuals and its policy on assessment of maximum penalties. This statement covers FRA's definition of "willful" and explains the informal procedures FRA uses to assess penalties and negotiate final penalty amounts with individuals. This statement also contains a useful summary of FRA's overall civil penalty enforcement process. All those interested in that process are urged to become familiar with the statement. The policy statement also addresses the extent of FRA's jurisdiction over railroads and the enforcement authority available to FRA in addition to civil penalties, subjects not discussed in the interim statement.

Finally, this notice makes technical amendments necessary to re-issue, under the authority of the Federal Railroad Safety Act of 1970, the recordkeeping requirements of Subpart B of Part 228 of 49 CFR (which pertain to records of employees' hours of service and reporting instances of excess service under the Hours of Service Act). Section 208(d)(1) of the Safety Act (added by the 1980 amendments to the safety laws, Pub. L. No. 96-423) authorizes FRA to issue, *inter alia*, recordkeeping and reporting requirements in furtherance of the substantive requirements of the older safety statutes. The 1980 amendments also added to the Safety Act section 209(e), which provides for criminal penalties for falsification of records or other knowing and willful violation of recordkeeping requirements. Previously, FRA had been forced to rely on similar authority provided under the Interstate Commerce Act as the basis for civil and criminal penalties for recordkeeping violations related to compliance with the older safety statutes. As revised, the authority citation for Part 228 no longer refers to the Interstate Commerce Act, and the relevant penalty provisions (§§ 228.21 and 228.23) rely on the authority added to the Safety Act in 1980.

Readers should note that this notice does not issue procedural regulations for exercise of the authority, provided by section 3(a) of the RSIA, to suspend or disqualify an individual from safety-sensitive functions. In another proceeding (docket RSEP-6, notice No. 1, 53 FR 49695; December 9, 1988), FRA has proposed to amend Part 209 of 49 CFR to include such procedures.

To the extent that this notice does not amend the interim rule and statements, they will become final with publication of this notice.

#### Discussion of Comments Received

FRA has received only one set of comments on its interim rule and statements of policy. The commenter, a commuter railroad authority, merely posed questions rather than advance a particular position on an issue raised by the interim rule. Those questions, which concerned individual liability for safety violations, were: What role will the National Transportation Safety Board play in determining a "willful" violation? Will the Board's findings as to the causes of accidents be used to justify the placement of fines? Where an individual protests a direct order to violate a safety law, who will determine what the direct order was—the NTSB



investigator, the FRA inspector, or the operating railroad?

FRA believes that these questions are based on certain fundamental misconceptions. First, the NTSB plays no role in the enforcement of the federal railroad safety laws. In the rail area, NTSB's role is limited to investigating serious railroad accidents, reporting on the Board's view as to causal factors, and making appropriate recommendations to private or public bodies. While it may happen that an NTSB investigator may come upon evidence of a safety violation and be called on by FRA to provide relevant testimony in an enforcement proceeding, such an occurrence is very unlikely. Very few of FRA's penalty actions arise from accident investigations. Most result from FRA's routine inspections and complaint investigations. Moreover, FRA exercises concurrent jurisdiction with the NTSB in investigating railroad accidents, and FRA's inspectors often investigate the most serious accidents along with, and sometimes on behalf of, the Board. In the rare circumstance where the NTSB had access to facts indicating safety violations and FRA did not, the Board would undoubtedly share that information with FRA, and would not wait until issuance of its report to do so. Only if FRA could not independently corroborate that information through its own observations or relevant documents would it consider calling on the Board investigator to provide testimony.

The commenter also apparently misunderstood the nature of the protest that the RSIA permits an individual to lodge and document in the face of a direct order to violate the law. Where the evidence demonstrates that such an order has been given, one who files such a protest will be presumed to have lacked the mental state (willfulness) necessary to have made his or her actions subject to a civil penalty. However, the mere lodging and documentation of such a protest will not conclusively establish that a direct order to violate the safety laws had been given. That will be a factual question to be resolved in light of all the evidence, of which the documented protest will be one part. FRA will look to anyone with pertinent knowledge on the nature of the order to provide that information. FRA has included discussion of this point in its final statement of agency policy.

#### Regulatory Impact

##### *E.O. 12291 and DOT Regulatory Policies and Procedures*

This final rule and policy statement have been evaluated in accordance with existing policies and procedures. They

are considered to be non-major under Executive Order 12291. Because of the substantial public interest associated with issuance of this rule, it is considered significant under the DOT policies and procedures. (44 FR 11034; February 28, 1979.)

This rule will not have any direct or indirect economic impact because it does not alter any existing substantive or procedural regulation in such a way as to impose additional burdens. The cost of complying with existing substantive regulations is not being increased. The rule merely contains a regulatory formulation of FRA's amended statutory authority and a statement of its enforcement policy in the event of noncompliance. Accordingly, preparation of a regulatory evaluation is not warranted.

#### Regulatory Flexibility Act

FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities. There are no direct or indirect economic impacts for small units of government, businesses, or other organizations. State rail agencies remain free to participate in the enforcement of FRA's rules but are not required to do so.

#### Paperwork Reduction Act

There are no information collection requirements contained in this rule and policy statement.

#### Environmental Impact

FRA has evaluated this rule and policy statement in accordance with its procedures for ensuring full consideration of the potential environmental impacts of FRA actions, as required by the National Environmental Policy Act and related directives. This notice meets the criteria that establish this as a non-major action for environmental purposes.

#### Federalism Implications

This rule and statement of policy will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12812, preparation of a Federalism Assessment is not warranted.

#### List of Subjects in 49 CFR Parts 209, 213 through 229, and 231 through 236

##### Railroad safety, Penalties.

Therefore, in consideration of the foregoing, Parts 209, 213 through 229, and 231 through 236, Title 49, Code of

Federal Regulations are amended as follows:

#### PART 209—[AMENDED]

##### 1. Part 209 is amended as follows:

A. The authority citation for Part 209 is revised to read as follows:

Authority: 45 U.S.C. 6, 10, and 13, as amended; 45 U.S.C. 34, as amended, 45 U.S.C. 43, as amended; 45 U.S.C. 64a, as amended; 45 U.S.C. 431, 437, 438 and 439, as amended; 49 U.S.C. 103(c); 49 App. U.S.C. 28(h), as amended; 49 App. U.S.C. 1655(e), as amended; Pub. L. 100-342; and 49 CFR 1.49 (c), (d), (f), (g), and (m).

Subparts B and C also issued under 49 App. U.S.C. 1802, 1804, 1808, 1809, and 1810; and 49 CFR 1.49(e).

##### § 209.1 [Amended]

B. Section 209.1 is amended by (1) inserting the first sentence of the introductory text the following: "Appendix A to this part contains a statement of agency policy concerning enforcement of those laws."; (2) removing from paragraph (a) the parenthetical "(49 CFR 1.49(f))" and inserting in its place "(49 CFR 1.49(s))"; (3) removing from paragraph (b) the language "45 U.S.C. 421, 431-441 (49 CFR 1.49(n))" and inserting in its place "45 U.S.C. 421 *et seq.* (49 CFR 1.49(m))"; and (4) in paragraph (c), removing all language after the word "Act" and inserting in its place: "49 App. U.S.C. 1655(e) (49 CFR 1.49 (c), (d), (f), and (g))."

C. Appendix A to Part 209 is revised to read as follows:

#### Appendix A to Part 209—Statement of Agency Policy Concerning Enforcement Of The Federal Railroad Safety Laws

The Federal Railroad Administration ("FRA") enforces the federal railroad safety statutes under delegation from the Secretary of Transportation. See 49 CFR 1.49 (c), (d), (f), (g), and (m). Those statutes include the Federal Railroad Safety Act of 1970 ("Safety Act"), 45 U.S.C. 421 *et seq.*, and a group of statutes enacted prior to 1970 referred to collectively herein as the "older safety statutes": The Safety Appliance Acts, 45 U.S.C. 1-16; the Locomotive Inspection Act, 45 U.S.C. 22-34; the Accident Reports Act, 45 U.S.C. 38-43; the Hours of Service Act, 45 U.S.C. 61-64b; and the Signal Inspection Act, 49 App. U.S.C. 26. Regulations implementing those statutes are found at 49 CFR Parts 213 through 236. The Rail Safety Improvement Act of 1988 (Pub. L. No. 100-342, enacted June 22, 1988) ("RSIA") raised the maximum civil penalties available under the railroad safety laws and made individuals liable for willful violations of those laws. FRA also enforces the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*, as it pertains to the shipment or transportation of hazardous materials by rail.

#### The Civil Penalty Process

The front lines in the civil penalty process are the FRA safety inspectors: FRA employs over 300 inspectors, and their work is supplemented by approximately 100 inspectors from states participating in enforcement of the federal rail safety laws. These inspectors routinely inspect the equipment, track, and signal systems and observe the operations of the nation's railroads. They also investigate hundreds of complaints filed annually by those alleging noncompliance with the laws. When inspection or complaint investigation reveals noncompliance with the laws, each noncomplying condition or action is listed on an inspection report. Where the inspector determines that the best method of promoting compliance is to assess a civil penalty, he or she prepares a violation report, which is essentially a recommendation to the FRA Office of Chief Counsel to assess a penalty based on the evidence provided in or with the report.

In determining which instances of noncompliance merit penalty recommendations, the inspector considers:

- (1) The inherent seriousness of the condition or action;
- (2) The kind and degree of potential safety hazard the condition or action poses in light of the immediate factual situation;
- (3) Any actual harm to persons or property already caused by the condition or action;
- (4) The offending person's (*i.e.*, railroad's or individual's) general level of current compliance as revealed by the inspection as a whole;
- (5) The person's recent history of compliance with the relevant set of regulations, especially at the specific location or division of the railroad involved;
- (6) Whether a remedy other than a civil penalty (ranging from a warning on up to an emergency order) is more appropriate under all of the facts; and
- (7) Such other factors as the immediate circumstances make relevant.

The civil penalty recommendation is reviewed at the regional level by a specialist in the subject matter involved, who requires correction of any technical flaws and determines whether the recommendation is consistent with national enforcement policy in similar circumstances. Guidance on that policy in close cases is sometimes sought from Office of Safety headquarters. Violation reports that are technically and legally sufficient and in accord with FRA policy are sent from the regional office to the Office of Chief Counsel.

The exercise of this discretion at the field and regional levels is a vital part of the enforcement process, ensuring that the exacting and time-consuming civil penalty process is used to address those situations most in need of the deterrent effect of penalties. FRA exercises that discretion with regard to individual violators in the same manner it does with respect to railroads.

The Office of Chief Counsel's Safety Division reviews each violation report it receives from the regional offices for legal sufficiency and assesses penalties based on those allegations that survive that review. Historically, the Division has returned to the

regional offices less than five percent of the reports submitted in a given year, often with a request for further work and resubmission.

Where the violation was committed by a railroad, penalties are assessed by issuance of a penalty demand letter that summarizes the claims, encloses the violation report with a copy of all evidence on which FRA is relying in making its initial charge, and explains that the railroad may pay in full or submit, orally or in writing, information concerning any defenses or mitigating factors. The railroad safety statutes, in conjunction with the Federal Claims Collection Act, authorize FRA to adjust or compromise the initial penalty claims based on a wide variety of mitigating factors. This system permits the efficient collection of civil penalties in amounts that fit the actual offense without resort to time-consuming and expensive litigation. Over its history, FRA has had to request that the Attorney General bring suit to collect a penalty on only a very few occasions.

Once penalties have been assessed, the railroad is given a reasonable amount of time to investigate the charges. Larger railroads usually make their case before FRA in an informal conference covering a number of case files that have been issued and investigated since the previous conference. Thus, in terms of the negotiating time of both sides, economies of scale are achieved that would be impossible if each case were negotiated separately. The settlement conferences, held either in Washington or another mutually agreed on location, include technical experts from both FRA and the railroad as well as lawyers for both parties. In addition to allowing the two sides to make their cases for the relative merits of the various claims, these conferences also provide a forum for addressing current compliance problems. Smaller railroads usually prefer to handle negotiations through the mail or over the telephone, often on a single case at a time. Once the two sides have agreed to an amount on each case, that agreement is put in writing and a check is submitted to FRA's accounting division covering the full amount agreed on.

Cases brought under the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*, are, due to certain statutory requirements, handled under more formal administrative procedures. See 49 CFR Part 209, Subpart B.

#### Civil Penalties Against Individuals

The RSIA amended the penalty provisions of the railroad safety statutes to make them applicable to any "person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad)" who fails to comply with the regulations or statutes. *E.g.*, section 3 of the RSIA, amending section 209 of the Safety Act. However, the RSIA also provided that civil penalties may be assessed against individuals "only for willful violations."

Thus, any individual meeting the statutory description of "person" is liable for a civil penalty for a willful violation of, or for willfully causing the violation of, the safety statutes or regulations. Of course, as has traditionally been the case with respect to

acts of noncompliance by railroads, the FRA field inspector exercises discretion in deciding which situations call for a civil penalty assessment as the best method of ensuring compliance. The inspector has a range of options, including an informal warning, a more formal warning letter issued by the Safety Division of the Office of Chief Counsel, recommendation of a civil penalty assessment, recommendation of disqualification or suspension from safety-sensitive service, or, under the most extreme circumstances, recommendation of emergency action.

The threshold question in any alleged violation by an individual will be whether that violation was "willful." (Note that section 3(a) of the RSIA, which authorizes suspension or disqualification of a person whose violation of the safety laws has shown him or her to be unfit for safety-sensitive service, does not require a showing of willfulness. Regulations implementing that provision are found at 49 CFR Part 209, Subpart D.) FRA proposed this standard of liability when, in 1987, it originally proposed a statutory revision authorizing civil penalties against individuals. FRA believed then that it would be too harsh a system to collect fines from individuals on a strict liability basis, as the safety statutes permit FRA to do with respect to railroads. FRA also believed that even a reasonable care standard (*e.g.*, the Hazardous Materials Transportation Act's standard for civil penalty liability, 49 U.S.C. 1809(e)) would subject individuals to civil penalties in more situations than the record warranted. Instead, FRA wanted the authority to penalize those who violate the safety laws through a purposeful act of free will.

Thus, FRA considers a "willful" violation to be one that is an intentional, voluntary act committed either with knowledge of the relevant law or reckless disregard for whether the act violated the requirements of the law. Accordingly, neither a showing of evil purpose (as is sometimes required in certain criminal cases) nor actual knowledge of the law is necessary to prove a willful violation, but a level of culpability higher than negligence must be demonstrated. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Brock v. Morello Bros. Constr., Inc.* 809 F.2d 161 (1st Cir. 1987); and *Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170 (D.C. Cir. 1984).

Reckless disregard for the requirements of the law can be demonstrated in many ways. Evidence that a person was trained on or made aware of the specific rule involved—or, as is more likely, its corresponding industry equivalent—would suffice. Moreover, certain requirements are so obviously fundamental to safe railroading (*e.g.*, the prohibition against disabling an automatic train control device) that any violation of them, regardless of whether the person was actually aware of the prohibition, should be seen as reckless disregard of the law. See *Brock, supra*, 809 F.2d 164. Thus, a lack of subjective knowledge of the law is no impediment to a finding of willfulness. If it were, a mere denial of the content of the particular regulation would provide a defense. Having



proposed use of the word "willful," FRA believes it was not intended to insulate from liability those who simply claim—contrary to the established facts of the case—they had no reason to believe their conduct was wrongful.

A willful violation entails knowledge of the facts constituting the violation, but actual, subjective knowledge need not be demonstrated. It will suffice to show objectively what the alleged violator must have known of the facts based on reasonable inferences drawn from the circumstances. For example, a person shown to have been responsible for performing an initial terminal air brake test that was not in fact performed would not be able to defend against a charge of a willful violation simply by claiming subjective ignorance of the fact that the test was not performed. If the facts, taken as a whole, demonstrated that the person was responsible for doing the test and had no reason to believe it was performed by others, and if that person was shown to have acted with actual knowledge of or reckless disregard for the law requiring such a test, he or she would be subject to a civil penalty.

This definition of "willful" fits squarely within the parameters for willful acts laid out by Congress in the RSIA and its legislative history. Section 3(a) of the RSIA amends the Safety Act to provide:

For purposes of this section, an individual shall be deemed not to have committed a willful violation where such individual has acted pursuant to the direct order of a railroad official or supervisor, under protest communicated to the supervisor. Such individual shall have the right to document such protest.

As FRA made clear when it recommended legislation granting individual penalty authority, a railroad employee should not have to choose between liability for a civil penalty or insubordination charges by the railroad. Where an employee (or even a supervisor) violates the law under a direct order from a supervisor, he or she does not do so of his or her free will. Thus, the act is not a voluntary one and, therefore, not willful under FRA's definition of the word. Instead, the action of the person who has directly ordered the commission of the violation is itself a willful violation subjecting that person to a civil penalty. As one of the primary sponsors of the RSIA said on the Senate floor:

This amendment also seeks to clarify that the purpose of imposing civil penalties against individuals is to deter those who, of their free will, decide to violate the safety laws. The purpose is not to penalize those who are ordered to commit violations by those above them in the railroad chain of command. Rather, in such cases, the railroad official or supervisor who orders the others to violate the law would be liable for any violations his order caused to occur. One example is the movement of railroad cars or locomotives that are actually known to contain certain defective conditions. A train crew member who was ordered to move such equipment would not be liable for a civil penalty, and his participation in such movements could not be used against him in any disqualification proceeding brought by FRA.

133 Cong. Rec. S.15899 (daily ed. Nov. 5, 1987) (remarks of Senator Exon).

It should be noted that FRA will apply the same definition of "willful" to corporate acts as is set out here with regard to individual violations. Although railroads are strictly liable for violations of the railroad safety laws and deemed to have knowledge of those laws, FRA's penalty schedules contain, for each regulation, a separate amount earmarked as the initial assessment for willful violations. Where FRA seeks such an extraordinary penalty from a railroad, it will apply the definition of "willful" set forth above. In such cases—as in all civil penalty cases brought by FRA—the aggregate knowledge and actions of the railroad's managers, supervisors, employees, and other agents will be imputed to the railroad. Thus, in situations that FRA decides warrant a civil penalty based on a willful violation, FRA will have the option of citing the railroad and/or one or more of the individuals involved. In cases against railroads other than those in which FRA alleges willfulness or in which a particular regulation imposes a special standard, the principles of strict liability and presumed knowledge of the law will continue to apply.

The RSIA gives individuals the right to protest a direct order to violate the law and to document the protest. FRA will consider such protests and supporting documentation in deciding whether and against whom to cite civil penalties in a particular situation. Where such a direct order has been shown to have been given as alleged, and where such a protest is shown to have been communicated to the supervisor, the person or persons communicating it will have demonstrated their lack of willfulness. Any documentation of the protest will be considered along with all other evidence in determining whether the alleged order to violate was in fact given.

However, the absence of such a protest will not be viewed as warranting a presumption of willfulness on the part of the employee who might have communicated it. The statute says that a person who communicates such a protest shall be deemed not to have acted willfully; it does not say that a person who does not communicate such a protest will be deemed to have acted willfully. FRA would have to prove from all the pertinent facts that the employee willfully violated the law. Moreover, the absence of a protest would not be dispositive with regard to the willfulness of a supervisor who issued a direct order to violate the law. That is, the supervisor who allegedly issued an order to violate will not be able to rely on the employee's failure to protest the order as a complete defense. Rather, the issue will be whether, in view of all pertinent facts, the supervisor intentionally and voluntarily ordered the employee to commit an act that the supervisor knew would violate the law or acted with reckless disregard for whether it violated the law.

FRA exercises the civil penalty authority over individuals through informal procedures very similar to those used with respect to railroad violations. However, FRA varies those procedures somewhat to account for differences that may exist between the railroad's ability to defend itself against a

civil penalty charge and an individual's ability to do so. First, when the field inspector decides that an individual's actions warrant a civil penalty recommendation and drafts a violation report, the inspector or the regional director informs the individual in writing of his or her intention to seek assessment of a civil penalty and the fact that a violation report has been transmitted to the Office of Chief Counsel. This ensures that the individual has the opportunity to seek counsel, preserve documents, or take any other necessary steps to aid his or her defense at the earliest possible time.

Second, if the Office of Chief Counsel concludes that the case is meritorious and issues a penalty demand letter, that letter makes clear that FRA encourages discussion, through the mail, over the telephone or in person, of any defenses or mitigating factors the individual may wish to raise. That letter also advises the individual that he or she may wish to obtain representation by an attorney and/or labor representative. During the negotiation stage, FRA considers each case individually on its merits and gives due weight to whatever information the alleged violator provides.

Finally, in the unlikely event that a settlement cannot be reached, FRA sends the individual a letter warning of its intention to request that the Attorney General sue for the initially proposed amount and giving the person a sufficient interval (e.g., 30 days) to decide if that is the only alternative.

FRA believes that the intent of Congress would be violated if individuals who agree to pay a civil penalty or are ordered to do so by a court are indemnified for that penalty by the railroad or another institution (such as a labor organization). Congress intended that the penalties have a deterrent effect on individual behavior that would be lessened, if not eliminated, by such indemnification.

Although informal, face-to-face meetings are encouraged during the negotiation of a civil penalty charge, the RSIA does not require that FRA give individuals or railroads the opportunity for a formal, trial-type administrative hearing as part of the civil penalty process. FRA does not provide that opportunity because such administrative hearings would be likely to add significantly to the costs an individual would have to bear in defense of a safety claim (and also to FRA's enforcement expenses) without shedding any more light on what resolution of the matter is fair than would the informal procedures set forth here. Of course, should an individual or railroad decide not to settle, that person would be entitled to a trial *de novo* when FRA, through the Attorney General, sued to collect the penalty in the appropriate United States district court.

#### Penalty Schedules; Assessment of Maximum Penalties

As recommended by the Department of Transportation in its initial proposal for rail safety legislative revisions in 1987, the RSIA raised the maximum civil penalties for violations of the safety regulations. Under the Hours of Service Act, the penalty was changed from a flat \$500 to a penalty of "up to \$1,000, as the Secretary of Transportation

deems reasonable." Under all the other statutes, the maximum penalty was raised from \$2,500 to \$10,000 per violation, except that, "where a grossly negligent violation or pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury," a penalty of up to \$20,000 per violation may be assessed.

FRA's traditional practice has been to issue penalty schedules assigning to each particular regulation specific dollar amounts for initial penalty assessments. The schedule (except where issued after notice and an opportunity for comment) constitutes a statement of agency policy, and is ordinarily issued as an appendix to the relevant part of the Code of Federal Regulations. For each regulation, the schedule shows two amounts within the \$250 to \$10,000 range in separate columns, the first for ordinary violations, the second for willful violations (whether committed by railroads or individuals). In one instance—Part 231—the schedule refers to sections of the relevant FRA defect code rather than to sections of the CFR text. Of course, the defect code, which is simply a reorganized version of the CFR text used by FRA to facilitate computerization of inspection data, is substantively identical to the CFR text.

The schedule amounts are meant to provide guidance as to FRA's policy in predictable situations, not to bind FRA from using the full range of penalty authority where extraordinary circumstances warrant. The Senate report on the bill that became the RSIA stated:

It is expected that the Secretary would act expeditiously to set penalty levels commensurate with the severity of the violations, with imposition of the maximum penalty reserved for violation of any regulation where warranted by exceptional circumstances.

S. Rep. No. 100-153, 100th Cong., 2d Sess. 8 (1987).

Accordingly, under each of the schedules (ordinarily in a footnote), and regardless of the fact that a lesser amount might be shown in both columns of the schedule, FRA reserves the right to assess the statutory maximum penalty of up to \$20,000 per violation where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury. This authority to assess a penalty for a single violation above \$10,000 and up to \$20,000 is used only in very exceptional cases to penalize egregious behavior. Where FRA avails itself of this right to use the higher penalties in place of the schedule amount it so indicates in its penalty demand letter.

#### The Extent And Exercise Of FRA's Safety Jurisdiction

The Safety Act and, as amended by the RSIA, the older safety statutes apply to "railroads." Section 202(e) of the Safety Act defines railroad as follows:

The term "railroad" as used in this title means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger

service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Prior to 1988, the older safety statutes had applied only to common carriers engaged in interstate or foreign commerce by rail. The Safety Act, by contrast, was intended to reach as far as the Commerce Clause of the Constitution (i.e., to all railroads that affect interstate commerce) rather than be limited to common carriers actually engaged in interstate commerce. In reporting out the bill that became the 1970 Safety Act, the House Committee on Interstate and Foreign Commerce stated:

The Secretary's authority to regulate extends to all areas of railroad safety. This legislation is intended to encompass all those means of rail transportation as are commonly included within the term. Thus, "railroad" is not limited to the confines of "common carrier by railroad" as that language is defined in the Interstate Commerce Act. H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. at 16 (1970).

FRA's jurisdiction was bifurcated until, in 1988, the RSIA amended the older safety statutes to make them coextensive with the Safety Act by making them applicable to railroads and incorporating the Safety Act's definition of the term (e.g., 45 U.S.C. 16, as amended). The RSIA also made clear that FRA's safety jurisdiction is not confined to entities using traditional railroad technology. The new definition of "railroad" emphasized that all non-highway high speed ground transportation systems—regardless of technology used—would be considered railroads.

Thus, with the exception of self-contained urban rapid transit systems, FRA's statutory jurisdiction extends to all entities that can be construed as railroads by virtue of their providing non-highway ground transportation over rails or electromagnetic guideways, and will extend to future railroads using other technologies not yet in use. For policy reasons, however, FRA does not exercise jurisdiction under all of its regulations to the full extent permitted by statute. Based on its knowledge of where the safety problems were occurring at the time of its regulatory action and its assessment of the practical limitations on its role, FRA has, in each regulatory context, decided that the best option was to regulate something less than the total universe of railroads.

For example, all of FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation, i.e., "plant railroads" such as those in steel mills that do not go beyond the plant's boundaries. E.g., 49 CFR 225.3 (accident reporting regulations). Other regulations (e.g., 49 CFR 213.3, track safety regulations) exclude not only plant railroads but all other railroads that are not part of, or

operated over, the "general railroad system of transportation," i.e., the network of standard gauge railroads over which the interchange of goods and passengers throughout the nation is possible—including even certain railroads not physically connected to the continental system, such as a freight railroad in Alaska with which other American railroads interchange cars by means of intermediate modes of transport. (Note that FRA proposed the "general system" language now found in section 202(e) of the Safety Act, and its construction of that language is not bound by construction of similar phrases used in other statutes, e.g., 45 U.S.C. 151 First; those similar phrases are generally part of provisions in those laws limiting their reach—unlike that of the amended safety laws—to "common carriers engaged in interstate commerce.")

Of course, even where a railroad operates outside the general system, other railroads that are definitely part of that system may have occasion to enter the first railroad's property (e.g., a major railroad goes into a chemical or auto plant to pick up or set out cars). In such cases, the railroad that is part of the general system remains part of that system while inside the installation; thus, all of its activities are covered by FRA's regulations during that period. The plant railroad itself, however, does not get swept into the general system by virtue of the other railroad's activity, except to the extent it is liable, as the track owner, for the condition of its track over which the other railroad operates during its incursion into the plant. Of course, in the opposite situation, where the plant railroad itself operates beyond the plant boundaries on the general system, it becomes a railroad with respect to those particular operations, during which its equipment, crew, and practices would be subject to FRA's regulations.

In some cases, the plant railroad leases track immediately adjacent to its plant from the general system railroad. Assuming such a lease provides for, and actual practice entails, the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant, the lease would remove the plant railroad's operations on that trackage from the general system for purposes of FRA's regulations, as it would make that trackage part and parcel of the industrial installation. (As explained above, however, the track itself would have to meet FRA's standards if a general system railroad operated over it. See 49 CFR 213.5 for the rules on how an owner of track may assign responsibility for it.) A lease or practice that permitted other types of movements by general system railroads on that trackage would, of course, bring it back into the general system, as would operations by the plant railroad indicating it was moving cars on such trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire).

It is important to note that FRA's exercise of its regulatory authority on a given matter does not preclude it from subsequently amending its regulations on that subject to bring in railroads originally excluded. More



important, the self-imposed restrictions on FRA's exercise of regulatory authority in no way constrain its exercise of emergency order authority under section 203 of the Safety Act. That authority was designed to deal with imminent hazards not dealt with by existing regulations and/or so dangerous as to require immediate, *ex parte* action on the government's part. Thus, a railroad excluded from the reach of any of FRA's regulations is fully within the reach of FRA's emergency order authority, which is coextensive with FRA's statutory jurisdiction over all railroads.

#### Extraordinary Remedies

While civil penalties are the primary enforcement tool under the federal railroad safety laws, more extreme measures are available under certain circumstances. FRA has authority to issue orders directing compliance with the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, the older safety statutes, or regulations issued under any of those statutes. See 45 U.S.C. 437(a) and (d), and 49 App. U.S.C. 1806(a). Such an order may issue only after notice and opportunity for a hearing in accordance with the procedures set forth in 49 CFR Part 209, Subpart C. FRA inspectors also have the authority to issue a special notice requiring repairs where a locomotive or freight car is unsafe for further service or where a segment of track does not meet the standards for the class at which the track is being operated. Such a special notice may be appealed to the regional director and the FRA Administrator. See 49 CFR Part 216, Subpart B.

FRA may, through the Attorney General, also seek injunctive relief in federal district court to restrain violations or enforce rules issued under the railroad safety laws. See 45 U.S.C. 439 and 49 App. U.S.C. 1810.

FRA also has the authority to issue, after notice and an opportunity for a hearing, an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period. This disqualification authority is exercised under procedures found at 49 CFR Part 209, Subpart D.

Criminal penalties are available for willful violations of the Hazardous Materials Transportation Act or its regulations. See 49 App. U.S.C. 1809(b), and 49 CFR 209.131, 133. Criminal penalties are also available under 45 U.S.C. 438(e) for knowingly and willfully falsifying, destroying, or failing to complete records or reports required to be kept under the various railroad safety statutes and regulations. The Accident Reports Act, 45 U.S.C. 39, also contains criminal penalties.

Perhaps FRA's most sweeping enforcement tool is its authority to issue emergency safety orders "where an unsafe condition or practice, or a combination of unsafe conditions or practices, or both, create an emergency situation involving a hazard of death or injury to persons . . . 45 U.S.C. 432(a). After its issuance, such an order may be reviewed in a trial-type hearing. See 49 CFR 211.47 and 216.21 through 216.27. The emergency order authority is unique because it can be used to address unsafe conditions and practices whether or not they contravene

an existing regulatory or statutory requirement. Given its extraordinary nature, FRA has used the emergency order authority sparingly.

#### PART 213—[AMENDED]

2. Part 213 is amended as follows:

A. The authority citation for Part 213 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

#### § 213.15 [Amended]

B. Section 213.15 is amended by (1) removing the paragraph designator "(a)" before the first paragraph; (2) removing all of paragraph (b); and (3) adding at the end of the remaining text the following: "See Appendix B to this part for a statement of agency civil penalty policy."

C. Appendix B to Part 213 is revised to read as follows:

#### APPENDIX B TO PART 213—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
Subpart A—General:		
213.4(a) Excepted track <sup>a</sup>	\$2,500	\$5,000
213.4(b) Excepted track <sup>a</sup>	2,500	5,000
213.4(c) Excepted track <sup>a</sup>	2,500	5,000
213.4(d) Excepted track <sup>a</sup>	2,500	5,000
213.4(e):		
1 Excepted track	5,000	7,500
2 Excepted track	7,000	10,000
32 Excepted track	7,000	10,000
213.7 Designation of qualified persons to supervise certain renewals and inspect track	1,000	2,000
213.9 Classes of track:		
Operating speed limits	2,500	5,000
213.11 Restoration or renewal of track under traffic conditions	2,500	5,000
213.13 Measuring track not under load	1,000	2,000
Subpart B—Roadbed:		
213.33 Drainage	2,500	5,000
213.37 Vegetation	1,000	2,000
Subpart C—Track geometry:		
213.53 Gage	5,000	7,500
213.55 Alignment	5,000	7,500
213.57 Curves, elevation and speed limitations	2,500	5,000

#### APPENDIX B TO PART 213—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
213.59 Elevation of curved track; runoff	2,500	5,000
213.63 Track surface	5,000	7,500
Subpart D—Track surface:		
213.103 Ballast, general	2,500	5,000
213.109 Crossties:		
(a) Material used	1,000	2,000
(b) Distribution of ties	2,500	5,000
(c) Sufficient number of nondefective ties	1,000	2,000
(d) Joint ties	2,500	5,000
213.113 Defective rails	5,000	7,500
213.115 Rail end mismatch	2,500	5,000
213.121 (a) Rail joints	2,500	5,000
213.121 (b) Rail joints	2,500	5,000
213.121 (c) Rail joints	5,000	7,500
213.121 (d) Rail joints	2,500	5,000
213.121 (e) Rail joints	2,500	5,000
213.121 (f) Rail joints	2,500	5,000
213.121 (g) Rail joints	5,000	7,500
213.123 Tie plates	1,000	2,000
213.127 Track spikes	2,500	5,000
213.133 Turnouts and track crossings generally	1,000	2,000
213.135 Switches:		
(a) through (g)	2,500	5,000
(h) chipped or worn points	5,000	7,500
213.137 Frogs	2,500	5,000
213.139 Spring rail frogs	5,000	7,500
213.141 Self-guarded frogs	2,500	5,000
213.143 Frog guard rails and guard faces; gage	2,500	5,000
Subpart E—Track appliances and track-related devices:		
213.205 Derails	2,500	5,000
Subpart F—Inspection:		
213.233 Track inspections	2,000	4,000
213.235 Switch and track crossings inspections	2,000	4,000
213.237 Inspection of rail	2,500	5,000
213.239 Special inspections	2,500	5,000
213.241 Inspection records	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

<sup>2</sup> In addition to assessment of penalties for each instance of noncompliance with the requirements identified by this footnote, track segments designated as excepted track that are or become ineligible for such designation by virtue of noncompliance with any of the requirements to which this footnote applies are subject to all other requirements of Part 213 until such noncompliance is remedied.

#### PART 215—[AMENDED]

3. Part 215 is amended as follows:

A. The authority citation for Part 215 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

#### § 215.7 [Amended]

B. Section 215.7 is amended by adding at the end thereof the following: "See Appendix B to this part for a statement of agency civil penalty policy."

C. Appendix B to Part 215 is revised to read as follows:

#### APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
Subpart A—General:		
215.9 Movement for repair:		
(a), (c)	( <sup>1</sup> )	( <sup>1</sup> )
(b)	\$2,500	\$5,000
215.11 Designation of qualified persons	2,500	5,000
215.13 Pre-departure inspection	2,000	4,000
Subpart B—Freight Car Components:		
215.103 Defective wheel:		
(a) Flange thickness of:		
(1) 7/8" or less but more than 3/4"	2,500	5,000
(2) 1 1/8" or less	5,000	7,500
(b) Flange height of:		
(1) 1 1/2" or greater but less than 1 3/4"	2,500	5,000
(2) 1 3/4" or more	5,000	7,500

#### APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(c) Rim thickness of:		
(1) 1 1/8" or less but more than 1/2"	2,500	5,000
(2) 1/2" or less	5,000	7,500
(d) Wheel rim, flange plate hub width:		
(1) Crack of less than 1"	2,500	5,000
(2) Crack of 1" or more	5,000	7,500
(3) Break	5,000	7,500
(e) Chip or gouge in flange of:		
(1) 1 1/2" or more but less than 1 3/4" in length; and 1/2" or more but less than 1/2" in width	2,500	5,000
(2) 1 1/2" or more in length; or 1/2" or more in width	5,000	7,500
(f) Slid flat or shelled spot(s):		
(1)(i) One spot more than 2 1/2", but less than 3" in length	2,500	5,000
(ii) One spot 3" or more in length	5,000	7,500
(2)(i) Two adjoining spots each of which is more than 2" but less than 2 1/2" in length	2,500	5,000

#### APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(ii) Two adjoining spots both of which are at least 2" in length, if either spot is 2 1/2", or more in length	5,000	7,500
(g) Loose on axle	6,000	8,500
(h) Overheated; discoloration extending:		
(1) more than 4" but less than 4 1/2"	2,500	5,000
(2) 4 1/2" or more	5,000	7,500
(i) Welded	5,000	7,500
215.105 Defective axle:		
(a)(1) Crack of 1" or less	2,500	5,000
(2) Crack of more than 1"	5,000	7,500
(3) Break	8,000	8,500
(b) Gouge in surface that is between the wheel seats and is more than 1/2" in depth	2,500	5,000
(c) End collar with crack or break	2,500	5,000
(d) Journal overheated	5,000	7,500
(e) Journal surface has: a ridge; a depression; a circumferential score; corrugation; a scratch; a continuous streak; pitting; rust; or etching	2,500	5,000
215.107 Defective plain bearing box: general:		
(a)(1) No visible free oil	1,500	3,000



APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(2) Lubricating pad dry (no expression of oil observed when pad is compressed).....	5,000	7,500
(b) Box lid is missing, broken, or open except to receive servicing.....	1,000	2,000
(c) Contains foreign matter that can be expected to damage the bearing or have a detrimental effect on the lubrication of the journal and bearing.....	2,500	5,000
215.109 Defective plain bearing box: journal lubrication system:		
(a) Lubricating pad has a tear.....	1,000	2,000
(b) Lubricating pad scorched, burned, or glazed.....	2,500	5,000
(c) Lubricating pad contains decaying or deteriorating fabric.....	2,500	5,000
(d) Lubricating pad has an exposed center core or metal parts contacting the journal.....	2,500	5,000
(e) Lubricating pad is missing or not in contact with the journal.....	5,000	7,500
215.111 Defective plain bearing:		
(a) Missing.....	5,000	7,500
(b) Bearing liner is loose or has piece broken out.....	2,500	5,000
(c) Overheated.....	5,000	7,500

APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
215.113 Defective plain bearing wedge:		
(a) Missing.....	5,000	7,500
(b) Cracked.....	2,500	5,000
(c) Broken.....	5,000	7,500
(d) Not located in its design position.....	5,000	7,500
215.115 Defective roller bearing:		
(a)(1) Overheated.....	5,000	7,500
(2) (i) Cap screw(s) loose.....	2,500	5,000
(ii) Cap screw lock broken, missing or improperly applied.....	1,000	2,000
(3) Seal is loose or damaged, or permits leakage of lubricant.....	2,500	5,000
(b)(1) Not inspected and tested after derailment.....	2,500	5,000
(2) Not disassembled after derailment.....	2,500	5,000
(3) Not repaired or replaced after derailment.....	5,000	7,500
215.117 Defective roller bearing adapter:		
(a) Cracked or broken.....	2,500	5,000
(b) Not in its design position.....	5,000	7,500
(c) Worn on the crown.....	2,500	5,000
215.119 Defective freight car truck:		
(a)(1) A side frame or bolster that is broken.....	5,000	7,500
(2)(i) Side frame or bolster with crack of: 1/4" or more, but less than 1".....	2,500	5,000
(ii) 1" or more.....	5,000	7,500

APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(b) A snubbing device that is ineffective or missing.....	2,500	5,000
(c) Side bearing(s):		
(1) Assembly missing or broken.....	5,000	7,500
(2) In contact except by design.....	5,000	7,500
(3), (4) Total clearance at one end or at diagonally opposite sides of:.....		
(i) more than 3/4" but not more than 1".....	2,500	5,000
(ii) more than 1".....	5,000	7,500
(d) Truck spring(s):		
(1) Do not maintain travel or load.....	2,500	5,000
(2) Compressed solid.....	2,500	5,000
(3) Outer truck springs broken or missing:		
(i) Two outer springs.....	2,500	5,000
(ii) Three or more outer springs.....	5,000	7,500
(e) Truck bolster-center plate interference.....	5,000	7,500
(f) Brake beam shelf support worn.....	2,500	5,000

APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
215.121 Defective car body:		
(a) Has less than 2 1/2" clearance from the top of rail.....	2,500	5,000
(b) Car center sill is:		
(1) Broken.....	8,000	8,500
(2) Cracked more than 6".....	2,500	5,000
(3) Bent or buckled more than 2 1/2" in any 6' length.....	2,500	5,000
(c) Coupler carrier that is broken or missing.....	2,500	5,000
(d) Car door not equipped with operative safety hangers.....	5,000	7,500
(e)(1) Center plate not properly secured.....	5,000	7,500
(2) Portion missing.....	2,500	5,000
(3) Broken.....	5,000	7,500
(4) Two or more cracks.....	2,500	5,000
(f) Broken sidesill, cross-bearer, or body bolster.....	2,500	5,000
215.123 Defective couplers:		
(a) Shank bent out of alignment.....	1,000	2,000
(b) Crack in highly stressed junction area.....	2,500	5,000
(c) Coupler knuckle broken or cracked.....	2,500	5,000
(d) Coupler knuckle pin or thrower that is missing or inoperative.....	2,500	5,000
(e) Coupler retainer pin lock that is missing or broken.....	1,000	2,000

APPENDIX B TO PART 215—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(f) Coupler with following conditions: locklift inoperative; no anticreep protection; or coupler lock is missing, inoperative, bent, cracked, or broken.....	2,500	5,000
215.125 Defective uncoupling device.....	2,500	5,000
215.127 Defective draft arrangement:		
(a) Draft gear that is inoperative.....	2,500	5,000
(b) Yoke that is broken.....	2,500	5,000
(c) End of car cushioning unit is leaking or inoperative.....	2,500	5,000
(d) Vertical coupler pin retainer plate missing or has missing fastener.....	5,000	7,500
(e) Draft key or draft key retainer that is inoperative or missing.....	5,000	7,500
(f) Follower plate that is missing or broken.....	2,500	5,000
215.129 Defective cushioning device.....	2,500	5,000
Subpart C—Restricted equipment:		
215.203 Restricted cars.....	2,500	5,000
Subpart D—Stencilling:		
215.301 General.....	1,000	2,000
215.303 Stencilling of restricted cars.....	1,000	2,000
215.305 Stencilling of maintenance-of-way.....	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. Generally, when two or more violations of these regulations are discovered with respect to a single freight car that is placed or continued in service by a railroad, the appropriate penalties set forth above are aggregated up to a maximum of \$10,000 per day. However, a failure to perform, with respect to a particular freight car, the predeparture inspection required by § 215.13 of this part will be treated as a violation separate and distinct from, and in addition to, any substantive

violation conditions found on the car. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 208, Appendix A. Failure to observe any condition for movement set forth in paragraphs (a) and (c) of § 215.9 will deprive the railroad of the benefit of the movement-for-repair provision and make the railroad and any responsible individuals liable for penalty under the particular regulatory section(s) concerning the substantive defect(s) present on the freight car at the time of movement. Maintenance-of-way equipment not stenciled in accordance with § 215.305 is subject to all requirements of this part. See § 215.3(c)(3).

PART 216—[AMENDED]

4. Part 216 is amended as follows:  
A. The authority citation for Part 216 is revised to read as follows:

Authority: 45 U.S.C. 431, 432, and 438, as amended; 45 U.S.C. 22-34, as amended; Pub. L. 100-342; and 49 CFR 1.49 (c) and (m).

PART 217—[AMENDED]

5. Part 217 is amended as follows:  
A. The authority citation for Part 217 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

§ 217.5 [Amended]

B. Section 217.5 is amended by adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. Appendix A to Part 217 is revised to read as follows:

APPENDIX A TO PART 217—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
217.7 Filing of operating rules:		
(a).....	\$2,500	\$5,000
(b).....	2,500	5,000
217.9 Program of operational tests and inspections and recordkeeping:		
(a).....	5,000	7,500
(b) and (c).....	2,500	5,000
(d).....	1,000	2,000
217.11 Program of instruction on operating rules:		
(a).....	5,000	7,500
(b).....	2,500	5,000
(c).....	2,500	5,000
217.13 Annual report:		
(a) and (c).....	1,000	2,000
(b) and (d).....	2,500	5,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

PART 218—[AMENDED]

6. Part 218 is amended as follows:



A. The authority citation for Part 218 continues to read as follows:

Authority: 49 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

**§ 218.9 [Amended]**

B. Section 218.9 is amended by adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. Section 218.41 is revised to read as follows:

**§ 218.41 Noncompliance with hump operations rule.**

A person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) who fails to comply with a railroad's operating rule issued pursuant to § 218.39 of this part is subject to a penalty, as provided in Appendix A of this part.

D. Appendix A to Part 218 is revised to read as follows:

**APPENDIX A TO PART 218—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>**

Section	Violation	Willful violation
Subpart B—Blue signal protection of workmen:		
218.23 Blue signal display .....	\$5,000	\$7,500
218.25 Workmen on a main track .....	5,000	7,500
218.27 Workmen on track other than main track:		
(a) Protection provided except that signal not displayed at switch .....	2,000	4,000
(b) through (e) .....	5,000	7,500
218.29 Alternate methods of protection:		
(a)(1) protection provided except that signal not displayed at switch .....	2,000	4,000
(a)(2) through (a)(8) .....	5,000	7,500
(b)(1) protection provided except that signal not displayed at switch .....	2,000	4,000
(b)(2) through (b)(4) .....	5,000	7,500

**APPENDIX A TO PART 218—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>—Continued**

Section	Violation	Willful violation
(c) use of derails .....	5,000	7,500
(d) emergency repairs .....	5,000	7,500
218.30 Remotely controlled switches:		
(a) and (b) .....	5,000	7,500
(c) .....	1,000	2,000
Subpart C—Protection of trains and locomotives:		
218.35 Yard limits:		
(a) and (b) .....	5,000	7,500
(c) .....	1,000	2,000
218.37 Flag protection:		
(a) .....	5,000	7,500
(b) and (c) .....	5,000	7,500
218.39 Hump operations .....	5,000	7,500
218.41 Noncompliance with hump operations rule .....	5,000	7,500
Subpart D—Prohibition against tampering with safety devices:		
218.55 Tampering [Reserved]:		
218.57 Operating or permitting operation of disabled equipment [Reserved]:		
(a) Knowingly		
(b) Willfully		
218.59 Operation of disabled equipment [Reserved]:		

<sup>1</sup> Except as provided for in section 218.57, a penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

**PART 219—[AMENDED]**

7. Part 219 is amended as follows:

A. The authority citation for Part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

**§ 219.9 [Amended]**

B. Section 219.9(d) is amended by adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. Appendix A to Part 219 is revised to read as follows:

**APPENDIX A TO PART 219—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>**

Section	Violation	Willful violation
Subpart B—Prohibitions:		
219.101 Alcohol and drug use:		
(i) Employee violates prohibition .....	(—)	\$10,000
(ii) Employee is required or permitted to violate prohibition .....	(—)	10,000
(iii) Failure to exercise due diligence to assure compliance .....	\$2,500	5,000
Subpart C—Post-accident testing:		
219.201 Events for which testing is required:		
(i) Failure to facilitate conduct of required post-accident toxicological test by making reasonable inquiry and good faith judgments with respect to circumstances of accident/incident; by failing to take all practicable steps to require employee participation; or by otherwise failing to comply with Subpart C such that test cannot be conducted .....	5,000	7,500
(ii) required employee to provide samples in reliance on Subpart C where not required (including failure to make reasonable inquiry or exercise good faith judgment) .....	5,000	10,000

**APPENDIX A TO PART 219—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>—Continued**

Section	Violation	Willful violation
219.203 Responsibilities of Railroads and Employees:		
(b) Delay in obtaining samples account failure to make every reasonable effort .....	2,500	5,000
(c) Place of sample collection; by whom .....	2,500	5,000
(d) Failure to notify FRA of an employee injury requiring FRA intervention .....	2,500	5,000
219.205 Sample collection and handling:		
(i) Failure to promptly forward samples .....	2,500	5,000
(ii) Failure to provide information sheet(s) with samples .....	1,000	2,000
(iii) Failure to observe other requirements with respect to sample collection, marking and handling .....	2,500	5,000
219.207 Fatality:		
(a) Failure to contact custodian and request assistance .....	2,500	5,000
(b) Failure to notify FRA where intervention needed .....	2,500	5,000
219.209 Reports of tests and refusals:		
(a) Failure to provide telephonic report .....	1,000	2,000
(b) Failure to provide written report (samples not provided) .....	1,000	2,000

**APPENDIX A TO PART 219—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>—Continued**

Section	Violation	Willful violation
219.213 Unlawful refusals, consequences:		
(a) Failure to take action against employee who refuses to provide samples .....	2,500	5,000
(b), (c) Failure to provide timely notice and proper hearing .....	2,500	5,000
Subpart D—Authorization to test for cause:		
219.301 Testing for reasonable cause:		
Employee required to submit to testing without reasonable cause .....	5,000	7,500
219.303 Breath testing procedures and safeguards .....	2,500	5,000
219.305 Urine test procedures and safeguards .....	2,500	5,000
219.307 Standards for urine assays .....	2,500	5,000
219.309 Presumption of impairment, notice: Failure to provide effective notice of presumption from positive urine test .....	2,500	5,000
Subpart E—Identification of troubled employees:		
219.401 Requirements for policies:		
(i) Failure to adopt or publish or wholesale failure to implement policy required by Subpart E .....	5,000	7,500
(ii) Failure to implement as to individual employee .....	2,500	5,000
219.407 Alternate policies: Failure to file agreement or other document or provide timely notice of revocation .....	1,000	2,000

**APPENDIX A TO PART 219—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>—Continued**

Section	Violation	Willful violation
Subpart F—Pre-employment drug screen:		
219.501 Pre-employment drug screens:		
(a) Failure to perform pre-employment drug screen prior to employing applicant in covered service .....	2,500	5,000
(b)(i) Failure to provide prior notice of drug screen .....	2,500	5,000
(ii) Maintaining record of declaration of test .....	500	1,000
(c) Failure to test for specific substances as required by FRA .....	2,500	5,000
(d) Failure to conduct second test on positive sample .....	2,500	5,000
219.503 Notification; records:		
(a) Failure to provide notice of positive test and opportunity for response .....	2,000	4,000
(b) Failure to maintain and make available to FRA records of tests conducted .....	2,500	5,000
219.505 Refusals: Applicant who refuses test employed in covered service .....	2,500	5,000
Subpart G—Random drug testing:		
219.601 (i) Failure to implement and/or submit to FRA for approval a random drug testing program that satisfies requirements of this subpart and subpart H .....	5,000	7,500



APPENDIX A TO PART 219—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(ii) other violation 219.603 (i) Failure to facilitate conduct of required random drug testing by failing to take all practical steps to require employee participation or by otherwise failing to comply with Subpart G such that test cannot be conducted	1,000	2,000
(ii) Required employee to provide samples in reliance on subpart G based on other than random selection	2,500	5,000
(iii) Required employee to submit to testing without observance of procedures and safeguards contained in subparts G and H	5,000	7,500
(iv) Failure to take action against employee who refuses to provide sample	2,500	5,000
(v) Failure to provide timely notice and proper hearing	2,500	5,000
(vi) other violation	1,000	2,000
219.605 (i) Failure to provide notice of positive test results	2,000	4,000
(ii) other violation	1,000	2,000
219.607 Failure to retain or provide records	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 220—[AMENDED]

8. Part 220 is amended as follows:  
A. The authority citation for Part 220 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

## § 220.7 [Amended]

B. Section 220.7 is amended by adding at the end thereof the following: "See Appendix C to this part for a statement of agency civil penalty policy."

C. Appendix C to Part 220 is revised to read as follows:

APPENDIX C TO PART 220—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
220.21 Railroad Operating rules; radio communications:		
(a).....	\$5,000	\$7,500
(b).....	2,500	5,000
220.23 Publication of radio information	2,500	5,000
220.25 Instruction of employees	5,000	7,500
220.27 Identification	1,000	2,000
220.29 Statement of letters and numbers	1,000	2,000
220.31 Initiating a transmission	1,000	2,000
220.33 Receiving a transmission	1,000	2,000
220.35 Ending a transmission	1,000	2,000
220.37 Voice test	5,000	7,500
220.39 Continuous monitoring	2,500	5,000
220.41 Notification on failure of train radio	2,500	5,000
220.43 Communication consistent with the rules	2,500	5,000
220.45 Complete communications	2,500	5,000
220.47 Emergencies	2,500	5,000
220.49 Switching, backing or pushing	5,000	7,500
220.51 Signal indications	5,000	7,500
220.61 Transmission of train orders by radio	5,000	7,500

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 221—[AMENDED]

9. Part 221 is amended as follows:  
A. The authority citation for Part 221 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

## § 221.7 [Amended]

B. Section 221.7 is amended by adding at the end thereof the following: "See Appendix C to this part for a statement of agency civil penalty policy."

C. Appendix C to Part 221 is revised to read as follows:

APPENDIX C TO PART 221—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
221.13 Marking device display:		
(a) device not present, not displayed, or not properly illuminated	\$5,000	\$7,500
(d) device too close to rail	1,000	2,000
221.14 Marking devices: Use of unapproved or noncomplying device	2,500	5,000
221.15 Marking device inspection:		
(a) Failure to inspect at crew change	2,500	5,000
(b), (c) improper inspection	2,500	5,000
221.16 Inspection procedure:		
(a) Failure to obtain protection	5,000	7,500
(b) improper protection	2,500	5,000
221.17 Movement of defective equipment		( <sup>1</sup> )

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A. Where the conditions for movement of defective equipment set forth in § 221.17 of this part are not met, the movement constitutes a violation of § 221.13 of this part.

## PART 223—[AMENDED]

10. Part 223 is amended as follows:  
A. The authority citation for Part 223 continues to read as follows:

Authority: 45 U.S.C. 431 and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49(m).

## § 223.7 [Amended]

B. Section 223.7 is amended by adding at the end thereof the following: "See Appendix B to this part for a statement of agency civil penalty policy."

C. Appendix B to Part 223 is revised to read as follows:

APPENDIX B TO PART 223—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
223.9 New or rebuilt equipment:		
(a) Locomotives	\$2,500	\$5,000
(b) Caboose	2,500	5,000
(c) Passenger cars	2,500	5,000
223.11(c) Existing locomotives	2,500	5,000
(d) repair of window	1,000	2,000
223.13(c) Existing cabooses	2,500	5,000

APPENDIX B TO PART 223—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(d) Repair of window	1,000	2,000
223.15(c) Existing passenger cars	2,500	5,000
(d) repair of window	1,000	2,000
223.17 Identification of units	500	1,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 225—[AMENDED]

11. Part 225 is amended as follows:  
A. The authority citation for Part 225 continues to read as follows:

Authority: 45 U.S.C. 38, 42 and 43, as amended; 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49 (c) and (m).

## § 225.29 [Amended]

B. Section 225.29 is amended by removing the last sentence and adding at the end thereof the following: "See Appendix B to this part for a statement of agency civil penalty policy. A person may also be subject to the criminal penalties provided for in 45 U.S.C. 39 and 438(e)."

C. Appendix B to Part 225 is revised to read as follows:

APPENDIX B TO PART 225—Schedule of Civil Penalties<sup>1</sup>

Section	Violation	Willful violation
225.9 Telephonic reports of certain accidents/incidents	\$1,000	\$2,000
225.11 Reports of accidents/incidents	2,500	5,000
225.13 Late reports	2,500	5,000
225.17(d) Alcohol or drug involvement	2,500	5,000
225.23 Joint operations	( <sup>1</sup> )	( <sup>1</sup> )
225.25 Recordkeeping	2,500	5,000
225.27 Retention of records	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A. A failure to comply with § 225.23 constitutes a violation of § 225.11. For purposes of §§ 225.25 and 225.27 of this part, each of the following constitutes a single act of noncompliance: (1) A missing or incomplete log entry for a particular employee's injury or illness; (2) a missing or incomplete supplementary record of a particular employee's injury of illness; or (3) a missing or incomplete annual summary for a particular establishment. Each day a violation continues is a separate offense.

## PART 228—[AMENDED]

12. Part 228 is amended as follows:  
A. The authority citation for Part 228 is revised to read as follows:

Authority: 45 U.S.C. 61-64b, as amended; 45 U.S.C. 437 and 438, as amended; Pub. L. 100-342; 49 App. U.S.C. 1655(e), as amended; and 49 CFR 1.49 (d) and (m).

B. Section 228.21 is revised to read as follows:

## § 228.21 Civil penalty.

Any person (including a railroad subject to this part and any manager, supervisor, official, or other employee or agent of such a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix B to this part for a statement of agency civil penalty policy. Violations of the Hours of Service Act itself (e.g., requiring an employee to work excessive hours or beginning construction of a sleeping quarters subject to approval under subpart C of this part without prior approval) are subject to penalty under that Act's penalty provision, 45 U.S.C. 64a.

C. Section 228.23 is revised to read as follows:

## § 228.23 Criminal penalty.

Any person who knowingly and willfully falsifies a report or record required to be kept under this part or otherwise knowingly and willfully violates any requirement of this part may be liable for criminal penalties of a fine up to \$5,000, imprisonment for up to two years, or both, in accordance with 45 U.S.C. 438(e).

D. A new Appendix B to Part 228 is added to read as follows:

APPENDIX B—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
Subpart B—Records and Reporting:		
228.9 Railroad records	\$500	\$1,000
228.11 Hours of duty records	500	1,000

APPENDIX B—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
228.17 Dispatcher's record	500	1,000
228.19 Monthly reports of excess service	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 229—[AMENDED]

13. Part 229 is amended as follows:  
A. The authority citation for Part 229 continues to read as follows:

Authority: 45 U.S.C. 22-34, as amended; 49 App. U.S.C. 1655(e), as amended; Pub. L. 100-342; and 49 CFR 1.49 (c) and (g).

## § 229.7 [Amended]

B. Section 229.7(b) is amended by adding at the end thereof the following: "See Appendix B to this part for a statement of agency civil penalty policy."

C. Appendix B to Part 229 is revised to read as follows:

APPENDIX B TO PART 229—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
Subpart A—General		
229.7 Prohibited acts: Safety deficiencies not governed by specific regulations: To be assessed on relevant facts	\$1,000-5,000	\$2,000-7,500
229.9 Movement of noncomplying locomotives	( <sup>1</sup> )	( <sup>1</sup> )
229.11 Locomotive identification	1,000	2,000
229.13 Control of locomotives	2,500	5,000
229.17 Accident reports	2,500	5,000
229.19 Prior Waivers	( <sup>1</sup> )	( <sup>1</sup> )

## Subpart B—Inspection and tests

229.21 Daily inspection:		
(a)(b):		
(1) Inspection overdue	2,000	4,000
(2) Inspection report not made, improperly executed, or not retained	1,000	2,000
(c) Inspection not performed by a qualified person	1,000	2,000



APPENDIX B TO PART 229—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
229.23 Periodic inspection General (a)(b):		
(1) Inspection overdue	2,500	5,000
(2) Inspection performed improperly or at a location where the underneath portion cannot be safely inspected	2,500	5,000
(c)(d):		
(1) Form missing	1,000	2,000
(2) Form not properly displayed	1,000	2,000
(3) Form improperly executed	1,000	2,000
(e) Replace Form FRA F 6180-48A by April 2	1,000	2,000
(f) Secondary record of the information reported on Form FRA F 6180-48A	1,000	2,000
229.25 Tests: Every periodic inspection	2,500	5,000
229.27 Annual tests	2,500	5,000
229.29 Biennial tests	2,500	5,000
229.31:		
(a) Biennial hydrostatic tests of main reservoirs	2,500	5,000
(b) Biennial hammer tests of main reservoirs	2,500	5,000
(c) Drilled telltale holes in welded main reservoirs	2,500	5,000
(d) Biennial tests of aluminum main reservoirs	2,500	5,000
229.33 Out-of-use credit	1,000	2,000
<b>Subpart C—Safety Requirements</b>		
229.41 Protection against personal injury	2,500	5,000
229.43 Exhaust and battery gases	2,500	5,000
229.45 General condition: To be assessed based on relevant facts	1,000-5,000	2,000-7,500
229.46 Brakes: General	2,500	5,000
229.47 Emergency brake valve	2,500	5,000
229.49 Main reservoir system:		
(a)(1) Main reservoir safety valve	2,500	5,000

APPENDIX B TO PART 229—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(2) Pneumatically actuated control reservoir	2,500	5,000
(b)(c) Main reservoir governors	2,500	5,000
229.51 Aluminum main reservoirs	2,500	5,000
229.53 Brake gauges	2,500	5,000
229.55 Piston travel	2,500	5,000
229.57 Foundation brake gear	2,500	5,000
229.59 Leakage	2,500	5,000
229.61 Draft system	2,500	5,000
229.63 Lateral motion	2,500	5,000
229.64 Plain bearing	2,500	5,000
229.65 Spring rigging	2,500	5,000
229.67 Trucks	2,500	5,000
229.69 Side bearings	2,500	5,000
229.71 Clearance above top of rail	2,500	5,000
229.73 Wheel sets	2,500	5,000
229.75 Wheel and tire defects:		
(a),(d) Slid flat or shelled spots:		
(1) One spot 2½" or more but less than 3" in length	2,500	5,000
(2) One spot 3" or more in length	5,000	7,500
(3) Two adjoining spots each of which is 2" or more in length but less than 2½" in length	2,500	5,000
(4) Two adjoining spots each of which are at least 2" in length, if either spot is 2½" or more in length	5,000	7,500
(b) Gouge or chip in flange of:		
(1) more than 1½" but less than 1¾" in length; and more than ¼" but less than ⅜" in width	2,500	5,000
(2) 1½" or more in length and ⅜" or more in width	5,000	7,500
(c) Broken rim	5,000	7,500
(e) Seam in tread	2,500	5,000
(f) Flange thickness of:		
(1) ⅜" or less but more than ⅜" in	2,500	5,000

APPENDIX B TO PART 229—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(2) ⅜" or less	5,000	7,500
(g) Tread worn hollow	2,500	5,000
(h) Flange height of:		
(1) 1½" or greater but less than 1¾"	2,500	5,000
(2) 1½" or more	5,000	7,000
(i) Tire thickness	2,500	5,000
(j) Rim thickness:		
(1) Less than 1" in road service and ¼" in yard service	2,500	5,000
(2) 1½" or less in road service and ⅜" in yard service	5,000	7,500
(k) Crack of less than 1"	5,000	7,500
(1) Crack of less than 1"	2,500	5,000
(2) Crack of 1" or more	5,000	7,500
(3) Break	5,000	7,500
(l) Loose wheel or tire	5,000	7,500
(m) Welded wheel or tire	5,000	7,500
229.77 Current collectors	2,500	5,000
229.79 Third rail shoes and beams	2,000	4,000
229.81 Emergency pole; shoe insulation	2,500	5,000
229.83 Insulation or grounding	5,000	7,500
229.85 Door and cover plates marked "Danger"	2,500	5,000
229.87 Hand operated switches	2,500	5,000
229.89 Jumpers; cable connections:		
(a) Jumpers and cable connections; located and guarded	2,500	5,000
(b) Condition of jumpers and cable connections	2,500	5,000
229.91 Motors and generators	2,500	5,000
229.93 Safety cut-off device	2,500	5,000
229.95 Venting	2,500	5,000
229.97 Grounding fuel tanks	2,500	5,000
229.99 Safety hangers	2,500	5,000
229.101 Engines:		
(a) Temperature alarms, controls, and switches	2,500	5,000
(b) Warning notice	2,500	5,000
(c) Wheel slip/slide protection	2,500	5,000

APPENDIX B TO PART 229—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
229.103 Safe working pressure; factor of safety	2,500	5,000
229.105 Steam generator number	500	1,000
229.107 Pressure	2,500	5,000
229.109 Safety valves	2,500	5,000
229.111 Water-flow indicator	2,500	5,000
229.113 Warning notice	2,500	5,000
229.115 Slip/slide alarms	2,500	5,000
229.117 Speed indicators	2,500	5,000
229.119 Cabs, floors, and passageways:		
(a)(1) Cab set not securely mounted or braced	2,500	5,000
(2) Insecure or improper latching device	2,500	5,000
(b) Cab windows of lead locomotive	2,500	5,000
(c) Floors, passageways, and compartments	2,500	5,000
(d) Ventilation and heating arrangement	2,500	5,000
(e) Continuous barrier	2,500	5,000
(f) Containers for fuses and torpedoes	2,500	5,000
229.121 Locomotive cab noise	2,500	5,000
229.123 Pilots, snowplows, and plates	2,500	5,000
229.125 Headlights	2,500	5,000
229.127 Cab lights	2,500	5,000
229.129 Audible warning device	2,500	5,000
229.131 Sanders	1,000	2,000

## Subpart D—Design Requirements

229.141 Body structure, MU locomotives	2,500	5,000
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<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. Generally, when two or more violations of these regulations are discovered with respect to a single locomotive that is used by a railroad, the appropriate penalties set forth above are aggregated up to a maximum of \$10,000 per day. However, a failure to perform, with respect to a particular locomotive, any of the inspections and tests required under Subpart B of this part will be treated as a violation separate and distinct from, and in addition to, any substantive violative conditions found on that locomotive. Moreover, the Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

Failure to observe any condition for movement set forth in § 229.9 will deprive the railroad of the benefit of the movement-for-repair provision and make the railroad and any responsible individuals liable for penalty under the particular regulatory section(s) concerning the substantive defect(s) present on the

locomotive at the time of movement. Failure to comply with § 229.19 will result in the lapse of any affected waiver.

## PART 231—[AMENDED]

14. Part 231 is amended as follows:  
A. The authority citation for Part 231 continues to read as follows:

Authority: 45 U.S.C. 2, 4, 8, 10, and 11-18, as amended; 49 App. U.S.C. 1655(e), as amended; Pub. L. 100-342; and 49 CFR 1.49(c) and (g).

## § 231.0 [Amended]

B. Section 231.0 is amended by adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. A new Appendix A to Part 231 is added to read as follows:

APPENDIX A TO PART 231—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

FRA safety appliance defect code section <sup>2</sup>	Violation	Willful violation
110.A1 Hand Brake or Hand Brake Part Missing	\$5,000	\$7,500
110.A2 Hand Brake or Hand Brake Part Broken	5,000	7,500
110.A3 Hand Brake or Hand Brake Part Loose or Worn	2,500	5,000
110.B1 Hand Brake Inoperative	5,000	7,500
110.B2 Hand Brake Inefficient	2,500	5,000
110.B3 Hand Brake Improperly Applied	2,500	5,000
110.B4 Hand Brake Incorrectly located	2,500	5,000
110.B5 Hand Brake Shaft Welded or Wrong Dimension	2,500	5,000
110.B6 Hand Brake Shaft Not Retained in Operating Position	2,500	5,000
110.B8 Hand Brake or Hand Brake Parts Wrong Design	2,500	5,000
114.B2 Hand Brake Wheel or Lever Has Insufficient Clearance Around Rim or Handle	2,500	5,000
114.B3 Hand Brake Wheel/Lever Clearance Insufficient to Vertical Plane Through Inside Face of Knuckle	2,500	5,000
120.A1 Brake Step Missing Except by Design	5,000	7,500
120.A2 Brake Step or Brace Broken or Decayed	2,500	5,000
120.A3 Brake Step or Brace Loose	2,500	5,000
120.B1 Brake Step or Brace Bent	2,500	5,000
120.B2 Brake Step or Wrong Dimensions	2,500	5,000

APPENDIX A TO PART 231—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

FRA safety appliance defect code section <sup>2</sup>	Violation	Willful violation
120.C1 Brake Step Improperly Applied	2,500	5,000
120.C2 Brake Step Improperly Located	2,500	5,000
120.C3 Brake Step With Less Than 4" Clearance to Vertical Plane Through Inside Face of Knuckle	2,500	5,000
120.C4 Brake Step Obstructed or Otherwise Unsafe	2,500	5,000
124.A1 Running Board Missing or Part Missing Except By Design	5,000	7,500
124.A2 Running Board Broken or Decayed	5,000	7,500
124.A3 Running Board Loose Presents a Tripping Hazard or Other Unsafe Condition	2,500	5,000
124.A4 Running Board Wrong Material	2,500	5,000
124.B1 Running Board Bent to the Extent that it is Unsafe	2,500	5,000
124.B2 Running Board Wrong Dimensions	2,500	5,000
124.B3 Running Board Wrong Location	2,500	5,000
124.C1 Running Board Improperly Applied	2,500	5,000
124.C2 Running Board Obstructed	2,500	5,000
126.A1 End Platform Missing or Part Except By Design	5,000	7,500
126.A2 End Platform Broken or Decayed	5,000	7,500
126.A3 End Platform Loose	2,500	5,000
126.B1 End Platform or Brace Bent	2,500	5,000
126.B2 End Platform Wrong Dimensions	2,500	5,000
126.C1 End Platform Improperly Applied	2,500	5,000
126.C2 End Platform With Less Than Required Clearance to Vertical Plane Through Inside Face of Knuckle	2,500	5,000
126.C3 End Platform Improperly Located	2,500	5,000
126.C4 End Platform Obstructed	5,000	7,500
128.A1 Platform or Switching Step Missing	5,000	7,500
128.A2 Platform or Switching Step Broken or Decayed	5,000	7,500
128.A3 Platform or Switching Step Loose	2,500	5,000
128.B1 Platform or Switching Step Bent	2,500	5,000



APPENDIX A TO PART 231—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

FRA safety appliance defect code section <sup>2</sup>	Violation	Willful violation
128.B2 Platform or Switching Step Does Not Meet the Required Location or Dimensions	2,500	5,000
128.C1 Platform or Switching Step Improperly Applied or Repaired	2,500	5,000
128.C2 Platform or Switching Step Obstructed	2,500	5,000
128.D1 Switching Step Back Stop or Kick Plate Missing	2,500	5,000
128.D2 Switching Step Not Illuminated When Required	2,500	5,000
128.D3 Non-Illuminated Step Not Painted Contrasting Color	1,000	2,000
130.A1 Sill Step or Additional Tread, Missing	5,000	7,500
130.A2 Sill Step or Additional Tread, Broken	5,000	7,500
130.A3 Sill Step or Additional Tread, Loose	2,500	5,000
130.B1 Sill Step or Additional Tread, Bent	2,500	5,000
130.B2 Sill Step or Additional Tread, Having Wrong Dimensions or Improperly Located	2,500	5,000
130.B3 Sill Step Improperly Applied	2,500	5,000
132.A1 Side Missing Step	5,000	7,500
132.A2 Side Door Step Broken	5,000	7,500
132.A3 Side Door Step Loose	2,500	5,000
132.B1 Side Door Step Bent	2,500	5,000
132.B2 Side Door Step Having Wrong Dimensions	2,500	5,000
134.A1 Ladder Missing	5,000	7,500
134.A2 Ladder Broken	5,000	7,500
134.A3 Ladder Loose	2,500	5,000
134.B1 Ladder Bent	2,500	5,000
134.B2 Ladder Having Wrong Dimensions	2,500	5,000
134.C1 Ladder Improperly Applied	2,500	5,000
134.C2 Ladder Having Insufficient Clearance or Improperly Located	2,500	5,000
134.C3 Ladder Wrong Design	2,500	5,000
134.C4 Ladder Wrong Material	2,500	5,000
134.D1 End Clearance Insufficient	2,500	5,000
138.A1 Ladder Tread or Handholds Missing	5,000	7,500

APPENDIX A TO PART 231—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

FRA safety appliance defect code section <sup>2</sup>	Violation	Willful violation
136.A2 Ladder Tread or Handhold Broken	5,000	7,500
136.A3 Ladder Tread or Handhold Loose Except By Design	2,500	5,000
136.B1 Ladder Tread or Handhold Bent to The Extent That It May Be Unsafe	2,500	5,000
136.B2 Ladder Tread or Handhold Wrong Dimensions	2,500	5,000
136.C1 Ladder Tread or Handhold Improperly Applied	2,500	5,000
136.C2 Ladder Tread or Handhold Having Wrong Clearance	2,500	5,000
136.C3 Ladder or Handhold Improperly Located	2,500	5,000
136.C4 Ladder Tread or Handhold Obstructed	2,500	5,000
136.C5 Ladder Tread Without Footguards	2,500	5,000
138.A1 Hand or Safety Railing Missing	5,000	7,500
138.A2 Hand or Safety Railing Broken	5,000	7,500
138.A3 Hand or Safety Railing Loose Except by Design	2,500	5,000
138.B1 Hand or Safety Railing Bent	2,500	5,000
138.B2 Hand or Safety Railing Wrong Dimensions	2,500	5,000
138.C1 Hand or Safety Railing Improperly Applied	2,500	5,000
138.C2 Hand or Safety Railing Having Less Than the Required Clearance	2,500	5,000
138.C3 Hand or Safety Railing Improperly Located	2,500	5,000
140.A1 Uncoupling Lever Missing	2,500	5,000
140.A2 Uncoupling Lever Broken or Disconnected	2,500	5,000
140.B1 Uncoupling Lever Bent Will Not Safely and Reasonably Function As Intended	2,500	5,000
140.C1 Uncoupling Lever Bracket Bent Lever Will Not Function Properly	2,500	5,000
140.C2 Uncoupling Lever Bracket Broken or Missing	2,500	5,000
140.D1 Uncoupling Lever Wrong Dimension	2,500	5,000
140.D2 Uncoupling Lever With Improper Handle Clearance	2,500	5,000
144.A1 Coupler Missing	5,000	7,500

APPENDIX A TO PART 231—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

FRA safety appliance defect code section <sup>2</sup>	Violation	Willful violation
144.B1 Coupler Height Incorrect	2,500	5,000
144.C1 Coupler Inoperative	2,500	5,000
145.A1 Kick Plates Missing	2,500	5,000
145.A2 Kick Plates Broken	2,500	5,000
145.B1 Kick Plates Wrong Dimensions	2,500	5,000
145.B2 Kick Plates Improper Clearance	2,500	5,000
145.B3 Kick Plates Insecure Or Improperly Applied	2,500	5,000
146.A Notice or Stencil not Posted on Caboose with Running Boards Removed	500	1,000
146.B Safe Means not Provided to Clean or Maintain Windows of Caboose	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

<sup>2</sup> This schedule uses section numbers from FRA's Safety Appliance Defect Code, a restatement of the CFR text in a reorganized format. For convenience, and as an exception to FRA's general policy, penalty citations will cite the defect code rather than the CFR. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR and/or statutory citation in place of the defect code section cited in the penalty demand letter.

## PART 232—[AMENDED]

15. Part 232 is amended as follows:  
A. The authority citation for Part 232 is revised to read as follows:

Authority: 45 U.S.C. 1, 3, 5, 6, 8-12, and 16, as amended; 49 App. U.S.C. 1855(e), as amended; Pub. L. 100-342; and 49 CFR 1.49 (c) and (g).

## § 232.0 [Amended]

B. Section 232.0 is amended by adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. Appendix A to Part 232 is revised to read as follows:

APPENDIX A TO PART 232—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
232.1 Power brakes, minimum percentage	\$5,000	\$7,000
232.2 Drawbars; standard height	2,500	5,000
232.3 Power brakes and appliances for operating power brake systems	2,500	5,000

APPENDIX A TO PART 232—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
Rules for Inspection, Testing and Maintenance of Air Brake Equipment: 232.10 General rules—locomotives:		
(b) Air brake equipment not inspected or tested to assure it is in a safe and suitable condition	2,500	5,000
(c) Compressor not tested for capacity	2,500	5,000
(d) Main reservoir not tested	2,500	5,000
(e) Air gauges not tested; if inaccurate not repaired or replaced	2,500	5,000
(f)(1) Operating portion of air brake equipment, dirt collectors, and filters not cleaned, repaired, and tested	2,500	5,000
(2) Hand brakes, parts and connections not inspected or suitably stenciled	1,000	2,000
(g) Date of testing or cleaning of air brake equipment not displayed in the cab	1,000	2,000
(h)(1) Minimum brake cylinder piston travel insufficient	2,500	5,000
(2) Maximum brake cylinder piston travel excessive	2,500	5,000
(i)(1) Foundation brake rigging, safety supports and brake shoes	2,500	5,000
(2) Foundation brake rigging or safety supports have improper clearance to the rails	2,500	5,000
(j)(1) Main reservoir leakage	2,500	5,000
(2) Brake pipe leakage	2,500	5,000
(3) Brake cylinder leakage	2,500	5,000
(4) Main reservoir safety valve	2,500	5,000
(5) Governor	2,500	5,000

APPENDIX A TO PART 232—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(6) Compressor governor when used in connection with automatic air brake system	2,500	5,000
(k) Communicating signal system on locomotive	1,000	2,000
(l) Enginemen taking charge of locomotive	2,500	5,000
(m) Drain cocks on air compressors of steam locomotives	2,500	5,000
(n) Air pressure regulating devices	2,500	5,000
232.11 Train air brake system tests:		
(b) Communicating signal system on passenger train	2,500	5,000
(c) Effective and operative air brakes	2,500	5,000
(d) Condensation from yard line or motive power	2,500	5,000
232.12 Initial terminal road train air brake tests:		
(a) Total failure to perform initial terminal test	10,000	(1)
(b) 1,000 mile inspection not performed	5,000	10,000
(c)-(f) partial failure to perform initial terminal test	2,500	5,000
232.13 Road train and intermediate terminal train air brake tests:		
(a) Passenger trains: locomotive is detached	5,000	7,500
(b) Freight trains: locomotive is detached	5,000	7,500
(c)(1) Locomotive or caboose is changed, or one or more cars are cut off from the rear end or head end	5,000	7,500
(2) Brake pipe pressure restored	5,000	7,500
(3) Electropneumatic application and release test	5,000	7,500
(d)(1) Cars are added at a point other than a terminal	5,000	7,500

APPENDIX A TO PART 232—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(2)(i) Cars added at a terminal and have not been charged and tested	5,000	7,500
(ii) Cars added at a terminal and have not been charged and tested	5,000	7,500
(3) Brake pipe pressure restored at the rear of freight train	5,000	7,500
(e)(1) Transfer train and yard train movements	2,500	5,000
(2) Transfer train and yard train movements exceeding 20 miles	5,000	7,500
(f) Locomotives, cars or train standing on a yard	5,000	7,500
(h) Device is used to comply with test requirement	2,500	5,000
232.14 Inbound brake equipment inspection:		
(a) Inspection of trains upon arrival at terminals	1,000	2,000
(b) Special instructions provide for immediate brake inspection and repairs	1,000	2,000
232.15 Double heading and helper service:		
(a) Enginemen of the leading locomotive shall operate the brakes	5,000	7,500
(b) Electro-pneumatic brake valve	5,000	7,500
232.16 Running tests	2,500	5,000
232.17 Freight and passenger train car brakes:		
(a) Testing and repairing brakes on cars while in shop or on repair track		
(1) Periodic attention on freight car air brake equipment while car is on repair track	5,000	7,500
(2)(i) Single car testing of freight cars	2,500	5,000

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APPENDIX A TO PART 232—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(ii) Repair track tests of freight cars	2,500	5,000
(iii) Single car testing of freight cars	2,500	5,000
(iv) Car is released from a shop or repair track	2,500	5,000
(b)(1) Brake equipment on cars other than passenger cars	2,500	5,000
(2) Brake equipment on passenger cars	4,000	6,000
232.19 End of train device:		
(a) Location of front unit and rear unit	2,500	5,000
(b) Rear unit	2,500	5,000
(c) Reporting rate	2,500	5,000
(d) Operating environment	2,500	5,000
(e) Unique code	2,500	5,000
(f) Front unit	2,500	5,000
(g) Radio equipment	2,500	5,000
(h) Inspection	2,000	4,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 233—[AMENDED]

16. Part 233 is amended as follows:  
A. The authority citation for Part 233 continues to read as follows:

Authority: 49 App. U.S.C. 26, as amended; 49 App. U.S.C. 1655(e), as amended; 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49 (f), (g), and (m).

## § 233.11 [Amended]

B. Section 233.11 is amended by removing the last sentence (which begins "See") and adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. A new Appendix A is added to Part 233 to read as follows:

APPENDIX A TO PART 233—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
233.5 Accidents resulting from signal failure	\$2,500	\$5,000
233.7 Signal failure reports	5,000	7,500
233.9 Annual reports	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 235—[AMENDED]

17. Part 235 is amended as follows:  
A. The authority citation for Part 235 continues to read as follows:

Authority: 49 App. U.S.C. 26, as amended; 49 App. U.S.C. 1655(e), as amended; 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49 (f), (g), and (m).

## § 235.9 [Amended]

B. Section 235.9 is amended by removing the last sentence (which begins "See") and adding at the end thereof the following: "See Appendix A to this part for a statement of agency civil penalty policy."

C. A new Appendix A is added to Part 235 to read as follows:

APPENDIX A TO PART 235—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
235.5 Changes requiring filing of application	\$5,000	\$7,500

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

## PART 236—[AMENDED]

18. Part 236 is amended as follows:  
A. The authority citation for Part 236 continues to read as follows:

Authority: 49 App. U.S.C. 26, as amended; 49 App. U.S.C. 1655(e), as amended; 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100-342; and 49 CFR 1.49 (f), (g), and (m).

B. Section 236.0 is amended by revising the section title and adding paragraph (f) to read as follows:

§ 236.0 Applicability, minimum requirements, and civil penalties.

(f) Any person (including a railroad subject to this part and any manager, supervisor, official, or other employee or

agent of such a railroad) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$250 and not more than \$10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$20,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

C. Appendix A to Part 236 is revised to read as follows:

APPENDIX A TO PART 236—CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful violation
<b>Subpart A—Rules and Instructions—All Systems</b>		
<i>General:</i>		
236.0 Applicability, minimum requirements	\$2,500	\$5,000
236.1 Plans, where kept	1,000	2,000
236.2 Grounds	1,000	2,000
236.3 Locking of signal apparatus housings:		
(a) Power interlocking machine cabinet not secured against unauthorized entry	2,500	5,000
(b) other violations	1,000	2,000
236.4 Interference with normal functioning of device	5,000	7,500
236.5 Design of control circuits on closed circuit principle	1,000	2,000
236.6 Hand-operated switch equipped with switch circuit controller	1,000	2,000
236.7 Circuit controller operated by switch-and-lock movement	1,000	2,000
236.8 Operating characteristics of electro-magnetic, electronic, or electrical apparatus	1,000	2,000
236.9 Selection of circuits through indicating or annunciating instruments	1,000	2,000
236.10 Electric locks, force drop type; where required	1,000	2,000
236.11 Adjustment, repair, or replacement of component	2,500	5,000

APPENDIX A TO PART 236—CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
236.12 Spring switch signal protection; where required	1,000	2,000
236.13 Spring switch; selection of signal control circuits through circuit controller	1,000	2,000
236.14 Spring switch signal protection; requirements	1,000	2,000
236.15 Timetable instructions	1,000	2,000
236.16 Electric lock, main track releasing circuit:		
(a) Electric lock releasing circuit on main track extends into fouling circuit where turnout not equipped with derail at clearance point either pipe-connected to switch or independently locked, electrically	2,500	5,000
(b) other violations	1,000	2,000
236.17 Pipe for operating connections, requirements	1,000	2,000
<b>Roadway Signals and Cab Signals</b>		
236.21 Location of roadway signals	1,000	2,000
236.22 Semaphore signal arm; clearance to other objects	1,000	2,000
236.23 Aspects and indications	1,000	2,000
236.24 Spacing of roadway signals	2,500	5,000
236.26 Buffing device, maintenance	1,000	2,000
<b>Track Circuits</b>		
236.51 Track circuit requirements:		
(a) Shunt fouling circuit used where permissible speed through turnout greater than 45 m.p.h.	2,500	5,000

APPENDIX A TO PART 236—CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
(b) Track relay not in de-energized position or device that functions as track relay not in its most restrictive state when train, locomotive, or car occupies any part of track circuit, except fouling section of turnout of hand-operated main-track crossover	2,500	5,000
(c) other violations	1,000	2,000
236.52 Relayed cut-section	1,000	2,000
236.53 Track circuit feed at grade crossing	1,000	2,000
236.54 Minimum length of track circuit	1,000	2,000
236.55 Dead section; maximum length	1,000	2,000
236.56 Shunting sensitivity	2,500	5,000
236.57 Shunt and fouling wires:		
(a) Shunt or fouling wires do not consist of at least two discrete conductors	2,500	5,000
(b) other violations	1,000	2,000
236.58 Turnout, fouling section:		
(a) Rail joint in shunt fouling section not bonded	2,500	5,000
(b) other violations	1,000	2,000
236.59 Insulated rail joints	1,000	2,000
236.60 Switch shunting circuit; use restricted	2,500	5,000
<b>Wires and Cables</b>		
236.71 Signal wires on pole line and aerial cable	1,000	2,000
236.73 Open-wire transmission line; clearance to other circuits	1,000	2,000
236.74 Protection of insulated wire; splice in underground wire	1,000	2,000
236.76 Tagging of wires and interference of wires or tags with signal apparatus	1,000	2,000
<b>Inspections and Tests; All Systems</b>		
236.101 Purpose of inspection and tests; removal from service or relay or device failing to meet test requirements	2,500	5,000

APPENDIX A TO PART 236—CIVIL PENALTIES<sup>1</sup>—Continued

Section	Violation	Willful violation
236.102 Semaphore or search-light signal mechanism	1,000	2,000
236.103 Switch circuit controller or point detector	1,000	2,000
236.104 Shunt fouling circuit	1,000	2,000
236.105 Electric lock	1,000	2,000
236.106 Relays	1,000	2,000
236.107 Ground tests	1,000	2,000
236.108 Insulation resistance tests, wires in trunking and cables:		
(a) Circuit permitted to function on a conductor having insulation resistance value less than 200,000 ohms	2,500	5,000
(b) other violations	1,000	2,000
236.109 Time releases, timing relays and timing devices	1,000	2,000
236.110 Results of tests	1,000	2,000

## Subpart B—Automatic Block Signal Systems

236.201 Track circuit control of signals	1,000	2,000
236.202 Signal governing movements over hand-operated switch	1,000	2,000
236.203 Hand-operated crossover between main tracks; protection	1,000	2,000
236.204 Track signaled for movements in both directions, requirements	1,000	2,000
236.205 Signal control circuits; requirements	1,000	2,000
236.206 Battery or power supply with respect to relay; location	1,000	2,000

## Subpart C—Interlocking

236.207 Electric lock on hand-operated switch; control:		
(a) Approach or time locking of electric lock on hand-operated switch can be defeated by unauthorized use of emergency device which is not kept sealed in the non-release position	2,500	5,000
(b) other violations	1,000	2,000



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APPENDIX A TO PART 236—CIVIL PENALTIES <sup>1</sup> —Continued		
Section	Violation	Willful violation
236.587 Departure test: (a) Test of automatic train stop, train control, or cab signal apparatus on locomotive not made on departure of locomotive from initial terminal if equipment on locomotive not cut out between initial terminal and equipped territory .....	5,000	7,500
(b) Test of automatic train stop, train control, or cab signal apparatus on locomotive not made immediately on entering equipped territory, if equipment on locomotive cut out between initial terminal and equipped territory .....	5,000	7,500

APPENDIX A TO PART 236—CIVIL PENALTIES <sup>1</sup> —Continued		
Section	Violation	Willful violation
(c) Automatic train stop, train control, or cab signal apparatus on locomotive making more than one trip within 24-hour period not given departure test within corresponding 24-hour period .....	5,000	7,500
(d) other violations .....	2,500	5,000
236.588 Periodic test .....	2,500	5,000
236.589 Relays .....	2,500	5,000
236.590 Pneumatic apparatus: (a) Automatic train stop, train control, or cab signal apparatus not inspected and cleaned at least once every 736 days .....	2,500	5,000
(b) other violations .....	1,000	2,000

APPENDIX A TO PART 236—CIVIL PENALTIES <sup>1</sup> —Continued		
Section	Violation	Willful violation
Subpart F—Dragging Equipment and Slide Detectors and Other Similar Protective Devices; Standards		
236.601 Signals controlled by devices; location .....	1,000	2,000

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$20,000 for any violation where circumstances warrant. See 49 CFR Part 209, Appendix A.

Issued in Washington, DC, on December 21, 1988.

John H. Riley,  
Federal Railroad Administrator.  
[FR Doc. 89-29733 Filed 12-23-88; 8:45 am]  
BILLING CODE 4910-06-M

Federal Register

Thursday  
December 29, 1988

Part III

Department of the  
Interior

Office of Surface Mining Reclamation and  
Enforcement

30 CFR Parts 772, 815 and 942  
Permanent Program Performance  
Standards—Coal Exploration; Tennessee  
Federal Program—Requirements for Coal  
Exploration; Final Rule



## DEPARTMENT OF THE INTERIOR

## Office of Surface Mining Reclamation and Enforcement

## 30 CFR Parts 772, 815 and 942

## Permanent Program Performance Standards—Coal Exploration; Tennessee Federal Program—Requirements for Coal Exploration

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.  
ACTION: Final rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) is amending its rules pertaining to coal exploration operations. The amendments require a notice of intent for all coal exploration operations in which 250 tons of coal or less is removed, clarify limitations on commercial use or sale of coal obtained by exploration and clarify which permit information requirements pertain to exploration. The exploration rules for the Tennessee Federal program are also amended to bring them into conformance with the notice requirements adopted herein. The rules for all other Federal program States cross-reference the coal exploration rules at 30 CFR Part 772; therefore all changes to the Federal rules automatically apply in these States.

**EFFECTIVE DATE:** January 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Dr. Fred Block, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, DC 20240; Telephone: 202-343-1884 (Commercial or FTS).

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Discussion of Comments and Rules Adopted
- III. Procedural Matters

**I. Background**

The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, at section 512, requires that each State or Federal program ensure that coal exploration operations that substantially disturb the natural land surface are conducted in accordance with exploration rules issued by the regulatory authority. Section 512 of SMCRA sets forth the notice, permit, reclamation, and other requirements for conducting coal exploration operations. In addition to the general requirement to file a notice of intent to conduct coal exploration, the removal of more than 250 tons of coal

during exploration requires the specific written approval of the regulatory authority.

The informational requirements for a notice of intent to explore and for an exploration permit are contained in 30 CFR 772.11 and 772.12, and are distinct from the more expansive permit requirements for a surface coal mining operation contained in 30 CFR Parts 773, 777 through 780, and 783 through 785 of the OSMRE regulations. These differing requirements reflect the fact that the definition of surface coal mining operations in section 701(28) of SMCRA excludes coal exploration operations, which are subject to the requirements of section 512 of SMCRA.

OSMRE first promulgated rules establishing general requirements for coal exploration at 30 CFR Part 776, and permanent program performance standards for coal exploration at 30 CFR Part 815, on March 13, 1979 (44 FR 15311). These 1979 exploration rules were revised on September 8, 1983 (48 FR 40622), and Part 776 was redesignated as Part 772.

Challenges to these 1983 regulations resulted in a court ruling on July 15, 1985, *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144, (D.D.C. July 15, 1985) (*In Re: Permanent (II)*), and a suspension notice was issued by OSMRE on November 20, 1986 (51 FR 41961).

On June 22, 1988, OSMRE published in the *Federal Register* (53 FR 23532) a proposed rule to revise the coal exploration notice requirements, to revise various coal exploration permit requirements, to add requirements for approval of commercial sale or use of coal extracted during exploration for testing purposes, to clarify which permit information requirements pertain to exploration, and to revise the Tennessee Federal Program requirements to conform with the revised rules proposed in the rulemaking.

A public comment period commenced with publication of the proposed rule and ended on August 8, 1988. A public hearing that had been scheduled to be held in Washington, DC on August 1, 1988, was not held because no one requested to testify at the hearing.

**II. Discussion of Comments and Rules Adopted****General Comments**

Twelve sets of comments were received on the proposed rule.

Several commenters expressed general support for the rulemaking, although they included some specific suggestions for improvement that are addressed below. One commenter

generally disagreed with the proposed rulemaking, and along with other commenters, commented on specific provisions of the proposed rule, expressing agreement or disagreement and suggesting changes.

One commenter suggested that after the rule is finalized, OSMRE immediately require States, under 30 CFR Part 732, to amend their approved regulatory program regulations to render them no less effective than the new Federal regulations. Another commenter stated that OSMRE should not automatically require State regulatory programs to be revised where such State programs adequately address regulation of coal exploration operations. Following promulgation of this final rule OSMRE will evaluate all permanent State regulatory programs approved under SMCRA as expeditiously as possible to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended to make them no less effective than the revised Federal rules, the individual states will be notified according to the provisions of 30 CFR 732.17.

One commenter stated that except for the narrative and map revisions, the proposed rules were meant to address isolated activities in perhaps two states, which should be addressed within the states where the problems occur. OSMRE disagrees with the commenter. Revised national standards pertaining to coal exploration are necessary to ensure application of minimum national standards for control of the potential harmful effects from coal exploration activities.

The U.S. Department of Agriculture Forest Service requested that the role of the Forest Service, or other land management agency, be recognized and acknowledged in authorizing exploration on lands under their jurisdiction. OSMRE's promulgation of revised exploration regulations at 30 CFR Part 772 does not limit or affect in any way the role and authority of the Forest Service to impose its own requirements to control or limit exploration operations on lands under its jurisdiction.

**Section 772.11(a) Notice Requirements for Exploration; Removing 250 Tons or Less of Coal**

Final § 772.11(a) is promulgated as proposed except that the proposed requirement that the provisions of § 772.14 apply to exploration under a notice of intent has not been adopted. Paragraph (a) requires any person who

conducts coal exploration operations where 250 tons or less of coal are removed to file a notice of intent to explore. Previous § 772.11(a) required a notice only for those operations which may substantially disturb the natural land surface. That rule was challenged in the District Court of the District of Columbia and was remanded on the grounds that OSMRE had failed to explain adequately its departure from the previous rule or to address adequately the concerns raised by commenters. *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144 (D.D.C. July 15, 1985) (*In Re: Permanent (II)*).

Three commenters supported the reinstatement of the notice requirement for all exploration operations. One stated that the operator should not be in the position to determine whether he is regulated or not. One said that to maintain administrative control over exploration operations OSMRE should adopt the proposed requirement that operators notify the regulatory authority of all exploration where coal will be removed. This commenter further stated that OSMRE should exempt the collection of environmental baseline data from the notice requirement unless the land is substantially disturbed. One commenter opposed the proposed requirement for a notice of intent for all exploration stating that "[a]ccepted canons of statutory interpretations dictate that the requirements of Section 512(a) [of SMCRA], including notice, pertain only to coal exploration which substantially disturbs the land," and that this was properly reflected in the 1983 rule. The commenter said that section 512(c) supports this interpretation since it only subjects exploration which substantially disturbs the surface to the penalty provisions of section 518.

In promulgating the final rule, OSMRE has considered the practical problems raised by the remanded rule, namely that for the regulatory authority to determine which proposed coal exploration operations may substantially disturb the natural land surface it must be informed of all proposed exploration. OSMRE has determined that coal exploration operators should not be in a position of making a determination of whether their operations substantially disturb the natural land surface and that the regulatory authority has the responsibility for making that determination. For effective monitoring and enforcement, the regulatory authorities should be informed of all exploration occurring within their

jurisdictions, including exploration for environmental baseline data, and this can best be accomplished through notification by all who intend to explore.

As proposed, final § 772.11(a) provides that any person who intends to conduct coal exploration on lands designated as unsuitable for surface coal mining operations under Subchapter F, Areas Unsuitable for Mining, must apply for and receive an exploration permit under § 772.12. This revision does not change or add any regulatory requirement, but will alert anyone contemplating exploration on such lands that the requirements of § 772.12 apply, including the requirement that prior written approval be obtained from the regulatory authority, regardless of the tonnage to be removed.

One commenter expressed disapproval of the provision allowing coal exploration in areas that have been designated unsuitable for surface coal mining operations. OSMRE wishes to make clear that this is not a new regulatory proposal but merely a reiteration of the existing requirement in 30 CFR 772.12(a) that such exploration must have prior written approval from the regulatory authority.

Final § 772.11(a) further states that exploration under a notice of intent shall be subject to the compliance requirements prescribed under § 772.13. The proposed provision that exploration under a notice of intent would be subject to the limitations on commercial sale or commercial use of coal obtained by exploration prescribed under § 772.14 has not been adopted.

As pointed out by one commenter, 30 CFR 700.11(a)(2) exempts from the requirements for a permit for surface coal mining operations, "the extraction of 250 tons of coal or less by a person conducting a surface coal mining operation." Therefore, it would not be reasonable to require a person conducting coal exploration under a notice of intent to obtain a permit for a surface coal mining operation before commercial use or sale of 250 tons or less of coal.

The addition of the cross-reference to § 772.13 does not change or add, as one commenter understood it, any requirement, but merely clarifies the applicability of an existing requirement.

One commenter stated that the notice requirement fails to incorporate the statutory distinction which subjects only those activities which substantially disturb the surface to the reclamation provisions under SMCRA and suggested the addition of a new paragraph under

§ 772.11 to provide clarification. Sections 772.13 and 815.1 clearly provide that the standards of Part 815 apply only to those operations which substantially disturb the surface. Therefore, no paragraph need be added to § 772.11 to this effect.

**Section 772.11(b)(3) Narrative or Map in a Coal Exploration Notice.**

Previous § 772.11(b)(3) required either "a narrative or map" as part of a notice of intent to explore under § 772.11. The rule was challenged on the basis that it did not require a narrative description of the exploration area in all instances. The court found that either a map or a narrative would meet the statutory requirement of a "description" of the exploration area as required in section 512(a)(1) of SMCRA, but determined that the map provisions of § 772.11(b)(3) were not specific enough to satisfy the requirements of SMCRA. *In Re: Permanent (II)*, July 15, 1985 Mem. op. at 139-140.

As proposed and adopted, § 772.11(b)(3) continues to require either a narrative or a map describing the exploration area in a notice of intent to explore. In compliance with the court's ruling, this final rule defines the minimal information to be shown when a map is submitted in a notice of intent. Such maps must be at a scale of 1:24,000 or larger, and include the proposed area of exploration, the general location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines. OSMRE believes that these additional requirements satisfy the court's concerns that the regulation explain the level of detail to be provided in a map which serves as the description of an exploration area.

One commenter supported the continuation of the rule that provided the option to provide a narrative or a map. Another commenter supported the proposed map detail and further recommended that the detail set out in § 772.11(b)(3) should also apply to the narrative which has no specified level of detail. Although the final rule continues to provide the option of a narrative or a map for coal exploration notices of intent, OSMRE does not agree that the rule need contain any greater specificity for the narrative option, and will leave to the regulatory authority the determination of whether the narrative description sufficiently defines the proposed exploration.

One commenter stated that for accuracy and legibility, all maps should be required to be produced by the U.S. Geological Survey. OSMRE does not



agree that the regulations should require the submittal of a map from a specific provider. OSMRE does agree that any materials submitted by an operator to the regulatory authority should be accurate and legible, but it is not necessary to include such a requirement in these regulations. The regulatory authority is responsible for requiring submission of legible materials.

The commenter also suggested that the map requirements for notices should be identical to those for permits. OSMRE disagrees. SMCRA recognizes two levels of exploration activity by requiring written approval from the regulatory authority where more than 250 tons of coal would be removed. Accordingly, the regulations contain differing levels of detail for a permit requiring prior approval as opposed to a notice requiring no prior approval.

Two commenters suggested that the applicant should be required to provide all reasonably available knowledge and information about the exploration site. OSMRE believes that the exploration regulations contain sufficient detail to allow the regulatory authority to effectively monitor and enforce exploration operations and to review and determine the appropriateness of the proposed exploration and the subsequent reclamation.

Another commenter suggested that narratives and maps as well as any other relevant existing resource information, be provided in an exploration notice. This comment is not accepted because OSMRE agrees with Judge Flannery's 1980 decision on this issue specifically stating that OSMRE could not require both a narrative and a map (*In Re: Permanent Surface Mining Regulation Litigation*, No. 79-1144, (D.D.C. May 16, 1980)). In his 1985 decision, Judge Flannery affirmed his earlier opinion and clarified that either a narrative or a map would meet the statutory definition of a description of the exploration area as required by § 512 of SMCRA (*In Re: Permanent (II)*, *supra*).

Three commenters objected to the inclusion of "drill hole locations" in the map included with an exploration notice. The commenters stated that in some cases drill hole locations are not known in advance, since they will depend on results obtained from previous drill holes or other discoveries in the field. OSMRE recognizes that the exact drill hole locations will not always be known beforehand. Therefore, the final rule language has been modified to require the general location of drill holes on the map.

**Section 772.12 Permit Requirements for Exploration Removing More Than 250 Tons of Coal, or Occurring on Lands Designated as Unsuitable for Surface Coal Mining Operations.**

The headnote for § 772.12 is amended in this final rule for clarity at the suggestion of two commenters to indicate that any exploration which occurs on lands designated as unsuitable for surface coal mining operations is subject to the permit provisions of § 772.12. Lands designated as unsuitable includes lands designated unsuitable under SMCRA section 522(a) and those designated by Congress under section 522(e). The final rule, as proposed, adds a statement to § 772.12(a) to provide that exploration conducted outside a permit area during which more than 250 tons of coal is removed or which will take place on lands designated as unsuitable for mining, will be subject to the requirements of §§ 772.13 and 772.14. This revision does not add or change any regulatory requirement, but only clarifies existing requirements.

Two commenters stated that this rulemaking added the requirement to obtain an exploration permit for exploration in all section 522(e) areas, regardless of tonnage. Two other commenters stated that the permit requirement for exploration in all section 522(e) areas is not justified and OSMRE should exempt the permit requirement for the collection of environmental baseline data on lands designated unsuitable under § 761.11(d)-(g), unless the land is substantially disturbed. Two other commenters recognized the existing requirement for a permit for any exploration on unsuitable areas regardless of tonnage and stated that OSMRE should not change the requirement.

OSMRE wishes to make clear that existing exploration regulations in § 772.12(a) already contain the requirement for an exploration permit for all exploration in unsuitable areas regardless of tonnage removed and no change to it was proposed. This rulemaking only provides clarification that such exploration shall be subject to §§ 772.13 and 772.14.

**Section 772.12(b)(3) Narrative in a Coal Exploration Permit Application.**

As proposed and adopted, § 772.12(b)(3) requires that a narrative describing the exploration area be included in an exploration permit application. The option to provide a map describing the proposed exploration area instead of a narrative is deleted. Previous § 772.12(b)(3), which required a

narrative or map to describe the exploration area, was challenged and remanded in *In Re: Permanent II* for the same reason that § 772.11(b)(3) was remanded, namely that the map provisions of § 772.12(b)(3) were not specific enough to satisfy section 512(a) of SMCRA which requires a description of the exploration area. However, the court in 1980 also ruled that either a narrative or a map, but not both, could serve as a description of the exploration area. On the basis of the court ruling that either a narrative or a map, but not both, could serve as a description of the exploration area, OSMRE has decided to require a narrative for that purpose. It is not necessary under § 772.12(b)(3) to provide for an optional narrative or map since either is sufficient.

One commenter stated that the rule as proposed required a narrative and a map of the exploration area and that OSMRE has not adequately explained the rationale for deleting the narrative or map option. The commenter referred to the existing map requirement under § 772.12(b)(12) and to the preamble to the proposed rule which stated that the map required under § 772.12(b)(12) would include the essential features that would be required to satisfy the court requirement concerning § 772.12(b)(3). If the map under (b)(12) is adequate to meet the requirements of § 772.12(b)(3), the commenter asked why then is a narrative also needed. The commenter said that OSMRE should (1) allow for either a narrative or the map under § 772.12(b)(12); (2) delete the requirement at § 772.12(b)(3) for a narrative; or (3) limit the required narrative to areas not substantially disturbed (not covered by the map required in § 772.12(b)(12)).

Although there is an existing map requirement included in § 772.12(b)(12), and it is thus correct that the revised rules require a narrative and map, only the narrative is required to provide a description of the exploration area. The purpose of the map, which existing § 772.12(b)(12) continues to require, is to show the areas of land to be disturbed by the proposed exploration and reclamation. Thus, as the court stated, the map under (b)(12) may not be the same as the map to describe the area of proposed exploration in accordance with § 772.12(b)(3). Under the existing requirements of § 772.12(b)(12), an application for an exploration permit must include a map showing the locations of all areas to be disturbed by exploration, and specifically showing existing roads, occupied dwellings, topographic, and hydrologic features, roads and structures to be constructed,

the location of land excavations, exploration holes, etc. Exploratory surveying and sampling areas that would not cause land to be disturbed would not necessarily be included on the map. Any geochemical, soil, water, vegetation, or other sampling and survey activities must be included in the narrative description of the exploration area.

One commenter suggested that the narrative requirement of § 772.12(b)(3) must contain greater detail and must include all reasonably available information, as the narrative has no specified level of detail. OSMRE does not believe it is necessary to require any specific detail for a narrative, and will leave to the regulatory authority the determination of whether the narrative description sufficiently defines the proposed exploration.

**Sections 772.12 (b)(14) and (d)(2)(iv) Exploration in Areas Unsuitable for Surface Coal Mining Operations Under Section 522(e)(1) of SMCRA.**

The revisions proposed at § 772.12 (b)(14) and (d)(2)(iv) have not been adopted. Proposed § 772.12 (b)(14) would have required that an application for a permit for exploration activities within an area covered by § 761.11(a) contain documentation that the person has valid existing rights to conduct surface coal mining operations in the area. Proposed § 772.12 (d)(2)(iv) would have required that the regulatory authority shall, prior to approval of exploration in areas covered by 30 CFR 761.11(a), find in writing that the exploration will be conducted by or on behalf of a person who possesses valid existing rights to conduct surface coal mining operations within the proposed exploration area.

A number of commenters supported the proposed requirement for VER to obtain a permit to explore on SMCRA section 522(e)(1) (§ 761.11(a)) areas.

Two commenters took the position that there should be no exploration within any section 522(e) areas without proof of VER, and the proposed prohibition should be extended to all section 522(e) areas. One noted that the preamble failed to give any reason for the distinction between section 522(e)(1) areas and areas protected by section 522 (e)(2) through (e)(5). The commenters stated that unlike section 522(a)(1) of SMCRA, section 522(e) does not explicitly provide that exploration on section 522(e) areas is allowed. One said that had Congress intended the section 522(e) areas to be subject to exploration, it would have so provided in SMCRA. The commenter also stated that section 522(e) of SMCRA expressly bans surface coal mining operations subject to VER,

but not subject to coal exploration, and the only exploration allowed by SMCRA on unsuitable lands is on areas designated pursuant to a petition filed under section 522(a).

One commenter expressed general support for the proposed requirement for VER prior to exploration in section 522(e)(1) areas and noted that the proposed rulemaking would have an immediate effect in the New River Gorge National River (NRGNR), a unit of the National Park System in southern West Virginia. The commenter referred to public testimony in the hearing records of the Subcommittee on Mining and Natural Resources of the House Committee on Interior and Insular Affairs, expressing concern over a number of coal exploration activities taking place in the NRGNR. The commenter viewed surface mining of any type or degree as an inappropriate land use activity for national park unit lands, but said that SMCRA properly recognizes the concept of valid existing rights to mine on those lands.

Two other commenters referenced problems with coal exploration activities in the NRGNR in West Virginia, and expressed the belief that the proposed rule would help to resolve those problems.

One commenter stated that the VER requirement is not supported by SMCRA, and OSMRE has never interpreted section 522(e) to require VER prior to exploration. The commenter noted that the definition of surface coal mining operations in SMCRA section 701(28) excludes coal exploration operations subject to section 512 of SMCRA and that the SMCRA prohibitions in section 522(e) apply only to surface coal mining operations. The commenter stated that the proposal to require VER prior to exploration was an unauthorized attempt to amend SMCRA by regulation. The commenter objected to the VER requirement and suggested that alternatives other than the proposed rule changes exist to address concerns of the National Park Service (NPS), such as closer coordination and consultation, and that the VER requirement is unreasonable because there is no discussion or consideration of such alternatives.

One commenter stated that the biggest problem is that a new VER rule has not yet been proposed and that rule would have much bearing on the applicability of the proposed VER requirement of the exploration rule. The commenter said that the VER definition has a tremendous bearing on the applicability of the proposed rule in national park and other 522(e) areas.

OSMRE has carefully reviewed and analyzed all of these comments and has considered the effects of future VER rulemaking activities on the proposed requirement to show VER to explore on section 522(e)(1) areas. Section 522(e) of SMCRA prohibits, subject to valid existing rights, surface coal mining operations except those which existed on the date of enactment of SMCRA, on lands designated in section 522 (e)(1) through (e)(5). The definition of surface coal mining operations in section 701(28) of SMCRA excludes coal exploration subject to section 512 of SMCRA. Therefore, there is merit to the argument that SMCRA does not ban exploration in these areas rather than the commenter's analysis that because specific language relating to exploration appears in section 522(a) of SMCRA, the absence of similar language in section 522(e) means that exploration is prohibited in areas covered by section 522(e). By its own terms, section 522(e) seems to be a prohibition which applies only to surface coal mining operations, and not to exploration. No need would exist to create an exception to allow exploration if the section does not apply to exploration. Although it is not clear why specific language was included in section 522(a) precluding unsuitability designations under that paragraph from preventing coal exploration under such designation, Congress may have included such language for clarity following a process to allow designations of "all or certain types" of surface coal mining operations. It is not necessary, however, to determine conclusively the meaning of section 522(a) to interpret section 522(e).

Notwithstanding these or other arguments for or against the prohibition of exploration in section 522(e) areas absent a showing of VER, OSMRE finds that a forthcoming promulgation of a new definition of VER is a significant factor that must be considered in the context of the proposed VER requirement for exploration in section 522(e)(1) areas. Until a new definition of VER is promulgated, the applicability of the proposed VER requirement for exploration cannot be clearly predicted. Therefore, OSMRE has determined that it would not be appropriate at this time to promulgate a VER requirement for exploration within section 522(e)(1) areas. When a new VER rule is promulgated, OSMRE will reconsider the issue of whether a person conducting exploration operations within section 522(e)(1) areas should be required to demonstrate VER prior to conducting such exploration.



The following additional comments pertain to the proposal to require VER for coal exploration of section 522(e)(1) areas.

One commenter stated that there is "virtually no justification for proving the existence of coal reserves on section 522(e) lands, when further surface mining permits will be denied." OSMRE does not fully agree with the commenter. There are instances when there may be compelling reasons to explore when surface mining permits may be denied. Mineral valuation may legitimately be necessary for reasons other than pre-development such as for acquisition purposes or to allow assessment of potential "takings" claims.

One commenter stated that it is unclear whether the proposed rule requires VER for all exploration in section 522(e)(1) areas (less and more than 250 tons) and said it should not apply for 250 tons or less. Another commenter strongly supported the proposed rule's application of the permit requirement to lands that have been designated unsuitable, regardless of tonnage. The requirement for VER to explore on section 522(e)(1) areas has not been adopted, as discussed above; therefore these comments are moot.

Another commenter suggested that the regulations could be improved by clarifying that the NPS should be routinely consulted on all surface disturbances within 300 feet of park boundaries and in park boundary adjustments pending in Congress. These comments are beyond the scope of this rulemaking. This rulemaking only addressed exploration in section 522(e)(1) areas with respect to NPS lands.

Another commenter stated that OSMRE should revise § 772.12 to eliminate "excess tonnage" (more than 250 tons) permits in section 522(e) areas even if VER is proved. OSMRE disagrees with the commenter because eliminating exploration permits allowing removal of more than 250 tons in those areas would prevent those operators from conducting exploration as provided for by section 512 of SMCRA.

The commenter also stated that the proposed rule ignores revision to § 762.14, which, in the commenter's view, is the source for allowing exploration in section 522(e) areas. OSMRE disagrees. Section 762.14 concerns exploration on lands in a State that have been designated unsuitable under the petition process described in section 522(a)(1) of SMCRA. Section 522(a)(1) of SMCRA expressly allows exploration on these areas.

One commenter questioned what actions OSMRE will take with respect to

State adoption of final rules, once the proposed VER requirement was adopted but before all States were in compliance. The VER requirement has not been adopted in this final rule, as discussed above.

One commenter stated that there must be public input into the VER determination, and a right to challenge. The procedures for determination of valid existing rights is an entirely separate process unrelated to this rulemaking; thus the comment is not relevant to this final rule.

One commenter requested reassurance that until a new VER definition is promulgated, OSMRE would not process VER applications within units of the National Park System in States that use a "takings" standard. The Federal Register notice which established this policy (51 FR 41955, November 20, 1986) is unaffected by this rulemaking. Another commenter said that the proposed exploration rule changes would extend this policy to VER determinations for exploration purposes in National Park System units where a "takings" standard applies. The proposed VER requirement for exploration is not adopted.

One commenter suggested that for clarity the heading of § 772.12(d) be modified to indicate that section 522(e)(1) areas are included. As proposed, the heading for § 772.12(d) has been modified to be sufficiently general as to include these areas.

#### Section 772.14 Commercial Use or Sale.

Section 772.14 is adopted as proposed except for certain changes as discussed below. Section 772.14 is retitled "Commercial Use or Sale" and is expanded to include the commercial use of coal in addition to the sale of coal. Commercial use of coal encompasses those activities which provide a commercial benefit to the person conducting the exploration or another, such as when the owner of a power generating plant conducts coal exploration directly or when exploration is conducted on behalf of the power plant owner through an agent or subsidiary company and the coal is used in the power generating plant.

Paragraph 772.14(a) provides that except as provided under §§ 772.14(b) and 700.11(a)(5), any person who intends to commercially use or sell coal extracted during exploration under an exploration permit shall first obtain a surface coal mining and reclamation operations permit.

One commenter stated that the cross-reference under § 772.14(a) should properly refer only to § 700.11(a)(5) and

not to all of § 700.11(a). Section 700.11(a)(5) provides the specific exemption from Chapter VII requirements, for coal exploration on lands subject to the requirements of 43 CFR Parts 3480-3487. As suggested, final § 772.14(a) refers to § 700.11(a)(5).

Another commenter stated that it is unclear whether § 772.14 applies to exploration where 250 tons of coal or less is removed. The commenter stated that the reference to § 700.11(a) implies that the requirement to obtain a surface coal mining permit does not apply to exploration removing less than 250 tons even if it is commercially sold or used. The commenter recommended that it should not apply, and asked that clarification be provided.

OSMRE agrees with the commenter. Section 700.11(a)(2) provides that extraction of 250 tons or less of coal by a person conducting a surface coal mining operation is exempt from the requirements of 30 CFR Chapter VII. It would not be reasonable to require written approval for commercial sale or use under § 772.14 if less than 250 tons of coal were removed, since under § 700.11(a)(2) no permit is required for a surface coal mining operation removing 250 tons or less. OSMRE has deleted the language that would have required a permit to conduct surface coal mining operations for the sale or use of coal extracted under a notice of intent to explore, to clarify that § 772.14 applies only to coal exploration operations removing more than 250 tons or occurring on lands designated unsuitable for mining.

Two commenters stated that they were in favor of the proposed information requirements. One said that abuse of exploration permits "undercuts legitimate mining activities and threatens the creation of unreclaimed areas mined under sham exemptions for which no bond is available to conduct reclamation."

One commenter referred to proposed revisions to § 772.13 governing commercial sale or use of coal. This rule does not contain any revisions to § 772.13 nor does that section concern commercial use or sale.

Paragraph 772.14(b) provides that with the prior approval of the regulatory authority, no permit to conduct surface coal mining operations is required for the sale or commercial use of coal extracted during exploration under an exploration permit if the sale or use is for coal testing purposes only. The application shall demonstrate that the coal testing is necessary for the development of a future surface coal mining and reclamation operation for

which a surface coal mining operations permit application will be submitted in the near future, and that commercial use or sale is solely for the purposes of testing the coal. The proposed words "and reclamation" are deleted from the phrase "surface coal mining and reclamation operations permit application" in the final rule. This is not a substantive change, as this is merely a descriptive term for a surface coal mining operations permit under 30 CFR Part 773 as distinct from a coal exploration permit. Final § 772.14(b) adopts as proposed the requirements for specific information that must be met for approval of such testing. The rule has been edited from the proposed language to eliminate unnecessary repetition.

One commenter was concerned that exceptions would be made in the application of the commercial sale and use restrictions. The commenter stated that the proposed rule allows exceptions at the discretion of the regulatory authority. OSMRE disagrees that the rule allows exceptions. Prior written approval of the regulatory authority is required under an exploration permit for any commercial sale or use of more than 250 tons of coal extracted without a permit to conduct surface coal mining operations.

One commenter stated that § 772.14(b) would appear to limit the testing exemption to new coal operations since the proposed rule language referred to the "development" of a mining operation. The commenter said that existing operations should qualify for this exemption if it is necessary to conduct exploration off the permit area where existing operations may expand into unpermitted reserves. OSMRE does not agree that the rule language limits this exemption to new operations. The word "development" does not necessarily refer only to new operations.

Two commenters were concerned that the tonnage of coal used for approved testing may be subject to abuse and that strict recordkeeping is needed. OSMRE expects that any person extracting coal during exploration for a test burn will be able to demonstrate compliance with the terms of the approval. Such a demonstration would have to be from competent sources, including, for instance, records of the end user and the person performing the extraction. OSMRE does not believe, however, that the regulations should specify recordkeeping requirements for these provisions, but will leave any tracking or the imposition of recordkeeping requirements to the regulatory authority.

One commenter stated that the preamble of the proposed rule did not explain the "concern about abuses" to

justify the new requirements and that the reasonableness of the new rule cannot be properly evaluated without such information. The commenter said that OSMRE should evaluate specific instances which raised concerns and seek solutions through the State program. OSMRE's evaluation of exploration operations has shown that in several cases, approved testing under an exploration permit appears to be an early start-up of mining rather than exploration to determine whether the coal would be suitable for commercial purposes. Exploration operations have also been approved which allow activities not envisioned by SMCRA, such as commercial sale of coal removed from exploration operations under the pretense that the coal is needed for testing. OSMRE has determined that the previous regulations do not require the applicant to provide sufficient information and assurances to enable the regulatory authority to establish whether the extraction of coal for commercial sale is necessary for testing purposes. OSMRE believes that revised national standards are necessary to ensure application of minimum standards to control the potential harmful effects of exploration activities.

Section 772.14(b)(1) requires that the application contain the name of the firm at which the coal will be tested and the locations for testing.

Section 772.14(b)(2) requires that if the coal is sold directly to or commercially used directly by the intended end user, the end user shall submit a statement that provides: the specific reasons for the test, including why the coal may be so different from the intended user's other coal supplies as to require the testing; the amount of coal necessary for the test and why a lesser amount is not sufficient; and a description of the specific tests that will be conducted.

As proposed, § 772.14(b)(3) requires that if the coal is sold indirectly to the intended end user through an agent or broker, the agent or broker must submit the statement as described above. In the final rule, proposed paragraph (b)(3) has been incorporated in paragraph (b)(2), to avoid unnecessary repetition.

The information required to be submitted under § 772.14(b)(2) includes a statement from the intended end user (e.g. a utility) or his/her agent or broker on the coal being tested, as independent verification of the need for testing and the kind of testing necessary. The rule recognizes that in some cases, such as when the coal is to be exported, a broker obtains the coal for an end-user. This rule allows a broker to verify the validity of the testing at either the end-

user's facilities or at an appropriate other location. Typically, a coal broker assembles a test shipment by blending coal from various sources to suit the end-user's needs, and a test burn or other test may be needed to verify the coal quality and/or suitability for such shipments. Such testing of coal could be considered appropriate under this rule. The required documentation on the need for the testing provided by a broker acting for an end-user, could also be considered sufficient.

One commenter stated that the proposed rule was ambiguous on testing, and that the rule implies that the exemption for testing will only apply to tests for qualitative properties of the coal. The commenter noted that test burns may be necessary to determine the coal's compatibility with the customer's boiler specifications, or suitability for blending with other coals, rather than just to determine quality of the coal. OSMRE agrees with the commenter that test burns are sometimes required for determinations other than the quality of the coal. Testing for purposes of § 772.14(b) is considered by OSMRE to include valid test burns that are required by the end-user, but only in an amount necessary to evaluate the coal's compatibility with boiler or other technical specifications or to determine properties of the coal.

Final paragraph (b)(3), proposed as paragraph (b)(4), requires that the application also contain evidence that sufficient reserves of coal are available to the person conducting exploration, or its principals, for future commercial use or sale to the intended end user to demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve. The phrase "or its principals" was added to recognize that in some situations the person conducting the exploration may be an agent of another.

Final paragraph (b)(4), proposed as paragraph (b)(5), requires the application to contain an explanation as to why other means of exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of future surface coal mining operations. The words "prospecting or" which preceded the word "exploration" in the proposed rule, do not appear in the final rule because "prospecting" is not defined, and, as intended, is a subset of exploration.

The intent of these new requirements is to continue to allow valid testing, while eliminating practices whereby testing is used as a means to circumvent the prohibition of commercial use or sale of coal obtained during exploration.



Any exploration operation which sells or uses coal commercially without a valid testing approval shall be in violation of these rules, unless a permit for a surface coal mining and reclamation operation is first obtained.

**30 CFR Part 815—Permanent Program Performance Standards—Coal Exploration**

#### Section 815.2 Permitting Information

As proposed, OSMRE adds new § 815.2 to clarify the extent of the information required to be submitted in an application for an exploration permit. The performance standards for coal exploration at 30 CFR 815.15 currently contain requirements which cross-reference certain requirements in 30 CFR Part 816. The cross-referenced rules in Part 816 contain further cross references to permit application requirements for surface coal mining operations and, in particular, to those at 30 CFR Part 780. However, the cross-referenced permit application requirements are intended for surface coal mining operations and need not be applied to exploration operations because of the much more limited nature and scope of exploration activity.

The need for more careful specification of exploration permitting information was recently demonstrated by an administrative appeal to an exploration permit issued to Chatham Coal Co. The appeal alleged that the regulatory authority failed to require the Part 780 permitting information cross-referenced by the exploration performance standards. The Administrative Law Judge's decision held that, as written, the cross-referenced permit information requirements which were in question applied to coal exploration. *Chatham County v. OSMRE*, No. NX 7-1-A (August 24, 1987).

New § 815.2 states that notwithstanding cross-references in other parts which may be otherwise construed, Part 772 establishes the permit information requirements for coal exploration. As a result of the addition of this provision, the cross-references to the surface coal mining permit application requirements in Part 816 (which are cross-referenced in the exploration performance standards in 30 CFR 815.15) do not apply to exploration permits. However, the cross-references to the 816 standards still apply except to the extent that they reference plans contained in 30 CFR Part 780. Thus, OSMRE is deleting the perceived applicability of the surface coal mining permit application requirements to exploration operation.

One commenter supported the addition of § 815.2, and suggested that the language added under new § 815.2 should also be added to § 772.1, scope and purpose. OSMRE does not agree that the language need appear in both places and has not adopted the commenter's suggestion.

Another commenter stated that the proposed § 815.2 necessitates a demonstration in Part 772 of how SMCRA section 512(a)(2) standards will be met. The commenter said that absent such a demonstration the proposed rule created a void in the preapproval information requirements, which must be filled in by requiring the application to demonstrate that the exploration will be conducted in conformance with Part 816 standards, applicable through Part 815. The commenter's assertion that proposed § 815.2 created a void in the preapproval information requirements is incorrect. Permit application information requirements for exploration permits are set forth in 30 CFR 772.12(b). Section 772.12(b) establishes a numerous information requirements which provide the regulatory authority with sufficient data to make an informed decision on the application. In particular, § 772.12(b)(10) requires an applicant to submit a description of the measures to be used to comply with the applicable requirements of Part 815. If an applicant's submittal is inadequate, the regulatory authority may always require the submission of additional information.

#### 30 CFR Part 942—Tennessee

##### Section 942.772 Requirements for Coal Exploration in the Federal Program for Tennessee

The Tennessee Federal program, promulgated on October 1, 1984 (49 FR 38874), added a provision to the coal exploration rules for Tennessee at 30 CFR 942.772(b) requiring that any person who intends to use mechanized earth moving equipment or explosives to conduct coal exploration activities must file a written notice of intent with OSMRE. This provision is in addition to the requirements of 30 CFR 772.11(a) requiring a written notice of intention to explore from a person intending to conduct coal exploration activities that may substantially disturb the natural land surface. The additional provision in the Tennessee program rules was added to aid enforcement and because the use of mechanized earth moving equipment or explosives is a fairly reliable indicator that substantial disturbance would be likely to occur during exploration. However, those provisions could be less effective than this final

rule, which requires all who would explore for 250 tons or less of coal to file a notice of intent. Therefore, the exploration rules for the Tennessee Federal program are revised to make them consistent with the final rules adopted for 30 CFR Part 772.

As proposed and adopted, § 942.772(a) states that Part 772 of this chapter, Requirements for Coal Exploration, shall apply to any person who conducts or seeks to conduct coal exploration operations in Tennessee. Previous § 942.772(b) is removed and replaced by a provision which provides consistency with the exploration application processing provisions contained in the other Federal programs for States. Final § 942.772(b) provides that OSMRE shall make every effort to act on an exploration application within 60 days of its receipt, or such longer time as may be reasonably required, and OSMRE will notify the applicant if additional time is needed to complete the review, setting forth the reasons for the additional time that is needed.

#### III. Procedural Matters

##### Effect in Federal Program States

The rules under 30 CFR Parts 772 and 815 apply, through cross-referencing, in those States with Federal programs. These include California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively.

##### Effects on State Programs

Upon promulgation of this final rule, OSMRE will evaluate permanent State regulatory programs approved under section 503 of SMCRA to determine whether any changes in these programs will be necessary. If the Director determines that certain State program provisions should be amended in order to be made no less effective than the revised Federal rules, the individual States will be notified in accordance with the provisions of 30 CFR 732.17.

##### Federal Paperwork Reduction Act

The collection of information contained in this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1029-0033. Public reporting burden for this information is estimated to average 6.2 hours per response under 30 CFR Part 772, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the

data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to: Information Collection Clearance Officer, 1951 Constitution Avenue NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

##### Executive Order 12291 and Regulatory Flexibility Act

The U.S. Department of the Interior (DOI) has determined that this proposed rule is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

The rule does not distinguish between small and large entities. The economic effects of the rule are estimated to be minor and no incremental effects are anticipated as a result of the rule.

##### National Environmental Policy Act

OSMRE has prepared a final environmental assessment (EA), and has made a finding that the rules adopted in this rulemaking will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). A finding of no significant impact (FONSI) has been approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the OSMRE Administrative Record at the address specified previously (see "ADDRESSES").

##### Author

The principal author of this rule is Dr. Fred Block, Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-1864 (Commercial or FTS).

##### List of Subjects

###### 30 CFR Part 772

Reporting and recordkeeping requirements, Surface mining, Underground mining.

###### 30 CFR Part 815

Reporting and recordkeeping requirements, Surface mining.

###### 30 CFR Part 942

Intergovernmental relations, Reporting and recordkeeping

requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Parts 772, 815 and 942 are amended as set forth below:

Dated: November 21, 1988.

James E. Cason,  
Deputy Assistant Secretary, Land and Minerals Management.

#### PART 772—REQUIREMENTS FOR COAL EXPLORATION

1. The authority citation for Part 772 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; 16 U.S.C. 470 *et seq.*; and Pub. L. 100-34.

2. Section 772.11 is amended by revising paragraphs (a) and (b)(3) to read as follows:

##### § 772.11 Notice requirements for exploration removing 250 tons of coal or less.

(a) Any person who intends to conduct coal exploration operations outside a permit area during which 250 tons or less of coal will be removed, shall, before conducting the exploration, file with the regulatory authority a written notice of intention to explore. Exploration which will take place on lands designated as unsuitable for surface coal mining operations under Subchapter F of this chapter, shall be subject to the permitting requirements under § 772.12. Exploration conducted under a notice of intent shall be subject to the requirements prescribed under § 772.13.

(b) The notice shall include—

(3) A narrative describing the proposed exploration area or a map at a scale of 1:24,000, or greater, showing the proposed area of exploration and the general location of drill holes and trenches, existing and proposed roads, occupied dwellings, topographic features, bodies of surface water, and pipelines;

3. Section 772.12 is amended by revising the section heading, revising paragraphs (a) and (b)(3); and revising the heading for paragraph (d); to read as follows:

##### § 772.12 Permit requirements for exploration removing more than 250 tons of coal, or occurring on lands designated as unsuitable for surface coal mining operations.

(a) *Exploration permit.* Any person who intends to conduct coal exploration outside a permit area during which more than 250 tons of coal will be removed or which will take place on lands designated as unsuitable for surface

mining under Subchapter F of this chapter, shall, before conducting the exploration, submit an application and obtain written approval from the regulatory authority in an exploration permit. Such exploration shall be subject to the requirements prescribed under §§ 772.13 and 772.14.

(b) *Application information.*

(3) A narrative describing the proposed exploration area.

(d) *Decisions on applications for exploration.*

4. Section 772.14 is revised to read as follows:

##### § 772.14 Commercial use or sale.

(a) Except as provided under §§ 772.14(b) and 700.11(a)(5), any person who intends to commercially use or sell coal extracted during coal exploration operations under an exploration permit, shall first obtain a permit to conduct surface coal mining operations for those operations from the regulatory authority under Parts 773 through 785 of this chapter.

(b) With the prior written approval of the regulatory authority, no permit to conduct surface coal mining operations is required for the sale or commercial use of coal extracted during exploration operations if such sale or commercial use is for coal testing purposes only. The person conducting the exploration shall file an application for such approval with the regulatory authority. The application shall demonstrate that the coal testing is necessary for the development of a surface coal mining and reclamation operation for which a surface coal mining operations permit application is to be submitted in the near future, and that the proposed commercial use or sale of coal extracted during exploration operations is solely for the purpose of testing the coal. The application shall contain the following:

(1) The name of the testing firm and the locations at which the coal will be tested.

(2) If the coal will be sold directly to, or commercially used directly by, the intended end user, a statement from the intended end user, or if the coal is sold indirectly to the intended end user through an agent or broker, a statement from the agent or broker. The statement shall include:

(i) The specific reason for the test, including why the coal may be so different from the intended user's other coal supplies as to require testing;

(ii) the amount of coal necessary for the test and why a lesser amount is not sufficient; and



(iii) a description of the specific tests that will be conducted.

(3) Evidence that sufficient reserves of coal are available to the person conducting exploration or its principals for future commercial use or sale to the intended end user, or agent or broker of such user identified above, to demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve.

(4) An explanation as to why other means of exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of developing a surface coal mining operation.

**PART 815—PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL EXPLORATION**

5. The authority citation for Part 815 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

6. Section 815.2 is added to read as follows:

**§ 815.2 Permitting information.**

Notwithstanding cross-references in other parts which may be otherwise construed, Part 772 establishes the notice and permit information requirements for coal exploration.

**SUBCHAPTER T—PROGRAMS FOR THE CONDUCT OF SURFACE MINING OPERATIONS WITHIN EACH STATE**

**PART 942—TENNESSEE**

7. The authority citation for Part 942 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, as amended; and Pub. L. 100-34.

8. Section 942.772 is revised to read as follows:

**§ 942.772 Requirements for coal exploration.**

(a) Part 772 of this chapter, Requirements for Coal Exploration, shall apply to any person who conducts or seeks to conduct coal exploration operations.

(b) The Office shall make every effort to act on an exploration application within 60 days of receipt or such longer time as may be reasonable under the circumstances. If additional time is needed, the Office shall notify the applicant that the application is being reviewed, but that more time is necessary to complete such reviews, setting forth the reasons and the additional time that is needed.

[FR Doc. 88-29721 Filed 12-28-88; 8:45 am]  
BILLING CODE 4310-05-M

# Federal Register

Thursday  
December 29, 1988

## Part IV

## Department of Health and Human Services

Food and Drug Administration

21 CFR Part 888  
Orthopedic Devices; Exemptions From  
Premarket Notification; Final Rule



## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

## 21 CFR Part 888

(Docket No. 86N-0012)

## Orthopedic Devices; Exemptions From Premarket Notification

AGENCY: Food and Drug Administration.  
ACTION: Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is exempting from the requirement of premarket notification, with limitations, seven generic types of class I orthopedic devices. For the exempted devices, FDA has determined that manufacturers' submissions of premarket notifications are unnecessary for the protection of the public health and that review of such notifications by the agency will not advance FDA's public health mission. Granting the exemptions will allow the agency to make better use of its resources and thus better serve the public.

EFFECTIVE DATE: January 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Carl A. Larson, Center for Devices and Radiological Health (HFZ-410), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7158.

**SUPPLEMENTARY INFORMATION:** The Medical Device Amendments of 1976 (the amendments) (Pub. L. 94-295) establish a comprehensive system for the regulation of medical devices intended for human use. One provision of the amendments, section 513 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. 360c), establishes three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance and safety and effectiveness: Class I, general controls; class II, performance standards; and class III, premarket approval.

Section 513(d)(2)(A) of the Act (21 U.S.C. 360c(d)(2)(A)) authorizes FDA to exempt, by regulation, a generic type of class I device from the requirement of, among other things, premarket notification in section 510(k) of the Act (21 U.S.C. 360(k)) and Subpart E of 21 CFR Part 807. Such an exemption permits manufacturers to introduce into commercial distribution generic types of devices without first submitting to FDA a premarket notification. When FDA was publishing its proposed classification regulations for preamendments devices, the agency did

not routinely evaluate whether it should grant to manufacturers of devices placed in class I an exemption from the requirement of premarket notification. Generally, FDA considered such exemptions only when the advisory panels specifically included them in recommendations made to the agency. Recently, FDA developed criteria for exempting certain class I devices from the requirement of premarket notification, to reduce the number of unnecessary premarket notifications, thereby freeing agency resources for the review of more important notifications.

FDA believes that exempting certain devices from premarket notification will allow the agency to make better use of its resources and thus better serve the public. In other words, the process of exempting devices from the premarket notification program of section 510(k) of the Act (21 U.S.C. 360(k)), where premarket notification will not advance FDA's public health mission, will free additional resources to address pressing regulatory concerns and will make the agency more efficient. The development of exemption criteria and the issuance of proposed and final rules exempting appropriate devices from the requirement of premarket notification will help implement a goal in FDA's May 1987 "A Plan for Action Phase II" (Ref. 1).

On September 4, 1987 (52 FR 33686), FDA published a final regulation classifying 77 orthopedic devices. Also on September 4, 1987 (52 FR 33714), FDA proposed to exempt from the requirement of premarket notification, with limitations, seven of those devices classified into class I. Interested persons were given until November 3, 1987, to submit written comments on the proposal. One comment was received from a manufacturer:

1. The comment suggested that § 888.9 *Limitations of exemptions from section 510(k) of the Act* be revised to include a reference to 21 CFR 807.81, which regulation specifies when a premarket notification submission is required.

FDA believes that cross-referencing 21 CFR 807.81 is unnecessary, because §§ 807.81 and 888.9 are independent and complementary sections and must be read together in determining whether a section 510(k) premarket notification submission is necessary.

2. The comment noted that the exemption from premarket notification for four devices (§§ 888.4200 *Cement dispenser*, 888.4210 *Cement mixer for clinical use*, 888.4230 *Cement ventilation tube*, and 888.5940 *Cost component*) was limited to those devices made of the same materials that were used in the devices before May 28, 1976. The

comment said that it is highly unlikely that use in these innocuous devices of materials that are different from the materials used before May 28, 1976, would significantly affect the safety and effectiveness of the devices. Thus, the comment suggested that the proposed exemption from premarket notification not be limited to the devices made of the same materials and used before May 28, 1976.

FDA believes that use of materials in the four devices that are different from the materials used in the devices before May 28, 1976, may significantly affect the safety and effectiveness of these devices. Accordingly, under 21 CFR 807.81(a)(3), a premarket notification must be filed with the agency for any of the four devices when made of new materials. Then FDA will be able to assess the significance of the effect of the new materials on the safety and effectiveness of any of the four devices.

3. The comment suggested that FDA clarify the four regulations by identifying materials in use in the devices before May 28, 1976.

FDA is clarifying the four regulations as suggested, by identifying examples of the materials known by the agency to have been used in the devices before May 28, 1976.

Accordingly, FDA is adopting the regulations as proposed with minor clarifications to identify the materials used in four devices (§§ 888.4200, 888.4210, 888.4230, and 888.5940) before May 28, 1976.

## Criteria for 510(k) Exemptions

FDA is exempting a generic type of class I device from the requirement of premarket notification, with the limitations described below, if the agency determines that premarket notification is unnecessary for the protection of the public health. FDA is granting an exemption if both of the following criteria are met:

1. FDA has determined that the device does not have a significant history of false or misleading claims or of risks associated with inherent characteristics of the device, such as device design or materials. When making these determinations, FDA may consider the frequency, persistence, cause, or seriousness of such claims or risks, or other factors.

2. FDA has determined that: (a) Characteristics of the device necessary for its safe and effective performance are well established; (b) anticipated changes in the device that are of the type that could affect safety and effectiveness will (i) be readily detectable by users by visual

examination or other means, such as routine testing, e.g., testing of a clinical laboratory reagent with positive and negative controls, before causing harm; or (ii) not materially increase the risk of injury, incorrect diagnosis, or ineffective treatment; and (c) that any changes in the device will not be likely to result in a change in the device's classification.

FDA will make the determinations above based on its knowledge of the device, including past experience and relevant reports or studies on device performance. FDA may, if it has concerns only about certain types of changes in a class I device, grant a limited exemption from premarket notification for the generic type of device. A limited exemption will specify that types of changes manufacturers must continue to report to FDA in the context of premarket notification. For example, FDA may exempt a device except when a manufacturer intends to use a different material.

FDA's decision to grant an exemption from the requirement of premarket notification for a generic type of class I device is based upon the existing and reasonably foreseeable characteristics of commercially distributed devices within that generic type. Because FDA cannot anticipate every change in intended use or characteristic of a device that could significantly affect a device's safety or effectiveness, manufacturers of any commercially distributed class I device for which FDA has granted an exemption from the requirement of premarket notification must still submit a premarket notification to FDA before introducing or delivering for introduction into interstate commerce for commercial distribution the device when:

(1) The device is intended for a use different from its intended use before May 28, 1976, or the device is intended for a use different from the intended use of a preamendments device to which it had been determined to be substantially equivalent; e.g., the device is intended for a different medical purpose, or the device is intended for lay use where the former intended use was by health care professionals only; or

(2) The modified device operates using a different fundamental scientific technology than that in use in the device before May 28, 1976; e.g., a surgical instrument cuts tissue with a laser beam rather than with a sharpened metal blade, or an in vitro diagnostic device detects or identifies infectious agents by using a deoxyribonucleic acid (DNA) probe or nucleic acid hybridization technology rather than culture or immunoassay technology.

## Reference

The following information has been placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857, and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. "Food and Drug Administration—A Plan for Action Phase II," Public Health Service, Department of Health and Human Services, May 1987, p. 19.

## Environmental Impact

The agency has determined under 21 CFR 25.24(e)(2) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## Economic Impact

FDA has carefully analyzed the economic effects of this final rule and has determined that the final rule would not have a significant economic impact on a substantial number of small entities as defined by the Regulatory Flexibility Act. In accordance with section 3(g)(1) of Executive Order 12291, the impact of this final rule has been carefully analyzed, and it has been determined that the final rule does not constitute a major rule as defined in section 1(b) of the Executive Order.

The devices subject to this final rule are now subject only to the general controls provisions of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 351, 352, 360, 360f, 360h, 360i, and 360j), with certain exemptions.

## List of Subjects in 21 CFR Part 888

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 888 is amended as follows:

## PART 888—ORTHOPEDIC DEVICES

1. The authority citation for 21 CFR Part 888 continues to read as follows:

Authority: Secs. 501(f), 510, 513, 515, 520, 701(a), 52 Stat. 1055, 76 Stat. 794-795 as amended, 90 Stat. 540-546, 552-559, 565-574, 576-577 (21 U.S.C. 351(f), 360, 360c, 360e, 360j, 371(a)); 21 CFR 5.10.

2. Section 888.9 is added to Subpart A to read as follows:

## § 888.9 Limitations of exemptions from section 510(k) of the act.

FDA's decision to grant an exemption from the requirement of premarket notification (section 510(k) of the act) for

a generic type of class I device is based upon the existing and reasonably foreseeable characteristics of commercially distributed devices within that generic type. Because FDA cannot anticipate every change in intended use or characteristic that could significantly affect a device's safety or effectiveness, manufacturers of any commercially distributed class I device for which FDA has granted an exemption from the requirement of premarket notification must still submit a premarket notification to FDA before introducing or delivering for introduction into interstate commerce for commercial distribution the device when:

(a) The device is intended for a use different from its intended use before May 28, 1976, or the device is intended for a use different from the intended use of a preamendments device to which it had been determined to be substantially equivalent; e.g., the device is intended for a different medical purpose, or the device is intended for lay use where the former intended use was by health care professionals only; or

(b) The modified device operates using a different fundamental scientific technology than that in use in the device before May 28, 1976; e.g., a surgical instrument cuts tissue with a laser beam rather than with a sharpened metal blade, or an in vitro diagnostic device detects or identifies infectious agents by using a deoxyribonucleic acid (DNA) probe or nucleic acid hybridization technology rather than culture or immunoassay technology.

3. Section 888.4200 is amended by revising paragraph (b) to read as follows:

## § 888.4200 Cement dispenser.

(b) *Classification.* Class I. If the device is made of the same materials that were used in the device before May 28, 1976 (e.g., 316 stainless steel, chrome plated carbon steel, or polyethylene), the device is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter.

4. Section 888.4210 is amended by revising paragraph (b) to read as follows:

## § 888.4210 Cement mixer for clinical use.

(b) *Classification.* Class I. If the device is made of the same materials that were used in the device before May 28, 1976 (e.g., 316 stainless steel or polyethylene), the device is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter.



5. Section 888.4220 is amended by revising paragraph (b) to read as follows:

**§ 888.4220 Cement monomer vapor evacuator.**

(b) *Classification.* Class I. The device is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter.

6. Section 888.4230 is amended by revising paragraph (b) to read as follows:

**§ 888.4230 Cement ventilation tube.**

(b) *Classification.* Class I. If the device is made of the same materials that were used in the device before May 28, 1976 (e.g., polypropylene or polyethylene), the device is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter.

7. Section 888.5890 is amended by revising paragraph (b) to read as follows:

**§ 888.5890 Noninvasive traction component.**

(b) *Classification.* Class I. The device is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter. The device is exempt from the current good manufacturing practice regulations in Part 820 of this chapter, with the exception of § 820.180, regarding general requirements concerning records, and § 820.198, regarding complaint files.

8. Section 888.5940 is amended by revising paragraph (b) to read as follows:

**§ 888.5940 Cast component.**

(b) *Classification.* Class I. If the device is made of the same materials that were used in the device before May 28, 1976, (e.g., heels of rubber vinyl; walking irons of plate steel) it is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter. The device is exempt from the current good manufacturing practice

regulations in Part 820 of this chapter, with the exception of § 820.180, regarding general requirements concerning records, and § 820.198, regarding complaint files.

9. Section 888.5980 is amended by revising paragraph (b) to read as follows:

**§ 888.5980 Manual cast application and removal instrument.**

(b) *Classification.* Class I. The device is exempt from the premarket notification procedures in Subpart E of Part 807 of this chapter. The device is exempt from the current good manufacturing regulations in Part 820 of this chapter, with the exception of § 820.180, regarding general requirements concerning records, and § 820.198, regarding complaint files.

Dated: December 9, 1988.

Frank E. Young,

Commissioner of Food and Drugs.

[FR Doc. 88-29886 Filed 12-28-88; 8:45 am]

BILLING CODE 4160-01-M

# federal register

Thursday  
December 29, 1988

## Part V

## Department of Energy

### Economic Regulatory Administration

Electric and Gas Utilities Covered in  
1989; Requirements for State Regulatory  
Authorities to Notify the Department of  
Energy, Notice

BEST COPY AVAILABLE



## DEPARTMENT OF ENERGY

## Economic Regulatory Administration

(Docket No. ERA-R-79-43B)

**Electric and Gas Utilities Covered in 1989 by Titles I and III of the Public Utility Regulatory Policies Act of 1978 and Titles II and VII of the National Energy Conservation Policy Act of 1978 and Requirements for State Regulatory Authorities To Notify the Department of Energy**

**AGENCY:** Economic Regulatory Administration, Department of Energy.  
**ACTION:** Notice.

**SUMMARY:** Sections 102(c) and 301(d) of the Public Utility Regulatory Policies Act of 1978 (PURPA) and section 211(b) of the National Energy Conservation Policy Act (NECPA) require the Secretary of Energy to publish a list before the beginning of each calendar year, identifying each electric utility and gas utility to which Titles I and III of PURPA and Titles II and VII of NECPA apply during such calendar year. The 1989 list is published here as two separate tabulations. Appendix A lists the covered utilities by State and Appendix B lists them alphabetically.

Each State regulatory authority is required, pursuant to sections 102(c) and 301(d) of PURPA and section 211(b) of NECPA, to notify the Secretary of Energy of each electric utility and gas utility on the list for which such State regulatory authority has ratemaking authority. In addition, written comments are requested on the accuracy of the list of electric utilities and gas utilities.

**DATE:** Notifications by State regulatory authorities and written comments must be received by no later than 4:30 p.m. on February 15, 1989.

**ADDRESS:** Notifications and written comments should be forwarded to: Department of Energy, Coal and Electricity Division, 1000 Independence Avenue, SW., Room 3F-070, Docket No. ERA-R-79-43B, Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Steven Mintz, Coal and Electricity Division, Economic Regulatory Administration, Department of Energy, 1000 Independence Avenue, SW., Room 3F-070, Washington, DC 20585, Telephone 202/586-9506.

**SUPPLEMENTARY INFORMATION:****I. Background**

Pursuant to sections 102(c) and 301(d) of PURPA, Pub. L. 95-617, 92 Stat. 3117 *et seq.* (16 U.S.C. 2601 *et seq.*), and section 211(b) of NECPA, Pub. L. 95-619, 92 Stat. 3206 *et seq.*, (42 U.S.C. 8211 *et*

*seq.*), hereinafter referred to as the "Acts", the Department of Energy (DOE) is required to publish a list of utilities to which Titles I and III of PURPA and Titles II and VII of NECPA apply in 1989.

State regulatory authorities are required by the above cited Acts to notify the Secretary of Energy as to their ratemaking authority over the listed utilities. The inclusion or exclusion of any utility on or from the list does not affect the legal obligations of such utility or the responsible authority under the Acts.

The term "State regulatory authority" means any State, including the District of Columbia and Puerto Rico, or a political subdivision thereof, and any agency or instrumentality, either of which has authority to fix, modify, approve, or disapprove rates with respect to the sale of electric energy or natural gas by any utility (other than such State agency). In the case of a utility for which the Tennessee Valley Authority (TVA) has ratemaking authority, the term "State regulatory authority" means the TVA.

Title I or PURPA sets forth ratemaking and regulatory policy standards with respect to electric utilities. Section 102(c) of Title I requires the Secretary of Energy to publish a list, before the beginning of each calendar year, identifying each electric utility to which Title I applies during such calendar year. An electric utility is defined as any person, State agency or Federal agency, which sells electric energy. An electric utility is covered by Title I for any calendar year if it had total sales of electric energy for purposes other than resale in excess of 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year. An electric utility is covered in 1989 if it exceeded the threshold in any year from 1976 through 1987.

Title III of PURPA addresses ratemaking and other regulatory policy standards with respect to natural gas utilities. Section 301(d) of Title III requires the Secretary of Energy to publish a list, before the beginning of each calendar year, identifying each gas utility to which Title III applies during such calendar year. A gas utility is defined as any person, State agency or Federal agency, engaged in the local distribution of natural gas and the sale of natural gas to any ultimate consumer of natural gas. A gas utility is covered by Title III if it had total sales of natural gas for purposes other than resale in excess of 10 billion cubic feet during any calendar year beginning after December

31, 1975, and before the immediately preceding calendar year. A gas utility is covered in 1989 if it exceeded the threshold in any year from 1976 through 1987.

Title II, Part 1, of NECPA, addresses residential conservation programs, and Title VII of NECPA, enacted as part of the Energy Security Act, Pub. L. 96-294, 94 Stat. 611 *et seq.* (42 U.S.C. 8701 *et seq.*), and amended by Pub. L. 99-412, 100 Stat. 932 *et seq.*, addresses commercial building and multi-family dwelling conservation programs. Section 211(b) contains a requirement, similar to that of PURPA, that the Secretary of Energy publish a list of electric and gas utilities to which Titles II and VII apply. The NECPA requirements for coverage of electric utilities and gas utilities differ from the PURPA requirements in only three respects:

(1) The NECPA threshold for electric utilities is 750 million kilowatt-hours for purposes other than resale;

(2) A utility is covered for any calendar year if it exceeded the threshold during the second preceding calendar year; e.g., a utility is covered in 1989 if it exceeded the threshold in 1987; and

(3) Only utilities which have residential sales are covered by Title II and only utilities which have sales to commercial buildings or multi-family dwellings are covered by Title VII.

In compiling the list published today, the DOE revised the 1988 list (52 FR 49328, December 30, 1987) upon the assumption that all entities included on the 1988 list are properly included on the 1989 list unless the DOE has information to the contrary. In doing this, the DOE took into account information which was received from the rural Electrification Administration or included in public documents regarding entities which exceeded the PURPA and NECPA thresholds for the first time in 1987. The DOE believes that it will become aware of any errors or omissions in the list published today by means of the comment process called for by this notice. The DOE will, after consideration of any comment and other information available to the DOE, provide written notice of any further additions or deletions to the list.

**II. Notification and Comment Procedures**

No later than 4:30 p.m. on February 15, 1989, each State regulatory authority must notify the Department of Energy in writing of each utility on the list over which it has ratemaking authority. Five copies of such notification should be submitted to the address indicated in

the "ADDRESS" section of this Notice and should be identified on the outside of the envelope and on the document with the designation "Docket No. ERA-R-79-43B." Such notification should include:

1. A complete list of electric utilities and gas utilities over which the State regulatory authority has ratemaking authority;

2. legal citations pertaining to the ratemaking authority of the State regulatory authority; and

3. for any listed utility known to be subject to other ratemaking authorities within the State for portions of its service area, a precise description of the portion to which such notification applies.

All interested persons, including State regulatory authorities, are invited to comment in writing, no later than 4:30 p.m. on February 15, 1989, on any errors or omissions with respect to the list. Five copies of such comments should be sent to the address indicated in the "ADDRESS" section of this Notice and should be identified on the outside of the envelope and on the document with the designation "Docket No. ERA-R-79-43B." Written comments should include the commenter's name, address and telephone number.

All notifications and comments received by the DOE will be made available, upon request, for public inspection in the Freedom of Information Reading Room, Room 1E-190; 1000 Independence Avenue, SW., Washington, D.C. 20585 between the hours of 9:00 a.m. and 4:00 p.m. Monday through Friday.

**III. List of Electric Utilities and Gas Utilities**

Appendices A and B contain two different tabulations of the utilities which meet both PURPA and NECPA coverage requirements. In both appendices, the listed utilities covered by PURPA but not covered by NECPA also are noted. As stated above, the inclusion or exclusion of any utility on or from the lists does not affect its legal obligations or those of the responsible State regulatory authority under PURPA and NECPA.

Appendix A contains a list of utilities which are covered by PURPA and/or NECPA. These utilities are grouped by State and by the regulatory authority within each State. Also included in this list are utilities which are covered by PURPA and/or NECPA but which are not regulated by the State regulatory authority. This tabulation, including explanatory notes, is based on information provided to the DOE by State regulatory authorities in response

to the December 30, 1987, Federal Register Notice (52 FR 49328) requiring each State regulatory authority to notify the DOE of each utility on the list over which it has ratemaking authority, public comments received with respect to that notice, and information subsequently made available to the DOE.

The utilities classified in Appendix A as not regulated by the State regulatory authority in fact may be regulated by local municipal authorities. These municipal authorities would be State agencies as defined by PURPA and thus have responsibilities under PURPA identical to those of the State regulatory authority. Therefore, each such municipality is to notify the DOE of each utility on the list over which it has ratemaking authority.

In Appendix B, the utilities are listed alphabetically, subdivided into electric utilities and gas utilities, and further subdivided by type of ownership: investor-owned utilities, publicly-owned utilities, and rural cooperatives.

The changes to the 1988 list of electric and gas utilities are as follows:

**Additions**

\*Joe Wheeler Electric Membership Corporation (AL)  
\*New Hampshire Electric Cooperative, Inc. (NH)  
\*Sawnee Electric Membership Corporation (GA)

**Erroneously Listed in 1988 List**

Northern Central Public Service Company (MN)

(Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 *et seq.* (16 U.S.C. 2601 *et seq.*); National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 *et seq.*, as amended by Pub. L. 96-294, 94 Stat. 611 *et seq.*, and Pub. L. 99-412, 100 Stat. 932 *et seq.* (42 U.S.C. 8211 *et seq.*))

Issued in Washington, DC, on December 23, 1988.

Constance L. Buckley,  
Acting Director, Office of Fuels Programs,  
Economic Regulatory Administration.

**Appendix A**

All gas utilities listed below had natural gas sales, for purposes other than resale, in excess of 10 billion cubic feet in 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986 or 1987. All except those marked (\*) are covered by PURPA Title III, and NECPA Titles II and VII. Utilities marked (\*) are not covered by NECPA Titles II and VII because they either did not exceed the NECPA threshold of 10 billion cubic feet in 1987 for purposes other than resale, or do not have residential or commercial sales.

All electric utilities listed below had electric energy sales, for purposes other than resale, in excess of 500 million kilowatt-hours in 1976, 1977, 1978, 1979, 1980, 1981, 1983, 1984, 1985, 1986 or 1987. All except those marked (\*) are covered by PURPA Title I and NECPA Titles II and VII. Utilities marked (\*) are not covered by NECPA Titles II and VII because they either did not exceed the NECPA threshold of 750 million kilowatt-hours in 1987 for purposes other than resale, or do not have residential or commercial sales.

**State: Alabama**

Regulatory Authority: Alabama Public Service Commission.

**Gas Utilities****Investor-Owned:**

Alabama Gas Corporation  
\*Alabama-Tennessee Natural Gas Company  
Mobile Gas Service Corporation  
Northwest Alabama Gas Dist.

**Electric Utilities****Investor-Owned:**

Alabama Power Company  
The following covered utilities within the State of Alabama are not regulated by the Alabama Public Service Commission:

**Electric Utilities****Investor-Owned:**

Dacula Electric Department  
\*Dothan Electric Department  
Florence Electric Department  
Huntsville Utilities

**Rural Electric Cooperatives:**

\*Joe Wheeler Electric Membership Corporation  
Rural Electric System

**State: Alaska**

Regulatory Authority: Alaska Public Utilities Commission.

**Gas Utilities****Investor-Owned:**

Enstar Natural Gas Company

**Electric Utilities****Rural Electric Cooperatives:**

Chugach Electric Association  
Publicly-Owned:  
\*Anchorage Municipal Light & Power Department

**State: Arizona**

Regulatory Authority: Arizona Corporation Commission.

**Gas Utilities****Investor-Owned:**

Southern Union Gas Company  
Southwest Gas Corporation



**Electric Utilities****Investor-Owned:**

Arizona Public Service Company  
Tucson Electric Power Company

**Publicly-Owned:**

\*Trico Electric Cooperative, Inc.  
Rural Electric Cooperative:  
Duncan Valley Electric Cooperative,  
Inc.

The following covered utilities within  
the State of Arizona are not regulated by  
the Arizona Corporation Commission:

**Electric Utilities****Publicly-Owned:**

Salt River Project Agricultural  
Improvement and Power District

**State: Arkansas**

Regulatory Authority: Arkansas  
Public Service Commission.

**Gas Utilities****Investor-Owned:**

Arkansas-Louisiana Gas Company  
Arkansas-Oklahoma Gas Corporation  
Arkansas Western Gas Company  
Associated Natural Gas Company

**Electric Utilities****Investor-Owned:**

Arkansas Power and Light Company  
Empire District Electric Company  
Oklahoma Gas and Electric Company  
Southwestern Electric Power  
Company

**Rural Electric Cooperative:**

\*First Electric Cooperative  
Corporation

The following covered utility within  
the State of Arkansas is not regulated  
by the Arkansas Public Service  
Commission:

**Publicly-Owned:**

\*North Little Rock Electric  
Department

**State: California**

Regulatory Authority: California  
Public Utilities Commission.

**Gas Utilities****Investor-Owned:**

Pacific Gas and Electric Company  
San Diego Gas and Electric Company  
Southern California Gas Company  
Southwest Gas Corporation

**Electric Utilities****Investor-Owned:**

Pacific Gas and Electric Company  
Pacific Power and Light Company  
San Diego Gas and Electric Company  
Sierra Pacific Power Company  
Southern California Edison Company  
The following covered utilities within  
the State of California are not regulated  
by the California Public Utilities  
Commission:

**Electric Utilities****Publicly-Owned:**

Anaheim Public Utilities Department  
Burbank Public Service Department  
\*Glendale Public Service Department  
Imperial Irrigation District  
Los Angeles Department of Water and  
Power

Modesto Irrigation District  
Palo Alto Electric Utility  
Pasadena Water and Power  
Department

Riverside Public Utilities  
Sacramento Municipal Utility District  
Santa Clara Electric Department  
Turlock Irrigation District  
Vernon Municipal Light Department

**Gas Utilities****Publicly-Owned:**

Long Beach Gas Department

**State: Colorado**

Regulatory Authority: Colorado Public  
Utilities Commission.

**Gas Utilities****Investor-Owned:**

Greeley Gas Company  
Iowa Electric Light and Power  
Company  
Kansas-Nebraska Natural Gas  
Company  
Peoples Natural Gas Company,  
Division of Internorth, Inc.  
Public Service Company of Colorado

**Publicly-Owned:**

Colorado Springs Department of  
Utilities (jurisdiction only sales to  
another gas utility)

**Electric Utilities****Investor-Owned:**

Public Service Company of Colorado  
Southern Colorado Power Division  
of Centel

The following covered utilities within  
the State of Colorado are not regulated  
by the Colorado Public Utilities  
Commission:

**Gas Utilities****Publicly-Owned:**

Colorado Springs Department of  
Utilities (except sales to another gas  
utility)

**Electric Utilities****Publicly-Owned:**

Colorado Springs Department of  
Utilities  
Rural Electric Cooperatives:  
\*Intermountain Rural Association  
Moon Lake Electric Association

**State: Connecticut**

Regulatory Authority: Connecticut  
Department of Public Utility Control

**Gas Utilities****Investor-Owned:**

Connecticut Light and Power  
Company  
Connecticut Natural Gas Corporation  
Southern Connecticut Gas Company

**Electric Utilities****Investor-Owned:**

Connecticut Light and Power  
Company  
United Illuminating Company  
Publicly-Owned:  
\*Groton Public Utilities

**State: Delaware**

Regulatory Authority: Delaware  
Public Service Commission

**Gas Utilities****Investor-Owned:**

Delmarva Power and Light Company

**Electric Utilities****Investor-Owned:**

Delmarva Power and Light Company

**State: District of Columbia**

Regulatory Authority: Public Service  
Commission of the District of Columbia

**Gas Utilities****Investor-Owned:**

Washington Gas Light Company

**Electric Utilities****Investor-Owned:**

Potomac Electric Power Company

**State: Florida**

Regulatory Authority: Florida Public  
Service Commission.

**Gas Utilities****Investor-Owned:**

\*City Gas Company of Florida  
Peoples Gas System

**Electric Utilities****Investor-Owned:**

Florida Power Corporation  
Florida Power and Light Company  
Gulf Power Company  
Tampa Electric Company  
Publicly-Owned: The Florida Public  
Service Commission has rate  
structure jurisdiction over the  
following utilities—  
Gainesville Regional Utilities  
Jacksonville Electric Authority  
Lakeland Department of Electric and  
Water  
\*Ocala Electric Authority  
Orlando Utilities Commission  
Tallahassee, City of  
Rural Electric Cooperative: The Florida  
Public Service Commission has rate

structure jurisdiction over the  
following utilities—  
Clay Electric Cooperative  
Lee County Electric Cooperative  
\*Sumter Electric Cooperative, Inc.  
Withlacoochee River Electric  
Cooperative

**State: Georgia**

Regulatory Authority: Georgia Public  
Service Commission.

**Gas Utilities****Investor-Owned:**

Atlanta Gas Light Company

**Electric Utilities****Investor-Owned:**

Georgia Power Company  
Savannah Electric and Power  
Company

The following utilities within the State  
of Georgia are not regulated by the  
Georgia Public Service Commission.

**Electric Utilities****Publicly-Owned:**

\*Albany Water, Gas & Light  
Commission  
\*Dalton Water, Light & Sink  
Rural Electric Cooperatives:  
\*Douglas County Electric Membership  
Corporation  
Cobb Electric Membership  
Corporation  
Flint Electric Membership Corporation  
Jackson Electric Membership  
Corporation  
North Georgia Electric Membership  
Corporation  
\*Sawnee Electric Membership  
Corporation  
Walton Electric Membership  
Corporation

**State: Hawaii**

Regulatory Authority: Hawaii Public  
Utilities Commission.

**Gas Utilities**

None.

**Electric Utilities****Investor-Owned:**

Hawaiian Electric Company, Inc.

**State: Idaho**

Regulatory Authority: Idaho Public  
Utilities Commission.

**Gas Utilities****Investor-Owned:**

Intermountain Gas Company  
Washington Water Power Company

**Electric Utilities****Investor-Owned:**

Idaho Power Company  
Pacific Power and Light Company

Utah Power and Light Company  
Washington Water Power Company

**State: Illinois**

Regulatory Authority: Illinois  
Commerce Commission.

**Gas Utilities****Investor-Owned:**

Central Illinois Light Company  
Central Illinois Public Service  
Company  
Illinois Power Company  
Iowa-Illinois Gas and Electric  
Company  
North Shore Gas Company  
Northern Illinois Gas Company  
\*Panhandle Eastern Pipeline  
Company  
Peoples Gas, Light and Coke  
Company

**Electric Utilities****Investor-Owned:**

Central Illinois Light Company  
Central Illinois Public Service  
Company  
Commonwealth Edison Company  
Illinois Power Company  
Interstate Power Company  
Iowa-Illinois Gas and Electric  
Company  
Union Electric Company

The following covered utility within  
the State of Illinois is not regulated by  
the Illinois Commerce Commission:

**Electric Utilities****Publicly-Owned:**

Springfield Water, Light and Power  
Department

**State: Indiana**

Regulatory Authority: Indiana Public  
Service Commission.

**Gas Utilities****Investor-Owned:**

Indiana Gas Company  
Northern Indiana Public Service  
Company  
Southern Indiana Gas and Electric  
Company  
Terre Haute Gas Corporation  
Publicly-Owned:  
Citizens Gas and Coke Utility

**Electric Utilities****Investor-Owned:**

Indiana and Michigan Power  
Company  
Indianapolis Power and Light  
Company  
Northern Indiana Public Service  
Company  
Public Service Company of Indiana  
Southern Indiana Gas and Electric  
Company  
Publicly-Owned:

\*Richmond Power and Light

**State: Iowa**

Regulatory Authority: Iowa Commerce  
Commission.

**Gas Utilities****Investor-Owned:**

Interstate Power Company  
Iowa Electric Light and Power  
Company  
Iowa-Illinois Gas and Electric  
Company  
Iowa Power and Light Company  
Iowa Public Service Company  
Iowa Southern Utilities Company  
Peoples Natural Gas Company,  
Division of Internorth, Inc.

**Electric Utilities****Investor-Owned:**

Interstate Power Company  
Iowa Electric Light and Power  
Company  
Iowa-Illinois Gas and Electric  
Company  
Iowa Power and Light Company  
Iowa Public Service Company  
Iowa Southern Utilities Company  
Union Electric Company  
Publicly-Owned: The Iowa Commerce  
Commission has service and safety  
regulation over the following  
utilities—  
\*Muscatine Power and Water  
Omaha Public Power District

**State: Kansas**

Regulatory Authority: Kansas State  
Corporation Commission.

**Gas Utilities****Investor-Owned:**

Anadarko Production Company  
Arkansas-Louisiana Gas Company  
Gas Service Company  
Greeley Gas Company  
Kansas-Nebraska Natural Gas  
Company  
Kansas Power and Light Company  
\*Panhandle Eastern Pipeline  
Company  
Peoples Natural Gas Company,  
Division of Internorth, Inc.  
Union Gas System Inc.

**Electric Utilities****Investor-Owned:**

Empire District Electric Company  
Kansas City Power and Light  
Company  
Kansas Gas and Electric Company  
Kansas Power and Electric Company  
Southwestern Public Service  
Company  
Western Power Division of Centel  
Rural Electric Cooperatives:  
Midwest Energy Incorporated



The following covered utility within the State of Kansas is not regulated by the Kansas State Corporation Commission:

*Electric Utilities*

Publicly-Owned:  
Kansas City Board of Public Utilities

**State: Kentucky**

Regulatory Authority: Kentucky Energy Regulatory Commission.

*Gas Utilities*

Investor-Owned:  
Columbia Gas of Kentucky, Inc.  
Louisville Gas and Electric Company  
Union Light, Heat and Power Company  
Western Kentucky Gas Company

*Electric Utilities*

Investor-Owned:  
Kentucky Power Company  
Kentucky Utilities Company  
Louisville Gas and Electric Company  
Union Light, Heat and Power Company

Rural Electric Cooperatives:  
Green River Electric Corporation  
Henderson-Union Rural Electric Cooperative Corporation

The following covered utilities within the State of Kentucky are not regulated by the Kentucky Energy Regulatory Commission:  
Bowling Green Municipal Utilities  
Owensboro Municipal Utilities  
Pennyrile Rural Electric Cooperative Corporation  
Warren Rural Electric Cooperative Corporation  
West Kentucky Rural Electric Cooperative Corporation

**State: Louisiana**

Regulatory Authority: Louisiana Public Service Commission.

*Gas Utilities*

Investor-Owned:  
Arkansas-Louisiana Gas Company  
Entex, Inc.  
Gulf States Utilities Company  
Louisiana Gas Service Company  
New Orleans Public Service, Inc. (East and West Bank)  
Trans Louisiana Gas Company

*Electric Utilities*

Investor-Owned:  
Arkansas Power and Light  
Central Louisiana Electric Company  
Gulf States Utilities Company  
Louisiana Power and Light Company (West Bank)  
New Orleans Public Service, Inc. (East Bank)

Southwestern Electric Power Company

Rural Electric Cooperatives:  
Dixie Electric Membership Corporation

The following covered utilities within the State of Louisiana are not regulated by the Louisiana Public Service Commission:

*Electric Utilities*

Publicly-Owned:  
Lafayette Utilities System  
Rural Electric Cooperatives:  
Southwest Louisiana Electric Membership Corporation

**State: Maine**

Regulatory Authority: Maine Public Utilities Commission.

*Gas Utilities*

None.

*Electric Utilities*

Investor-Owned:  
Bangor Hydro-Electric Company  
Central-Maine Power Company

**State: Maryland**

Regulatory Authority: Maryland Public Service Commission.

*Gas Utilities*

Investor-Owned:  
Baltimore Gas and Electric Company  
Washington Gas Light Company

*Electric Utilities*

Investor-Owned:  
Baltimore Gas and Electric Company  
Conowingo Power Company  
Delmarva Power and Light Company of Maryland  
Potomac Edison Company  
Potomac Electric Power Company  
Rural Electric Cooperatives:  
Southern Maryland Electric Cooperative, Inc.

**State: Massachusetts**

Regulatory Authority: Massachusetts Department of Public Utilities.

*Gas Utilities*

Investor-Owned:  
Bay State Gas Company  
Boston Gas Company  
Colonial Gas Energy System  
Commonwealth Gas Company  
Lowell Gas Company

*Electric Utilities*

Investor-Owned:  
Boston Edison Company  
Cambridge Electric Light Company  
Commonwealth Electric Company  
Eastern Edison Company  
Massachusetts Electric Company

Western Massachusetts Electric Company

**State: Michigan**

Regulatory Authority: Michigan Public Service Commission.

*Gas Utilities*

Investor-Owned:  
Consumers Power Company  
Michigan Consolidated Gas Company  
Michigan Gas Utilities Company  
Michigan Power Company  
Southeastern Michigan Gas Company  
Wisconsin Public Service Corporation

*Electric Utilities*

Investor-Owned:  
Consumers Power Company  
Detroit Edison Company  
Indiana and Michigan Electric Company  
Lake Superior District Power Company  
Michigan Power Company  
Upper Peninsula Power Company  
Wisconsin Electric Power Company  
Wisconsin Public Service Corporation

The following covered utilities within the State of Michigan are not regulated by the Michigan Public Service Commission:

*Gas Utilities*

Investor-Owned:  
Battle Creek Gas Company

*Electric Utilities*

Publicly-Owned:  
Lansing Board of Water and Light

**State: Minnesota**

Regulatory Authority: Minnesota Public Utility Commission.

*Gas Utilities*

Investor-Owned:  
Interstate Power Company  
Iowa Electric Light and Power Company  
Minnegasco, Inc.  
Northern Minnesota Utilities—  
Division of UtiliCorp United, Inc.  
Northern States Power Company  
Peoples Natural Gas Company—  
Division of UtiliCorp United, Inc.

*Electric Utilities*

Investor-Owned:  
Interstate Power Company  
Minnesota Power and Light Company  
Northern States Power Company  
Otter Tail Power Company

Rural Electric Cooperative:  
Dakota Electric Association

The following covered utilities within the State of Minnesota are not regulated by the Minnesota Public Service Commission:

*Electric Utilities*

Publicly-Owned:  
Rochester Department of Public Utilities

Rural Electric Cooperatives:  
Anoka Electric Cooperative

**State: Mississippi**

Regulatory Authority: Mississippi Public Service Commission.

*Gas Utilities*

Investor-Owned:  
Entex, Inc.  
Mississippi Valley Gas Company

*Electric Utilities*

Investor-Owned:  
Mississippi Power and Light Company  
Mississippi Power Company

The following covered utilities within the State of Mississippi are not regulated by the Mississippi Public Service Commission.

*Electric Utilities*

Rural Electric Cooperatives:  
Alcorn County Electric Power Association  
Coast Electric Power Association  
4-County Electric Power Association  
Singing River Electric Power Association  
Southern Pine Electric Power Association  
Tombigbee Electric Power Association

**State: Missouri**

Regulatory Authority: Missouri Public Service Commission.

*Gas Utilities*

Investor-Owned:  
Associated Natural Gas Company  
Gas Service Company  
Laclede Gas Company Consolidated  
Missouri Public Service Company  
Peoples Natural Gas Company  
Division of Inter-North, Inc.

*Electric Utilities*

Investor-Owned:  
Empire District Electric Company  
Kansas City Power and Light Company  
Missouri Public Service Company  
St. Joseph Light and Power Company  
Union Electric Company

The following covered utilities within the State of Missouri are not regulated by Missouri Public Service Commission:

*Gas Utilities*

Investor-Owned:  
Cities Service Gas Company  
Publicly-Owned:  
Springfield City Utilities

*Electric Utilities*

Publicly-Owned:  
Independence Power and Light Department  
Springfield City Utilities

**State: Montana**

Regulatory Authority: Montana Public Service Commission.

*Gas Facilities*

Investor-Owned:  
Montana-Dakota Utilities Company  
Montana Power Company

*Electric Utilities*

Investor-Owned:  
Black Hills Power and Light Company  
Montana-Dakota Utilities Company  
Montana Power Company  
Pacific Power and Light Company  
Washington Water Power Company

**State: Nebraska**

Regulatory Authority: Nebraska Public Service Commission.

The Commission does not regulate the rates and service of the gas and electric utilities of the State of Nebraska.

The following covered utilities within the State of Nebraska are not regulated by the Nebraska Public Service Commission.

*Electric Utilities*

Publicly-Owned:  
Lincoln Electric System  
Nebraska Public Power District  
Omaha Public Power District

*Gas Utilities*

Investor-Owned:  
Gas Service Company  
Iowa Electric Light and Power Company  
Iowa Public Service Company  
KN Energy, Inc.  
Minnegasco, Inc.  
Northwestern Public Service Company  
Peoples Natural Gas Company  
Division of Internorth, Inc.

The governing body of each Nebraska municipality exercises ratemaking jurisdiction over gas utility rates, operations and services provided by a gas utility within its city or town limits. These municipal authorities would be State agencies as defined by PURPA, and thus have responsibilities under PURPA identical to those of the State regulatory authority.

Publicly-Owned:  
Metropolitan Utilities District of Omaha

**State: Nevada**

Regulatory Authority: Nevada Public Service Commission.

*Gas Utilities*

Investor-Owned:  
Southwest Gas Corporation

*Electric Utilities*

Investor-Owned:  
Idaho Power Company  
Nevada Power Company  
Sierra Pacific Power Company

**State: New Hampshire**

Regulatory Authority: New Hampshire Public Utilities Commission.

*Electric Utilities*

Investor-Owned:  
Public Service Company of New Hampshire

The following covered utility within the State of New Hampshire is not regulated by the New Hampshire Public Utilities Commission

*Electric Utilities*

Rural Electric Cooperatives:  
New Hampshire Electric Cooperative, Inc.

**State: New Jersey**

Regulatory Authority: New Jersey Department of Energy Board of Public Utilities.

*Gas Utilities*

Investor-Owned:  
Elizabethtown Gas Company  
New Jersey Natural Gas Company  
Public Service Electric and Gas Company  
South Jersey Gas Company

*Electric Utilities*

Investor-Owned:  
Atlantic City Electric Company  
Jersey Central Power and Light Company  
Public Service Electric and Gas Company  
Rockland Electric Company

**State: New Mexico**

Regulatory Authority: New Mexico Public Service Commission.

*Gas Utilities*

Gas Company of New Mexico

*Electric Utilities*

Investor-Owned:  
El Paso Electric Company  
Public Service Company of New Mexico  
Southwestern Public Service Company  
Texas-New Mexico Power Company  
Rural Electric Cooperative:  
Duncan Valley Electric Cooperative, Inc.



**\*Lea County Electric Cooperative, Inc.****State: New York**

Regulatory Authority: New York Public Service Commission.

**Gas Utilities****Investor-Owned:**

Brooklyn Union Gas Company  
Columbia Gas of New York, Inc.  
Consolidated Edison Company of New York, Inc.  
Long Island Lighting Company  
National Fuel Gas Distribution Corporation  
New York State Electric and Gas Corporation  
Niagara Mohawk Power Corporation  
Orange and Rockland Utilities  
Rochester Gas and Electric Corporation

**Electric Utilities****Investor-Owned:**

Central Hudson Gas and Electric Corporation  
Consolidated Edison Company of New York  
Long Island Lighting Company  
New York State Electric and Gas Corporation  
Niagara Mohawk Power Corporation  
Orange and Rockland Utilities  
Rochester Gas and Electric Corporation

The following covered utility within the State of New York is not regulated by the New York Public Service Commission:

**Electric Utilities****Publicly-Owned:**

Power Authority of New York

**State: North Carolina**

Regulatory Authority: North Carolina Utilities Commission.

**Gas Utilities****Investor-Owned:**

North Carolina Natural Gas Corporation  
Piedmont Natural Gas Company  
Public Service Company, Inc. of North Carolina

**Electric Utilities****Investor-Owned:**

Carolina Power and Light Company  
Duke Power Company  
Nantahala Power & Light Company  
Virginia Electric and Power Company  
The following covered utilities within the State of North Carolina are not regulated by the North Carolina Utilities Commission:

**Electric Utilities****Publicly-Owned:****Fayetteville Public Works Commission**

\*Greenville Utilities Commission  
\*High Point Electric Utility Department

\*Rocky Mount Public Utilities  
\*Wilson Utilities Department

**Rural Electric Cooperatives:**

\*Blue Ridge Electric Membership Corp.  
\*Rutherford Electric Membership Corporation

**State: North Dakota**

Regulatory Authority: North Dakota Public Service Commission.

**Gas Utilities****Investor-Owned:**

Montana Dakota Utilities Company  
Northern States Power Company

**Electric Utilities****Investor-Owned:**

Montana Dakota Utilities Company  
Northern States Power Company  
Otter Tail Power Company

**State: Ohio**

Regulatory Authority: Ohio Public Utilities Commission.

**Gas Utilities****Investor-Owned:**

Cincinnati Gas and Electric Company  
Columbia Gas of Ohio, Inc.  
Dayton Power and Light Company  
East Ohio Gas Company  
National Gas and Oil Company  
West Ohio Gas Company

**Electric Utilities****Investor-Owned:**

Cincinnati Gas and Electric Company  
Cleveland Electric Illuminating Company  
Columbus and Southern Ohio Electric Company  
Dayton Power and Light Company  
Monongahela Power Company  
Ohio Edison Company  
Ohio Power Company  
Toledo Edison Company

The following covered utilities within the State of Ohio are not regulated by the Ohio Public Utilities Commission:

**Electric Utilities****Publicly-Owned:**

\*Cleveland Division of Light and Power  
Rural Electric Cooperative:  
Southern Central Power Company

**State: Oklahoma**

Regulatory Authority: Oklahoma Corporation Commission

**Gas Utilities****Investor-Owned:**

Arkansas-Louisiana Gas Company  
Arkansas-Oklahoma Gas Corporation  
Gas Service Company  
Lone Star Gas Company  
Oklahoma Natural Gas Company  
Southern Union Gas Company  
Union Gas System Inc.

**Electric Utilities****Investor-Owned:**

Empire District Electric Company  
Oklahoma Gas and Electric Company  
Public Service Company of Oklahoma  
Southwestern Public Service Company

**Rural Electric Cooperative:**

\*Cotton Electric Cooperative

**Gas Utilities****Investor-Owned:**

Cities Service Gas Company

**State: Oregon**

Regulatory Authority: Public Utility Commissioner of Oregon.

**Gas Utilities****Investor-Owned:**

Cascade Natural Gas Corporation  
Northwest Natural Gas Company

**Electric Utilities****Investor-Owned:**

\*CP National Corporation  
Idaho Power Company  
Pacific Power and Light Company  
Portland General Electric Company  
The following covered utilities within the State of Oregon are not regulated by the Public Utility Commissioner of Oregon:

**Electric Utilities****Publicly-Owned:**

Central Lincoln People's Utility District  
\*Clatskanie People's Utility District  
Eugene Water and Electric Board  
\*Springfield Utility Board  
Rural Electric Cooperatives: Utility  
\*Umatilla Electric Cooperative Association

**State: Pennsylvania**

Regulatory Authority: Pennsylvania Public Utility Commission.

**Gas Utilities****Investor-Owned:**

Carnegie Natural Gas Company  
Columbia Gas of Pennsylvania, Inc.  
Equitable Gas Company  
National Fuel Gas Distribution Corporation  
North Penn Gas Company  
Pennsylvania Gas and Water Company  
Peoples Natural Gas Company

Philadelphia Electric Company  
T.W. Phillips Gas and Oil Company  
UGI Corporation

**Electric Utilities****Investor-Owned:**

Duquesne Light Company  
Metropolitan Edison Company  
Pennsylvania Electric Company  
Pennsylvania Power Company  
Pennsylvania Power and Light Company  
Philadelphia Electric Company  
\*UGI—Luzerne Electric Company  
West Penn Power Company

The following covered utility within the State of Pennsylvania is not regulated by the Pennsylvania Public Utility Commission:

**Gas Utilities****Publicly-Owned:**

Philadelphia Gas Works

**State: Puerto Rico**

Regulatory Authority: Puerto Rico Public Service Commission.

**Gas Utilities**

None.

**Electric Utilities**

None.

The following covered utility within Puerto Rico is not regulated by the Puerto Rico Public Service Commission:

**Electric Utilities****Publicly-Owned:**

Puerto Rico Electric Power Authority

**State: Rhode Island**

Regulatory Authority: Rhode Island Public Utilities Commission.

**Gas Utilities****Investor-Owned:**

Providence Gas Company

**Electric Utilities****Investor-Owned:**

Blackstone Valley Electric Company  
Narragansett Electric Company

**State: South Carolina**

Regulatory Authority: South Carolina Public Service Commission.

**Gas Utilities****Investor-Owned:**

Carolina Pipeline Company  
Piedmont Natural Gas Company  
South Carolina Electric and Gas Company

**Electric Utilities****Investor-Owned:**

Carolina Power and Light Company  
Duke Power Company

**South Carolina Electric and Gas Company**

The following covered utilities within the State of South Carolina are not regulated by the South Carolina Public Service Commission:

**Electric Utilities****Publicly-Owned:**

South Carolina Public Service Authority

**Rural Electric Cooperatives:**

\*Berkeley Electric Cooperatives, Inc.  
\*Palmetto Electric Cooperative, Inc.

**State: South Dakota**

Regulatory Authority: South Dakota Public Utilities Commission.

**Gas Utilities****Investor-Owned:**

Iowa Public Service Company  
Minnegasco, Inc.  
Montana-Dakota Utilities Company  
Northwestern Public Service Company

**Electric Utilities****Investor-Owned:**

Black Hills Power and Light Company  
Iowa Public Service Company  
Montana-Dakota Utilities Company  
Northern States Power Company  
Northwestern Public Service Company  
Otter Tail Power Company

The following covered utility within the State of South Dakota is not regulated by the South Dakota Public Service Commission:

**Electric Utilities****Publicly-Owned:**

Nebraska Public Power District

**State: Tennessee**

Regulatory Authority: Tennessee Public Service Commission.

**Gas Utilities****Investor-Owned:**

Chattanooga Gas Company  
Nashville Gas Company

**Electric Utilities****Investor-Owned:**

Kingsport Power Company

The following covered utilities within the State of Tennessee are not regulated by the Tennessee Public Service Commission:

**Electric Utilities****Publicly-Owned:**

\*Bristol Tennessee Electric System  
Chattanooga Electric Power Board  
\*Clarksville Department of Electricity  
\*Cleveland Utilities  
\*Greeneville Light and Power System

**Jackson Utility Division—Electric Department**

Johnson City Power Board  
Knoxville Utilities Board  
\*Lenoir City Utilities Board  
Memphis Light Gas and Water Division

\*Murfreesboro Electric Department

Nashville Electric Services

\*Sevier County Electric System

**Rural Electric Cooperatives:**

\*Appalachian Electric Cooperative  
Cumberland Electric Membership Corporation

Duck River Electric Membership Cooperative

\*Gibson County Electric Membership Corporation

\*Meriwether Lewis Electric Cooperative

Middle Tennessee Electric Membership Corporation

\*Southwest Tennessee Electric Membership Corporation

\*Tri-County Electric Membership Corporation

\*Upper Cumberland Electric Membership Corporation

Volunteer Electric Cooperative

**Gas Utilities****Publicly-Owned:**

Memphis Light, Gas and Water Division

**State: Tennessee**

Regulatory Authority: Tennessee Valley Authority.

**Gas Utilities**

None.

**Electric Utilities****Publicly-Owned:**

\*Bowling Green Municipal Utilities  
\*Bristol Tennessee Electric System  
Chattanooga Electric Power Board  
\*Clarksville Department of Electricity  
\*Cleveland Utilities

Decatur Electric Department

Florence Electric Department

\*Greeneville Light and Power System

Huntsville Utilities

Jackson Utility Division—Electric Department

Johnson City Power Board

Knoxville Utilities Board

\*Lenoir City Utilities Board

Memphis Light, Gas and Water Division

\*Murfreesboro Electric Department

Nashville Electric Service

\*Sevier County Electric System

**Rural Electric Cooperatives:**

\*Alcorn County Electric Power Association

\*Appalachian Electric Cooperative

Cumberland Electric Membership



Corporation  
 Duck River Electric Membership Corporation  
 \*4-County Electric Power Association  
 \*Gibson County Electric Membership Corporation  
 \*Joe Wheeler Electric Membership Corporation  
 \*Meriwether Lewis Electric Cooperative  
 Middle Tennessee Electric Membership Corporation  
 North Georgia Electric Membership Corporation  
 \*Pennyrile Rural Electric Cooperative Corporation  
 \*Southwest Tennessee Electric Membership Corporation  
 \*Tombigbee Electric Power Association  
 \*Tri-County Electric Membership Corporation  
 \*Upper Cumberland Electric Membership Corporation  
 Volunteer Electric Cooperative  
 Warren Rural Electric Cooperative Corporation  
 \*West Kentucky Rural Electric Cooperative Corporation

**State: Texas**

Regulatory Authority: Texas Public Utility Commission.

**Gas Utilities**

Investor-Owned:  
 None.

**Electric Utilities****Investor-Owned:**

Central Power and Light Company  
 El Paso Electric Company  
 Gulf States Utilities Company  
 Houston Lighting and Power Company  
 Southwestern Electric Power Company  
 \*Southwestern Electric Service Company  
 Southwestern Public Service Company  
 Texas-New Mexico Power Company  
 Texas Utilities Electric Company  
 West Texas Utilities Company

**Publicly-Owned:**

\*Lower Colorado River Authority  
 Rural Electric Cooperatives:  
 \*Bluebonnet Electric Cooperative, Inc.  
 \*Guadalupe Valley Electric Cooperative, Inc.  
 Pedernales Electric Cooperative, Inc.  
 \*Sam Houston Electric Cooperative, Inc.

The governing body of each Texas municipality exercise exclusive original jurisdiction over electric utility rates, operations and services provided by an electric utility (whether privately owned or publicly owned), within its city or town limits, unless the municipality has

surrendered this jurisdiction to the Texas Public Utility Commission. The Commission hears *de novo* appeals from the decisions of such municipalities. These municipal authorities would be State agencies as defined by PURPA, and thus have responsibilities under PURPA identical to those of a State regulatory authority.

The municipally owned electric utilities listed below are not under the commission's original ratemaking jurisdiction.

**Electric Utilities****Publicly-Owned:**

Austin Electric Department  
 Garland Electric Department  
 \*Lubbock Power and Light  
 San Antonio City Public Service Board

**State: Texas**

Regulatory Authority: Railroad Commission of Texas.

**Gas Utilities****Investor-Owned:**

Energas Company  
 Entex, Inc.  
 Lone Star Gas Company, a division of ENSERCH Corp.  
 Southern Union Company

The governing body of each Texas municipality exercises exclusive original ratemaking jurisdiction over gas utility rates, operations, and services provided by a gas utility within its city or town limits, subject to appellate review by the Railroad Commission of Texas. These municipal authorities would be State agencies as defined by PURPA and thus have responsibilities under PURPA identical to those of a State regulatory authority.

The following covered utilities within the State of Texas are not regulated by the Railroad Commission of Texas. (The Railroad Commission's appellate authority does not extend to municipally owned gas utilities.)

**Gas Utilities****Publicly-Owned:**

City Public Service Board (San Antonio)

**State: Utah**

Regulatory Authority: Utah Public Service Commission.

**Gas Utilities****Investor-Owned:**

Mountain Fuel Supply Company

**Electric Utilities****Investor-Owned:**

Utah Power and Light Company  
 Rural Electric Cooperatives:

**Moon Lake Electric Association****State: Vermont**

Regulatory Authority: Vermont Public Service Board.

**Gas Utilities**

None.

**Electric Utilities****Investor-Owned:**

Central Vermont Public Service Corporation  
 Green Mountain Power Corporation  
 Public Service Company of New Hampshire.

**State: Virginia**

Regulatory Authority: Virginia State Corporation Commission.

**Gas Utilities****Investor-Owned:**

Columbia Gas of Virginia, Inc.  
 Commonwealth Gas Services, Inc.  
 Northern Virginia Natural Gas  
 Virginia Natural Gas

**Electric Utilities****Investor-Owned:**

Appalachian Power Company  
 Delmarva Power and Light Company  
 \*Old Dominion Power Company  
 Potomac Edison Company  
 Virginia Electric and Power Company

**Rural Electric Cooperatives**

Northern Virginia Electric Cooperative  
 Rappahannock Electric Cooperative

The following covered utility within the State of Virginia is not regulated by the Virginia State Corporation Commission.

**Gas Utilities****Publicly-Owned:**

City of Richmond, Virginia,  
 Department of Public Utilities

**Electric Utilities****Publicly-Owned:**

\*Danville Water, Gas & Electric

**State: Washington**

Regulatory Authority: Washington Utilities and Transportation Commission.

**Gas Utilities****Investor-Owned:**

Cascade Natural Gas Corporation  
 Northwest Natural Gas Company  
 Washington Natural Gas Company  
 Washington Water Power Company

**Electric Utilities****Investor-Owned:**

Pacific Power and Light Company

Puget Sound Power and Light Company  
 Washington Water Power Company  
 The following covered utilities within the State of Washington are not regulated by the Washington Utilities and Transportation Commission.

**Electric Utilities****Publicly-Owned:**

\*Port Angeles Light and Water Department  
 Public Utility District No. 1 of Benton County  
 Public Utility District No. 1 of Chelan County  
 Public Utility District No. 1 of Clark County  
 Public Utility District No. 1 of Cowlitz County  
 Public Utility District No. 1 of Douglas County  
 Public Utility District No. 1 of Franklin County  
 Public Utility District No. 1 of Grant County  
 Public Utility District No. 1 of Grays Harbor County  
 Public Utility District No. 1 of Lewis County  
 Public Utility District No. 1 of Snohomish County  
 \*Richland Energy Service Department  
 Seattle City Light Department  
 Tacoma Public Utility—Light Division

**State: West Virginia**

Regulatory Authority: West Virginia Public Service Commission.

**Gas Utilities****Investor-Owned:**

Equitable Gas Company  
 Hope Gas, Incorporated  
 Mountaineer Gas Company

**Electric Utilities****Investor-Owned:**

Appalachian Power Company  
 Monongahela Power Company  
 Potomac Edison Company  
 Virginia Electric and Power Company  
 Wheeling Electric Company

**State: Wisconsin**

Regulatory Authority: Wisconsin Public Service Commission.

**Gas Utilities****Investor-Owned:**

Madison Gas and Electric Company  
 Northern States Power Company  
 Wisconsin Fuel and Light Company  
 Wisconsin Gas Company  
 Wisconsin Natural Gas Company  
 Wisconsin Power and Light Company  
 Wisconsin Public Service Corporation

**Electric Utilities****Investor-Owned:**

Madison Gas and Electric Company  
 Northern States Power Company  
 Wisconsin Electric Power Company  
 Wisconsin Power and Light Company  
 Wisconsin Public Service Corporation

**State: Wyoming**

Regulatory Authority: Wyoming Public Service Commission.

**Gas Utilities****Investor-Owned:**

\*Cheyenne Light Fuel and Power Company  
 Kansas-Nebraska Natural Gas Company  
 Montana-Dakota Utilities Company  
 Mountain Fuel Supply Company

**Electric Utilities****Investor-Owned:**

Black Hills Power and Light Company  
 Montana-Dakota Utilities Company  
 Pacific Power and Light Company  
 Utah Power and Light Company

**Rural Electric Cooperative:**

Tri-County Electric Association, Inc.

**Appendix B****Electric Utilities**

All utilities listed below had electric energy sales, for purposes other than resale, in excess of 500 million kilowatt hours in 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986 or 1987. All except those marked (\*) are covered by PURPA Title I and NECPA Titles II and VII. Utilities marked (\*) either did not exceed the NECPA threshold of 750 million kilowatt-hour in 1987 for purposes other than resale, or do not have residential or commercial sales and therefore, are not covered by NECPA Titles II and VII. The utilities listed more than once have sales in more than one State, and those States are indicated by abbreviations in parentheses.

**Investor-Owned:**

Alabama Power Company  
 Appalachian Power Company [VA]  
 Appalachian Power Company [WV]  
 Arizona Public Service Company  
 Arkansas Power & Light Company [AR]  
 Arkansas Power & Light Company [LA]  
 Atlantic City Electric Company  
 Baltimore Gas & Electric Company  
 Bangor Hydro-Electric Company  
 Black Hills Power & Light Company [MT]  
 Black Hills Power & Light Company [SD]  
 Black Hills Power & Light Company [WY]  
 Blackstone Valley Electric Company  
 Boston Edison Company

Cambridge Electric Light Company  
 Carolina Power & Light Company [NC]  
 Carolina Power & Light Company [SC]  
 Central Hudson Gas & Electric Corporation  
 Central Illinois Light Company  
 Central Illinois Public Service Company  
 Central Louisiana Electric Company  
 Central Maine Power Company  
 Central Power & Light Company  
 Central Vermont Public Service Corporation  
 Cincinnati Gas & Electric Company  
 Cleveland Electric Illuminating Company  
 Columbus and Southern Ohio Electric Company  
 Commonwealth Edison Company  
 Commonwealth Electric Company  
 Connecticut Light & Power Company  
 \*Conowingo Power Company  
 Consolidated Edison Company of New York  
 Consumer Power Company  
 \*CP National Corporation  
 Dayton Power & Light Company  
 Delmarva Power & Light Company [DE]  
 Delmarva Power & Light Company [VA]  
 Delmarva Power & Light Company of Maryland  
 Detroit Edison Company  
 Duke Power Company [NC]  
 Duke Power Company [SC]  
 Duquesne Light Company  
 Eastern Edison Company  
 El Paso Electric Company [NM]  
 El Paso Electric Company [TX]  
 Empire District Electric Company [AR]  
 Empire District Electric Company [KS]  
 Empire District Electric Company [MO]  
 Empire District Electric Company [OK]  
 Florida Power Corporation  
 Florida Power & Light Company  
 Georgia Power Company  
 Green Mountain Power Corporation  
 Gulf Power Company  
 Gulf States Utilities Company [LA]  
 Gulf States Utilities Company [TX]  
 Hawaiian Electric Company Inc.  
 Houston Lighting & Power Company  
 Idaho Power Company [ID]  
 Idaho Power Company [NV]  
 Idaho Power Company [OR]  
 Illinois Power Company  
 Indiana & Michigan Power Company [IN]  
 Indiana & Michigan Power Company [MI]  
 Indianapolis Power & Light Company  
 Interstate Power Company [IA]  
 Interstate Power Company [IL]



Interstate Power Company [MN]  
Iowa Electric Light & Power Company  
Iowa-Illinois Gas & Electric Company [IA]  
Iowa-Illinois Gas & Electric Company [IL]  
Iowa Power & Light Company  
Iowa Public Service Company [LA]  
Iowa Public Service Company [SD]  
Iowa Southern Utilities Company  
Jersey Central Power & Light Company  
Kansas City Power & Light Company [KS]  
Kansas City Power & Light Company [MO]  
Kansas Gas & Electric Company  
Kansas Power & Light Company  
Kentucky Power Company  
Kentucky Utilities Company  
Kingsport Power Company  
Lake Superior District Power Company [MI]  
Long Island Lighting Company  
Louisiana Power & Light Company  
Louisville Gas & Electric Company  
Madison Gas & Electric Company  
Massachusetts Electric Company  
Metropolitan Edison Company  
\*Michigan Power Company  
Minnesota Power & Light Company  
Mississippi Power Company  
Mississippi Power & Light Company  
Missouri Public Service Company  
Monongahela Power Company [OH]  
Monongahela Power Company [WV]  
Montana-Dakota Utilities Company [MT]  
Montana-Dakota Utilities Company [ND]  
Montana-Dakota Utilities Company [SD]  
Montana-Dakota Utilities Company [WY]  
Montana-Dakota Power Company  
Nantahala Power & Light Company  
Naragansett Electric Company  
Nevada Power Company  
New Orleans Public Service Inc.  
New York State Electric & Gas Corporation  
Niagara Mohawk Power Company  
Northern Indiana Public Service Company  
Northern States Power Company [MN]  
Northern States Power Company [ND]  
Northern States Power Company [SD]  
Northern States Power Company [WI]  
Northwestern Public Service Company  
Ohio Edison Company  
Ohio Power Company  
Oklahoma Gas & Electric Company [AR]  
Oklahoma Gas & Electric Company [OK]  
Old Dominion Power Company  
Orange & Rockland Utilities

Otter Tail Power Company [MN]  
Otter Tail Power Company [ND]  
Otter Tail Power Company [SD]  
Pacific Gas & Electric Company  
Pacific Power Light Company [CA]  
Pacific Power Light Company [ID]  
Pacific Power Light Company [MT]  
Pacific Power Light Company [OR]  
Pacific Power Light Company [WA]  
Pacific Power Light Company [WY]  
Pennsylvania Electric Company  
Pennsylvania Power & Light Company  
Pennsylvania Power Company  
Philadelphia Electric Company  
Portland General Electric Company  
Portland General Electric Company  
Potomac Edison Company (MD)  
Potomac Edison Company (VA)  
Potomac Edison Company (WV)  
Potomac Electric Power Company (DC)  
Potomac Electric Power Company (MD)  
Public Service Company of Colorado  
Public Service Company of Indiana  
Public Service Company of New Hampshire (NH)  
Public Service Company of New Hampshire (VT)  
Public Service Company of New Mexico  
Public Service Company of Oklahoma  
Public Service Electric and Gas Company  
Puget Sound Power & Light Company  
Rochester Gas & Electric Corporation  
Rockland Electric Company  
St. Joseph Light & Power Company  
San Diego Gas & Electric Company  
Savannah Electric & Power Company  
Sierra Pacific Power Company (CA)  
Sierra Pacific Power Company (NV)  
South Carolina Electric & Gas Company  
Southern California Edison Company  
Southern Colorado Power Division of Centel (CO)  
Southern Indiana Gas & Electric Company  
Southwestern Electric Power Company (AR)  
Southwestern Electric Power Company (LA)  
Southwestern Electric Power Company (TX)  
Southwestern Electric Service Company  
Southwestern Public Service Company (KS)  
Southwestern Public Service Company (NM)  
Southwestern Public Service Company (OK)  
Southwestern Public Service Company (TX)  
Tampa Electric Company  
Texas-New Mexico Power Company  
Texas Utilities Electric Company  
Toledo Edison Company

Tucson Electric Power Company  
\*UGI-Luzerne Electric Division  
Union Electric Company (LA)  
Union Electric Company (IL)  
Union Electric Company (MO)  
Union Light, Heat & Power Company  
United Illuminating Company  
\*Upper Peninsula Power Company  
Utah Power & Light Company (ID)  
Utah Power & Light Company (UT)  
Utah Power & Light Company (WY)  
Virginia Electric & Power Company (NC)  
Virginia Electric & Power Company (VA)  
Virginia Electric & Power Company (WV)  
Washington Water Power Company (ID)  
Washington Water Power Company (MT)  
Washington Water Power Company (WA)  
West Penn Power Company  
West Texas Utilities Company  
Western Massachusetts Electric Company  
Western Power Division of Centel (KS)  
Wheeling Electric Company  
Wisconsin Electric Power Company (MI)  
Wisconsin Electric Power Company (WI)  
Wisconsin Power & Light Company  
Wisconsin Public Service Corporation (MI)  
Wisconsin Public Service Corporation (WI)  
Publicly-Owned:  
\*Albany Water Gas & Light Commission (GA)  
Anaheim Public Utilities Department (CA)  
\*Anchorage Municipal Light & Power Department (AK)  
Austin Electric Department (TX)  
\*Bowling Green Municipal Utilities (KY)  
\*Bristol Tennessee Electric System (TN)  
\*Brownsville Public Utility Board (TX)  
Burbank Public Service Department (CA)  
Central Lincoln People's Utility District (OR)  
Chattanooga Electric Power Board (TN)  
\*Clarksville Department of Electricity (TN)  
\*Clatskanie People's Utility District (OR)  
\*Cleveland Division of Light & Power (OH)  
\*Cleveland Utilities (TN)  
Colorado Springs Department of Utilities (CO)  
\*Dalton Water Light & Sink (GA)

\*Danville Water Gas & Electric (VA)  
Decatur Electric Department (AL)  
\*Dothan Electric Department (AL)  
Eugene Water & Electric Board (OR)  
Fayetteville Public Works Commission (NC)  
Florence Electric Department (AL)  
Gainesville Regional Utilities (FL)  
Garland Electric Department (TX)  
Glendale Public Service Department (CA)  
\*Greenville Light & Power System (TN)  
\*Greenville Utilities Commission (NC)  
\*Groton Public Utilities (CT)  
\*High Point Electric Utility Dept. (NC)  
Huntsville Utilities (AL)  
Imperial Irrigation District (CA)  
\*Independence Power & Light Department (MO)  
Jackson Utility Division—Electric Department (TN)  
Jacksonville Electric Authority (FL)  
Johnson City Power Board (TN)  
Kansas City Board of Public Utilities (KS)  
Knoxville Utilities Board (TN)  
Lafayette Utilities System (LA)  
Lakeland Department of Electric and Water (FL)  
Lansing Board of Water & Light (MI)  
\*Lenoir City Utilities Board (TN)  
Lincoln Electric System (NE)  
Los Angeles Department of Water and Power (CA)  
\*Lower Colorado River Authority (TX)  
\*Lubbock Power & Light (TX)  
Memphis Light, Gas & Water Division (TN)  
Modesto Irrigation District (CA)  
\*Murfreesboro Electric Dept. (TN)  
\*Muscatine Power & Water (IA)  
Nashville Electric Service (TN)  
Nebraska Public Power District (NE)  
Nebraska Public Power District (SD)  
\*North Little Rock Electric Department (AR)  
\*Ocala Electric Authority (FL)  
Omaha Public Power District (IA)  
Omaha Public Power District (NE)  
Orlando Utilities Commission (FL)  
\*Owensboro Municipal Utilities (KY)  
Palo Alto Electric Utility (CA)  
Pasadena Water & Power Department (CA)  
\*Power Authority of New York (NY)  
\*Port Angeles Light & Water Department (WA)  
Public Utility District No. 1 of Benton County (WA)  
Public Utility District No. 1 of Chelan County (WA)  
Public Utility District No. 1 of Clark County (WA)  
Public Utility District No. 1 of Cowlitz County (WA)  
\*Public Utility District No. 1 of Douglas County (WA)  
\*Public Utility District No. 1 of

Franklin County (WA)  
Public Utility District No. 1 of Grant County (WA)  
Public Utility District No. 1 of Grays Harbor County (WA)  
\*Public Utility District No. 1 of Lewis County (WA)  
Public Utility District No. 1 of Snohomish County (WA)  
Puerto Rico Electric Power Authority  
\*Richland Energy Services Department (WA)  
\*Richmond Power & Light (IN)  
Riverside Public Utilities (CA)  
\*Rochester Department of Public Utilities (MN)  
\*Rocky Mount Public Utilities (NC)  
Sacramento Municipal Utility District (CA)  
Salt River Project Agricultural Improvement and Power District (AZ)  
San Antonio City Public Service Board (TX)  
Santa Clara Electric Department (CA)  
Seattle City Light Department (WA)  
\*Sevier County Electric System (TN)  
South Carolina Public Service Authority  
\*Springfield City Utilities (MO)  
\*Springfield Utility Board (OR)  
Springfield Water, Lights & Power Department (IL)  
Tacoma Public Utilities—Light Division (WA)  
\*Trico Electric Cooperative, Inc. (AZ)  
Tallahassee, City of (FL)  
Turlock Irrigation District (CA)  
Vernon Municipal Light Department (CA)  
\*Wilson Utilities Department (NC)

#### Rural Electric Cooperatives

\*Alcorn County Electric Power Association (MS)  
\*Anoka Electric Cooperative (MN)  
\*Appalachian Electric Cooperative (TN)  
\*Berkeley Electric Cooperative (SC)  
\*Bluebonnet Electric Cooperative, Inc. (TX)  
\*Blue Ridge Electric Membership Corporation (NC)  
Chugach Electric Association (AK)  
Clay Electric Cooperative (FL)  
\*Coast Electric Power Association (MS)  
Cobb Electric Membership Corporation (GA)  
\*Cotton Electric Cooperative (OK)  
\*Cumberland Electric Membership Corporation (TN)  
\*Dakota Electric Association (MN)  
\*Douglas County Electric Membership Corporation (CA)  
Dixie Electric Membership Corporation (LA)  
Duck River Electric Membership Corporation (TN)

\*Duncan Valley Electric Cooperative, Inc. (AZ, NM)  
\*First Electric Cooperative Corporation (AR)  
\*Flint Electric Membership Corporation (GA)  
\*4-County Electric Power Association (MS)  
\*Gibson County Electric Membership Corporation (TN)  
Green River Electric Corporation (KY)  
\*Guadalupe Valley Electric Cooperative, Inc. (TX)  
Henderson-Union Rural Electric Cooperative Corporation (KY)  
\*Intermountain Rural Electric (CO)  
Jackson Electric Membership Corporation (GA)  
\*Joe Wheeler Electric Membership Corporation (AL)  
\*Lea County Electric Cooperative, Inc. (NM)  
Lee County Electric Cooperative (FL)  
\*Meriwether Lewis Electric Cooperative (TN)  
Middle Tennessee Electric Membership Corporation (TN)  
\*Midwest Energy Incorporated (KS)  
Moon Lake Electric Association (CO)  
\*New Hampshire Electric Cooperative, Inc. (NH)  
\*Northern Virginia Electric Cooperative (VA)  
North Georgia Electric Membership Corporation (GA)  
\*Palmetto Electric Cooperative, Inc. (SC)  
Pedernales Electric Cooperative Corporation, Inc. (TX)  
\*Pennyrite Rural Electric Cooperative Corporation (KY, TN)  
Rappahannock Electric Cooperative (VA)  
Rural Electric System (AL)  
\*Rutherford Electric Membership Corporation (NC)  
\*Sam Houston Electric Cooperative, Inc. (TX)  
\*Sawnee Electric Membership Corporation (GA)  
\*Singing River Electric Power Association (MS)  
South Central Power Company (OH)  
Southern Maryland Electric Cooperative, Inc. (MD)  
Southern Pine Electric Power Association (MS)  
Southwest Louisiana Electric Membership Corporation (LA)  
\*Southwest Tennessee Electric Membership Corporation (TN)  
\*Sumter Electric Cooperative (FL)  
\*Tombigbee Electric Power Association (MS)  
Tri-County Electric Association Inc. (WY)  
\*Tri-County Electric Membership Corporation (TN)



\*Umatilla Electric Cooperative Association (OR)  
 \*Upper Cumberland Electric Membership Corporation (TN)  
 Volunteer Electric Cooperative (TN)  
 Walton Electric Membership Corporation (GA)  
 Warren Rural Electric Cooperative Corporation (KY)  
 \*West Kentucky Rural Electric Cooperative Corporation (KY)  
 Withlacoochee River Electric Cooperative (FL)

#### Federal Agencies

\*Bonneville Power Administration (OR)  
 \*Tennessee Valley Authority (TN)  
 \*Western Area Power Administration (CO)

#### Gas Utilities

All gas utilities listed below had natural gas sales, for purposes other than resale, in excess of 10 billion cubic feet in 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986 or 1987. All except those marked (\*) are covered by PURPA Title III and NECPA Titles II and VII. Utilities marked (\*) are not covered by NECPA Titles II and VII because they either did not exceed the NECPA threshold of 10 billion cubic feet in 1987 for purposes other than resale, or do not have residential or commercial sales. The utilities listed more than once have sales in more than one State and those States are indicated by abbreviations in parentheses.

#### Investor-Owned:

Alabama Gas Corporation  
 Alabama-Tennessee Natural Gas Company  
 Anadarko Production Company  
 Arkansas-Louisiana Gas Company (AR)  
 Arkansas-Louisiana Gas Company (KS)  
 Arkansas-Louisiana Gas Company (LA)  
 Arkansas-Louisiana Gas Company (OK)  
 Arkansas-Oklahoma Gas Corporation (AR)  
 Arkansas-Oklahoma Gas Corporation (OK)  
 Arkansas Western Gas Company  
 Associated Natural Gas Company (AR)  
 Associated Natural Gas Company (MO)  
 Atlanta Gas Light Company  
 Baltimore Gas & Electric Company  
 Battle Creek Gas Company  
 Bay State Gas Company  
 Boston Gas Company  
 Brooklyn Union Gas Company  
 Carnegie Natural Gas Company  
 Carolina Pipeline Company

Cascade Natural Gas Corporation (OR)  
 Cascade Natural Gas Corporation (WA)  
 Central Illinois Light Company  
 Central Illinois Public Service Company  
 Chattanooga Gas Company (TN)  
 \*Cheyenne Light, Fuel and Power Company  
 Cincinnati Gas and Electric Company  
 Cities Services Gas Company (covered by NECPA only)  
 \*City Gas Company of Florida  
 Colonial Gas Energy System  
 Columbia Gas of Kentucky, Inc.  
 Columbia Gas of New York, Inc.  
 Columbia Gas of Ohio, Inc.  
 Columbia Gas of Pennsylvania, Inc.  
 Columbia Gas of Virginia, Inc.  
 Commonwealth Gas Company  
 Commonwealth Gas Service Incorporated

Commonwealth Gas Services, Incorporated  
 Connecticut Light & Power Company  
 Connecticut Natural Gas Corporation  
 Consolidated Edison Company of New York, Inc.

Consumers Power Company  
 Dayton Power & Light Company  
 Delmarva Power & Light Company (DE)

East Ohio Gas Company  
 Elizabethtown Gas Company  
 Energas Company  
 Enstar Natural Gas Company  
 Entex Inc. (LA)  
 Entex Inc. (MS)  
 Entex Inc. (TX)

Equitable Gas Company (PA)  
 Equitable Gas Company (WV)  
 Gas Company of New Mexico  
 Gas Service Company (KS)  
 Gas Service Company (MO)  
 Gas Service Company (NE)  
 Gas Service Company (OK)  
 Greeley Gas Company (CO)  
 Greeley Gas Company (KS)  
 Gulf States Utilities Company  
 Hope Gas, Incorporated  
 Illinois Power Company  
 Indiana Gas Company  
 Intermountain Gas Company  
 Interstate Power Company (IA)  
 Interstate Power Company (MN)  
 Iowa Electric Light & Power Company (CO)  
 Iowa Electric Light & Power Company (IA)  
 Iowa Electric Light & Power Company (MN)  
 Iowa Electric Light & Power Company (NE)  
 Iowa-Illinois Gas & Electric Company (IA)  
 Iowa-Illinois Gas & Electric Company (IL)  
 Iowa Power & Light Company

Iowa Public Service Company (IA)  
 Iowa Public Service Company (NE)  
 Iowa Public Service Company (SD)  
 Iowa Southern Utilities Company  
 Kansas-Nebraska Natural Gas Company (CO)  
 Kansas-Nebraska Natural Gas Company (KS)  
 Kansas-Nebraska Natural Gas Company (WY)  
 Kansas Power & Light Company  
 KN Energy, Inc.  
 Laclede Gas Company Consolidated  
 Lone Star Gas Company (OK)  
 Lone Star Gas Company, a division of ENSERCH Corp. (TX)

Long Island Lighting Company  
 Louisiana Gas Service Company  
 Louisville Gas & Electric Company  
 Lowell Gas Company  
 Madison Gas & Electric Company  
 Michigan Consolidated Gas Company  
 Michigan Gas Utilities Company  
 Michigan Power Company  
 Minnegasco, Inc. (MN)  
 Minnegasco, Inc. (NE)  
 Minnegasco, Inc. (SD)  
 Mississippi Valley Gas Company  
 Missouri Public Service Company  
 Mobile Gas Service Corporation  
 Montana-Dakota Utilities Company (MN)

Montana-Dakota Utilities Company (MT)  
 Montana-Dakota Utilities Company (ND)  
 Montana-Dakota Utilities Company (SD)  
 Montana-Dakota Utilities Company (WY)

Montana Power Company  
 Mountaineer Gas Company  
 Mountain Fuel Supply Company (UT)  
 Mountain Fuel Supply Company (WY)  
 Nashville Gas Company  
 National Fuel Gas Distribution Corporation (NY)  
 National Fuel Gas Distribution Corporation (PA)  
 National Gas and Oil Company  
 New Jersey Natural Gas Company  
 New Orleans Public Service, Inc.  
 New York State Electric & Gas Corporation  
 Niagara Mohawk Power Company  
 North Carolina Natural Gas Corporation  
 North Shore Gas Company  
 Northern Illinois Gas Company  
 Northern Indiana Public Service Company  
 Northern Minnesota Utilities—  
 Division of Utilicorp United, Inc.  
 Northern Natural Gas Company (KS)  
 Northern Natural Gas Company (NE)  
 Northern States Power Company (MN)  
 Northern States Power Company (ND)

Northern States Power Company (WI)  
 North Penn Gas Company  
 Northwest Alabama Gas District  
 Northwest Natural Company (OR)  
 Northwest Natural Gas Company (WA)  
 Northwestern Public Service Company (NE)  
 Northwestern Public Service Company (SD)  
 Oklahoma Natural Gas Company  
 Orange & Rockland Utilities  
 Pacific Gas & Electric Company  
 \*Panhandle Eastern Pipeline Company (IL)  
 \*Panhandle Eastern Pipeline Company (KS)  
 Pennsylvania Gas & Water Company  
 Peoples Gas, Light and Coke Company  
 Peoples Gas System  
 Peoples Natural Gas Company  
 Peoples Natural Gas Company, Division of Internorth, Inc. (IA)  
 Peoples Natural Gas Company, Division of Internorth, Inc. (IA)  
 Peoples Natural Gas Company, Division of Internorth, Inc. (KS)  
 Peoples Natural Gas Company, Division of Internorth, Inc. (MN)  
 Peoples Natural Gas Company, Division of Internorth, Inc. (MO)  
 Peoples Natural Gas Company, Division of Internorth, Inc. (NE)  
 Philadelphia Electric Company  
 Piedmont Natural Gas Company (NC)

Piedmont Natural Gas Company (SC)  
 Providence Gas Company  
 Public Service Company of Colorado  
 Public Service Company Inc. of North Carolina  
 Public Service Electric and Gas Company  
 Rochester Gas & Electric Corporation  
 San Diego Gas & Electric Company  
 South Carolina Gas & Electric Company  
 South Jersey Gas Company  
 Southeastern Michigan Gas Company  
 Southern California Gas Company  
 Southern Connecticut Gas Company  
 Southern Indiana Gas & Electric Company  
 Southern Union Company (TX)  
 Southern Union Gas Company (AZ)  
 Southern Union Gas Company (OK)  
 Southwest Gas Corporation (AZ)  
 Southwest Gas Corporation (CA)  
 Southwest Gas Corporation (NV)  
 Terre Haute Gas Corporation  
 Trans Louisiana Gas Company  
 T.W. Phillips Gas and Oil Company  
 UGI Corporation  
 Union Gas System, Inc. (KS)  
 Union Gas System, Inc. (OK)  
 Union Light, Heat & Power Company (KY)  
 Virginia Natural Gas  
 Washington Gas Light Company (DC)  
 Washington Gas Light Company (MD)  
 Washington Gas Light Company (VA)  
 Washington Natural Gas Company

Washington Water Power Company (ID)  
 Washington Water Power Company (WA)  
 West Ohio Gas Company  
 Western Kentucky Gas Company  
 Wisconsin Fuel & Light Company  
 Wisconsin Gas Company  
 Wisconsin Natural Gas Company  
 Wisconsin Power & Light Company  
 Wisconsin Public Service Corporation (MI)  
 Wisconsin Public Service Corporation (WI)

#### Public-Owned

Citizens Gas & Coke Utility (IN)  
 City of Richmond, Virginia,  
 Department of Public Utilities (VA)  
 City Public Services Board (San Antonio) (TX)  
 Colorado Springs, Department of Utilities (CO)  
 Long Beach Gas Department (CA)  
 Memphis Light, Gas & Water Division (TN)  
 Metropolitan Utilities District of Omaha (NE)  
 Philadelphia Gas Works (PA)  
 Springfield City Utilities (MO)

[FR Doc. 88-30004 Filed 12-28-88; 8:45 am]  
 BILLING CODE 6450-01-M



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12-30-88  
Vol. 53 No. 251

Friday  
December 30, 1988

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12-30-88  
Vol. 53 No. 251  
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# federal register

Friday  
December 30, 1988

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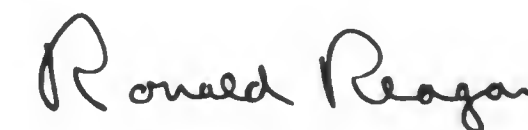
Title 3—

Notice of December 28, 1988

The President

Continuation of Libyan Emergency

On January 7, 1986, by Executive Order No. 12543, I declared a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the actions and policies of the Government of Libya. On January 8, 1986, by Executive Order No. 12544, I took additional measures to block Libyan assets in the United States. I transmitted a notice continuing this emergency to the Congress and the Federal Register on December 23, 1986. Because the Government of Libya has continued its actions and policies in support of international terrorism, the national emergency declared on January 7, 1986, and the measures adopted on January 7 and January 8, 1986, to deal with that emergency, must continue in effect beyond January 7, 1989. Therefore, in accordance with Section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Libya. This notice shall be published in the Federal Register and transmitted to the Congress.



THE WHITE HOUSE,  
December 28, 1988.

[FR Doc. 88-30203

Filed 12-28-88; 2:54 pm]

Billing code 3195-01-M

Editorial note: For the text of the President's letters to the Speaker of the House of Representatives and the President of the Senate, dated Dec. 28, on the extension of the national emergency, see the *Weekly Compilation of Presidential Documents* (vol. 24, no. 52).



## Rules and Regulations

Federal Register

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Friday, December 30, 1988

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

### DEPARTMENT OF AGRICULTURE

#### Animal and Plant Health Inspection Service

##### 7 CFR Part 201

[Docket No. 88-208]

#### Federal Seed Act Regulations

**AGENCY:** Animal and Plant Health Inspection Service, USDA.<sup>1</sup>

**ACTION:** Interim rule and request for comments.

**SUMMARY:** This rule removes the origin staining requirements for seed of alfalfa or red clover grown in Canada and imported into the United States. The removal of the requirements is necessary to make the regulations conform to the amendment of the Federal Seed Act by the United States-Canada Free-Trade Implementation Act of 1988. This action relieves a restriction on importation of alfalfa and red clover seed from Canada.

**DATE:** This rule takes effect on the date that the United States-Canada Free-Trade Agreement enters into force. (See Supplementary Information below.) The Animal and Plant Health Inspection Service will publish a document in the Federal Register announcing the effective date. Written comments must be postmarked or received on or before February 28, 1989.

**ADDRESSES:** Send an original and two copies of written comments to Helene R. Wright, Chief, Regulatory Analysis and Development, PPD, APHIS, USDA, Room 866, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments refer to Docket No. 88-208. Comments received may be inspected at USDA, Room 1141,

<sup>1</sup> Delegation of authority published September 22, 1982 (page 41725) and Functional Responsibility published October 25, 1982 (page 47229).

South Building, 14th and Independence Avenue, SW, Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

**FOR FURTHER INFORMATION CONTACT:** Frank E. Cooper, Senior Operations Officer, Port Operations, PPQ, APHIS, USDA, Room 632, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8393.

#### SUPPLEMENTARY INFORMATION:

##### Background

We are amending the Federal Seed Act Regulations (the regulations) by removing the requirement that one percent of each container of seed of alfalfa or red clover grown in the Dominion of Canada and imported into the United States be stained violet.

On January 2, 1988, President Reagan signed the United States-Canada Free-Trade Agreement (FTA), to become effective January 1, 1989, subject to both countries taking certain actions necessary to implement the FTA. Congress satisfied one of the prerequisites by passing the United States-Canada Free-Trade Implementation Act of 1988 (the Act). The statutory amendments included in the Act become effective coincident with the FTA.

This amendment is mandated by section 301(e) of the Act, which amended section 302(e) of the Federal Seed Act (7 U.S.C. 1582(e)) by providing that the provisions requiring certain seeds to be stained shall not apply to alfalfa or clover seed originating in Canada. (See Pub. L. 100-449, 102 Stat 1868.) The Act provides implementing legislation for the FTA.

This regulation is being promulgated in anticipation of the entry into force of the FTA. Article 2105 of the FTA provides that the FTA enters into force "on January 1, 1989 upon an exchange of diplomatic notes certifying the completion of necessary legal procedures by each Party." It is anticipated the the FTA will enter into force on January 1, 1989. The Office of the United States Trade Representative will confirm in a Federal Register notice the precise date of the FTA's entry into force.

This action is taken to conform the regulations with the Act.

#### Emergency Action

The Administrator of the Animal and Plant Health Inspection Service has determined that good cause exists to publish this interim rule without prior notice and opportunity for public comment.

Certain regulatory actions must be taken as a result of the statutory amendments discussed in the "Background", and must become effective with the FTA to avoid inconsistency between the regulations and their statutory authority. Removal of the origin staining requirement for alfalfa and clover seed imported from Canada is one of the regulatory changes that must become effective at the same time as the Agreement and the Act to avoid this conflict.

This action relieves a restriction on importation of certain seed from Canada. Since prior notice and other public procedures with respect to this interim rule and impracticable and since this regulatory change is mandated by Congress, there is good cause under 5 U.S.C. 553 for making this interim rule effective upon the entry into force of the FTA.

We will consider comments postmarked or received on or before February 28, 1989.

#### Executive Order 12291 and Regulatory Flexibility Act

Since this rule merely deletes a regulatory requirement which is no longer authorized by the Federal Seed Act because of its amendment, it has been determined that it is not a "major rule" within the meaning of Executive Order 12291 and Departmental regulation 1512-1. For the same reason, it is not subject to regulatory analysis pursuant to the requirement of the Regulatory Flexibility Act.

#### Paperwork Reduction Act

The regulations in this rule contain no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980, as amended (44 U.S.C. 3501 *et seq.*).

#### List of Subjects in 7 CFR Part 201

Advertising, Agricultural commodities, Imports, Labelling, Reporting and recordkeeping requirements, Seeds, Vegetables.



Accordingly, 7 CFR Part 201 is amended as follows:

# **PART 201—FEDERAL SEED ACT REGULATIONS**

1. The authority citation for Part 201 is revised to read as follows:

Authority: 7 U.S.C. 1592.

## **§ 201.104 [Amended]**

2. In § 201.104, paragraph (c) is removed and paragraph (d) is redesignated as paragraph (c).

Done in Washington, DC this 28th day of December, 1988.

James Glosser,  
Administrator, Animal and Plant Health  
Inspection Service  
December 28, 1988.

[FR Doc 88-30219 Filed 12-29-88; 9:14 a.m.]  
BILLING CODE 3410-34-M

## **7 CFR Part 354**

[Docket No. 88-189]

### **Overtime Work at Border Ports, Sea Ports, and Airports**

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

**SUMMARY:** We are amending the regulations that establish charges for overtime work performed by Plant Protection and Quarantine inspectors of the U.S. Department of Agriculture at border ports, sea ports, and airports. The regulations are amended by: (1) Increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at an airport outside of the regularly established hours of service; and (2) increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of an employee of Plant Protection and Quarantine on a Sunday or holiday or at any other time outside the employee's regular tour of duty. These increases reflect salary increases for federal employees in accordance with the Federal Pay Comparability Act of 1970 (Pub. L. 91-656), and Pub. L. 100-440, 102 Stat. 1756, dated September 22, 1988, and reflect allowable costs associated with the implementation of the Debt Collection Act of 1982.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul R. Eggert, Director, Resource Management Support, Plant Protection and Quarantine, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Room 822, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-7764.

**SUPPLEMENTARY INFORMATION:**

### **Executive Order 12291 and Regulatory Flexibility Act and Effective Date**

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

We are amending the regulations by increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at any airport outside of the regularly established hours of service. The rates are increased by \$2.52 per hour for services performed outside of the regularly established hours on a Sunday and by \$2.20 per hour for services performed outside of the regularly established hours on a holiday or any other period.

We are also amending the regulations by increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of an employee of Plant Protection and Quarantine on a Sunday or holiday or at any other time outside the regular tour of duty of the employee. The rates are increased by \$4.64 per hour for services performed outside the regular tour of duty on a Sunday and by \$4.32 per hour for services performed outside the regular tour of duty on a holiday or any other period.

Services of an employee of Plant Protection and Quarantine at an airport during a regular tour of duty and during regularly established hours of service on Sundays and holidays are still provided

free of charge to those requesting the service. Based on information compiled by the Department, we have estimated that Plant Protection and Quarantine provided an average of 10,957 hours per week of services for which charges were assessed during 1988, and these services were requested by thousands of entities. We do not expect that the number of hours of service for which charges will be imposed will increase significantly in 1989.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The hourly rate for services of an employee of Plant Protection and Quarantine depend entirely upon facts within the knowledge of the Department of Agriculture. The Department has no alternatives to raising the rates. By law, importers and exporters are required to reimburse the Department for its costs associated with services rendered. A cost analysis was performed to determine if fees for overtime are adequate to recover the cost of providing the services. Unless the rates are raised, the Department will not be able to recover the costs for providing services outside regularly established hours or outside regular tours of duty hours.

Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find for good cause that prior notice and other public procedure with respect to this rule are impracticable, unnecessary, and contrary to the public interest; we also find good cause that this rule be made effective less than 30 days after publication of this document in the Federal Register.

### **Paperwork Reduction Act**

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

### **Executive Order 12372**

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V.)

### **List of Subjects in 7 CFR Part 354**

Agricultural commodities, Exports, Government employees, Imports, Plants

(Agriculture) Quarantine, Transportation.

## **PART 354—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS**

1. The authority citation for Part 354 continues to read as follows:

Authority: 7 U.S.C. 2260; 49 U.S.C. 1741; 7 CFR 2.17, 2.51, and 371.2(c).

2. Section 354.1(a)(1) is revised to read as follows:

### **§ 354.1 Overtime work at border ports, sea ports, and airports.**

(a)(1) Any person, firm, or corporation having ownership, custody, or control of plants, plant products, animals, animal byproducts, or other commodities or articles subject to inspection, laboratory testing, certification, or quarantine under this chapter and Subchapter D of Chapter I, Title 9 CFR, who requires the services of an employee of Plant Protection and Quarantine on a Sunday or holiday, or at any other time outside the regular tour of duty of the employee, shall sufficiently in advance of the period of Sunday or holiday or overtime service request the Plant Protection and Quarantine inspector in charge to furnish the service during the overtime or Sunday or holiday period, and shall pay the Government at a rate of \$37.92 per work-hour per employee on a Sunday and at the rate of \$29.28 per work-hour per employee for holiday or any other period, except as provided in paragraphs (a)(1)(i), (a)(1)(ii), and (a)(1)(iii) of this section:

(i) For any services performed on a Sunday or holiday, or at any time after 5 p.m. or before 8 a.m. on a weekday, in connection with the arrivals in or departure from the United States of a private aircraft or vessel, the total amount payable shall not exceed \$25 for all inspection services performed by the Customs Service, Immigration and Naturalization Service, Public Health Service, and the Department of Agriculture;

(ii) Owners and operators of aircraft will be provided service without reimbursement during regularly established hours of service on a Sunday or holiday; and

(iii) The overtime rate to be charged owners or operators of aircraft at airports of entry or other places of inspection as a consequence of the operation of the aircraft, for work performed outside of the regularly established hours of service on a Sunday will be \$31.16 and for work performed outside of the regularly established hours of service for a holiday or any other period will be

\$23.68 per hour (these charges exclude administrative overhead costs).

Done at Washington, DC, this 27th day of December, 1988.

James Glosser,  
Administrator, Animal and Plant Health  
Inspection Service.

December 27, 1988.

[FR Doc. 88-30129 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-34-M

## **Agricultural Marketing Service**

### **7 CFR Parts 1124 and 1125**

[Docket Nos. AO-368-A16 and AO-226-A32; DA-88-108]

### **Milk in the Oregon-Washington and Puget Sound-Inland Marketing Areas; Order Amending and Merging Orders**

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

**SUMMARY:** This action merges the Oregon-Washington and Puget Sound-Inland Federal orders on the basis of industry proposals considered at a public hearing held November 17-18, 1987, in Portland, Oregon. The merged "Pacific Northwest" marketing area includes, in addition to all of the presently regulated area of the two individual orders, five additional Washington counties, the unregulated portion of another Washington county, and three central Oregon counties. The Class I differentials at Portland, Oregon, and Spokane, Washington, are reduced from \$1.95 to \$1.90; and the Class I differential at Seattle, Washington, is increased from \$1.85 to \$1.90.

The provisions of the merged order are patterned largely after those of the present Puget Sound-Inland order, with some modifications to accommodate specific marketing conditions of the Oregon-Washington order area. Provisions of the merged order that represent significant changes in regulation for handlers and producers currently pooled under the Oregon-Washington order include a single butterfat differential for adjusting order prices for variations in butterfat content, payment to producers on the basis of a uniform price for all production rather than a base-excess plan, and determination of handler obligations to the marketwide pool on an equalization basis (the difference between the use value of producer receipts and the value of those receipts at the uniform price).

The merger is necessary to reflect changes in market structure in that the two separately regulated areas have

become, in effect, one common market. Cooperative associations representing more than the required two-thirds of the producers supplying milk for the market during the representative period of September 1988 have approved issuance of the amended order.

**EFFECTIVE DATE:** February 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Constance M. Brenner, Marketing Specialist, USDA/AMS/Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, (202) 447-7183.

Prior documents in this proceeding:  
*Notice of Hearing:* Issued October 26, 1987; published October 29, 1987 (52 FR 41566).

*Recommended Decision:* Issued September 7, 1988; published September 19, 1988 (53 FR 36291).

*Final Decision:* Issued November 29, 1988; published December 6, 1988 (53 FR 49154).

### **Findings and Determinations**

The findings and determinations hereinafter set forth supplement those that were made when the Oregon-Washington and Puget Sound-Inland orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

(a) Findings upon the basis of the hearing record. Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreements and to the orders regulating the handling of milk in the Oregon-Washington and Puget Sound-Inland marketing areas.

Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The Pacific Northwest order, which amends and merges the Oregon-Washington and Puget Sound-Inland orders, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the Pacific Northwest marketing area; and the minimum prices



specified in the Pacific Northwest order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The Pacific Northwest order regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, marketing agreements upon which hearings have been held;

(4) All milk and milk products handled by handlers, as defined in the Pacific Northwest order are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 4 cents per hundredweight or such lesser amount as the Secretary may prescribe, with respect to milk specified in § 1124.85.

(b) Determinations. It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the act;

(2) The issuance of this order amending and merging the orders is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order; and

(3) The issuance of the order amending and merging the orders is approved or favored by at least two-thirds of the producers who during the determined representative period were engaged in the production of milk for sale in the Pacific Northwest marketing area.

#### List of Subjects in 7 CFR Parts 1124 and 1125

Milk marketing orders, Milk, Dairy products.

#### Order Relative to Handling

It is therefore ordered, That on and after the effective date hereof, the handling of milk in the Oregon-Washington and Puget Sound-Inland marketing areas (Parts 1124 and 1125, respectively) shall be amended and merged into one order. Part 1125 is superseded thereby, and such vacated Part designation shall be reserved for future assignment. The handling of milk in the merged marketing area, to be

designated as the "Pacific Northwest Marketing Area" (Part 1124), shall be in conformity to and in compliance with the terms and conditions of the following attached order.

For the reasons set forth in the preamble, Chapter X of Title 7 of the Code of Federal Regulations is amended as follows:

#### PART 1125—[REMOVED AND RESERVED]

1. Part 1125 is removed and reserved.
2. Part 1124 is revised to read as follows:

#### PART 1124—MILK IN THE PACIFIC NORTHWEST MARKETING AREA

##### Subpart—Order Regulating Handling

###### General Provisions

###### Sec.

1124.1 General provisions.

###### Definitions

- 1124.2 Pacific Northwest marketing area.
- 1124.3 Route disposition.
- 1124.4 Plant.
- 1124.5 Distributing plant.
- 1124.6 Supply plant.
- 1124.7 Pool plant.
- 1124.8 Nonpool plant.
- 1124.9 Handler.
- 1124.10 Producer-handler.
- 1124.11 Cooperative reserve supply unit.
- 1124.12 Producer.
- 1124.13 Producer milk.
- 1124.14 Other source milk.
- 1124.15 Fluid milk product.
- 1124.16 Fluid cream product.
- 1124.17 Filled milk.
- 1124.18 Cooperative association.
- 1124.19 Product prices.

##### Handler Reports

- 1124.30 Reports of receipt and utilization.
- 1124.31 Payroll reports.
- 1124.32 Other reports.

##### Classification of Milk

- 1124.40 Classes of utilization.
- 1124.41 Shrinkage.
- 1124.42 Classification of transfers and diversions.
- 1124.43 General classification rules.
- 1124.44 Classification of producer milk.
- 1124.45 Market administrator's reports and announcements concerning classification.

##### Class Prices

- 1124.50 Class prices.
- 1124.51 Basic formula price.
- 1124.51a Basic Class II formula price.
- 1124.52 Plant location adjustments for handlers.
- 1124.53 Announcement of class prices.
- 1124.54 Equivalent price.

##### Uniform Price

###### Sec.

- 1124.60 Handler's value of milk for computing uniform price.
- 1124.61 Computation of uniform price.
- 1124.62 Announcement of uniform price and butterfat differential.

##### Payments for Milk

- 1124.70 Producer-settlement fund.
- 1124.71 Payments to the producer-settlement fund.
- 1124.72 Payments from the producer-settlement fund.
- 1124.73 Payments to producers and to cooperative associations.
- 1124.74 Butterfat differential.
- 1124.75 Plant location adjustments for producers and on nonpool milk.
- 1124.76 Payments by a handler operating a partially regulated distributing plant.
- 1124.77 Adjustment of accounts.
- 1124.78 Charges on overdue accounts.

##### Administrative Assessment and Marketing Service Deduction

- 1124.85 Assessment for order administration.
  - 1124.86 Deduction for marketing services.
- Authority: Secs. 1-19, 48 Stat. 31, as amended (7 U.S.C. 601-674).

##### Subpart—Order Regulating Handling

###### General Provisions

###### § 1124.1 General provisions.

The terms, definitions, and provisions in Part 1000 of this chapter are hereby referenced and made a part of this order.

###### Definitions

###### § 1124.2 Pacific Northwest marketing area.

"Pacific Northwest Marketing Area" (hereinafter called the "Marketing Area") means all territory geographically within the places listed below, including all territory fully or partly therein occupied by government (municipal, state or federal) reservations, facilities, installations, or institutions:

###### Idaho Counties:

Benewah, Bonner, Boundary, Kootenai, Latah, and Shoshone.

###### Washington Counties:

Adams, Asotin, Benton, Chelan, Clark, Columbia, Cowlitz, Douglas, Ferry, Franklin, Garfield, Grant, Grays Harbor, Island, King, Kitsap, Kittitas, Klickitat, Lewis, Lincoln, Mason, Okanogan, Pacific, Pend Oreille, Pierce, San Juan, Skagit, Skamania, Snohomish, Spokane, Stevens, Thurston, Wahkiakum, Walla Walla, Whitman and Yakima.

###### Oregon Counties:

Benton, Clackamas, Clatsop, Columbia, Coos, Crook, Deschutes, Douglas, Gilliam, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Wasco, Washington, Wheeler, and Yamhill.

###### § 1124.3 Route disposition.

"Route disposition" means any delivery of a fluid milk product classified as Class I milk from a plant to a retail or wholesale outlet (including any delivery through a distribution point as provided by this section, by a vendor, from a plant store or through a vending machine). The term "route disposition" does not include:

- (a) A delivery to a plant. However, packaged fluid milk products that are transferred to a pool distributing plant from another pool distributing plant, and classified as Class I under § 1124.42(a), shall be considered route disposition from the transferor-plant for the sole purpose of qualifying it as a pool distributing plant under § 1124.7(a), and the transferor-plant shall be assigned in-area dispositions but not in excess of the in-area dispositions of the transferee plant;
- (b) A delivery in bulk to a commercial food processing establishment pursuant to § 1124.40(b)(3); or
- (c) A delivery to a military or other ocean transport vessel leaving the marketing area, of fluid milk products which originated at a plant located outside the marketing area and were not received or processed at any pool plant.

###### § 1124.4 Plant.

"Plant" means the buildings, facilities and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment, which is maintained and operated primarily for the receiving, handling and/or processing of milk or milk products (including filled milk). Separate facilities used only as a distribution point for storing packaged fluid milk products in transit for route disposition or separate facilities used only as a reload point for transferring bulk milk from one tank truck to another shall not be a "plant" under this definition.

###### § 1124.5 Distributing plant.

"Distributing plant" means a plant in which a fluid milk product approved by a duly constituted regulatory agency for fluid consumption, or filled milk, is processed or packaged and that has route disposition in the marketing area during the month.

###### § 1124.6 Supply plant.

"Supply plant" means a plant from which a fluid milk product approved by a duly constituted regulatory agency for fluid consumption or filled milk, is transferred during the month to a pool distributing plant.

###### § 1124.7 Pool plant.

Except as provided in paragraph (d) of this section, "pool plant" means:

- (a) A distributing plant from which there is route disposition (except filled milk) in the marketing area during the month equal to not less than 10 percent of receipts of Grade A milk at such plant (exclusive of transfers of packaged fluid milk products from plants qualifying as pool plants pursuant to this paragraph, filled milk, and milk received at such plant as diverted milk from another plant, which milk is classified in Class III under this order and is subject to the pricing and pooling provisions of this or another order issued pursuant to the Act) or diverted therefrom pursuant to § 1124.13;
- (b) A supply plant from which during any month not less than 30 percent of the total quantity of milk that is physically received at such plant from dairy farmers eligible to be producers pursuant to § 1124.12 (excluding milk received at such plant as diverted milk from another plant, which milk is classified in Class III under this order and is subject to the pricing and pooling provisions of this or another order issued pursuant to the Act) or diverted as producer milk to another plant pursuant to § 1124.13, is shipped in the form of a fluid milk product (except as filled milk) to a pool distributing plant or is a route disposition in the marketing area of fluid milk products (except filled milk) processed and packaged at such plant; *Provided, That:*

- (1) With respect to a supply plant operated by a cooperative association, the producer milk of its members which is caused to be delivered directly from their farms to pool distributing plants, shall for the purpose of this paragraph, be considered as a receipt at the cooperative's supply plant and a shipment from the supply plant to pool distributing plants;
- (2) A plant which qualified as a pool plant pursuant to this paragraph in each month of September through February shall be a pool plant in each of the following months of March through August unless a written application is filed with the Market Administrator prior to the first day of any such month requesting that the plant be designated a nonpool plant for such month and each subsequent month through August

during which it would not otherwise qualify as a pool plant; and

(3) For the purpose of this paragraph, the operations of two or more supply plants may be combined and considered as the operation of one plant if so requested in writing to the Market Administrator by the handler(s) operating such plants prior to the first day of the month for which such consideration is requested.

(c) The Director of the Dairy Division may reduce or increase up to 10 percentage points from the levels set forth therein the pool plant performance standards in paragraphs (a) or (b) of this section, if the Director finds such revision is necessary to obtain needed shipments or to prevent uneconomic shipments. Before making such a finding, the Director shall investigate the need for revision either at the Director's own initiative or at the request of interested persons. If the investigation shows that a revision might be appropriate, the Director shall issue a notice stating that the revision is being considered and invite data, views, and arguments.

(d) The term "pool plant" shall not apply to the following plants:

- (1) A producer-handler plant;
- (2) A plant qualified pursuant to paragraph (a) of this section which also meets the pooling requirements of another Federal Order and from which, the Secretary determines, there is a greater quantity of route disposition during the month in such other Federal Order marketing area than in this marketing area, except that if such plant was subject to all the provisions of this part in the immediately preceding month it shall continue to be subject to all the provisions of this part until the fourth consecutive month in which a greater proportion of its route disposition is made in such other marketing area unless, notwithstanding the provisions of this paragraph, it is regulated under such other order;

(3) A plant qualified pursuant to paragraph (a) of this section which also meets the pooling requirements of another Federal Order on the basis of route disposition in such other marketing area and from which, the Secretary determines, there is a greater quantity of route disposition in this marketing area than in such other marketing area but which plant maintains pooling status for the month under such other Federal Order;

(4) A plant qualified pursuant to paragraph (b) of this section which also meets the pool plant requirements of another Federal Order and from which greater shipments are made during the



month to plants regulated under such other order than are made to plants regulated under this order;

(5) A distributing plant from which total route disposition (except filled milk) in the marketing area during the month averages 300 pounds or less per day; or

(6) That portion of a plant that is physically separated from the Grade A portion of such plant, is operated separately, and is not approved by any regulatory agency for the receiving, processing, or packaging of any fluid milk products for Grade A disposition.

#### § 1124.8 Nonpool plant.

"Nonpool plant" means any plant other than a pool plant. The following categories of nonpool plants are further defined as follows:

(a) "Other order plant" means a plant that is fully subject to the pricing and pooling provisions of another order issued pursuant to the Act.

(b) "Producer-handler plant" means a plant operated by a producer-handler as defined in any order (including this part) issued pursuant to the Act.

(c) "Partially regulated distributing plant" means a nonpool plant that is neither an other order plant nor a producer-handler plant, from which during the month an average of more than 300 pounds daily of fluid milk products is disposed of as route disposition in the marketing area.

(d) "Unregulated supply plant" means a nonpool plant that is neither an other order plant nor a producer-handler plant, from which fluid milk products are moved to a pool plant during the month.

(e) "Exempt distributing plant" means a plant, other than a pool supply plant or a regulated plant under another Federal Order that meets all the requirements for status as a pool distributing plant except that its route disposition (exclusive of filled milk) in the marketing area in the month does not exceed an average of 300 pounds daily. For purposes of this paragraph, route disposition shall not include receipts from a transferor-plant pursuant to the proviso of § 1124.3(a).

#### § 1124.9 Handler.

"Handler" means:

(a) The operator of one or more pool plants;

(b) Any cooperative association with respect to producer milk which it caused to be diverted for the account of such cooperative association to another plant or pursuant to § 1124.40(b)(3);

(c) Any cooperative association with respect to milk that it receives for its account from the farm of a producer for

delivery to a pool plant of another handler in a tank truck owned and operated by, or under the control of, such cooperative association, unless both the cooperative association and the operator of the pool plant notify the market administrator prior to the time that such milk is delivered to the pool plant that the plant operator will be the handler for such milk and will purchase such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples. Milk for which the cooperative association is the handler pursuant to this paragraph shall be deemed to have been received by the cooperative association at the location of the pool plant to which such milk is delivered;

(d) Any person who operates a plant defined in § 1124.8 (a) through (e).

#### § 1124.10 Producer-handler.

"Producer-handler" means a person who is engaged in the production of milk and also operates a plant from which during the month an average of more than 300 pounds daily of fluid milk products, except filled milk, is disposed of as route disposition within the marketing area and who has been so designated by the market administrator upon determination that all of the requirements of this section have been met, and that none of the conditions therein for cancellation of such designation exists. All designations shall remain in effect until canceled pursuant to paragraph (c) of this section. Any state institution shall be a producer-handler exempt from the provisions of this section and §§ 1124.30 and 1124.32 with respect to milk of its own production and receipts from pool plants processed or received for consumption in State institutions and with respect to movements of milk to or from a pool plant.

(a) *Requirements for designation.* (1) The producer-handler has and exercises (in its capacity as a handler) complete and exclusive control over the operation and management of a plant at which it handles and processes milk received from its milk production resources and facilities (designated as such pursuant to paragraph (b)(1) of this section), the operation and management of which are under the complete and exclusive control of the producer-handler (in its capacity as a dairy farmer).

(2) The producer-handler neither receives at its designated milk production resources and facilities nor receives, handles, processes or distributes at or through any of its milk handling, processing or distributing resources and facilities (designated as

such pursuant to paragraph (b)(2) of this section) milk products for reconstitution into fluid milk products, or fluid milk products derived from any source other than (i) its designated milk production resources and facilities, (ii) pool plants within the limitation specified in paragraph (c)(2) of this section, or (iii) nonfat milk solids which are used to fortify fluid milk products.

(3) The producer-handler is neither directly nor indirectly associated with the business control or management of, nor has a financial interest in, another handler's operation; nor is any other handler so associated with the producer-handler's operation.

(4) Designation of any person as a producer-handler following a cancellation of its prior designation shall be preceded by performance in accordance with paragraph (a) (1), (2), and (3) of this section for a period of 1 month.

(b) *Resources and facilities.*

Designation of a person as a producer-handler shall include the determination and designation of the milk production, handling, processing and distributing resources and facilities, all of which shall be deemed to constitute an integrated operation, as follows:

(1) As milk production resources and facilities: All resources and facilities (milking herd(s), buildings housing such herd(s), and the land on which such buildings are located) used for the production of milk;

(i) Which are directly, indirectly or partially owned, operated or controlled by the producer-handler;

(ii) In which the producer-handler in any way has an interest including any contractual arrangement; and

(iii) Which are directly, indirectly or partially owned, operated or controlled by any partner or stockholder of the producer-handler. However, for purposes of this paragraph any such milk production resources and facilities which the producer-handler proves to the satisfaction of the market administrator do not constitute an actual or potential source of milk supply for the producer-handler's operation as such shall not be considered a part of the producer-handler's milk production resources and facilities; and

(2) As milk handling, processing and distributing resources and facilities: All resources and facilities (including store outlets) used for handling, processing and distributing any fluid milk product:

(i) Which are directly, indirectly or partially owned, operated or controlled by the producer-handler; or

(ii) In which the producer-handler in any way has an interest, including any

contractual arrangement, or with respect to which the producer-handler directly or indirectly exercises any degree of management or control.

(c) *Cancellation.* The designation as a producer-handler shall be canceled under any of the conditions set forth in paragraph (c) (1) and (2) of this section or upon determination by the market administrator that any of the requirements of paragraph (a) (1), (2), and (3) of this section are not continuing to be met, such cancellation to be effective on the first day of the month following the month in which the requirements were not met, or the conditions for cancellation occurred.

(1) Milk from the designated milk production resources and facilities of the producer-handler is delivered in the name of another person as producer milk to another handler.

(2) The producer-handler handles fluid milk products derived from sources other than the designated milk production facilities and resources, with the exception of purchases from pool plants in the form of fluid milk products which do not exceed in the aggregate a daily average during the month of 100 pounds.

(d) *Public announcement.* The market administrator shall publicly announce the name, plant location and farm location(s) of persons designated as producer-handlers, of those whose designations have been canceled and the effective dates of producer-handler status or loss of producer-handler status for each. Such announcements shall be controlling with respect to the accounting at plants of other handlers for fluid milk products received from any producer-handler.

(e) *Burden of establishing and maintaining producer-handler status.*

The burden rests upon the handler who is designated as a producer-handler to establish through records required pursuant to § 1000.5 of this chapter that the requirements set forth in paragraph (a) of this section have been and are continuing to be met, and that the conditions set forth in paragraph (c) of this section for cancellation of designation do not exist.

#### § 1124.11 Cooperative reserve supply unit.

"Cooperative reserve supply unit" means any cooperative association or its agent that is a handler pursuant to § 1124.9 (b) or (c) that does not own or operate a plant, if such cooperative has been qualified to receive payments pursuant to § 1124.73 and has been a handler of producer milk under this or its predecessor order(s) during each of the 12 previous months, and if a majority of the cooperative's member producers

are located within 125 miles of a pool distributing plant. A cooperative reserve supply unit shall be subject to the following conditions:

(a) The cooperative shall file a request with the market administrator for cooperative reserve supply unit status at least 15 days prior to the first day of the month in which such status is desired to be effective. Once qualified as a cooperative reserve supply unit pursuant to this paragraph, such status shall continue to be effective unless the cooperative requests termination prior to the first day of the month that change of status is requested, or the cooperative fails to meet all of the conditions of this section;

(b) The cooperative reserve supply unit supplies fluid milk products to pool distributing plants located within 125 miles of a majority of the cooperative's member producers in compliance with any announcement by the market administrator requesting a minimum level of shipments as further provided below:

(1) The market administrator may require such supplies of bulk fluid milk from cooperative reserve supply units whenever the market administrator finds that milk supplies for Class I use at pool distributing plants are needed for plants defined in § 1124.7(a). Before making such a finding, the market administrator shall investigate the need for such shipments either on the market administrator's own initiative or at the request of interested persons. If the market administrator's investigation shows that such shipments might be appropriate, the market administrator shall issue a notice stating that a shipping announcement is being considered and inviting data, views and arguments with respect to the proposed shipping announcement.

(2) Failure of a cooperative reserve supply unit to comply with any announced shipping requirements, including making any significant change in the unit's marketing operation that the market administrator determines has the impact of evading or forcing such an announcement, shall result in immediate loss of cooperative reserve supply unit status until such time as the unit has been a handler pursuant to § 1124.9 (b) and (c) for at least 12 consecutive months.

#### § 1124.12 Producer.

(a) Except as provided in paragraph (b) of this section, "producer" means any person who produces milk approved by a duly constituted regulatory agency for disposition as Grade A milk and whose milk is:

(1) Received at a pool plant directly from such person;

(2) Received by a handler described in § 1124.9(c); or

(3) Diverted in accordance with § 1124.13;

(b) "Producer" shall not include:

(1) A producer-handler as defined in any order (including this part) issued pursuant to the Act;

(2) Any person with respect to milk produced by such person that is diverted to a pool plant from an other order plant if the other order designates such person as a producer under that order and such milk is allocated to Class II or Class III utilization pursuant to § 1124.44(a)(9)(iii) and the corresponding step of § 1124.44(b);

(3) Any person with respect to milk produced by such person that is reported as diverted to an other order plant if any portion of such person's milk so moved is assigned to Class I under the provisions of such order;

(4) Any person who during the month has disposed of as route disposition or to consumers at the farm an average of more than 110 pounds daily of fluid milk or fluid cream products; and

(5) Any person (known as a dairy farmer for other markets) whose milk was received at a nonpool plant or a commercial food processing establishment during the month as other than producer milk under this or any other Federal milk order.

#### § 1124.13 Producer milk.

"Producer milk" means the skim milk and butterfat in milk of a producer that is:

(a) Received or diverted by a handler defined in § 1124.9(a) under one of the following conditions:

(1) Received at such handler's pool plant directly from the farm of such producer;

(2) Received at such handler's plant from a handler defined in § 1124.9(c) for all purposes other than those specified in paragraph (b)(2)(i) of this section; and

(3) Diverted for the account of the operator of the pool plant, subject to the conditions set forth in paragraph (c) of this section.

(b) Received or diverted by a cooperative defined in § 1124.9 (b) or (c) under one of the following conditions:

(1) Milk diverted for the account of the cooperative association. Except for milk moved by a cooperative reserve supply unit defined in § 1124.11, such diversions shall be subject to the conditions set forth in paragraph (c) of this section;

(2) Milk for which the cooperative association is a handler pursuant to § 1124.9(c) to the following extent:



(i) For purposes of reporting pursuant to §§ 1124.30(c) and 1124.31(a) and making payments to producers pursuant to § 1124.73(a); and

(ii) For all purposes, with respect to any such milk which is not delivered to the pool plant of another handler.

(c) The following conditions shall apply to diverted producer milk:

(1) A cooperative association or its agent may divert for its account the milk of any producer. The total quantity of milk diverted may not exceed 80 percent during the months of September through April of the total quantity of producer milk which the association or its agent causes to be delivered to pool distributing plants or diverted. No percentage limit shall apply during the months of May through August. The percentage limits on diversions specified in this paragraph shall not apply to a cooperative reserve supply unit defined in § 1124.11;

(2) A handler other than a cooperative association that operates a pool plant may divert milk for its account to other plants or pursuant to § 1124.40(b)(3). The total quantity of milk so diverted may not exceed 80 percent during the months of September through April of the milk received at such handler's pool plant or diverted by such handler from any producer other than a member of a cooperative association which markets milk under paragraph (c)(1) of this section and for which the operator of such plant is the handler during the month. No percentage limit shall apply during the months of May through August;

(3) Milk diverted in excess of the limits specified shall not be considered producer milk, except for milk diverted by a cooperative reserve supply unit. The diverting handler shall specify the producers whose milk is ineligible as producer milk. If a handler fails to designate such producers, producer milk status shall be forfeited with respect to all milk diverted by the handler during the month;

(4) Two or more cooperative associations may have their allowable diversions computed on the basis of their combined deliveries of producer milk which the associations cause to be delivered to pool plants or diverted during the month if each association has filed a request in writing with the market administrator on or before the first day of the month the agreement is to be effective. This request shall specify the basis for assigning overdiverted milk to the producer deliveries of each cooperative according to a method approved by the market administrator;

(5) Diverted milk shall be priced at the location of the plant or commercial food processing establishment to which diverted; and

(d) In the case of any bulk tank load of milk originating at farms and subsequently divided among plants, the proportion of the load received at each plant shall be prorated among the individual producers involved on the basis of their respective percentage of the total load.

#### § 1124.14 Other source milk.

"Other source milk" means all skim milk and butterfat contained in or represented by:

(a) Receipts of fluid milk products and bulk products specified in § 1124.40(b)(1) from any source other than producers, handlers described in § 1124.9(c), or pool plants;

(b) Receipts in packaged form from other plants of products specified in § 1124.40(b)(1);

(c) Products (other than fluid milk products, products specified in § 1124.40(b)(1), and products produced at the plant during the same month) from any source which are reprocessed, converted into, or combined with another product in the plant during the month; and

(d) Receipts of any milk product (other than a fluid milk product or a product specified in § 1124.40(b)(1)) for which the handler fails to establish a disposition.

#### § 1124.15 Fluid milk product.

(a) Except as provided in paragraph (b) of this section, "fluid milk product" means any of the following products in fluid or frozen form: milk, skim milk, lowfat milk, milk drinks, buttermilk, mixtures of cream and milk or skim milk containing less than 15 percent butterfat (including those which are sterilized or aseptically packaged), filled milk, and milkshake and ice milk mixes containing less than 20 percent total solids, including any such products that are flavored, cultured, modified with added nonfat milk solids, concentrated (if in a consumer-type package), or reconstituted.

(b) The term "fluid milk product" shall not include:

(1) Evaporated or condensed milk (plain or sweetened), evaporated or condensed skim milk (plain or sweetened), formulas especially prepared for infant feeding or dietary use and milk or milk products (including filled milk) that are sterilized and packaged in hermetically sealed glass or all-metal containers, any product that contains by weight less than 6.5 percent nonfat milk solids, and whey; and

(2) The quantity of skim milk in any modified product specified in paragraph (a) of this section that is in excess of the quantity of skim milk in an equal volume of an unmodified product of the same nature and butterfat content.

#### § 1124.16 Fluid cream product.

"Fluid cream product" means cream (other than plastic cream or frozen cream), sour cream, or a mixture (including a cultured mixture) of cream and milk or skim milk containing 15 percent or more butterfat, with or without the addition of other ingredients.

#### § 1124.17 Filled milk.

"Filled milk" means any combination of nonmilk fat (or oil) with skim milk (whether fresh, cultured, reconstituted or modified by the addition of nonfat milk solids), with or without milkfat, so that the product (including stabilizers, emulsifiers, or flavoring) resembles milk or any other fluid milk product; and contains less than 6 percent nonmilk fat (or oil).

#### § 1124.18 Cooperative association.

"Cooperative association" means any cooperative marketing association of producers, which the Secretary determines, after application by the cooperative association:

(a) To be qualified under the provisions of the Act of Congress of February 18, 1922, known as the "Capper-Volstead Act", and any amendments thereto;

(b) To have full authority in the sale of milk of its members and to be engaged in making collective sales of or marketing milk for its members; and

(c) To have its entire activities under the control of its members.

#### § 1124.19 Product prices.

The following product prices shall be used in calculating the basic Class II formula price pursuant to § 1124.51a:

(a) *Butter price.* "Butter price" means the simple average, for the first 15 days of the month, of the daily prices per pound of Grade A (92-score) butter. The prices used shall be those of the Chicago Mercantile Exchange as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday, except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week

shall be the last price that was established.

(b) *Cheddar cheese price.* "Cheddar cheese price" means the simple average, for the first 15 days of the month, of the daily prices per pound of cheddar cheese in 40-pound blocks. The prices used shall be those of the National Cheese Exchange (Green Bay, WI), as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each following work-day until the next price is reported. A work-day is each Monday through Friday, except national holidays. For any week that the Exchange does not meet to establish a price, the price for the following week shall be the last price that was established.

(c) *Nonfat dry milk price.* "Nonfat dry milk price" means the simple average, for the first 15 days of the month, of the daily prices per pound of nonfat dry milk, which average shall be computed by the Director of the Dairy Division as follows:

(1) The prices used shall be the prices (using the midpoint of any price range as one price) of high heat, low heat and Grade A nonfat dry milk, respectively, for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service.

(2) For each week, determine the simple average of the prices reported for the three types of nonfat dry milk. Such average shall be the daily price for the day that such prices are reported and for each preceding work-day until the day such prices were previously reported. A work-day is each Monday through Friday except national holidays.

(3) Add the prices determined in paragraph (c)(2) of this section for the first 15 days of the month and divide by the number of days for which there is a daily price.

(d) *Edible whey price.* "Edible whey price" means the simple average, for the first 15 days of the month, of the daily prices per pound of edible whey powder (nonhygroscopic). The prices used shall be the prices (using the midpoint of any price range as one price) of edible whey powder for the Central States production area, as reported and published weekly by the Dairy Division, Agricultural Marketing Service. The average shall be computed by the Director of the Dairy Division, using the price reported each week as the daily price for that day and for each preceding work-day until the day such price was previously reported. A work-day is each

Monday through Friday, except national holidays.

#### Handler Reports

##### § 1124.30 Reports of receipts and utilization.

On or before the 9th day of each month each handler shall report to the market administrator, in the detail and on forms prescribed by the market administrator, the following information for the preceding month:

(a) Each handler operating a pool plant(s) shall report separately for each pool plant:

(1) The quantities of skim milk and butterfat contained in:

(i) Milk received directly from producers, showing separately any milk of own-farm production;

(ii) Milk received from a cooperative association pursuant to § 1124.9(c);

(iii) Fluid milk products and bulk fluid cream products received from other pool plants showing filled milk separately;

(iv) Other source milk showing filled milk separately; and

(v) Inventories at the beginning and end of the month of fluid milk products and products specified in § 1124.40(b)(1).

(2) The utilization of all skim milk and butterfat required to be reported, including separate statements of quantities in route disposition inside and outside the marketing area.

(b) Each producer-handler shall report:

(1) The quantities of skim milk and butterfat contained in:

(i) Milk of own-farm production;

(ii) Receipts of fluid milk products and fluid cream products from pool plants, showing separately receipts in packaged form and in bulk; and

(iii) Other source milk, showing separately any receipts from another dairy farmer.

(2) As specified in paragraph (a)(2) of this section.

(c) Each cooperative association shall report with respect to milk for which it is the handler pursuant to either § 1124.9(b) or (c):

(1) The quantities of skim milk and butterfat received from producers;

(2) The utilization of skim milk and butterfat for which it is the handler pursuant to § 1124.9(b); and

(3) The quantities of skim milk and butterfat delivered to each pool plant pursuant to § 1124.9(c).

(d) Each handler who operates a partially regulated distributing plant shall report as specified in paragraph (a)(1) and (2) of this section except that receipts from dairy farmers in Grade A milk shall be reported in lieu of those in producer milk. Such report shall include

separate statements, respectively, showing the respective amounts of skim milk and butterfat disposed of as route disposition in the marketing area as Class I milk and the quantity of reconstituted skim milk in fluid milk products disposed of as route disposition in the marketing area.

(e) Each handler who operates an other order plant with route disposition of fluid milk products in the marketing area shall report the quantities of skim milk and butterfat in such disposition.

(f) Each handler who operates an exempt plant or an unregulated supply plant shall report as specified in paragraph (a)(1) and (2) of this section except that receipts from dairy farmers in Grade A milk shall be reported in lieu of those in producer milk.

##### § 1124.31 Payroll reports.

On or before the 22nd day of each month handlers shall report to the market administrator as follows:

(a) Each handler with respect to each of its pool plants and each cooperative association which is a handler pursuant to § 1124.9(b) or (c) shall submit its producer payroll for deliveries (other than own-farm production) in the preceding month which shall show:

(1) The total pounds of milk received from each producer, the pounds of butterfat contained in such milk, and the number of days on which milk was delivered by such producer in such month;

(2) The amount of payment to each producer and cooperative association; and

(3) The nature and amount of any deductions or charges involved in such payments; and

(b) Each handler operating a partially regulated distributing plant who wishes computations pursuant to § 1124.76(a) to be considered in the computation of its obligation pursuant to § 1124.76 shall submit its payroll for deliveries of Grade A milk by dairy farmers which shall show:

(1) The total pounds of milk and the butterfat content thereof received from each dairy farmer;

(2) The amount of payment to each dairy farmer (or to a cooperative association on behalf of such dairy farmer); and

(3) The nature and amount of any deductions or charges involved in such payments.

##### § 1124.32 Other reports.

At such time and in such manner as the market administrator may prescribe, each handler shall report to the market administrator such information in



addition to that required under §§ 1124.30 and 1124.31 as may be requested by the market administrator with respect to milk and milk products (including filled milk) handled by the handler.

#### Classification of Milk

##### § 1124.40 Classes of utilization.

Except as provided in § 1124.42 all skim milk and butterfat required to be reported by a handler pursuant to § 1124.30 shall be classified as follows:

(a) *Class I milk.* Class I milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid milk product, except as otherwise provided in paragraphs (b) and (c) of this section;

(2) In packaged inventory of fluid milk products at the end of the month; and

(3) Not specifically accounted for as Class II or Class III milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat:

(1) Disposed of in the form of a fluid cream product, eggnog, yogurt, and any product containing 6 percent or more non-milk fat (or oil) that resembles a fluid cream product, eggnog, or yogurt, except as otherwise provided in paragraph (c) of this section;

(2) In packaged inventory at the end of the month of the products specified in paragraph (b)(1) of this section;

(3) In all bulk fluid milk products and bulk fluid cream products disposed of or diverted to any commercial food processing establishment, subject to the conditions of § 1124.42(e), at which food products (other than milk products and filled milk) are processed and from which there is no disposition of fluid milk products or fluid cream products other than those received in consumer-type packages; and

(4) Used to produce:

(i) Cottage cheese, lowfat cottage cheese, and dry curd cottage cheese;

(ii) Milkshake and ice milk mixes (or bases) containing 20 percent or more total solids, frozen desserts, and frozen dessert mixes;

(iii) Any concentrated milk product in bulk fluid form other than that specified in paragraph (c)(1)(iv) of this section.

(iv) Plastic cream, frozen cream and anhydrous milkfat.

(v) Custards, puddings, and pancake mixes;

(vi) Formulas especially prepared for infant feeding or dietary use that are packaged in hermetically sealed glass or all-metal containers; and

(vii) Any milk or milk products sterilized and packaged in hermetically sealed metal or glass containers.

(c) *Class III milk.* Class III milk shall be all skim milk and butterfat:

(1) Used to produce:

(i) Cheese (other than cottage cheese, lowfat cottage cheese, and dry curd cottage cheese);

(ii) Butter;

(iii) Any milk product in dry form;

(iv) Any concentrated milk product in bulk fluid form that is used to produce a Class III product;

(v) Evaporated or condensed milk (plain or sweetened) in a consumer-type package and evaporated or condensed skim milk (plain or sweetened) in a consumer-type package; and

(vi) Any product not otherwise specified in this section;

(2) In inventory at the end of the month of fluid milk products in bulk form and products specified in paragraph (b)(1) of this section in bulk form;

(3) In fluid milk products and products specified in paragraph (b)(1) of this section that are disposed of by a handler for animal feed;

(4) In fluid milk products and products specified in paragraph (b)(1) of this section that are dumped by a handler if the market administrator is notified of such dumping in advance and is given the opportunity to verify such disposition;

(5) In skim milk in any modified fluid milk product that is in excess of the quantity of skim milk in such product that was included within the fluid milk product definition pursuant to § 1124.15; and

(6) In shrinkage assigned pursuant to § 1125.41(a) to the receipts specified in § 1124.41(a)(2) and in shrinkage specified in § 1124.41 (b) and (c).

##### § 1124.41 Shrinkage.

For purposes of classifying all skim milk and butterfat to be reported by a handler pursuant to § 1124.30, the market administrator shall determine the following:

(a) The pro rata assignment of shrinkage of skim milk and butterfat, respectively, at each pool plant to the respective quantities of skim milk and butterfat:

(1) In the receipts specified in paragraph (b) (1) through (6) of this section on which shrinkage is allowed pursuant to such paragraph; and

(2) In other source milk not specified in paragraph (b) (1) through (6) of this section which was received in the form of a bulk fluid milk product or a bulk fluid cream product.

(b) The shrinkage of skim milk and butterfat, respectively, assigned pursuant to paragraph (a) of this section to the receipts specified in paragraph (a)(1) of this section that is not in excess of:

(1) Two percent of the skim milk and butterfat, respectively, in producer milk (excluding milk diverted by the plant operator to another plant or pursuant to § 1124.40(b)(3) and milk received from a handler described in § 1124.9(c));

(2) Plus 1.5 percent of the skim milk and butterfat, respectively, in milk received from a handler described in § 1124.9(c) and in milk diverted to such plant by the operator of another pool plant, except that if the operator of the plant to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be 2 percent;

(3) Plus 0.5 percent of the skim milk and butterfat, respectively, in producer milk diverted by the plant operator to another plant or pursuant to § 1124.40(b)(3), except that if the operator of the plant or establishment to which the milk is delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph shall be zero;

(4) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other pool plants;

(5) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received by transfer from other order plants, excluding the quantity for which Class II or Class III classification is requested by the operator of both plants;

(6) Plus 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products received from unregulated supply plants, excluding the quantity for which Class II or Class III classification is requested by the handler; and

(7) Less 1.5 percent of the skim milk and butterfat, respectively, in bulk fluid milk products transferred to other plants that is not in excess of the respective amounts of skim milk and butterfat to which percentages are applied in paragraph (b) (1), (2), (4), (5), and (6) of this section.

(c) The quantity of skim milk and butterfat, respectively, in shrinkage of milk from producers for which a cooperative association is the handler pursuant to § 1124.9 (b) or (c), but not in excess of 0.5 percent of the skim milk and butterfat, respectively, in such milk. If the operator of a plant or a commercial food processing establishment pursuant to § 1124.40(b)(3) to which the milk is

delivered purchases such milk on the basis of weights determined from its measurement at the farm and butterfat tests determined from farm bulk tank samples, the applicable percentage under this paragraph for the cooperative association shall be zero.

##### § 1124.42 Classification of transfers and diversions.

(a) *Transfers and diversions to pool plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to another pool plant shall be classified as Class I milk unless the operators of both plants request the same classification in another class. The classification of such transfers and diversions shall be subject to the following conditions:

(1) The skim milk or butterfat classified in each class shall be limited to the amount of skim milk and butterfat, respectively, remaining in such class at the receiving handler's plant after the computation pursuant to § 1124.44(a)(13) and the corresponding step of § 1124.44(b);

(2) If the transferor-plant or divertor-plant received during the month other source milk to be allocated pursuant to § 1124.44(a)(8) or the corresponding step of § 1124.44(b), the skim milk or butterfat so transferred shall be classified so as to allocate the least possible Class I utilization to such other source milk; and

(3) If the transferor-handler or divertor-handler received during the month other source milk to be allocated pursuant to § 1124.44(a) (12) or (13) or the corresponding steps of § 1124.44(b), the skim milk or butterfat so transferred or diverted up to the total of the skim milk and butterfat, respectively, in such receipts of other source milk, shall not be classified as Class I milk to a greater extent than would be the case if the other source milk had been received at the transferee-plant or divortee-plant.

(b) *Transfers and diversions to other order plants.* Skim milk or butterfat transferred or diverted in the form of a fluid milk product or a bulk fluid cream product from a pool plant to a nonpool plant shall be classified in the following manner. Such classification shall apply only to the skim milk or butterfat that is in excess of any receipts at the pool plant from the other order plant of skim milk and butterfat, respectively, in fluid milk products and bulk fluid cream products, respectively, that are in the same category as described in paragraph (b) (1), (2), or (3) of this section:

(1) If transferred as packaged fluid milk products, classification shall be in

the classes to which allocated as a fluid milk product under the other order;

(2) If transferred in bulk form, classification shall be in the classes to which allocated under the other order (including allocation under the conditions set forth in paragraph (b)(3) of this section);

(3) If the operators of both plants so request in their reports of receipts and utilization filed with their respective market administrators, transfers or diversions in bulk form shall be classified as Class II or Class III milk to the extent of such utilization available for such classification pursuant to the allocation provisions of the other order;

(4) If information concerning the classes to which such transfers or diversions were allocated under the other order is not available to the market administrator for the purpose of establishing classification under this paragraph, classification shall be as Class I, subject to adjustments when such information is available;

(5) For purposes of this paragraph, if the other order provides for a different number of classes of utilization than is provided for under this part, skim milk or butterfat allocated to a class consisting primarily of fluid milk products shall be classified as Class I milk, and skim milk or butterfat allocated to the other classes shall be classified as Class III milk; and

(6) If the form in which any fluid milk product that is transferred to an other order plant is not defined as a fluid milk product under such other order, classification under this paragraph shall be in accordance with the provisions of § 1124.40.

(c) *Transferor and diversions to producer-handlers.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a producer-handler under this or any other Federal order shall be classified:

(1) As Class I milk if transferred or diverted in the form of a fluid milk product; and

(2) In accordance with the utilization assigned to it by the market administrator, if transferred in the form of a bulk fluid cream product. For this purpose, the transferee's utilization of skim milk and butterfat in each class, in series beginning with Class III, shall be assigned to the extent possible to the transferee's receipts of skim milk and butterfat, respectively, in bulk fluid cream products, pro rata to each source.

(d) *Transfers and diversions to other nonpool plants.* Skim milk or butterfat transferred or diverted in the following forms from a pool plant to a nonpool plant that is not an other order plant or

a producer-handler plant shall be classified:

(1) As Class I milk, if transferred in the form of a packaged fluid milk product; and

(2) As Class I milk, if transferred or diverted in the form of a bulk fluid milk product or a bulk fluid cream product, unless the following conditions apply:

(i) If the conditions described in paragraph (d)(2)(i) (a) and (b) of this section are met, transfers or diversions in bulk form shall be classified on the basis of the assignment of the nonpool plant's utilization to its receipts as set forth in paragraph (d)(2) (ii) through (viii) of this section:

(A) The transferor-handler or divertor-handler claims such classification in its report of receipts and utilization filed pursuant to § 1124.30 for the month within which such transaction occurred; and

(B) The nonpool plant operator maintains books and records showing the utilization of all skim milk and butterfat received at such plant which are made available for verification purposes if requested by the market administrator;

(ii) Route disposition in the marketing area of each Federal milk order from the nonpool plant and transfers of packaged fluid milk products from such nonpool plant to plants fully regulated thereunder shall be assigned to the extent possible in the following sequence:

(A) Pro rata to receipts of packaged fluid milk products at such nonpool plant from pool plants;

(B) Pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from other order plants;

(C) Pro rata to receipts of bulk fluid milk products at such nonpool plant from pool plants; and

(D) Pro rata to any remaining unassigned receipts of bulk fluid milk products at such nonpool plant from other order plants;

(iii) Any remaining Class I disposition of packaged fluid milk products from the nonpool plant shall be assigned to the extent possible pro rata to any remaining unassigned receipts of packaged fluid milk products at such nonpool plant from pool plants and other order plants;

(iv) Transfers of bulk fluid milk products from the nonpool plant to a plant fully regulated under any Federal milk order, to the extent that such transfers to the regulated plant exceed receipts of fluid milk products from such plant and are allocated to Class I at the transferee-plant, shall be assigned to the

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extent possible in the following sequence:

(A) Pro rata to receipts of fluid milk products at such nonpool plant from pool plants; and

(B) Pro rata to any remaining unassigned receipts of fluid milk products at such nonpool plant from other order plants;

(v) Any remaining unassigned Class I disposition from the nonpool plant shall be assigned to the extent possible in the following sequence:

(A) To such nonpool plant's receipts from dairy farmers who the market administrator determines constitute regular sources of Grade A milk for such nonpool plant; and

(B) To such nonpool plant's receipts of Grade A milk from plants not fully regulated under any Federal milk order which the market administrator determines constitute regular sources of Grade A milk for such nonpool plant;

(vi) Any remaining unassigned receipts of bulk fluid milk products at the nonpool plant from pool plants and other order plants shall be assigned pro rata among such plants, to the extent possible first to any remaining Class I utilization, then to Class III utilization, and then to Class II utilization at such nonpool plant;

(vii) Receipts of bulk fluid cream products at the nonpool plant from pool plants and other order plants shall be assigned, pro rata among such plants, to the extent possible first to any remaining Class III utilization, then to any remaining Class II utilization, and then to Class I utilization at such nonpool plant; and

(viii) In determining the nonpool plant's utilization for purposes of this paragraph, any fluid milk products and bulk fluid cream products transferred from such nonpool plant to a plant not fully regulated under any Federal milk order shall be classified on the basis of the second plant's utilization using the same assignment priorities at the second plant that are set forth in this paragraph.

(e) *Transfers and diversions to a commercial food processing establishment.* Skim milk and butterfat transferred or diverted to a commercial food processing establishment shall be classified:

(1) Subject to the provisions of § 1124.13(c) and, except as provided in paragraph (e)(2) of this section, as Class II milk; or

(2) Transfers or diversions shall be classified as Class I milk unless the market administrator is permitted to audit the records of the commercial food processing establishment for the purpose of verification.

#### § 1124.43 General classification rules.

In determining the classification of producer milk pursuant to § 1124.44, the following rules shall apply:

(a) Each month the market administrator shall correct for mathematical and other obvious errors all reports filed pursuant to § 1124.30 and shall compute separately for each pool plant and for each cooperative association with respect to milk for which it is the handler pursuant to § 1124.9 (b) or (c) the pounds of skim milk and butterfat, respectively, in each class in accordance with §§ 1124.40, 1124.41, and 1124.42;

(b) If any of the water contained in the milk which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk in such product that are to be considered under this part as used or disposed of by the handler shall be an amount equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids;

(c) The classification of producer milk for which a cooperative association is the handler pursuant to § 1124.9 (b) or (c) shall be determined separately from the operations of any pool plant operated by such cooperative association; and

(d) For classification purposes, pursuant to §§ 1124.40 through 1124.45, butterfat in skim milk, either disposed of to others or used in the manufacture of milk products shall be accounted for at a butterfat content of 0.060 percent unless the handler has adequate records of the actual butterfat content of such skim milk.

#### § 1124.44 Classification of producer milk.

For each month the market administrator shall determine the classification of producer milk of each handler described in § 1124.9(a) for each of the handler's pool plants separately and of each handler described in § 1124.9 (b) or (c) by allocating the handler's receipts of skim milk and butterfat to its utilization as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class III the pounds of skim milk in shrinkage specified in § 1124.41(b);

(2) Subtract from the total pounds of skim milk in Class I the pounds of skim milk in receipts of packaged fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk disposed of to such plant by handlers fully regulated under any federal milk order is classified and priced as Class I milk and is not used as

an offset for any other payment obligation under any order;

(3) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in fluid milk products received in packaged form from an other order plant, except that to be subtracted pursuant to paragraph (a)(8)(vi) of this section, as follows:

(i) From Class III milk, the lesser of the pounds remaining or 2 percent of such receipts; and

(ii) From Class I milk, the remainder of such receipts;

(4) Subtract from the remaining pounds of skim milk in Class I the pounds of skim milk in packaged fluid milk products in inventory at the beginning of the month. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(5) Subtract from the pounds of skim milk in Class II the pounds of skim milk in products specified in § 1124.40(b)(1) that were received in packaged form from other plants, but not in excess of the pounds of skim milk remaining in Class II;

(6) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in products specified in § 1124.40(b)(1) that were in inventory at the beginning of the month in packaged form, but not in excess of the pounds of skim milk remaining in Class II. This paragraph shall apply only if the pool plant was subject to the provisions of this paragraph or comparable provisions of another Federal milk order in the immediately preceding month;

(7) Subtract from the remaining pounds of skim milk in Class II the pounds of skim milk in other source milk (except that received in the form of a fluid milk product or a fluid cream product) that is used to produce, or added to any product specified in § 1124.40(b) but not in excess of the pounds of skim milk remaining in Class II;

(8) Subtract in the order specified below from the pounds of skim milk remaining in each class, in series beginning with Class III, the pounds of skim milk in each of the following:

(i) Other source milk (except that received in the form of a fluid milk product) and, if paragraph (a)(6) of this section applies, packaged inventory at the beginning of the month of products specified in § 1124.40(b)(1) that was not subtracted pursuant to paragraph (a) (5), (6), and (7) of this section;

(ii) Receipts of fluid milk products (except filled milk) for which Grade A certification is not established;

(iii) Receipts of fluid milk products from unidentified sources;

(iv) Receipts of fluid milk products received or acquired for distribution from a producer-handler as defined under this or any other Federal Order;

(v) Receipts of reconstituted skim milk in filled milk from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) of this section;

(vi) Receipts of reconstituted skim milk in filled milk from an other order plant that is regulated under any Federal milk order providing for individual-handler pooling, to the extent that reconstituted skim milk is allocated to Class I at the transferor-plant; and

(vii) Receipts of fluid milk products from a person described in § 1124.12(b)(5);

(9) Subtract in the order specified below from the pounds of skim milk remaining in Class II and Class III, in sequence beginning with Class III:

(i) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2) and (8)(v) of this section which the handler requests a classification other than Class I, but not in excess of pounds of skim milk remaining in Class II and Class III combined;

(ii) The pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraph (a)(2), (8)(v), and (9)(i) of this section which are in excess of the pounds of skim milk determined pursuant to paragraph (a)(9)(ii) (c) through (c) of this section. Should the pounds of skim milk to be subtracted from Class II and Class III combined exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount;

(A) Multiply by 1.25 the sum of the pounds of skim milk remaining in Class I at this allocation step at all pool plants of the handler (excluding any duplication of Class I utilization

resulting from reported Class I transfers between pool plants of the handler);

(B) Subtract from the above result the sum of the pounds of skim milk in receipts at all pool plants of the handler of producer milk, fluid milk products from pool plants of other handlers, and bulk fluid milk products from other order plants that were not subtracted pursuant to paragraph (a)(8)(vi) of this section; and

(C) Multiply any plus quantity resulting above by the percentages that the receipts of skim milk in fluid milk products from unregulated supply plants that remain at this pool plant are of all such receipts remaining at this allocation step at all pool plants of the handler; and

(iii) The pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraph (a)(8)(vi) of this section, if Class II or Class III classification is requested by the operator of the other order plant and the handler but not in excess of the pounds of skim milk remaining in Class II and Class III combined;

(10) Subtract from the pounds of skim milk remaining in each class, in series, beginning with Class III, the pounds of skim milk in fluid milk products and products specified in § 1124.40(b)(1) in inventory at the beginning of the month that were not subtracted pursuant to paragraph (a) (4), (6), and (9)(i) of this section;

(11) Add to the remaining pounds of skim milk in Class III the pounds of skim milk subtracted pursuant to paragraph (a)(1) of this section;

(12) Subject to the provisions of paragraph (a)(12) (i) and (ii) of this section, subtract from the pounds of skim milk remaining in each class at the plant, pro rata to the total pounds of skim milk remaining in Class I and in Class II and Class III combined at this allocation step at all pool plants of the handler (excluding any duplication of utilization in each class resulting from transfers between pool plants of the handler), with the quantity pro rated, to Class II and Class III combined being subtracted first from Class III and then from Class II, the pounds of skim milk in receipts of fluid milk products from an unregulated supply plant that were not subtracted pursuant to paragraphs (a)(2), (8)(v), (9) (i) and (ii) of this section and that were not offset by transfers or diversions of fluid milk products to the same unregulated supply plant from which fluid milk products to be allocated at this step were received;

(i) Should the pounds of skim milk to be subtracted from Class II and Class III combined pursuant to this paragraph exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount; and

(ii) Should the pounds of skim milk to be subtracted from Class I pursuant to this paragraph exceed the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount, beginning with the nearest plant at which Class I utilization is available;

(13) Subtract in the manner specified below from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of bulk fluid milk products from an other order plant that are in excess of bulk fluid milk products transferred or diverted to such plant and that were not subtracted pursuant to paragraphs (a)(8)(vi) and (9)(iii) of this section:

(i) Subject to the provisions of paragraphs (a)(13) (ii), (iii), and (iv) of this section, such subtraction shall be pro rata to the pounds of skim milk in Class I and in Class II and Class III combined, with the quantity prorated to Class II and Class III combined being subtracted first from Class III and then from Class II, with respect to whichever of the following quantities represents the lower proportions of Class I milk:

(A) The estimated utilization of skim milk of all handlers in each class as announced for the month pursuant to § 1124.45(a); or

(B) The total pounds of skim milk remaining in each class at this allocation step at all pool plants of the handler (excluding any duplication of



utilization in each class resulting from transfers between pool plants of the handler);

(ii) Should the proration pursuant to paragraph (a)(13)(i) of this section result in the total pounds of skim milk at all pool plants of the handler that are to be subtracted at this allocation step from Class II and Class III combined exceeding the pounds of skim milk remaining in Class II and Class III at all such plants, the pounds of such excess shall be subtracted from the pounds of skim milk remaining in Class I after such proration at the pool plants at which such other source milk was received;

(iii) Except as provided in paragraph (a)(13)(ii) of this section, should the computations pursuant to paragraph (a)(13)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class II and Class III combined that exceed the pounds of skim milk remaining in such classes, the pounds of skim milk in Class II and Class III combined shall be increased (increasing as necessary Class III and then Class II to the extent of available utilization in such classes at the nearest other pool plant of the handler, and then at each successively more distant pool plant of the handler) by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class I shall be decreased by a like amount. In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plant(s) shall be adjusted in the reverse direction by a like amount; and

(iv) Except as provided in paragraph (a)(13)(ii) of this section, should the computations pursuant to paragraph (a)(13)(i) or (ii) of this section result in a quantity of skim milk to be subtracted from Class I that exceeds the pounds of skim milk remaining in such class, the pounds of skim milk in Class I shall be increased by an amount equal to such excess quantity to be subtracted, and the pounds of skim milk in Class II and Class III combined shall be decreased by a like amount (decreasing as necessary Class III and then Class II). In such case, the pounds of skim milk remaining in each class at this allocation step at the handler's other pool plants shall be adjusted in the reverse direction by a like amount beginning with the nearest plant at which Class I utilization is available;

(14) Subtract from the pounds of skim milk remaining in each class the pounds of skim milk in receipts of fluid milk products and bulk fluid cream products from another pool plant according to the classification of such products pursuant to § 1124.42(a); and

(15) If the total pounds of skim milk remaining in all classes exceed the pounds of skim milk in producer milk, subtract such excess from the pounds of skim milk remaining in each class in series beginning with Class III. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the procedure outlined for skim milk in paragraph (a) of this section; and

(c) The quantity of producer milk in each class shall be the combined pounds of skim milk and butterfat remaining in each class after the computations pursuant to paragraph (a)(15) of this section and the corresponding step of paragraph (b) of this section.

#### § 1124.45 Market administrator's reports and announcements concerning classification.

The market administrator shall make the following reports and announcements concerning classification:

(a) Whenever required for the purpose of allocating receipts from other order plants pursuant to § 1124.44(a)(13) and the corresponding step of § 1124.44(b), estimate and publicly announce the utilization (to the nearest whole percentage) in each class during the month of skim milk and butterfat, respectively, in producer milk of all handlers. Such estimate shall be based upon the most current available data and shall be final for such purpose.

(b) Report to the market administrator of the other order, as soon as possible after the report of receipts and utilization for the month is received from a handler who has received fluid milk products or bulk fluid cream products from another order plant, the class to which such receipts are allocated pursuant to § 1124.44 on the basis of such report, and thereafter, any change in such allocation required to correct errors disclosed in the verification of such report.

(c) Furnish to each handler operating a pool plant who has shipped fluid milk products or bulk fluid cream products to an other order plant the class to which such shipments were allocated by the market administrator of the other order on the basis of the report by the receiving handler, and, as necessary, any changes in such allocation arising from the verification of such report.

(d) On or before the 14th day after the end of each month, report to each cooperative association which so requests the amount and class utilization of producer milk delivered by members of such cooperative association to each handler receiving

such milk. For the purpose of this report the milk so received shall be prorated to each class in accordance with the total utilization of producer milk by such handler.

#### Class Prices

##### § 1124.50 Class prices.

Subject to the provisions of § 1124.52, the class prices for the month, per hundredweight of milk, shall be as follows:

(a) *Class I price.* The Class I price shall be the basic formula price for the second preceding month plus \$1.90.

(b) *Class II price.* A tentative Class II price shall be computed by the Director of the Dairy Division and transmitted to the market administrator on or before the 15th day of the preceding month. The tentative Class II price shall be the basic Class II formula price for the month plus the amount that the value computed pursuant to paragraph (b)(1) of this section exceeds the value computed pursuant to paragraph (b)(2) of this section, except that in no event shall the final Class II price be less than the Class III price. If the Class III price for the month is computed pursuant to paragraph (c) (1) through (3) of this section, the final Class II price shall be reduced by the amount that the Class III price is less than the basic formula price to the extent such reduction does not cause the Class II price to be less than the Class III price.

(1) Determine for the most recent 12-month period the simple average (rounded to the nearest cent) of the basic formula prices computed pursuant to § 1124.51 and add 25 cents; and

(2) Determine for the same 12-month period as specified in paragraph (b)(1) of this section the simple average (rounded to the nearest cent) of the basic Class II formula prices computed pursuant to § 1124.51a.

(c) *Class III price.* The Class III price shall be the basic formula price for the month but not to exceed the price computed as follows:

(1) Multiply the Chicago butter price pursuant to § 1124.51 by 4.2;

(2) Multiply by 8.2 the weighted average of carlot prices per pound for nonfat dry milk solids, spray process, for human consumption, f.o.b. manufacturing plants in the Chicago area, as published for the period from the 26th day of the immediately preceding month through the 25th day of the current month by the Department; and

(3) From the sum of the results arrived at under paragraph (c) (1) and (2) of this

section subtract 48 cents and round to the nearest cent.

##### § 1124.51 Basic formula price.

The "basic formula price" shall be the average price per hundredweight for manufacturing grade milk, f.o.b. plants in Minnesota and Wisconsin, as reported by the Department for the month, adjusted to 3.5 percent butterfat basis and rounded to the nearest cent. For such adjustment, the butterfat differential (rounded to the nearest one-tenth cent) per one-tenth percent butterfat shall be 0.12 times the simple average of the wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk butter per pound at Chicago, as reported by the Department for the month.

##### § 1124.51a Basic Class II formula price.

The "basic Class II formula price" for the month shall be the basic formula price determined pursuant to § 1124.51 for the second preceding month plus or minus the amount computed pursuant to paragraphs (a) through (d) of this section:

(a) The gross values per hundredweight of milk used to manufacture cheddar cheese and butter-nonfat dry milk shall be computed, using price data determined pursuant to § 1124.19 and yield factors in effect under the Dairy Price Support Program authorized by the Agricultural Act of 1949, as amended, for the first 15 days of the preceding month and, separately, for the first 15 days of the second preceding month as follows:

(1) The gross value of milk used to manufacture cheddar cheese shall be the sum of the following computations:

(i) Multiply the cheddar cheese price by the yield factor used under the Price Support Program for cheddar cheese;

(ii) Multiply the butter price by the yield factor used under the Price Support Program for determining the butterfat component of the whey value in the cheese price computation; and

(iii) Subtract from the edible whey price the processing cost used under the Price Support Program for edible whey and multiply any positive difference by the yield factor used under the Price Support Program for edible whey.

(2) The gross value of milk used to manufacture butter-nonfat dry milk shall be the sum of the following computations:

(i) Multiply the butter price by the yield factor used under the Price Support Program for butter; and

(ii) Multiply the nonfat dry milk price by the yield factor used under the Price Support Program for nonfat dry milk.

(b) Determine the amounts by which the gross value per hundredweight of milk used to manufacture cheddar cheese and the gross value per hundredweight of milk used to manufacture butter-nonfat dry milk for the first 15 days of the preceding month exceed or are less than the respective gross values for the first 15 days of the second preceding month.

(c) Compute weighting factors to be applied to the changes in gross values determined pursuant to paragraph (b) of this section by determining the relative proportion that the data included in each of the following paragraphs is of the total of the data represented in paragraphs (c) (1) and (2) of this section:

(1) Combine the total American cheese production for the States of Minnesota and Wisconsin, as reported by the Statistical Reporting Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for cheddar cheese to determine the quantity of milk used in the production of American cheddar cheese; and

(2) Combine the total nonfat dry milk production for the States of Minnesota and Wisconsin, as reported by the Statistical Reporting Service of the Department for the most recent preceding period, and divide by the yield factor used under the Price Support Program for nonfat dry milk to determine the quantity of milk used in the production of butter-nonfat dry milk.

(d) Compute a weighted average of the changes in gross values per hundredweight of milk determined pursuant to paragraph (b) of this section in accordance with the relative proportions of milk determined pursuant to paragraph (c) of this section.

##### § 1124.52 Plant location adjustments for handlers.

(a) The following zones are defined for the purpose of determining location adjustments:

(1) Zone 1 shall include:

(i) The Idaho counties of Benewah, Bonner, Boundary, Kootenai, Latah, and Shoshone;

(ii) The Oregon counties of Benton, Clackamas, Clatsop, Columbia, Douglas, Hood River, Lane, Lincoln, Linn, Marion, Multnomah, Polk, Tillamook, Washington, and Yamhill;

(iii) The Washington counties of Clark, Cowlitz, Ferry, Grays Harbor, Island, King, Kitsap, Lewis, Lincoln, Mason, Pacific, Pend Oreille, Pierce, Skagit, Snohomish, Skamania, Spokane, Stevens, Thurston, Wahkiakum, and Whitman.

(2) Zone 2 shall include: the Washington county of Whatcom;

(3) Zone 3 shall include: the Oregon counties of Coos, Jackson, and Josephine;

(4) Zone 4 shall include:

(i) The Idaho counties of Lewis and Nez Perce;

(ii) The Oregon counties of Crook, Deschutes, Gilliam, Jefferson, Klamath, Lake, Morrow, Sherman, Umatilla, Wallowa, Wasco and Wheeler;

(iii) The Washington counties of Adams, Asotin, Benton, Chelan, Clallam, Columbia, Douglas, Franklin, Garfield, Grant, Jefferson, Kittitas, Klickitat, Okanogan, San Juan, Walla Walla and Yakima.

(b) For milk received at a plant from producers and which is classified as Class I milk, the price specified in § 1124.50(a) shall be adjusted by the amount stated in paragraphs (b) (1) and (2) of this section for the location of such plant:

(1) For a plant located within one of the zones described in paragraphs (a) (1) through (4) of this section, the adjustment shall be as follows:

	Adjustment per Hundredweight
Zone 1	No adjustment.
Zone 2	Minus 6 cents.
Zone 3	Minus 8 cents.
Zone 4	Minus 15 cents.

(2) For a plant located outside of one of the zones described in paragraphs (a) (1) through (4) of this section, the adjustment shall be minus 1.5 cents per hundredweight for each 10 miles or fraction thereof by shortest hard-surfaced highway distance that the plant is located from the nearer of the county courthouse in Spokane, Washington, the Multnomah County Courthouse in Portland, Oregon, or the city hall in Eugene, Oregon;

(c) The Class I price applicable to other source milk shall be adjusted at the rates set forth in paragraph (b) of this section, except that the price when adjusted for location shall not be less than the Class II price.

(d) For fluid milk products transferred in bulk from a pool plant at another pool plant at which a higher Class I price applies and which is classified as Class I, the price shall be the Class I price applicable at the location of the transferee-plant subject to a location adjustment credit for the transferor-plant determined by the market administrator as follows:

(1) Subtract from the pounds of Class I remaining at the transferee-plant after



the computations pursuant to § 1124.44 (a)(13) and (b) the pounds of packaged fluid milk products from other pool plants;

(2) Subtract the pounds of bulk fluid milk products received at the transferee-plant from the following sources:

(i) Producers;

(ii) Handlers described in § 1124.9(c); and

(iii) Pool plants at which the same or a higher Class I price applies.

(3) Assign any pounds remaining to transferor-plants in sequence beginning with the plant at which the least adjustment would apply; and

(4) Multiply the pounds so computed for each transferor-plant by the difference in the Class I prices applicable at the transferee-plant and transferor-plant.

#### § 1124.53 Announcement of class prices.

The market administrator shall announce publicly on or before the fifth day of each month the Class I price for the following month, the Class III price for the preceding month and the final Class II price for the preceding month; and on or before the 15th day of each month the tentative Class II price for the following month.

#### § 1124.54 Equivalent price.

If for any reason a price or pricing constituent required by this part for computing class prices or for other purposes is not available as prescribed in this part, the market administrator shall use a price or pricing constituent determined by the Secretary to be equivalent to the pricing constituent that is required.

#### Uniform Price

#### § 1124.60 Handler's value of milk for computing uniform price.

For the purpose of computing the uniform price, the market administrator shall determine for each month the value of milk of each handler with respect to each of its pool plants and of each handler described in § 1124.9 (b) and (c) with respect to milk that was not received at a pool plant as follows:

(a) Multiply the quantity of producer milk in each class, as computed pursuant to § 1124.44(c), by the applicable class prices (adjusted pursuant to § 1124.52) and add together the resulting amounts;

(b) Add the amounts obtained from multiplying the pounds of overage deducted from each class pursuant to § 1124.44(a)(15) and the corresponding step of § 1124.44(b) by the class prices applicable at the location of the pool plant, as adjusted by the butterfat differential specified in § 1124.74. In

case overage occurs in a nonpool plant located on the same premises as a pool plant, such overage shall be prorated between the quantity transferred from the pool plant and other source milk in such nonpool plant. In such case, add an amount equal to the value of overage prorated to the quantity transferred to the nonpool plant at the class price applicable at the pool plant;

(c) Add an amount equal to the difference between the value at the Class I price applicable at the pool plant and the value at the Class III price, with respect to skim milk and butterfat in other source milk subtracted from Class I pursuant to § 1124.44(a)(8) (i) through (iv) and (vi) and the corresponding step of § 1124.44(b) excluding receipts of bulk fluid cream products from an other order plant;

(d) Add the amount obtained from multiplying the difference between the Class I price applicable at the location of the transferor-plant and the Class III price by the hundredweight of skim milk and butterfat subtracted from Class I pursuant to § 1124.44(a)(8) (v) and (vi) and the corresponding step of § 1124.44(b);

(e) Add the amount obtained from multiplying the difference between the Class III price for the preceding month and the Class I price adjusted pursuant to § 1124.52, or the Class II price as the case may be, for the current month by the hundredweight of skim milk and butterfat subtracted from Class I and Class II pursuant to § 1124.44(a)(10) and the corresponding step of § 1124.44(b);

(f) Add an amount equal to the value at the Class I price, adjusted for location of the nearest nonpool plant(s) from which an equivalent volume was received, with respect to skim milk and butterfat subtracted from Class I pursuant to § 1124.44(a)(12) and the corresponding step of § 1124.44(b), excluding such skim milk or butterfat in bulk receipts of fluid milk products from an unregulated supply plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such plant by a handler fully regulated under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any payment obligation under this or any other order; and

(g) Add or subtract as the case may be, the amount necessary to correct errors as disclosed by the verification of reports of such handler of the handler's receipts and utilization of skim milk and butterfat in previous months for which payment has not been made.

#### § 1124.61 Computation of uniform price.

For each month the market administrator shall compute the "uniform price" per hundredweight for milk of 3.5 percent butterfat content received from producers as follows:

(a) Combine into one total the values computed pursuant to § 1124.60 for all handlers who filed the reports prescribed by § 1124.30 for the month and who made the payments pursuant to § 1124.71 for the preceding month;

(b) Add the aggregate of all minus location adjustments computed pursuant to § 1124.75;

(c) Add an amount equal to not less than one-half of the unobligated balance in the producer-settlement fund;

(d) Divide the resulting amount by the sum of the following for all handlers included in these computations:

(1) The total hundredweight of producer milk; and

(2) The total hundredweight for which a value is computed pursuant to § 1124.60(f); and

(e) Subtract not less than 4 cents nor more than 5 cents per hundredweight. The result shall be the "uniform price" for milk received from producers.

#### § 1124.62 Announcement of uniform price and butterfat differential.

The market administrator shall announce publicly on or before:

(a) The fifth day after the end of each month the butterfat differential for such month; and

(b) The 14th day after the end of each month the uniform price for such month.

#### Payments for Milk

#### § 1124.70 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund," into which shall be deposited all payments made by handlers pursuant to §§ 1124.71 and 1124.76 and out of which shall be made all payments to handlers pursuant to § 1124.72. However, the market administrator shall offset the payment due to a handler from such fund against payments due from such handler.

#### § 1124.71 Payments to the producer-settlement fund.

(a) On or before the 18th day after the end of the month during which the skim milk and butterfat were received each handler shall pay to the market administrator the amount, if any, by which the total amount specified in paragraph (a)(1) of this section exceeds the total amount specified in paragraph (a)(2) of this section:

(1) The sum of:

(i) The total value of milk of the handler for such month as determined pursuant to § 1124.60; and

(ii) For a cooperative association handler, the amount due from other handlers pursuant to § 1124.73(d) but without adjustment for butterfat;

(2) The sum of:

(i) The value of milk received by such handler from producers at the applicable uniform price pursuant to § 1124.73(a)(2) but without adjustments for butterfat;

(ii) The amount to be paid to cooperative associations pursuant to § 1124.73(d) but without adjustment for butterfat; and

(iii) The value at the uniform price for all skim milk and butterfat applicable at the location of the plant(s) from which received (not to be less than the value at the Class III price) with respect to other source milk for which a value is computed pursuant to § 1124.60(f); and

(b) On or before the 25th day after the end of the month, each handler operating a plant specified in § 1124.7(d) (2) and (3), if such plant is subject to the classification and pricing provisions of another order which provides for individual handler pooling, shall pay to the market administrator for the producer-settlement fund an amount computed as follows:

(1) Determine the quantity of reconstituted skim milk in filled milk disposed of as route disposition in the marketing area which was allocated to Class I at such other order plant. If reconstituted skim milk in filled milk is disposed of from such plant as route disposition in the marketing areas regulated by two or more market pool orders, the reconstituted skim milk assigned to Class I shall be prorated according to such disposition in each area.

(2) Compute the value of the quantity assigned in paragraph (b)(1) of this section to Class I disposition in this area, at the Class I price under this part applicable at the location of the other order plant (but not to be less than the Class III price) and subtract its value at the Class III price.

(b) The payments required in paragraph (a) of this section shall be made, upon request, to a cooperative association qualified under § 1124.18, or its duly authorized agent, with respect to milk received from each producer who has given such association authorization by contract or by other written instrument to collect the proceeds from the sale of the producer's milk, and any payment made pursuant to this paragraph shall be made on or before 2 days prior to the dates specified in paragraph (a) of this section.

(c) Each handler shall pay to each cooperative association or its duly authorized agent which operates a pool

#### § 1124.72 Payments from the producer-settlement fund.

On or before the 18th day after the end of the month during which the skim milk and butterfat were received, the market administrator shall pay to each handler the amount, if any, by which the amount computed pursuant to § 1124.71(a)(2) exceeds the amount computed pursuant to § 1124.71(a)(1), and less any unpaid obligations of such handler to the market administrator pursuant to §§ 1124.71(a), 1124.77, 1124.85, and 1124.86. However, if the

balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available.

#### § 1124.73 Payments to producers and to cooperative associations.

(a) Each handler shall make payments to each producer for milk received from such producer during the month:

(1) On or before the last day of the month to each producer who had not discontinued shipping milk to such handler before the 18th day of the month, at not less than the Class III price for the preceding month per hundredweight of milk received during the first 15 days of the month, less proper deductions authorized in writing by such producer; and

(2) On or before the 19th day after the end of each month for milk received from such producers during such month:

(i) At not less than the uniform price for the quantity of milk received, adjusted by the butterfat differential pursuant to § 1124.74 and by any location adjustments applicable under § 1124.75;

(ii) Minus payments made pursuant to paragraph (a)(1) of this section. However, if by such date such handler has not received full payment for such month pursuant to § 1124.72, the handler shall not be deemed to be in violation of this paragraph if the handler reduced uniformly for all producers the payments per hundredweight pursuant to this paragraph by a total amount not in excess of the reduction in payment from the Market Administrator; however, the handler shall make such balance of payment uniformly to those producers to whom it is due on or before the date for making payments pursuant to this paragraph next following that on which such balance of payments is received from the market administrator.

(b) The payments required in paragraph (a) of this section shall be made, upon request, to a cooperative association qualified under § 1124.18, or its duly authorized agent, with respect to milk received from each producer who has given such association authorization by contract or by other written instrument to collect the proceeds from the sale of the producer's milk, and any payment made pursuant to this paragraph shall be made on or before 2 days prior to the dates specified in paragraph (a) of this section.

(c) Each handler shall pay to each cooperative association or its duly authorized agent which operates a pool

plant for skim milk and butterfat received from such plant:

(1) On or before the 2nd day prior to the date specified in paragraph (a)(1) of this section for skim milk and butterfat received during the first 15 days of that month at not less than the Class III price for the preceding month; and

(2) On or before the 15th day after the end of such month, an amount of money computed by multiplying the total pounds of such skim milk and butterfat in each class pursuant to § 1124.42(a) by the class price adjusted by the butterfat differential and taking into account any location adjustments as provided by § 1124.52 applicable at the pool plant of the cooperative association or its agent, minus payment made pursuant to paragraph (c)(1) of this section.

(d) Each handler who received milk for which a cooperative association is the handler pursuant to § 1124.9(c) shall pay such cooperative association for such milk received:

(1) On or before the 2nd day prior to the date specified in paragraph (a)(1) of this section for such milk received during the first 15 days of that month at not less than the Class III price for the preceding month; and

(2) On or before the 17th day after the end of each month, for the milk received at not less than the uniform price for all milk adjusted pursuant to §§ 1124.74 and 1124.75(b), minus payments made pursuant to paragraph (d)(1) of this section.

(e) None of the provisions of this section shall be construed to restrict any cooperative association qualified under section 8c(5)(F) of the Act from making payment for milk to its producers in accordance with such provision of the Act.

(f) In making payments to producers pursuant to this section, each handler, on or before the 19th day of each month shall furnish each producer with a supporting statement in such form that it may be retained by the producer, which shall show for the preceding month:

(1) The identity of the handler and the producer;

(2) The total pounds of milk delivered by the producer and the average butterfat test thereof and the pounds per shipment if such information is not furnished to the producer each day of delivery;

(3) The minimum rate at which payment to the producer is required under the provisions of this section;

(4) The rate per hundredweight and amount of any premiums or payments above the minimum price provided by the order;



(5) The amount or rate per hundredweight of each deduction claimed by the handler, together with a description of the respective deductions; and

(6) The net amount of payment to the producer.

(g) In making payments to a cooperative association in aggregate pursuant to this section, each handler upon request shall furnish to the cooperative association, with respect to each producer for whom such payment is made, any or all of the above information specified in paragraph (f) of this section.

#### § 1124.74 Butterfat differential.

For milk containing more or less than 3.5 percent butterfat, the uniform price shall be increased or decreased, respectively, for each one-tenth percent butterfat variation from 3.5 percent by a butterfat differential, rounded to the nearest one-tenth cent, which shall be 0.115 times the simple average of the wholesale selling prices (using the midpoint of any price range as one price) of Grade A (92-score) bulk butter per pound at Chicago as reported by the Department for the month.

#### § 1124.75 Plant location adjustments for producers and on nonpool milk.

(a) In making payment to producers pursuant to § 1124.73(a) subject to the application of § 1124.13(c)(5) appropriate adjustments shall be made per hundredweight of milk received from producers at respective plant locations at the same rate as specified for Class I milk set forth in § 1124.52.

(b) In making payments to a cooperative association pursuant to § 1124.73(d) appropriate adjustments shall be made at the rates specified for Class I milk in § 1124.52 for the location of the plant at which the milk was received from the cooperative association.

(c) For purposes of computations pursuant to §§ 1124.71(a) and 1124.72 the uniform price for all milk shall be adjusted at the rates set forth in § 1124.52 for Class I milk applicable at the location of the nonpool plant from which the milk or filled milk was received, except that the adjusted uniform price shall not be less than the Class III price.

#### § 1124.76 Payments by a handler operating a partially regulated distributing plant.

Each handler who operates a partially regulated distributing plant shall pay to the market administrator for the producer-settlement fund on or before the 25th day after the end of the month either of the amounts (at the handler's

election) calculated pursuant to paragraph (a) or (b) of this section. If the handler fails to report pursuant to §§ 1124.30(d) and 1124.31(b) the information necessary to compute the amount specified in paragraph (a) of this section, the handler shall pay the amount computed pursuant to paragraph (b) of this section:

(a) An amount computed as follows:

(1)(i) The obligation that would have been computed pursuant to § 1124.60 at such plant shall be determined as though such plant were a pool plant. For purposes of such computation, receipts at such nonpool plant from a pool plant or an other order plant shall be assigned to the utilization at which classified at the pool plant or other order plant and transfers from such nonpool plant to a pool plant or an other order plant shall be classified as Class II or Class III milk if allocated to such class at the pool plant or other order plant and be valued at the uniform price of the respective order if so allocated to Class I milk, except that reconstituted skim milk in filled milk shall be valued at the Class III price. No obligation shall apply to Class I milk transferred to a pool plant or another order plant if such Class I utilization is assigned to receipts at the partially regulated distributing plant from pool plants and other order plants at which an equivalent amount of milk was classified and priced as Class I milk. There shall be included in the obligation so computed a charge in the amount specified in § 1124.60(f) and a credit in the amount specified in § 1124.71(a)(2)(iii) with respect to receipts from an unregulated supply plant, except that the credit for receipts of reconstituted skim milk in filled milk shall be at the Class III price, unless an obligation with respect to such plant is computed as specified in paragraph (a)(1)(ii) of this section; and

(ii) If the operator of the partially regulated distributing plant so requests, and provides with reports filed pursuant to §§ 1124.30(d) and 1124.31(b) similar reports with respect to the operations of any other nonpool plant which serves as a supply plant for such partially regulated distributing plant by shipments to such plant during the month equivalent to the requirements of § 1124.7(b), with agreement of the operator of such plant that the market administrator may examine the books and records of such plant for purposes of verification of such reports, there will be added the amount of the obligation computed at such nonpool supply plant in the same manner and subject to the same conditions as for the partially regulated distributing plant.

(2) From this obligation there will be deducted the sum of:

(i) The gross payments made by such handler for Grade A milk received during the month from dairy farmers at such plant adjusted to a 3.5 percent butterfat basis by the butterfat differential pursuant to § 1124.74, and like payments made by the operator of a supply plant(s) included in the computations pursuant to paragraph (a)(1) of this section; and

(ii) Any payments to the producer-settlement fund of an other order under which such plant is also a partially regulated distributing plant.

(b) An amount computed as follows:

(1) Determine the respective amounts of skim milk and butterfat disposed of as route disposition of Class I milk within the marketing area;

(2) Deduct the respective amount of skim milk and butterfat received at the plant:

(i) As Class I milk from pool plants and other order plants, except that deducted under a similar provision of another order issued pursuant to the Act; and

(ii) From a nonpool plant that is not an other order plant to the extent that an equivalent amount of skim milk or butterfat disposed of to such nonpool plant by handlers fully regulated under this or any other order issued pursuant to the Act is classified and priced as Class I milk and is not used as an offset on any payment obligation under this or any other order;

(3) Deduct the quantity of reconstituted skim milk in fluid milk products disposed of as route disposition in the marketing area;

(4) From the value of such milk at the Class I price applicable at the location of the nonpool plant, subtract its value at the uniform price applicable at such location (not to be less than the Class III price), and add for the quantity of reconstituted skim milk specified in paragraph (b)(3) of this section its value computed at the Class I price applicable at the location of the nonpool plant (but not to be less than the Class III price) less the value of such skim milk at the Class III price.

#### § 1124.77 Adjustment of accounts.

Whenever verification by the market administrator of reports or payments of any handler discloses errors resulting in money due:

(a) The market administrator from such handler;

(b) Such handler from the market administrator; or

(c) Any producer or cooperative association from such handler, the

market administrator shall promptly notify such handler of any amount so due and payment thereof shall be made on or before the next date for making payments set forth in the provisions under which such error occurred following the 5th day after such notice.

#### § 1124.78 Charges on Overdue Accounts.

(a) Any unpaid obligation of a handler pursuant to §§ 1124.71, 1124.76, 1124.77, 1124.85 or 1124.86 shall be increased 1 percent beginning on the first day after the due date, and on each date of subsequent months following the day on which such type of obligation is normally due, subject to the following conditions:

(1) The amounts payable pursuant to this section shall be computed monthly on each unpaid obligation, which shall include any unpaid overdue charges previously computed pursuant to this section; and

(2) For the purpose of this section, any obligation that was determined at a date later than that prescribed by the order because of a handler's failure to submit a report to the market administrator when due shall be considered to have been payable by the date it would have been due if the report had been filed when due.

(b) All charges on overdue accounts shall be paid to the fund to which the account was due immediately after the charge has been collected.

#### Administrative Assessment and Marketing Service Deduction

#### § 1124.85 Assessment for order administration.

A pro rata share of the expense of administration of the order shall be paid to the market administrator by each handler on or before the 16th day after the end of the month 4 cents per hundredweight, or such lesser amount as the Secretary may prescribe, with respect to:

(a) Producer milk (including such handler's own production);

(b) Other source milk allocated to Class I pursuant to § 1124.44(a) (8) and (12) and the corresponding steps of § 1124.44(b), except such other source milk on which no handler obligation applies pursuant to § 1124.60(f); and

(c) Route disposition in the marketing area from a partially regulated distributing plant that exceeds the Class I milk:

(1) Received during the month at such plant from pool plants and other order plants that is not used as an offset under a similar provision of another order issued pursuant to the Act; and

(2) Specified in § 1124.78(b)(2)(ii).

#### § 1124.86 Deduction for marketing services.

(a) Except as set forth in paragraph (b) of this section, each handler, in making payments to producers (other than with respect to milk of such handler's own production) pursuant to § 1124.73(a)(2), shall make a deduction of 5 cents per hundredweight of milk or such amount not exceeding 5 cents per hundredweight as the Secretary may prescribe, with respect to the following:

(1) All milk received from producers at a plant not operated by a cooperative association.

(2) All milk received at a plant operated by a cooperative association from producers for whom the marketing services set forth below in this paragraph are not being performed by the cooperative association as determined by the market administrator. Such deduction shall be paid by the handler to the market administrator on or before the 16th day after the end of the month. Such moneys shall be expended by the market administrator for the verification of weights, sampling and testing of milk received from producers, and in providing for market information to producers. Such services are to be performed in whole or in part by the market administrator or by an agent engaged by and responsible to him.

(b) In the case of each producer:

(1) Who is a member of, or who has given written authorization for the rendering of marketing services and the taking of deductions therefore to, a cooperative association;

(2) Whose milk is received at a plant not operated by such association; and

(3) For whom the market administrator determines that such association is performing the services described in paragraph (a) of this section, each handler shall deduct, in lieu of the deduction specified under paragraph (a) of this section, from the payments made pursuant to § 1124.73(a)(2) the amount per hundredweight on milk authorized by such producer and shall pay, on or before the 16th day after the end of the month, such deduction to the association entitled to receive it under this paragraph.

Signed at Washington, DC, on December 23, 1988.

Kenneth A. Gilles,  
Assistant Secretary for Marketing and Inspection Services.

[FR Doc. 88-30074 Filed 12-29-88; 8:45 am]  
BILLING CODE 3410-02-M

#### Animal and Plant Health Inspection Service

#### 9 CFR Part 97

[Docket No. 88-190]

#### Overtime Work at Laboratories, Border Ports, Ocean Ports, and Airports

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

**SUMMARY:** We are amending the regulations that establish charges for overtime work performed by Veterinary Services inspectors of the U.S. Department of Agriculture at laboratories, border ports, ocean ports, and airports. The regulations are amended by: (1) Increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at an airport outside of the regularly established hours of service; and (2) increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of animals, animal byproducts, or other commodities subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of an employee of Veterinary Services on a Sunday or holiday or at any other time outside the employee's regular tour of duty. These increases reflect salary increases for federal employees in accordance with the Federal Pay Comparability Act of 1970 (Pub. L. 91-656), and Pub. L. 100-440, 102 Stat. 1756, dated September 22, 1988, and reflect allowable costs associated with the implementation of the Debt Collection Act of 1982.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Louise Rakestraw Lothery, Acting Director, Resources Management Staff, VS, APHIS, USDA, Room 740, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-7517.

#### SUPPLEMENTARY INFORMATION:

**Executive Order 12291 and Regulatory Flexibility Act and Effective Date**

We are issuing this rule in conformance with Executive Order 12291, and we have determined that it is not a "major rule." Based on information compiled by the Department, we have determined that this rule will have an effect on the economy of less than \$100 million; will not cause a major increase



in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; and will not have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

We are amending the regulations by increasing the hourly rates charged an owner or operator of an aircraft requesting inspection or quarantine services at an airport outside of the regularly established hours of service. The rates are increased by \$2.52 per hour for services performed outside of the regularly established hours of service on a Sunday and by \$2.20 per hour for services performed outside of the regularly established hours of service on a holiday or any other period.

We are also amending the regulations by increasing the hourly rates charged a person, firm, or corporation having ownership, custody, or control of animals, animal byproducts, or other commodities subject to certain inspection, laboratory testing, certification, or quarantine and who requires the services of the employee of Veterinary Services on a Sunday or holiday or at any other time outside the regular tour of duty of the employee. The rates are increased by \$4.84 per hour for services performed outside the regular tour of duty on a Sunday and by \$4.32 per hour for services performed outside the regular tour of duty on a holiday or any other period.

Services of an employee of Veterinary Services at an airport during a regular tour of duty and during regularly established hours on Sundays and holidays are still provided free of charge to those requesting the service. Based on information compiled by the Department, we have estimated that Veterinary Services provided an average of 1,015 hours per week of services for which charges were assessed during 1988, and these services were requested by thousands of entities. We do not expect that the number of hours of service for which charges will be imposed will increase significantly in 1989.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The hourly rate for services of an employee of Veterinary Services depends entirely upon facts within the knowledge of the Department of Agriculture. The Department has no alternatives to raising the rates. By law, importers and exporters are required to reimburse the Department for its costs associated with services rendered. A cost analysis was performed to determine if fees for overtime are adequate to recover the cost of providing the services. Unless the rates are raised, the Department will not be able to recover the costs for providing services outside regularly established hours or outside regular tours of duty hours.

Accordingly, pursuant to the administrative procedure provisions in 5 U.S.C. 553, we find for good cause that prior notice and other public procedure with respect to this rule are impracticable, unnecessary, and contrary to the public interest; we also find good cause that this rule be made effective less than 30 days after publication of this document in the Federal Register.

#### Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with state and local officials. (See 7 CFR Part 3015, Subpart V).

#### List of Subjects in 9 CFR Part 97

Exports, Government employees, Imports, Livestock and livestock products, Poultry and poultry products, Transportation.

#### PART 97—OVERTIME SERVICES RELATING TO IMPORTS AND EXPORTS

1. The authority citation for Part 97 continues to read as follows:

Authority: 7 U.S.C. 2280; 49 U.S.C. 1741; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 97.1, current paragraph (b) is removed; the first sentence of paragraph (a) is revised as set forth below and the remaining text of current paragraph (a) is redesignated as paragraph (b):

#### § 97.1 Overtime work at laboratories, border ports, ocean ports, and airports.

(a) Any person, firm, or corporation having ownership, custody, or control of animals, animal byproducts, or other commodities subject to inspection, laboratory testing, certification, or quarantine under this subchapter and Subchapter G of this Chapter, and who requires the services of an employee of Veterinary Services on a Sunday or holiday, or at any other time outside the regular tour of duty of the employee, shall sufficiently in advance of the period of Sunday or holiday or overtime service request the Veterinary Services inspector in charge to furnish the service and shall pay the Government at a rate of \$37.92 per work-hour per employee on a Sunday and at the rate of \$29.28 per work-hour per employee for holiday or any other period; except as provided in paragraphs (a)(1), (a)(2), and (a)(3) of this section:

(1) For any services performed on a Sunday or holiday, or at any time after 5 p.m. or before 8 a.m. on a weekday, in connection with the arrival in or departure from the United States of a private aircraft or private vessel, the total amount payable shall not exceed \$25 for all inspection services performed by the Customs Service, Immigration and Naturalization Service, Public Health Service, and the Department of Agriculture;

(2) Owners and operators of aircraft will be provided service without reimbursement during regularly established hours of service on a Sunday or holiday; and

(3) The overtime rate to be charged owners or operators of aircraft at airports of entry or other places of inspection as a consequence of the operation of the aircraft, for work performed outside of the regularly established hours of service on a Sunday will be \$31.16 and for work performed outside of the regularly established hours of service for a holiday or any other period will be \$23.88 per hour (these charges exclude administrative overhead costs).

Done in Washington, DC, this 27th day of December, 1988.

James Glosser,  
Administrator, Animal and Plant Health  
Inspection Service.  
December 27, 1988.

[FR Doc. 88-30130 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-34-M

#### NUCLEAR REGULATORY COMMISSION

##### 10 CFR Parts 1, 2, 9 and 73

#### Reorganization of Functions Within the Office of Administration and Resources Management and Minor Corrective Amendments

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its regulations to codify nomenclature changes required by a reorganization of NRC staff activities within the Office of Administration and Resources Management. The amendments are necessary to reflect the reorganization of functions reporting to the Deputy Director for Administration. The final rule is intended to inform the public of the administrative changes to NRC regulations.

**EFFECTIVE DATE:** December 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Donnie H. Grimsley, Director, Division of Freedom of Information and Publication Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301 492-7211.

**SUPPLEMENTARY INFORMATION:** On May 19, 1988, the Nuclear Regulatory Commission issued a notice to all its employees announcing the reorganization of certain functions in the Office of Administration and Resources Management. The reorganization combines the Division of Contracts and the Division of Facilities and Operations Support into a new Division of Contracts and Property Management, and combines the Division of Publications Services and the Division of Rules and Records into a new Division of Freedom of Information and Publications Services. The Nuclear Regulatory Commission is amending portions of its regulations to substitute references to the Division of Rules and Records with the new Division of Freedom of Information and Publications Services.

Because these are amendments dealing with agency practice and procedures, the notice and comment provisions of the Administrative Procedure Act do not apply pursuant to 5 U.S.C. 553(b)(1)(A). The amendments are effective upon publication in the Federal Register. Good cause exists to dispense with the usual 30-day delay in the effective date, because these amendments are of a minor and

administrative nature, dealing with the agency's reorganization.

#### Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

#### Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

#### List of Subjects

##### 10 CFR Part 1

Organization and functions (Government Agencies).

##### 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear Materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

##### 10 CFR Part 9

Freedom of information, Penalty, Privacy, Reporting and recordkeeping requirements.

##### 10 CFR Part 73

Hazardous materials-transportation, Incorporation by reference, Nuclear materials, Nuclear power plants and reactors, Penalty, Reporting and recordkeeping requirements, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR Parts 1, 2, 9, 55, and 73.

#### PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

1. The authority citation for Part 1 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

##### § 1.3 [Amended]

2. In § 1.3, in paragraph (c), remove the words "Division of Rules and Records," and add in their place the words

"Division of Freedom of Information and Publications Services".

#### PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

3. The authority citation for Part 2 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948 as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

##### § 2.802 [Amended]

4. In § 2.802, in paragraphs (b), (e), and (g), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

#### PART 9—PUBLIC RECORDS

5. The authority citation for Part 9 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

##### § 9.23 [Amended]

6. In § 9.23, in paragraphs (b) introductory text, (b)(1), (b)(2), and (e), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

##### § 9.25 [Amended]

7. In § 9.25, in paragraphs (a), (b), (c), and (f), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

##### § 9.27 [Amended]

8. In § 9.27, in paragraphs (a), (b), and (c), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

##### § 9.29 [Amended]

9. In § 9.29, in paragraphs (d), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

##### § 9.41 [Amended]

10. In § 9.41, in paragraph (a)(2), remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".

##### § 9.85 [Amended]

11. In § 9.85, remove the words "Division of Rules and Records," and add in their place the words "Division of Freedom of Information and Publications Services".



**PART 73—PHYSICAL PROTECTION OF PLANTS AND MATERIALS**

12. The authority citation for Part 73 continues to read in part as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); Sec. 201, 68 Stat. 1242, as amended (42 U.S.C. 5841).

**§ 73.57 [Amended]**

13. In § 73.57, in paragraph (d)(1) remove the words "Information and Records Management Branch (PMSS)," and add in their place the words "Records and Reports Management Branch, Division of Information Support Services."

Dated at Rockville, Maryland, 16th day of December 1988.

For the Nuclear Regulatory Commission,  
Victor Stello, Jr.,

*Executive Director for Operations.*

[FR Doc. 88-29763 Filed 12-29-88; 8:45 am]

BILLING CODE 7990-01-M

**DEPARTMENT OF COMMERCE****International Trade Administration****DEPARTMENT OF THE INTERIOR****Office of Territorial and International Affairs****15 CFR Part 303**

[Docket No. 80984-8243]

**Watch Duty-Exemption Program**

**AGENCIES:** Import Administration, International Trade Administration, Department of Commerce; Office of Territorial and International Affairs, Department of the Interior.

**ACTION:** Final rule.

**SUMMARY:** This action amends 15 CFR Part 303, which governs the allocation of duty-exemption entitlements among watch producers in the United States' insular possessions (the Virgin Islands, Guam, and American Samoa) and in the territory of the Northern Mariana Islands. The amendments convert tariff schedule references in the regulations to the new Harmonized Tariff Schedule of the United States; change the formula for allocating territorial shares to a fifty percent weight for creditable wages and fifty percent for units shipped; raise the maximum value of components used in the assembly of duty-free watches and watch movements to \$150 and \$35, respectively; eliminate specific dates for publication of notices on the quantity of watch and watch movement units, and territorial shares thereof, which may enter duty-free into the customs territory

of the United States each year; and raise to \$32,000 the limit on individual creditable wages.

**EFFECTIVE DATE:** Regulation effective December 30, 1988. The changes incorporated in these amendments are effective with respect to entries made and taxes and wages paid on or after January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Faye Robinson, (202) 377-1660.

**SUPPLEMENTARY INFORMATION:** We published these revisions in proposed form on October 7, 1988 (53 FR 39486) and invited comments. We received one comment. The comment supported all proposed changes.

Under 5 U.S.C. 553(d)(1) the effective date of this rule need not be delayed for 30 days because this rule relieves a restriction. The restriction is relieved by raising the maximum value of components used in the assembly of duty-free watches from \$80 to \$150 and watch movements from \$30 to \$35.

**Classification:** Executive Order 12291

In accordance with Executive Order 12291 (48 FR 13193, February 19, 1981), the Departments of Commerce and the Interior have determined that this rule does not constitute a "major rule" as defined by Section 1(b) of the Order. It is not likely to result in:

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Therefore, preparation of a Regulatory Impact Analysis is not required.

This regulation was submitted to the Office of Management and Budget for review, as required by Executive Order 12291.

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

**Regulatory Flexibility Act**

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the General Counsel of the Department of Commerce has certified that this action will not have a significant economic impact on a substantial number of small entities. Fewer than ten entities are directly affected by this action. The

commercial benefits of the program governed by these regulations, for entities both directly and indirectly affected, are less than \$10 million per year.

**Paperwork Reduction Act**

This rule does not contain information collection requirements subject to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

**List of Subjects in 15 CFR Part 303**

Imports, Customs duties and inspection, Watches and jewelry, Marketing quotas, Administrative practice and procedure, Reporting and recordkeeping requirements, American Samoa, Guam, Virgin Islands, Northern Mariana Islands.

**PART 303—[AMENDED]**

For reasons set forth above, we are amending Part 303 as follows:

1. The authority citation for Part 303 continues to read as follows:

Authority: Pub. L. 97-446, 90 Stat. 2329, 2331 (19 U.S.C. 1202 note); Pub. L. 94-241, 90 Stat. 263 (48 U.S.C. 1681, note)

**§ 303.1 [Amended]**

2. Section 303.1(a) is amended by changing the words "Headnote 6 of Schedule 7, Part 2, Subpart E of the Tariff Schedules of the U.S. ('Headnote 6')" to "U.S. Legal Note 5 to Chapter 91 of the Harmonized Tariff Schedule of the United States ('91/5').".

**§§ 303.1, 303.2, 303.5, and 303.14 [Amended]**

3. The terms "Headnote 6" and/or "headnote 3(a)" are changed to read "91/5" each time they appear in 303.1 (a) and (b), 303.2(a) (10), (13), and (14), 303.5(b)(7) and 303.14(a)(1)(i).

**§ 303.3 [Amended]**

4. Section 303.3(a) is revised to read as follows:

**§ 303.3 Determination of the total annual duty-exemption.**

(a) Procedure for determination. If, after considering the productive capacity of the territorial watch industry and the economic interests of the territories, the Secretaries determine that the amount of the total annual duty-exemption, or the territorial shares of the total amount, should be changed, they shall publish in the *Federal Register* a proposed limit on the quantity of watch units which may enter duty-free into the customs territory of the United States and proposed territorial shares thereof and, after considering comments, establish the limit and shares by *Federal Register* notice. If the

Secretaries take no action under this section, they shall make the allocations in accordance with the limit and shares last established by this procedure.

**§ 303.14 [Amended]**

5. Section 303.14(e)(1)(i) is amended by changing "Eighty percent" to "Fifty percent" and "\$28,000" to "\$32,000".

6. Section 303.14(a)(1)(ii) is amended by changing "Twenty percent" to "Fifty percent".

7. Section 303.14(b)(3) is amended by changing "\$30" to "\$35" and "\$80" to "\$150".

Timothy N. Bergan,  
Deputy Assistant Secretary for Import Administration.  
David Heggstad,  
Acting Assistant Secretary for Territorial and International Affairs.  
[FR Doc. 88-29910 Filed 12-29-88; 6:45 am]  
BILLING CODE 3510-08-M, 4310-03-M

**PENSION BENEFIT GUARANTY CORPORATION****29 CFR Part 2644****Collection of Withdrawal Liability; Adoption of New Interest Rate**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Final rule.

**SUMMARY:** This is an amendment to the Pension Benefit Guaranty Corporation's regulation on Notice and Collection of Withdrawal Liability. That regulation incorporates certain interest rates published by another Federal agency. The effect of this amendment is to add to the appendix of that regulation a new interest rate to be effective from January 1, 1989, to March 31, 1989.

**EFFECTIVE DATE:** January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** John Foster, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006; telephone 202-778-8850 (202-778-8859 or TTY and TDD). These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:** Under section 4219(c) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), the Pension Benefit Guaranty Corporation ("the PBGC") promulgated a final regulation on Notice and Collection of Withdrawal Liability. That regulation, codified at 29 CFR Part 2644, deals with the rate of interest to be charged by multiemployer pension plans on withdrawal liability

payments that are overdue or in default, or to be credited by plans on overpayments of withdrawal liability. The regulation allows plans to set rates, subject to certain restrictions. Where a plan does not set the interest rate, § 2644.3(b) of the regulation provides that the rate to be charged or credited for any calendar quarter is the average quoted prime rate on short-term commercial loans for the fifteenth day (or the next business day if the fifteenth day is not a business day) of the month preceding the beginning of the quarter, as reported by the Board of Governors of the Federal Reserve System in Statistical Release H.15 ("Selected Interest Rates").

Because the regulation incorporates interest rates published in Statistical Release H.15, that release is the authoritative source for the rates that are to be applied under the regulation. As a convenience to persons using the regulation, however, the PBGC collects the applicable rates and republishes them in an appendix to Part 2644. This amendment adds to this appendix the interest rate of 10 1/4 percent, which will be effective from January 1, 1989, through March 31, 1989. This rate represents an increase of 1/4 percent from the rate in effect for the fourth quarter of 1988. See 53 FR 38288 (September 30, 1988). This rate is based on the prime rate in effect on December 15, 1988.

The appendix to 29 CFR Part 2644 does not prescribe interest rates under the regulation; the rates prescribed in the regulation are those published in Statistical Release H.15. The appendix merely collects and republishes the rates in a convenient place. Thus, the interest rates in the appendix are informational only. Accordingly, the PBGC finds that notice of and public comment on this amendment would be unnecessary and contrary to the public interest. For the above reasons, the PBGC also believes that good cause exists for making this amendment effective immediately.

The PBGC has determined that this amendment is not a "major rule" within the meaning of Executive Order 12291, because it will not have an annual effect on the economy of \$100 million or more; nor create a major increase in costs or prices for consumers, individual industries, or geographic regions, nor have significant adverse effects on competition, employment, investment, innovation or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Because no general notice of proposed rulemaking is required for this

amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

**List of Subjects in 29 CFR Part 2644**

Employee benefit plans, Pensions. In consideration of the foregoing, Part 2644 of Subchapter F of Chapter XXVI of Title 29, Code of Federal Regulations, is amended as follows:

**PART 2644—NOTICE AND COLLECTION OF WITHDRAWAL LIABILITY**

1. The authority citation for Part 2644 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3) and 1399(c)(6).

**Appendix A—[Amended]**

2. Appendix A is amended by adding to the end of the table therein a new entry as follows:

From	To	Date of quotation	Rate (percent)
01/01/89	03/31/89	12/15/88	10.50

Issued at Washington, DC, on this 27th day of December 1988.

Kathleen P. Utgoff,

*Executive Director.*

[FR Doc. 88-30105 Filed 12-29-88; 8:45 am]

BILLING CODE 7700-01-M

**DEPARTMENT OF TRANSPORTATION****Coast Guard****33 CFR Part 135**

[CGD 88-050]

RIN 2115-AD01

**Offshore Oil Pollution Compensation Fund Barrel Fee Suspension**

**AGENCY:** Coast Guard, DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule suspends until further notice the \$.03 barrel fee levied on all oil produced on the Outer Continental Shelf (OCS). The Offshore Oil Pollution Compensation Fund (Fund) balance, to which the barrel fee revenues have been credited, is now within the statutorily prescribed maintenance level and is sufficient to meet obligations for oil pollution removal and damage claims settlements arising from OCS activities, and administrative expenses of the Fund program. This action relieves the owners of OCS oil from the economic burden of



paying barrel fees while the Fund balance is sufficient to meet reasonably anticipated obligations.

**EFFECTIVE DATE:** This final rule is effective April 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Frank A. Martin, Jr., Offshore Oil Pollution Compensation Fund Manager, telephone (202) 267-0535, between 7:30 a.m. and 3:00 p.m., Monday through Friday.

**SUPPLEMENTARY INFORMATION:** By notice published in the *Federal Register* on September 28, 1988 (53 FR 37794-5) the Coast Guard invited public comment on its proposal to suspend the per barrel fee, levied under 33 CFR 135.103(a), on all oil produced on the OCS.

Under section 302 of Title III, Outer Continental Shelf Lands Act Amendments of 1973 (43 U.S.C. 1812) the Fund is maintained at a level of not less than \$100 million and not more than \$200 million. The Fund's principal revenue source since its establishment in 1979 has been the \$.03 barrel fee levied on each barrel of oil produced on the OCS. In addition to barrel fees, the Fund also earns substantial interest revenue on its investment in U.S. Securities (Treasury Bonds, Notes, Bills) of monies in the Fund which are not immediately needed for oil pollution removal costs, damage claims settlement activities, and administrative costs of the Fund program.

The Treasury Department, Internal Revenue Services (IRS), collects and deposits the barrel fees into the Fund account at the U.S. Treasury. The Coast Guard is coordinating this suspension with the IRS, which will make any changes to its procedures necessary to stop collections.

The Coast Guard has not had to use the Fund for OCS pollution cleanup costs nor damage claims settlements, for any of the approximately 10,000 reported offshore spills which have occurred since its establishment. Cleanup of these spills, where necessary, was accomplished by the appropriate responsible party, and none of the spills were of sufficient size to result in damage claims. The only obligations against the Fund over the years have been for administration, and those expenses have been minimal. Present interest income more than covers Fund administration costs, and this income will continue to increase the Fund balance without the barrel fee revenues, absent major OCS pollution incidents which substantially draw down the Fund balance.

In addition to suspending the barrel fee collections, we are also updating the agency and regulatory references cited

in § 135.103(b), concerning measurement of OCS oil production. Since original publication of this rule the U.S. Geological Survey name has been changed to Minerals Management Service (MMS), and the regulatory material on OCS production measurement, formerly at 30 CFR 250.60, has been revised and moved to another section. OCS Order #13 was incorporated into that revision.

A total of twenty entities submitted written comments in response to the proposed rule. Represented among the respondents were the offshore oil industry and its trade associates and committees, including the National Ocean Industries Association, Offshore Operators Committee and the American Petroleum Institute. The Sea Grant Association and the Bering Sea Fishermen's Association also commented.

#### Discussion of Comments

In general, the majority of the comments were received from the interest who pay the fee, i.e., the owners of OCS oil at the time of production. These comments supported a rapid suspension of the barrel fees. Two respondents, the Sea Grant and Bering Sea Fisherman's Associations, objected to the proposed suspension, primarily taking the position that even a \$200 million Fund balance may not be sufficient for oil pollution response to future OCS development activities.

Proponents of the barrel fee suspension proposal generally favored the proposal for the following reasons:

(a) The present balance exceeds the \$100 million statutory minimum (actual balance as of December 1, 1988 was \$132,753,000);

(b) Interest income from Fund investments will continue to increase the Fund balance; and

(c) The offshore industry spill history since Fund establishment in 1978 has not resulted in any claims against the Fund for removal costs and damages.

Opponents of the proposal generally felt that even the \$200 million level authorized under the law could be insufficient for handling economic losses resulting from a major spill. The Coast Guard agrees that a major spill, or simultaneous spills, could rapidly deplete a \$200 million balance for cleanup and damages. However, there are other means to handle claims which exceed the immediately available balance.

In the event of an actual major OCS spill likely to result in cleanup and removal costs and third party damages, the Coast Guard, in accordance with 33 CFR Part 136, Offshore Oil Pollution

Compensation Fund Claims Procedures, would first look to the spiller, or its financial guarantor, to meet the primary statutory pollution liability. Liable party responsibility under law is \$35 million for damages, plus the total of all cleanup and removal costs. The Fund becomes obligated only when the spiller does not promptly pay, or when spiller liability is exceeded.

Current law contains provisions for borrowing from the U.S. Treasury to meet obligations of the Fund at any time the balance of the Fund is insufficient to meet obligations. Therefore, should a major spill, or series of spills, deplete the Fund balance, the Coast Guard could borrow from the Treasury amounts sufficient to meet Fund obligations. The Coast Guard would then reimpose the barrel fee levy to pay back the Treasury and to replenish the Fund balance.

Therefore, the present Fund balance, continuing interest income, up front spiller liability and Coast Guard borrowing authority provides a full range of flexibility to deal with OCS pollution after suspension of barrel fee revenues to the Fund.

#### Other Issues

Several comments received addressed matters beyond the scope of this rulemaking.

After the barrel fee is suspended, interest income to the Fund is expected to cause the Fund balance to exceed \$200 million before the end of 1993. Marathon Oil Company suggested that monies in excess of \$200 million be returned to those companies who have been paying the barrel fees over the years in proportion to the amount contributed. There is no basis under current law to rebate monies in the Fund which exceed \$200 million.

Conoco Inc. raised an issue concerning whether the Federal Government *owns* royalty oil at the time of production or whether the oil company producing the oil when it reaches the wellhead is subject to payment of the barrel fee on that royalty oil. The Coast Guard and Treasury Department addressed this issue at the time the Fund implementing rules and barrel fee collection regulations were established in 1979, and determined that the Federal Government entitlement to royalty oil does not constitute ownership of oil at the time of production (44 FR 16860; March 19, 1979).

Several oil companies expressed views opposing use of monies in the Fund for any purposes other than the purposes for which originally

established, i.e., removal costs, the processing and settlement of damage claims, and administrative costs of the Federal Government incident to administration of the Fund law. A related concern was allowing the fee to continue so as to generate revenues which could be made available for other purposes. Any use of the Fund, other than permitted by current law, would require legislative action.

#### Regulatory Evaluation

The final rule is considered non-major under Executive Order 12291 and non-significant under Department of Transportation regulatory policies and procedures (44 FR 11034; February 26, 1979). This regulatory action relieves an economic impact on the offshore oil industry for an indeterminate period of time. For fiscal year 1988, Fund barrel fees collected were \$10 million; interest income was \$14.7 million, and administrative expenses were \$126,000. As long as the Fund balance is being maintained by interest income, the Coast Guard has determined that barrel fees need not be levied. The barrel fee levy, at a rate not to exceed \$.03 per barrel on oil obtained from the OCS, will be reimposed in future rulemaking, as necessary, to maintain the Fund balance at an appropriate level within the statutory limits. Based upon current OCS crude oil production, the impact of this final rule is expected to be minimal; therefore a full regulatory evaluation is unnecessary.

There are no direct information collection requirements associated with this regulation action. Indirectly, there will be a small reduction of information reporting burdens on companies which pay the barrel fee collected by the IRS. The reduction will result from the companies not having to file with IRS the Fee Deposit and Quarterly Fees Due reports while the fee levy is at \$.00 per barrel.

#### Regulatory Flexibility Act

In accordance with paragraph 605(d) of the Regulatory Flexibility Act (94 Stat. 1164), the Coast Guard certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

#### Federalism

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Effective Date

This final rule is effective April 1, 1989. In selecting this effective date the Coast Guard is guided by several factors. First, the governing statute and regulations state that modification or suspension of the barrel fee requires 90 days notice in the *Federal Register*. Additionally, as stated in the proposed rule, IRS actually collects the barrel fees. In coordination with that agency, and its published fee collection procedures at 26 CFR Part 301, it is considered appropriate to have the fee collections stop at the end of a month (March 31, 1989) so as to have adequate reporting on production and fees due. Finally, an April 1, 1989 effective date will end barrel fee revenues to the Fund at the end of the first half of the government fiscal year.

#### List of Subjects in 33 CFR Part 135

Administrative practice and procedure, Advertising, Claims, Continental shelf, Insurance, Oil pollution, Reporting and record keeping requirements.

In consideration of the foregoing, Chapter I of Title 33, Code of Federal Regulations, is amended by revising Part 135 to read as follows:

#### PART 135—OFFSHORE OIL POLLUTION COMPENSATION FUND

1. The authority for Part 135 continues to read as follows:

Authority: 43 U.S.C. 1811-24; E.O. 12123, 44 FR 11199; 49 CFR 1.46.

2. Section 135.103 is revised to read as follows:

#### § 135.103 Levy and payment of barrel fee on OCS oil.

(a) A fee not to exceed \$.03 per barrel is levied on all oil produced on the OCS and is imposed on the owner of the oil when such oil is produced. Effective April 1, 1989, the fee per barrel is \$.00.

(b) The owner of oil obtained from the OCS shall, for the purpose of computing the barrel fee levied in paragraph (a) of this section, measure OCS oil production by employing the methods and criteria of the Minerals Management Service contained in 30 CFR 250.180.

3. Section 135.105(b) is revised to read as follows:

#### § 135.105 Adjustment of levy.

(a) . . .

(b) Modification or suspension of the barrel fee levied in this subpart is made effective not less than 90 days after publication in the *Federal Register*. . . . .

Dated: December 19, 1988.

J. D. Sipes,  
Rear Admiral, U.S. Coast Guard, Chief, Office  
of Marine Safety, Security and Environmental  
Protection.

[FR Doc. 88-30153 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-14-M

#### DEPARTMENT OF THE INTERIOR

##### Bureau of Land Management

##### 43 CFR Public Land Order 6697

[AZ-920-09-4214-10; A-12865]

##### Modification of Secretarial Order dated October 16, 1931; Arizona

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Public Land Order.

**SUMMARY:** This order modifies the Secretarial order insofar as it affects 640 acres of public land withdrawn for the Bureau of Reclamation's Boulder Canyon Project. This 640 acres has been identified for disposal by exchange, pursuant to section 206 of the Federal Land Policy and Management Act. The land described below will be opened to disposal by exchange but will remain closed to all other forms of surface entry and to mining. The land has been and will remain open to mineral leasing.

**EFFECTIVE DATE:** December 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Marsha Luke, BLM Arizona State Office, P.O. Box 16563, Phoenix, Arizona 85011, 602-241-5534.

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. The Secretarial Order dated October 16, 1931, which withdrew public land for the Bureau of Reclamation's Boulder Canyon Project is hereby modified to allow for the disposal, by exchange pursuant to section 206 of the Federal Land Policy and Management Act, 90 Stat. 2756; 43 U.S.C. 1718. The affected described land is identified as follows:

##### Gila and Salt River Meridian

T. 21 N., R. 21 W.,  
sec. 16, all.

The area described contains 640 acres in Mohave County.

2. At 9:00 a.m. on December 30, 1988, the land described in paragraph 1 will be opened to disposal by exchange pursuant to section 206 of the Federal Land Policy and Management Act. The land will remain closed to mining and



all forms of surface entry except disposal by exchange. The land has been and will remain open to mineral leasing.

Earl E. Gjeldre,  
Acting Secretary of the Interior.  
[FR Doc. 88-30132 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-84-M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 681

[Docket No. 80476-8229]

#### Western Pacific Crustacean Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.  
ACTION: Final rule.

**SUMMARY:** NOAA issues a final rule to revise the regulations implementing the Fishery Management Plan for the Crustacean Fisheries of the Western Pacific Region (FMP). This rule amends the regulations to better reflect the intent of Amendment 5 to the FMP with respect to escape vent panels and reporting requirements.

**EFFECTIVE DATE:** January 30, 1989.

**ADDRESS:** A copy of Amendment 5 may be obtained from the Western Pacific Fishery Management Council, 1164 Bishop Street, Suite 1408, Honolulu, Hawaii 96813, 808-523-1368.

**FOR FURTHER INFORMATION CONTACT:** James J. Morgan, Southwest Region, Terminal Island, CA, 213-514-8867; or Peter Milone, Southwest Region, Honolulu, HI, 808-955-8831.

#### SUPPLEMENTARY INFORMATION:

##### Background

Amendment 5 to the FMP was submitted by the Western Pacific Fishery Management Council (Council) and approved by the Secretary of Commerce. The final rule implementing Amendment 5 went into effect on January 14, 1988 (52 FR 47572, December 15, 1987). Several provisions contained in Amendment 5 relating to escape vent panels and reporting requirements were omitted from the proposed rule (52 FR 28028, July 27, 1987) and final rule. A proposed rule for this action was published on August 18, 1988 (53 FR 31381) to correct the discrepancies, and comments were invited through September 18, 1988. No comments have been received.

The regulations implementing Amendment 5 require that all lobster traps used in the Northwestern

Hawaiian Islands (NWHI) have a minimum of two escape vent panels that meet certain specifications. The Amendment also specified that the two panels be placed opposite each other in each trap. This latter provision was omitted from the proposed and final rules. To comply with the intent of the FMP regarding the configuration of escape vent panels, this rule amends the regulations to require that the panels be placed on opposite sides of each trap.

Amendment 5 also provided for a number of changes in FMP reporting requirements. The permit application form and daily catch log report were amended to add information requests needed for management of the lobster fishery. The requirement for an annual processor's report was eliminated and the Trip Processing and Sales Report was replaced by a new form, the Lobster Report for Transshipment and Sales. All the proposed changes in reporting requirements, as approved by the Office of Management and Budget under the Paperwork Reduction Act, were incorporated in the final rule, except for implementing the proposed Lobster Report for Transshipment and Sales form. The new reporting form is less confusing than the original form and better reflects the current structure of the fishery. Accordingly, this rule amends the regulatory text to require use of the new Lobster Report for Transshipment and Sales in place of the former Trip Processing and Sales Report.

An additional technical change to the regulations replaces the words "Center Director" with the words "Regional Director" in §§ 681.4(b)(2)(xxi) and 681.5(b)(2)(ix) to accurately reflect management responsibility.

The word "unobstructed" is added to the description of circular holes in escape vent panels in § 681.24(c)(1) to clarify the Council's original intent in Amendment 5 to the FMP.

The measures proposed in Amendment 5 were presented at a public information meeting in Honolulu, Hawaii on April 29, 1988 and at a public hearing in Honolulu on May 18, 1987. All lobster fishery permit holders have been kept apprised of the issues contained in Amendment 5 and were requested to offer comments.

#### Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this measure is necessary for the conservation and management of the crustacean fisheries of the western Pacific region and that it is consistent with the Magnuson Act and other applicable law.

The Council prepared an environmental impact statement (EIS) for the original FMP. An environmental assessment (EA) was also incorporated into Amendment 5. The measures to be implemented by this rule were included in Amendment 5, so the Assistant Administrator has concluded that this action falls within the categorical exclusion identified in the environmental review procedures in NOAA Directives Manual 02-10 at 5 (b)(3)(a). Consequently, no additional environmental document has been prepared. A copy of the amendment, incorporating the EA, and the FMP's EIS can be obtained from the Council at the above address.

The Under Secretary of Oceans and Atmosphere, NOAA, determined that this rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. The present action will not have a cumulative effect on the economy of \$100 million or more, nor will it result in a major increase in costs to consumers, industries, government agencies, or geographical regions. No significant adverse effects on competition, employment, investment, productivity, innovation, or competitiveness of U.S.-based enterprises are anticipated.

The General Counsel of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities. This is because the industry has already anticipated the proposed action to incorporate measures in the regulations for the correct placement of escape vents and the new reporting form, which were approved under Amendment 5, but inadvertently omitted from the proposed and final rules. A majority of the industry, if not all, have already complied with the vent requirements. This rule contains a collection of information requirement at section 681.5 subject to the Paperwork Reduction Act. This requirement has been approved by the Office of Management and Budget (OMB) under Control Number 0648-0214.

The burden associated with the revised reporting requirement will be the same as that reported in the final rule implementing Amendment 5 to the FMP. The replacement of the Trip Processing and Sales Report with the new Lobster Report for Transshipment and Sales form will not change the burden hours, and it will provide data essential for the management of the fishery. The burden had been calculated and approved by OMB as 48 hours, or 4

hours per fishermen (each of the 12 vessels fishing will incur a burden of 10 minutes per report for each of their 24 trips per year).

The Council has determined, and the appropriate State and territorial government offices have found, that the measures established in Amendment 5, including the measures implemented by this rule, are consistent to the maximum extent practicable with the approved coastal zone management programs of Hawaii and the territories of American Samoa and Guam.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

#### List of Subjects in 50 CFR Part 681

Fisheries, Reporting and recordkeeping requirements.

James W. Brennan,  
Assistant Administrator for Fisheries,  
National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR Part 681 is amended as follows:

#### PART 681—[AMENDED]

1. The authority citation for 50 CFR Part 681 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In Section 681.4, paragraph (b)(2)(xxi) is revised to read as follows:

#### § 681.4 Permits.

(b) \* \* \*

(2) \* \* \*

(xxi) Any other fishery management data requested by the Regional Director.

3. In § 681.5, in paragraphs (a)(3), (4), and (5), the words "Trip Processing and Sales Report" are revised to read "Lobster Report for Transshipment and Sales"; paragraphs (b)(2)(x), (b)(4), (b)(5), (c)(4)(iii) and (iv) are removed; and paragraphs (b)(2)(viii) and (ix), (c) introductory text, (c)(3), (c)(4) introductory text, (c)(4)(i) and (ii) are revised to read as follows:

#### § 681.5 Recordkeeping and reporting.

(b) \* \* \*

(2) \* \* \*

(viii) Number of octopus and other species per trap deployment;

(ix) Any other fishery management data requested by the Regional Director.

(c) *Lobster Report for Transshipment and Sales.* The Lobster Report for Transshipment and Sales must contain the following information for all lobsters taken under this part:

(1) \* \* \*

(2) \* \* \*

(3) Sales Information—

(i) Weight and revenue from sale of spiny lobsters by product type;

(ii) Weight and revenue from sale of slipper lobsters by product type;

(iii) Weight and revenue from sale of octopus by product type; and

(iv) Weight and revenue from sale of other fishery products by product type.

(4) Transshipment information (for lobster products that have not been sold but have been placed in storage or transshipped elsewhere for future sale)—

(i) Weight of spiny lobsters by product type; and

(ii) Weight of slipper lobsters by product type.

(4) In § 681.24, paragraph (c) introductory text and (c)(1) are revised and a new paragraph (c)(3) is added to read as follows:

#### § 681.24 Gear restrictions.

(c) Each lobster trap must have a minimum of two escape vent panels that meet the following requirements:

(1) Panels must have at least four unobstructed circular holes no smaller than 67 millimeters (mm) in diameter with centers at least 82 mm apart.

(3) Panels must be placed opposite one another in each trap.

[FR Doc. 88-30025 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-22-M



## Proposed Rules

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

### DEPARTMENT OF AGRICULTURE

#### Agricultural Marketing Service

##### 7 CFR Part 932

#### Expenses and Assessment Rate for Marketing Order Covering Olives Grown in California

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would authorize expenditures and establish an assessment rate under Marketing Order 932 for the 1989 fiscal year (January through December) established for that order. The proposal is needed for the California Olive Committee established under the order to incur operating expenses during the 1989 fiscal year and to collect funds during that year to pay those expenses. This would facilitate program operations. Funds to administer this program are derived from assessments on handlers.

**DATE:** Comments must be received by January 9, 1989.

**ADDRESS:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2085-S, Washington, DC 20090-6456. Comments should reference the date and page number of this issue of the Federal Register and will be available for public inspection in the Office of the Docket Clerk during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2530-S, Washington, DC 20090-6456, telephone 202-475-3862.

#### SUPPLEMENTARY INFORMATION:

This rule is proposed under Marketing Order No. 932 (7 CFR Part 932) regulating the handling of olives grown in California. The order is effective

under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this proposed rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately seven handlers of California olives regulated under this marketing order each season, and approximately 1,390 olive producers in California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual gross revenues for the last three years of less than \$500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. Most, but not all, of the olive producers and none of the olive handlers may be classified as small entities.

Each marketing order administered by the Department of Agriculture requires that the assessment rate for a particular fiscal year shall apply to all assessable commodities handled from the beginning of such year. An annual budget of expenses is prepared by each administrative committee and submitted to the Department for approval. The members of administrative committees are handlers and producers of the regulated commodities. They are familiar with the committee's needs and with the costs for goods, services and personnel in their local areas and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected

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persons have an opportunity to participate and provide input.

The assessment rate recommended by each committee is derived by dividing anticipated expenses by expected shipments of the commodity (e.g., pounds, tons, boxes, cartons, etc.). Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committees shortly before a season starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committees will have funds to pay their expenses.

The California Olive Committee unanimously recommended 1989 fiscal year expenditures of \$1,883,290 and an assessment rate of \$25.39 per ton of assessable olives shipped under M.O. 932. In comparison, 1988 fiscal year budgeted expenditures were \$1,627,482 and the assessment rate was \$23.92. Major expenditure items budgeted for the 1989 fiscal year compared with those budgeted in 1988 (in parentheses) are \$469,540 (\$435,434) for program administration, \$60,000 (\$51,948) for production research, \$760,000 (\$540,000) for consumer advertising, \$398,500 (\$494,000) for food service advertising, and \$195,250 (\$106,100) for public relations. The \$255,808 increase in budgeted expenditures from 1988 is mainly for advertising and promotion activities needed to market this year's larger crop.

An estimated assessment income of \$1,883,938 for the 1989 fiscal period based on shipments of 74,200 tons of olives will be utilized to cover the proposed expenses. Last year's shipments totalled 57,300 assessable tons. The committee also unanimously recommended that excess 1988 assessments (about \$245,473) be placed in its reserve, resulting in a reserve well within the maximum authorized under the order.

While this proposed action would impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed onto producers. However, these costs would be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the

Administrator of AMS has determined that this action would not have a significant economic impact on a substantial number of small entities.

Based on the foregoing, it is found and determined that a comment period of less than 30 days is appropriate because the budget and assessment rate approvals for the olive program need to be expedited. The committee needs to have sufficient funds to pay its expenses which are incurred on a continuous basis.

#### List of Subjects in 7 CFR Part 932

Marketing agreements and orders, olives, California.

For the reasons set forth in the preamble, it is proposed that § 932.223 be added as follows:

#### PART 932—OLIVES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR Part 932 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. New § 932.223, is added to read as follows:

#### § 932.223 Expenses and assessment rate.

Expenses of \$1,883,290 by the California Olive Committee are authorized, and an assessment rate of \$25.39 per ton of assessable olives is established, for the fiscal year ending December 31, 1989. Unexpended funds from the 1988 fiscal year may be carried over as a reserve.

Dated: December 27, 1988.

William J. Doyle,  
Associate Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 88-30131 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 985

[FV-89-001PR]

#### Spearmlnt Oil Produced in the Far West; Salable Quantities and Allotment Percentages for the 1989-90 Marketing Year

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would establish the quantity of spearmint oil produced in the Far West, by class, that may be purchased from or handled for producers by handlers during the 1989-90 marketing year, which begins June 1, 1989. This proposed action is taken under the marketing order for spearmint

oil produced in the Far West in order to avoid extreme fluctuations in supplies and prices and thus stabilize the market for spearmint oil. This action was recommended by the Spearmint Oil Administrative Committee (Committee), the agency which is responsible for local administration of the order.

**DATE:** Comments due January 30, 1989.

**ADDRESS:** Interested persons are invited to submit written comments concerning this proposal. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, Room 2085-S, P.O. Box 96456, Washington, DC 20090-6456. Comments should reference the date and page number of this issue of the Federal Register and will be made available for public inspection in the Office of the Docket Clerk during regular working hours.

#### FOR FURTHER INFORMATION CONTACT:

Jacquelyn R. Schlatter, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, Room 2525-S, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 447-5120.

**SUPPLEMENTARY INFORMATION:** This proposed rule is issued under Marketing Agreement and Order No. 985, as amended (7 CFR Part 985), regulating the handling of spearmint oil produced in the Far West. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the Act.

This rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

The Far West spearmint oil industry is characterized by primarily small producers whose farming operations generally involve more than one commodity and whose income from farming operations is not exclusively dependent on the production of

spearmint oil. The production of spearmint oil is concentrated in the Far West, primarily Washington, Idaho, and Oregon (part of the area covered under the marketing order). Spearmint oil is also produced in the Midwest and Great Plains. The production area covered by the marketing order normally accounts for more than 75 percent of U.S. production of spearmint oil.

The Committee reports that there are approximately 9 handlers and 253 producers of spearmint oil under the marketing order for spearmint oil produced in the Far West. Of the 253 producers, 180 producers hold "Class 1" (Scotch) oil allotment base and 136 producers hold "Class 3" (Native) oil allotment base. As of June 1, 1988, the producers' allotment base ranged from 667 to 181,902 pounds for Scotch oil and from 290 to 124,346 pounds for Native oil. The average total allotment base held is 10,413 pounds and 13,539 pounds for Scotch and Native oils, respectively.

Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.1) as those having average gross annual revenues for the last three years of less than \$500,000, and small agricultural service firms are defined as those whose gross annual receipts are less than \$3,500,000. The majority of Far West spearmint oil producers and handlers may be classified as small entities.

This proposed rule would establish salable quantities of 706,742 pounds and 781,092 pounds, respectively, for Scotch and Native spearmint oils produced in the Far West, and allotment percentages of 42 percent for both oils. This proposed action would limit the amount of spearmint oil that may be purchased from or handled for producers, by handlers, during the 1989-90 marketing year, which begins June 1, 1989. Such salable quantities and allotment percentages have been placed into effect each season since the order's inception in 1980. The establishment of salable quantities and allotment percentages would be likely to result in the production of less than half of the total allotment base available for production of spearmint oil. However, the amounts recommended for sale are based on average sales levels over the past seven years, and are not expected to cause a shortage of spearmint oil supplies. Any unanticipated or additional market needs which may develop can be more than satisfied by current reserve stocks. In addition, those producers who produce more than their annual percentage of allotment may transfer such excess spearmint oil to a producer with a deficiency in spearmint oil



production, or such excess spearmint oil may be placed into reserve stocks.

This proposed regulation, if adopted, would be similar to those which have been issued in prior seasons. Costs to producers and handlers resulting from this proposed action are expected to be offset by the benefits derived from improved returns.

The salable quantities and allotment percentages were recommended by the Committee at its September 21, 1988, meeting.

The proposed salable quantity and allotment percentage for each class of spearmint oil for the 1989-90 marketing year, which begins June 1, 1989, is based upon recommendations of the Committee and the following data and estimates:

(1) "Class 1" (Scotch) Spearmint Oil.

(A) Estimated carryin on June 1, 1989—16,892 pounds.

(B) Estimated trade demand (domestic and export) for the 1989-90 marketing year, based on an average of producer sales for the past seven marketing years, beginning with the 1980-81 marketing year through the 1986-87 marketing year (minus 23,419 pounds) <sup>1</sup>—718,000 pounds.

(C) Recommended desirable carryout on May 31, 1990—0 pounds.

(D) Salable quantity required from 1989 regulated production <sup>2</sup>—701,108 pounds.

(E) Total allotment bases for Scotch oil—1,682,719 pounds.

(F) Computed allotment percentage—41.6 percent.

(G) The Committee's recommended salable quantity—706,742 pounds.

(H) Recommended allotment percentage—42 percent.

(2) "Class 3" (Native) Spearmint Oil.

(A) Estimated carryin on June 1, 1989—40,000 pounds.

(B) Estimated trade demand (domestic and export) for the 1989-90 marketing year, based on an average of producer sales for the past seven marketing years, beginning with the 1980-81 marketing

year through the 1986-87 marketing year (minus 50,000 pounds) <sup>3</sup>—\$18,266 pounds.

(C) Recommended desirable carryout on May 31, 1990—0 pounds.

(D) Salable quantity required from 1989 production—778,226 pounds.

(E) Total allotment bases for Native oil—1,859,743 pounds.

(F) Computed allotment percentage—41.8 percent.

(G) The Committee's recommended salable quantity—781,902 pounds.

(H) Recommended allotment percentage—42 percent.

The salable quantity is the total quantity of each class of oil which handlers may purchase from or handle on behalf of producers during a marketing year. Each producer is allotted a share of the salable quantity by applying the allotment percentage to the producer's allotment base for the applicable class of spearmint oil. Pursuant to the order, the Committee may issue additional allotment base to both new and existing producers for each marketing year (7 CFR 985.51(b)).

The establishment of these salable quantities and allotment percentages would allow for anticipated market needs based on historical sales and provides spearmint oil producers with information on the amount of oil which should be produced for next season. Spearmint oil has an extremely inelastic demand and excess production normally is placed into the industry's reserves. Current reserves are equal to about 35 percent of the volume of Scotch spearmint oil and 110 percent of the volume of Native spearmint oil utilized by the market on a yearly basis. These reserve stocks are sufficient to meet any unanticipated marketing opportunities in the coming season.

Based on available information, the Administrator of the AMS has determined that the issuance of this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 7 CFR Part 985

Far West, Marketing agreements and orders, Spearmint oil.

For the reasons set forth in the preamble, 7 CFR Part 985 is proposed to be amended as follows:

<sup>1</sup> The seven year average of sales was 741,419 pounds. The high years average approximately 50,000 pounds above the seven year average and the low years average approximately 50,000 pounds below the seven year average. Taking into consideration the cyclical demand for Scotch spearmint oil over the past years, the committee determined that it was appropriate to reduce the estimated trade demand for the 1989-90 marketing year by 23,419 pounds.

<sup>2</sup> In past years, the Committee has considered production of 100,000 pounds from South Dakota in its computation of the Scotch salable quantity. However, this year, the Committee has determined that the South Dakota production does not directly affect the marketing of Far West Scotch spearmint oil. Therefore, South Dakota production was not included in the computation of trade demand and salable quantity this year.

#### PART 985—SPEARMINT OIL PRODUCED IN THE FAR WEST

1. The authority citation for 7 CFR Part 985 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

2. Add a new § 985.209 under Subpart—Salable Quantities and Allotment Percentages to read as follows:

#### Subpart—Salable Quantities and Allotment Percentages

§ 985.209 Salable quantities and allotment percentages—1989-90 marketing year.

The salable quantity and allotment percentage for each class of spearmint oil during the marketing year which begins June 1, 1989, shall be as follows:

(a) "Class 1" (Scotch) oil—a salable quantity of 706,742 pounds and an allotment percentage of 42 percent.

(b) "Class 3" (Native) oil—a salable quantity of 781,902 pounds and an allotment percentage of 42 percent.

Dated: December 27, 1988.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 88-30070 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-02-M

#### 7 CFR Part 1097

[DA-89-009]

#### Milk in the Memphis, TN, Marketing Area; Notice of Proposed Termination of Certain Provision of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed termination of rule.

**SUMMARY:** This notice invites public comments on a proposal to terminate the portion of the fluid milk plant definition of the Memphis order relating to pool supply plants. The termination was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that is continuing to make supplemental shipments of milk to meet the increased fluid milk needs of Memphis distributing plants. The supply that Mid-Am has available to meet the greater need for milk in fluid uses by such Memphis handlers is milk received at the cooperative's plants which handle reserve milk supplies associated with distributing plants that are regulated under other Federal order markets. Mid-Am contends that the level of shipments needed by such handlers could result in Mid-America's plants and the

associated milk supplies becoming regulated under the individual-handler pool Memphis order. Mid-Am contends that such a regulatory change would result in a reduction of returns to its member-producers and disrupt their normal association with other Federal orders. Mid-Am also claims that the termination would allow the reserve milk supplies and supplemental shipments for fluid milk needs to continue to be regulated under the orders with which the milk is currently associated and facilitate making sufficient supplies of milk available to Memphis distributing plants for fluid use.

**DATE:** Comments are due on or before January 6, 1989.

**ADDRESS:** Comments (two copies) should be filed with USDA/AMS, Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456.

#### FOR FURTHER INFORMATION CONTACT:

John F. Borovics, Marketing Specialist, USDA/AMS, Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456 (202) 447-2089.

**SUPPLEMENTARY INFORMATION:** The Regulatory Flexibility Act (5 U.S.C. 601-612) requires the Agency to examine the impact of a proposed rule on small entities. Pursuant to 5 U.S.C. 605(b), the Administrator of the Agricultural Marketing Service has certified that this proposed action would not have a significant economic impact on a substantial number of small entities. Such action would tend to ensure that dairy farmers would continue to have their milk priced under the order for the market which is the primary outlet for their milk and thereby receive the benefits that accrue from such pricing. This proposed rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512-1 and has been determined to be a "non-major" rule under the criteria contained therein.

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), the termination of the following provision of the order regulating the handling of milk in the Memphis, Tennessee, marketing area is being considered:

In § 1097.7, paragraph (b) in its entirety.

All persons who want to send written data, views or arguments about the proposed termination should send two copies of them to USDA/AMS, Dairy Division, Order Formulation Branch, Room 2968, South Building, P.O. Box 96456, Washington, DC 20090-6456, by

the 7th day after publication of this notice in the *Federal Register*. The period for filing comments is limited to 7 days because a longer period would not provide the time needed to complete the required procedures and include January 1989 in the termination period.

The comments that are sent will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.279(b)).

#### Statement of Consideration

The proposal would terminate on January 1, 1989, that portion of the fluid milk plant definition that relates to a pool supply plant. The provision has been suspended on three prior occasions: October-December 1986, March-December 1987, and January-December 1988. The Memphis order regulates any plant that ships in excess of 70,000 pounds of milk to fully regulated distributing plants during the month.

The termination was requested by Mid-America Dairymen, Inc. (Mid-Am), a cooperative association that is making supplemental shipments of milk to meet increased fluid milk needs of plants regulated under the Memphis order. Mid-Am indicates that the shipments to such handlers continue to be made and are expected to be necessary throughout 1989.

Mid-Am indicates that the most feasible supply that it has available to meet the continuing fluid milk needs of Memphis handlers is located in the heavy milk production area of southwest Missouri. However, milk in such area is associated with Mid-Am's plants that are regulated under the Southern Illinois-Eastern Missouri, Southwest Plains, or Texas Federal order. These plants are qualified for pool status under the respective orders either on the basis of shipments from the plant to distributing plants or on the basis of Mid-Am's marketwide performance in supplying milk to distributing plants. Mid-Am contends that shipments from such plants could result in the regulation of one or more of its plants under the Memphis order.

Mid-Am claims that since the Memphis order provides for individual-handler pooling, regulation of any such plant under that order would result in a reduction of returns to Mid-Am's producers since the reserve milk supplies of the other markets would also shift regulation. Thus, Mid-Am contends that termination action is needed to permit the continued pooling after 1988 of the reserve milk supplies under the orders with which such milk is currently associated and to facilitate making

sufficient supplies of milk available to Memphis handlers for fluid use.

Mid-Am has been relying on the southwest Missouri production area to supply Memphis handlers since September 1986. A shift in the regulation of such plants has been avoided by a suspension of the Memphis provision relating to pool supply plants during October-December 1986, March-December 1987 and January-December 1988 and by alternating the plants from which milk is shipped to Memphis distributing plants in the months the provision was not suspended. Proponent anticipates that a greater and continuing reliance on such milk supplies will be necessary for an extended period of time after the expiration of the current suspension. For this reason, the cooperative association has requested that the provision be terminated effective January 1, 1989.

#### List of Subjects in 7 CFR Part 1097

Milk marketing orders, Milk, Dairy products.

#### PART 1097—[AMENDED]

The authority citation for 7 CFR Part 1097 continues to read as follows:

Authority: Secs. 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674.

Signed at Washington, DC, on December 23, 1988.

Kenneth A. Gilles,

Assistant Secretary for Marketing and Inspection Services.

[FR Doc. 88-30073 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-02-M

#### DEPARTMENT OF STATE

#### Bureau of Consular Affairs

#### 22 CFR Part 44

[SD-223]

#### Visas: Documentation of Immigrants Under Section 3 of Pub. L. 100-658

AGENCY: Bureau of Consular Affairs DOS.

ACTION: Proposed rule.

**SUMMARY:** This proposed rule would add a new Part 44 in order to implement section 3 of Pub. L. 100-658. Section 3(a) provides for the issuance of 10,000 immigrant visas per year during Fiscal Years 1990 and 1991 to aliens selected at random from among those natives of "under-represented countries" as defined in section 3(e), under a procedure established by section 3(b). This rule would favorably affect a

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specific class of intending immigrants who would benefit from a separate annual numerical limitation of 10,000 during fiscal years 1990 and 1991.

**DATE:** Written comments must be received in duplicate on or before January 27, 1989.

**ADDRESS:** Cornelius D. Scully, III, Director, Office of Legislation, Regulations and Advisory Assistance, Visa Office, Department of State, Washington, DC, 20520.

**FOR FURTHER INFORMATION CONTACT:** Cornelius D. Scully, III (202) 663-1184.

**SUPPLEMENTARY INFORMATION:** Section 3 of Pub. L. 100-658 establishes a separate annual numerical limitation of 10,000 per year for Fiscal Years 1990 and 1991. Usage of the immigrant visa numbers authorized by section 3 is not subject to the world-wide annual limitation of 270,000 set forth in section 201(a) of the Immigration and Nationality Act (INA), but is subject to the foreign state limitation set forth in INA 202(a).

Aliens entitled to compete for immigrant visa numbers under section 3 are aliens who are natives of "under-represented countries", as defined in section 3(e). An "under-represented country" is a foreign state natives of which used "less than 25 percent of the maximum number of immigrant visas otherwise available to it in \* \* \* fiscal year 1988. NP-5 visa numbers are not counted in determining which countries were "under-represented." Under INA 202(a) no more than 20,000 immigrant visa numbers may be made available to natives of any single foreign state in any fiscal year. There are at this time 175 independent countries and other areas which meet the definition of "foreign state" set forth in INA 101(a)(14). A list of foreign states, as so defined, is contained in Exhibit I to 22 CFR 42.12, Volume 9, Visas, Part III, Immigrant, Foreign Affairs Manual. Visa Office records of immigrant visa number usage during Fiscal Year 1988 reflect that 5,000 or more immigrant visa numbers were used by natives of only thirteen foreign states—China-mainland born; China-Taiwan born; Colombia; the Dominican Republic; El Salvador; the United Kingdom; Guyana; Haiti; India; Jamaica; Korea; Mexico; and the Philippines. Thus, natives of 162 foreign states will be eligible to compete for visa numbers under section 3 of Pub. L. 100-658.

As was the case with respect to section 314 of Pub. L. 99-603, the so-called "NP-5" program, section 3 of Pub. L. 100-658 provides that visas shall be made available to qualified immigrants, but then goes on to exempt aliens applying under section 3 from the requirements of INA 212(a)(14), the

labor certification requirements. The exemption of these aliens from INA 212(a)(14) nullifies the currently applicable regulations concerning qualifying for nonpreference immigrant status.

Section 3 contains no provision for establishing qualifications, as was the case with respect to section 314. Thus, the Department is left with no alternative but to provide that an alien may qualify for consideration by the submission of a writing in which the alien indicates a desire to compete for immigration and lists his or her name, date and place of birth, current mailing address, the location of the consular office nearest to the alien's place of residence or, if currently in the United States, last place of foreign residence prior to entry, and the name, date and place of birth of the alien's spouse and children, if any.

Section 3 appears to provide for making the authorized visas available in a previously untried manner—at random. Section 3 specifies that visas shall be made available "in the same manner as visa numbers are made available to qualified immigrants under INA 203(a)(7), except that such visas shall be made available strictly in a random order \* \* \*." INA 202(a)(7) specifies that visas shall be made available to qualified aliens "strictly in the chronological order in which they qualify." Considering that it is not possible to make visas available both "strictly in chronological order" and "strictly in a random order," the Department believes that the Congress intended that the visas provided for in section 3 of Pub. L. 100-658 be made available strictly in a random order.

Accordingly, the Department is proposing a procedure, set forth in proposed Part 44, § 44.4, for that purpose.

Section 3 also provides that an alien may submit only one "petition" for consideration under the program and submission of more than one "petition" will void all "petitions" submitted by the alien. This provision requires several comments. First, the Department does not envision creating and distributing a "petition" form for registration under this program. Since there are no substantive requirements for qualification, as explained above, the basic information described above will be sufficient for that purpose. Because of difficulties experienced under the "NP-5" program in deciphering applicants' handwriting and because of the world-wide scope of section 3, the Department proposes to require that all applications be typewritten and in the Roman alphabet. The Department therefore

proposes, in § 44.1, to define the word "petition" for the purposes of this Part as any typewritten document using the Roman alphabet and containing the information previously described. For purposes of identification, the Department also proposes to require that each applicant affix a photograph of himself or herself, and of the spouse and each child, if any, to the typewritten document. The photograph must be of the type normally submitted by nonimmigrant visa applicants—1 and ½" square, recent full-face likeness against a light background.

Second, in order to facilitate enforcement of the one petition per alien requirements, the Department proposed to require that each alien submitting a petition write on the outside of the envelope, in the manner of a return address, his or her exact name and current mailing address, as given in the document contained in the envelope.

In processing mail received during the application period (discussed below), the Department proposes not to open any envelopes until after the random selection has been made. Each envelope will be examined to ensure that the name and return address appear on the outside thereof. Envelopes not so marked will be discarded without further consideration. Envelopes bearing the name and return address will be numbered to assign a number to each and will be stored in order of the assigned numbers to facilitate retrieval. Once all envelopes have been numbered, numbers will be selected at random, manually, mechanically, or electronically, the envelopes bearing those numbers will be retrieved and opened, and the selected applicants appropriately notified. As a further measure against multiple applications, should the selection process reveal two or more applications by any alien, all will be discarded and additional numbers will be selected at random in replacement.

The Department does not contemplate returning applications to applicants at any point. Rather, the Department contemplates that unselected applications would be retained, unopened, for an appropriate period (not less than six months) and thereafter destroyed.

The Department contemplates an application period lasting for approximately one month, with "petitions" mailed to a single processing facility through a post office box mailing address, as was done with the NP-5 registrations. Because of the nature of the proposed random selection system, in which unopened envelopes will be

selected at random, it is also necessary to require that only one application be included in any single envelope. Section 44.4 of this Part describes this procedure, but, it will be noted, contains neither the exact dates of the application period nor the exact post office box mailing address to which "petitions" should be mailed.

For planning purposes, the Department envisions that the application period should be no later than the month of April 1989. An application period later in the Fiscal Year (FY) than April would not allow sufficient time to ensure that there would be applicants ready for final action on their applications (visa issuance or refusal) at the beginning of FY 1990. The Department believes it to be important that implementation of section 3 be timed so as to create the least possible disruption in other consular processes. Timing implementation as described above would ensure an even monthly processing of selected applicants throughout the fiscal year.

The requirement that visas be made available "strictly in a random order" effectively eliminates the use of chronological order at any stage in the processing of the selected applications. Under the immigrant visa procedures which implement the Immigration and Nationality Act, there are two separate steps in the process which are governed by the statutory requirement for consideration of applications in chronological order. The first step is the sending of notifications (referred to as Packet 3) to individual applicants to initiate the administrative steps leading to final action (visa issuance or refusal). Such notifications are sent to the applicants in chronological order. When an applicant completes the required administrative steps, the applicant is said to be "documentarily qualified." Each month every immigrant-visa-issuing office submits to the Visa Office a report of the number of documentarily qualified applicants by foreign state, preference class and priority date. Each month, immigrant visa numbers are then allocated, within the applicable numerical limitations, to those applicants in strict chronological order of their priority dates.

The requirement of section 3(b) that visas be made available to applicants under section 3 "strictly in a random order" eliminates the possibility that either the sending of the initial notifications of the actual allocation of immigrant visa numbers can be accomplished on a chronological basis.

The identity of the applicants to whom the initial notifications are to be sent will be determined by the random selection process proposed in § 44.4(b) of this Part.

There remains the question of what basis to use for the allocation of immigrant visa numbers for a given month when, as will certainly be the case from time to time, the number of documentarily qualified applicants exceeds the amount of immigrant visa numbers available for allocation for that month. After consideration of this question, the Department has concluded that the order in which the applicants are selected initially will fix the order of consideration for immigrant visa number allocation when that step in the processing occurs. Thus, the first applicant selected in the initial selection will receive the rank order number one, the second rank order number two, etc. throughout the selection process. When consular offices periodically report documentarily qualified applicants ready for final action, they will report the applicants by rank order number. Immigrant visa numbers will be allocated for use by the reported applicants in rank order as far as the numerical limitations, annual and monthly, permit.

It will thus be seen that the rank order number system described above will serve the same purpose in the administration of section 3 of Pub. L. 100-658, as the chronological priority date system serves in the administration of the numerical limitations under the INA. The Department contemplates that, during the life of section 3, the monthly Visa Office Bulletin on immigrant visa availability would include the rank order number reached under section 3.

This rule is not considered to be a major rule for purposes of E.O. 12291 nor is it expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 22 CFR Part 44

Aliens, Immigration, Nonpreference immigrants, Visas.

In view of the foregoing, Title 22, Code of Federal Regulations, would be amended by adding Part 44 to Chapter I, Subchapter E—Visas, to read:

#### PART 44—VISAS: DOCUMENTATION OF IMMIGRANTS UNDER SECTION 3 OF PUB. L. 100-658.

Sec.

44.1 General.

44.2 Definitions.

Sec.

44.3 Registration of applicants.

44.4 Selection and processing of registrants.

44.5 Control of numerical limitation.

44.6 Eligibility to receive a visa.

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; Sec. 109(b)(1), 91 Stat. 847; Sec. 314, 100 Stat. 3359, 8 U.S.C. 1153 Note; Sec. 3, 102 Stat. 3908, 8 U.S.C. 1101 Note.

#### § 44.1 General.

Except as specifically provided in this Part, the provisions of the INA, as amended, and of Parts 40 and 42 of this chapter shall apply to application for, consideration of, and issuance or refusal of, immigrant visas under section 3 of Pub. L. 100-658.

#### § 44.2 Definitions.

The following definitions shall be applicable to this Part:

(a) "Petition" shall mean any typewritten document using the Roman alphabet and containing the name of the alien, the alien's date and place of birth, the alien's current mailing address, the location of the consular office nearest to the alien's residence abroad or, if the alien is in the United States, to the alien's last residence abroad prior to entry into the United States, and the name, date and place of birth of the alien's spouse and child or children (if any), to which shall be affixed a photograph of the alien (and of the alien's spouse and each child, if any) 1 and ½" square showing a recent full-face likeness against a light background.

(b) "Under-represented country" shall mean any foreign state, as defined in section 101(a)(14) of the Immigration and Nationality Act, as amended, natives of which used less than 5,000 immigrant visa numbers under INA 203(a) during Fiscal Year 1988. Immigrant visa numbers used by aliens under section 314 of Pub. L. 99-603 during Fiscal Year 1988 shall not be counted for this purpose. Usage of immigrant visa numbers by foreign states shall be determined from the records of the Visa Office of the Department of State. For the purposes of this Part, a dependent area, as defined in 22 CFR 40.1(f), shall be considered to be a part of its governing foreign state.

#### § 44.3 Registration of applicants.

(a) *Limitations on registration.* An alien shall not be eligible to register under this section unless the alien is a native of an under-represented country as defined in § 44.2(b) of this Part. Petitions from aliens seeking to register will be accepted only from (to be determined), 1989 until (to be determined), 1989. Applications received



before or after those dates will not be considered. If the Department thereafter determines that it is necessary to establish a further period for registration in order to ensure that the number of qualified applicants is sufficient to permit allocation of all immigrant visa numbers authorized by section 3 of Pub. L. 100-658, the Department will so provide by Public Notice in the Federal Register.

(b) *Place of registration.* An alien who is a native of an under-represented country who desires to register as an applicant for a visa under section 3 of Pub. L. 100-658 shall submit a petition in a separate envelope by mail to: (to be determined). Petitions shall not be accepted for this purpose by any means other than by mail nor at any address other than the one specified in the preceding sentence. All applications shall be submitted by regular domestic or international surface or airmail. Applications submitted by any means requiring any form of written acknowledgement or confirmation of receipt will not be given consideration. All envelopes submitted for this purpose shall bear on the outside thereof, clearly typewritten and in the Roman alphabet, the name and current mailing address of the applicant as they are typed on the petition contained therein.

(c) *Derivative registration.* A petition submitted in accordance with § 44.3 (a) and (b) shall be considered to include automatically the spouse or child of the applicant, whether or not such spouse or child is named in the petition, if, in the case of a spouse, the marriage to the applicant took place prior to the applicant's admission to the United States for permanent residence, or, in the case of a child, the child is the issue of a marriage which took place prior to the applicant's admission to the United States for permanent residence.

#### § 44.4 Selection and processing of registrants.

(a) *Selection.* All envelopes received at the mailing address specified in § 44.3(b) during the period specified in § 44.3(a) and bearing the name and address of the petitioner as specified in § 44.3(b) shall be assigned a number in order of receipt. Envelopes received prior or subsequent to the specified period and those not bearing the name and mailing address of the petitioner shall be discarded. Upon completion of the numbering of all envelopes, a quantity of numbers sufficient to permit the processing and issuance of all immigrant visas authorized under section 3 of Pub. L. 100-658 shall be selected at random, manually, mechanically or electronically, as the

Department shall determine. Any alien who submits more than one petition for this purpose shall be disqualified from consideration for registration or selection under this section.

(b) *Processing.* Upon selection of the envelopes pursuant to the provisions of § 44.4(a), the envelopes shall be opened and the applicant assigned a rank order number based upon the order in which his or her envelope was selected at random. The information concerning the applicants selected, including the applicant's rank order number, shall be transmitted to the consular office named in the petition. Thereafter, the consular officer shall process the application in accordance with the applicable provisions of Part 42 of this chapter and § 44.5 and § 44.6 of this Part.

#### § 44.5 Control of numerical limitation.

(a) *Centralized control.* Centralized control of the numerical limitation specified in section 3 of Pub. L. 100-658 is established in the Department of State. In order to effect this control, the Department shall limit the number of immigrant visas and the number of adjustments of status that may be granted, to aliens applying under section 3 of Pub. L. 100-658 to a number not to exceed 10,000 each in Fiscal Years 1990 and 1991 and not to exceed, in any month of either such fiscal year, 1,000 plus any balance remaining from authorizations for preceding months in the same fiscal year.

(b) *Notification of applicants.* Consular offices shall notify applicants to take the steps necessary to meet the requirements of INA 222(b) in order to apply formally for a visa upon notification from the department that the applicants have been selected as provided in § 44.4.

(c) *Reports of applicants ready to apply formally for a visa.* Consular officers shall report to the Department monthly, or at such other intervals as the Department may direct, the rank order numbers of applicants notified pursuant to § 44.5(b) who have informed the consular office that they have obtained the documents required under INA 222(b), and for whom the necessary clearance procedures have been completed.

(d) *Allocation of immigrant visa numbers.* Within the numerical limitations specified in § 44.5(a), the Department shall allocate immigrant visa numbers for use in connection with the issuance of immigrant visas and the granting of adjustment of status based on the rank order numbers of visa applicants reported by consular officers pursuant to § 44.5(c) and of applicants

for adjustment of status reported by officers of INS.

#### § 44.6 Eligibility to receive a visa.

The eligibility of an applicant for a visa under section 3 of Pub. L. 100-658 shall be determined as provided in the INA, as amended, and in Parts 40 and 42 of this chapter except that the provisions of INA 212(a)(14) shall not apply in determining an alien's eligibility for such visa.

Date: December 22, 1988.

Joan M. Clark,  
Assistant Secretary for Consular Affairs.  
[FR Doc. 88-29902 Filed 12-29-88; 8:45 am]  
BILLING CODE 4710-06-M

### DEPARTMENT OF TRANSPORTATION

#### Federal Highway Administration

##### 23 CFR Part 658

[FHWA Docket No. 87-1, Notice No. 2]

RIN 2125-AB70

#### Truck Size and Weight; Reasonable Access

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** FHWA proposes to amend § 658.19 of 23 CFR Part 658 which governs reasonable access by commercial vehicles with lengths and widths authorized by the Surface Transportation Assistance Act of 1982 (STAA), as amended. The proposed changes would define "terminals" and establish national minimum access requirements for STAA-defined vehicles off the National Network in all States in a safe and efficient manner. The proposed amendments have been developed in response to an industry petition and comments received on the ANPRM issued in the Federal Register at 52 FR 298 on January 5, 1987.

**DATE:** Comments on this docket must be received on or before May 1, 1989.

**ADDRESS:** Submit written, signed comments to FHWA Docket No. 87-1, Notice No. 2, Federal Highway Administration, Room 4232, HCC-10, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address between 8:30 a.m. and 3:30 p.m. EST, Monday through Friday, except legal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kevin E. Heanue, Office of Planning (202) 366-2951 or Mr. John F. Grimm, Office of Motor Carrier Information Management and Analysis (202) 366-4039, or Mr. David C. Oliver, Office of Chief Counsel (202) 366-1356, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except legal holidays.

**SUPPLEMENTARY INFORMATION:** On June 5, 1984, the FHWA issued a final rule in the Federal Register (23 CFR 658; 49 FR 23302) implementing the major size and weight provisions of the Surface Transportation Assistance Act of 1982, Pub. L. 97-424, 96 Stat. 2097. Section 658.19 of the June 5 rule (23 CFR 658.19) implemented the reasonable access provisions of the STAA of 1982. These provisions require the States to allow vehicles with the dimensions and weight limits authorized by the STAA reasonable access between the National Network and terminals and facilities for food, fuel, repairs and rest.

Reasonable access must also be provided from the network to points of loading and unloading for household goods carriers and for truck tractor-semitrailer combinations with a single semitrailer up to 28-feet long (28½ feet long if grandfathered) and up to 102-inches wide (see section 106 of Pub. L. 98-554, 98 Stat. 2832).

The National Network consists of the Interstate System and those Federal-aid primary routes designated by the Secretary of Transportation identified under each State in 23 CFR Part 658, Appendix A.

Docket comments on reasonable access received prior to the June 5, 1984, rule generally concerned two issues. The first was whether the States or the FHWA should define "reasonable access." The second was whether FHWA should define "terminal." The FHWA concluded that the wide variation in local conditions would make any single Federal definition of either "reasonable access" or "terminal" inappropriate under specific local conditions. Instead of defining "reasonable access" and "terminal," a background table in the June 5, 1984, Federal Register listed State requirements. The FHWA indicated its intention to monitor State laws and regulations and to intervene in specific cases where there was a clear denial of access.

#### Petition

On August 28, 1986, the National Industrial Transportation League

(NITLeague), an organization of shippers and shipper groups, petitioned the FHWA to adopt an interim rule that would amend the current Federal requirements for reasonable access (23 CFR 658.19) and institute a rulemaking proceeding.

The interim rule proposed by the NITLeague petition would have FHWA do two things. First, it would have FHWA prohibit States from denying access except on posted routes where:

(a) Large commercial vehicles were generally excluded and, for 102-inch wide vehicles, where lane widths were generally or substantially under 10 feet, and

(b) Safer alternative routes exist, considering any extra distance.

Second, it would have FHWA define the word "terminal" as any industrial, commercial, or job site location used for origination or termination.

The FHWA at that time did not have an adequate factual basis for adopting the interim rule proposed by the NITLeague and denied that part of the petition. The FHWA, however, did recognize that restrictions imposed by States and their political subdivisions on access to the National Network were many and varied and that the petition raised a substantial issue of whether FHWA should modify its position. As a result, FHWA granted that portion of the petition requesting the initiation of rulemaking procedures by issuing an advance notice of proposed rulemaking (ANPRM) in the Federal Register on January 5, 1987 (52 FR 298).

The January 5, 1987, ANPRM briefly described the intent of the NITLeague petition and requested comments on several issues related to possible amendment of the existing rule. In addition, the ANPRM requested data on accident experience as well as any geometric or engineering data relating access restrictions to safety.

#### Comments Discussion—General

In total there were 230 responses to the request for comments contained in the ANPRM. The preponderance of comments (200) were from industry associations and individual shipping and trucking companies with over 90 percent favoring a greater Federal role in defining and ensuring access. The next largest group of commenters were State highway agencies (20) of which 19 opposed further Federal involvement. The remaining commenters (10) were local governments, public interest groups and individuals. The responses from this group were all against any additional Federal involvement.

#### Comments Discussion—Definition of "Reasonable Access" and "Terminal"

In general, all industry responses advocated a Federal definition of both "reasonable access" and "terminal," while public agencies and public interest groups stated that there was no need for further preemption of State authority.

The State of Vermont commented that if further definition of terms is required it should be left up to each State using its own safety criteria. The State of Virginia noted that if national definitions were used they would have to be very restrictive to protect the public in a variety of terrain conditions. The State of Florida suggested that FHWA do no more than establish minimum elements that States would be required to address.

The State of Texas, in opposing FHWA definitions, responded that "... public safety must be maintained and that determination involves many issues that are unique to each specific site. National definitions for determining access could not take into consideration the unique conditions that determine the safety of an access route. For these reasons ... continue to allow the State and local governments to determine appropriate solutions to access problems."

The State of Illinois noted that it had not experienced problems with access on the State highway system because the State uses the term "points of loading and unloading" in lieu of "terminal." Illinois pointed out that access was not totally resolved in local areas, because local governments are reluctant to allow access on many streets and highways that are not geometrically or structurally adequate.

The Florida Department of Transportation submitted the definition of terminal facilities contained in its State code as follows: "... are devoted exclusively to wholesale commercial transportation activities, including the reception, retention, transfer, and forwarding of cargo or freight."

The State of Maine also provided a definition of terminal. Its definition is in terms of carrier types (i.e., linehaul trucks) which load/unload major portions of their loads or full loads as opposed to localized delivery, collection, or distribution.

The American Automobile Association asked FHWA to retain its current approach, but suggested, if a definition must be made, that FHWA use the New York Department of Transportation definition of terminal,



namely, "A 'terminal' . . . is a highly specialized distribution facility where longhaul inter-city freight is delivered from original points of origin, or stored, or distributed to final points of destination, or any combination thereof."

On the other hand, industry commented on the many difficulties faced by shippers and truckers due to the nonuniformity of the various States' access provisions. The Private Carrier Conference (PCC) responded that, "The access problems PCC members are experiencing have taken a number of different forms. PCC members have encountered outright denials of access to their terminals or other facilities or those of their customers. They have also had mileage restrictions imposed upon them of such limit from the National Network that the effect of the restriction has been tantamount to no access at all."

Another problem associated with lack of uniformity is the inability of industry to capitalize on the availability of the new vehicle type to enhance productivity. This problem is reflected in comments from the J.I. Case Company which noted that it had every intention of utilizing 102-inch wide trailers until it discovered that it would be impossible to deliver finished products to its customers due to access restrictions.

In addition, industry comments noted that there are currently as many definitions of these terms as there are States and that national definitions, established by FHWA, were necessary for uniformity across the country. Industry commenters noted that national definitions are needed to fulfill congressional objectives in the STAA of enhanced truck productivity, reduced costs, and fewer vehicles being operated on our public highways. In general, they also commented that safety would not be compromised.

The International Brotherhood of Teamsters (IBT) commented that FHWA should define the terms with assistance from the States.

None of the respondents supported formula-type definitions of a terminal. Those stating a preference recommended operational type definitions. Most industry commenters favored the broad definition of a terminal contained in the NITLeague petition. One commenter who supported the NITLeague definitions pointed out that use of tonnage, operations, and demographics-type definitions would discriminate against small carriers.

The IBT noted, on the other hand, that a customer is not a terminal. It pointed out the STAA's differential treatment of household goods movers as evidence of

congressional intent that reasonable access was somewhat less than unrestricted access.

With respect to reasonable access provisions that contain fixed mileage limitations, the State of North Carolina stated that it has defined as reasonable those routes within 3 miles of the National Network and indicated no significant problems. However, it commented that any distance set could be considered arbitrary and that the degree of reasonableness can only be judged by the number of complaints from both the trucking industry and enforcement officials. The State further argued that 3 miles is only appropriate for access for food, fuel, repairs and rest and that arbitrary distances for terminals cannot be set.

The Private Truck Council of America (PTCA) noted that blanket access regulations tied to distance should be viewed with skepticism and only tolerated when each and every route to which the regulation applies meets a concern for a specific safety or operational characteristic. The PTCA suggested that FHWA should develop regulations for States that opt to regulate access. Such regulations should require that any restrictions be based on safety or operating characteristics; any permit process be related to safety or operational characteristics; permit processes be timely; and the availability of facilities for food, fuel, repair and rest along the National Network be considered.

#### Comments Discussion—Safety

The FHWA in the ANPRM requested data on accident experience and any geometric or engineering data that would indicate safety problems under unrestricted or less restricted access provisions.

There were 18 industry commenters who responded with safety information and 2 States that provided accident data. Neither of the States provided rate-based data that would allow comparison by vehicle type. Only 1 State (California) responded with engineering/geometric data. The information demonstrated that it is possible to evaluate the adequacy of individual routes in terms of the amount of vehicle off-tracking.

The State of California also provided data showing increases in combination truck accidents from 1981 to 1985; however, accident rates were not given, and it was not possible to relate the changes to the larger STAA vehicles.

The accident involvement data provided by industry showed little change in accident rates from pre-STAA-dimensioned vehicles to STAA-

dimensioned vehicles. The predominance of change was toward accident rate reduction.

The preamble to the June 5, 1984, final rule on Truck Size and Weight characterized the "widely divergent" views on truck safety. This docket was no different. One major benchmark in the intervening years has been the publication of the congressionally requested study on twin trailer trucks by the National Academy of Science, Transportation Research Board.<sup>1</sup> This study concluded, after a 2-year effort, that "the increased use of twins will have little overall effect on highway safety, because a reduction in miles of truck travel will approximately offset the small possible increase in accident involvement per mile traveled."

#### Court Interpretations

The courts have been reluctant to enter into the area of State regulation vis-a-vis Federal powers with respect to interstate commerce in the absence of clear preemption or discrimination. However, those few courts which have discussed the subject of access have provided us with guidance in formulating this regulation. For example, in *Consolidated Freightways v. Kossel*, 475 F. Supp. 544, at 533 (D.C. Iowa, 1979) regarding twin trailer operations, Judge Stuart issued an order that the State grant access to terminals and facilities for food, fuel, repairs or rest up to 5 miles, unless closer facilities were available.

Likewise, in a recent District Court Opinion in the case of *Consolidated Freightways v. Larson*, 647 F. Supp. 1479 (1986), Judge R. Dixon Herman found a limitation of 2/10ths of a mile for food, fuel, rest, and repair to be unduly restrictive, as most such facilities are located beyond this distance. Therefore, availability of such facilities at regular intervals along the network, including abutting properties on non-controlled access highways, is an important factor in access determinations. At the same time, review of an expanded access route to or from a terminal may be reasonable. Delay in such review, however, constitutes a denial of reasonable access. Finally, Judge Herman noted that denial of an access route must be for safety and must be related to a safety or operating characteristic of the STAA vehicle in relation to the proposed route. According to this view, denial based on other factors and denial pending lengthy

<sup>1</sup> National Research Council, "Twin Trailer Trucks," Transportation Research Board Special Report 211, Washington, DC, 1986.

review amount to denials of reasonable access under the STAA.

#### NPRM Proposal

In developing the proposed amendment, FHWA has attempted to specifically address safety concerns while recognizing the needs of interstate commerce. As the above discussion illustrates, there is no real consensus on how "reasonable access" and "terminal" should be defined. Based on the comments received and FHWA's ongoing monitoring of the situation, FHWA has decided to propose definitions, within some broad criteria, of reasonable access and terminal. The FHWA has concluded that any definitions need to continue to emphasize that safety is paramount and should not be compromised in providing access from the National Network. With this in the forefront, FHWA is proposing to amend the regulation within the following four key provisions:

- (a) Definition of "terminals,"
- (b) A 5-mile minimum standard of "reasonable access" with a safety-based exception,
- (c) The requirement that all States have a program for evaluating requests for access to terminals beyond the minimum 5-mile standard, and
- (d) A certification provision which is an alternative means for States to gain compliance with the "reasonable access" provisions.

#### Terminals Defined

In defining terminals, the FHWA seeks to provide access for STAA vehicles consistent with public safety requirements. The proposed definition would include facilities where freight is transferred or stored, where vehicles are completely loaded or unloaded, or where vehicles are manufactured, stored, or maintained. States at their option may define terminals to include other facilities in addition to those described in the definition. While this definition should significantly expand access for the larger STAA vehicles, it seeks to balance current practices now employed by most of the States and those sought by the NITLeague petition that would have added access for virtually all locations.

The FHWA recognizes that there are other potential definitions of "terminals." The statute does not specifically define the term, but it, for example, could be argued that it should be limited to the traditional definition of "terminal," as it applies to motor carrier operations, which generally includes only areas where freight is consolidated, loaded and unloaded. In support of such limitation, it can be argued that the 1982

STAA may use the work "terminal" as it was commonly understood at the time, prior to efforts to expand the concept to ensure access to additional types of facilities. As indicated in response to the ANPRM, other alternative definitions of "terminals" have been suggested, which are similar to the traditional concept of "terminals." For example, Florida proposed that we use its definition that terminals are facilities "devoted exclusively to wholesale commercial transportation activities, including the reception, retention, transfer, and forwarding of cargo and freight." The definition proposed by Maine focuses on carrier types which load/unload major portions of their loads or full loads, in contrast to localized pick-up and delivery. The AAA suggests another definition: "A 'terminal' is a highly specialized distribution facility where longhaul freight is delivered from original points of origin, or stored, or distributed to final points of destination, or any combination thereof."

Comments are specifically requested on these alternative definitions; what impact would they have on interstate trucking; are they enforceable; are they easily understood; should a definition focus on a point where goods are consolidated, which is generally viewed as the "traditional" definition of terminal; and finally, what impact on safety would these alternative definitions have?

#### General Preemption—5 Miles

The proposed amendments contain a general preemption in the form of a broad 5-mile reasonable access provision. Under this proposed provision, STAA-type vehicles would be allowed access to terminals and to facilities for food, fuel, repairs, and rest within 5 road miles of the National Network along the shortest feasible route, unless a route is specifically posted as precluding such vehicles for safety reasons. The proposal is not designed to allow access on every road and street, but rather to establish a minimum for access via the shortest feasible route where there are no safety problems. The provision also allows for positive signing of access routes as an alternative. A preliminary analysis of State access provisions indicates that the 5-mile provision would impact approximately 25 States by virtue of their having either a shorter distance provision or not having any distance-based provision and requiring permits to leave the designated system.

The FHWA generally concurs with those comments that noted the difficulty of establishing completely objective mileage-based limitations, but FHWA

recognizes that a majority of States now use a mileage-based formula is providing access for the trucking industry. The FHWA proposal is designed to ensure a measure of uniformity in all States. In light of this, comments are requested on the 5-mile standard or if there should be any mileage-based standard and what impact a standard would have on the States and the industry. The FHWA proposal does not distinguish between urban or rural locations, and FHWA specifically seeks comment on the advisability and feasibility of establishing separate mileage based requirements for rural and urban areas. Further, FHWA seeks comments on the implications of establishing separate mileage-based requirements for service facilities (food, fuel, repairs and rest) and terminals and possibly for separate STAA vehicle classes (i.e., twin trailers, longer semitrailer combinations, etc.) Most service facilities, for example, are much closer than 5 miles from the National Network. Most States that now use a mileage standard do not make these distinctions, but is there justification or a basis to have separate definitions? How would the States and the industry be affected?

#### Limited Preemption—Beyond 5 Miles

The proposed regulation would require the States to have a process for evaluating access requests for terminals, as defined above, that are not included in the proposed 5-mile provision. This notice proposes two regulatory options for comment by the industry, States, and interested parties.

Under Option 1, States would be required to provide access beyond 5 miles unless safety reasons require denial. A State's process would meet the regulatory requirements if it generally provides access and provides for expeditious processing. A State process would be required and be subject to the following Federal criteria: Routes can be posted on the basis of safety. In those cases where a State chooses to adopt a route approval system, this option would require that requests be automatically granted, if not acted on within 90 days. Finally, it would require that, when a State grants route approval for one vehicle of any type, the approval constitutes approval for all vehicles of that type. Thus, individual trip permits could no longer be required, and the paperwork burden upon both the States and industry will be reduced. This option would not prohibit the use of kingpin-to-rear-axle restrictions or other safety-based State restriction procedures on access routes.



Under Option 2, a State process would be required, but decisions on its detailed provisions and administration would be left to the States. As long as a State adopts a process for evaluating requests, this option would not require the State to meet further Federal requirements for access beyond 5 miles from the National Network. The FHWA would not review the State process or evaluate its actual impacts. For example, a State could decide to restrict access for safety or non-safety reasons such as reducing wear and tear on roads or promoting efficiency by encouraging the relocation of older terminals to within 5 miles of the National Network. However, all States would be required to have a process for evaluating requests for access beyond 5 miles.

#### Certification Provision

The proposed amendment includes a certification provision whereby States may request FHWA to accept their reasonable access policies as complying with 23 CFR 658.19. This provision could be used by States whose reasonable access policies are different than those specified in this amendment, but do have a process which provides for "a substantially equivalent level of access," such a process would have to provide for a rational accommodation of STAA vehicles and not impose an unreasonable burden on carriers.

For example, some States with 1- or 2-mile reasonable access provisions have very effective programs for considering requests for access from terminal operators located at distances greater than these limits from the National Network. Requests are handled expeditiously, a field review is undertaken and, if no safety problems are identified, the requests are granted. In some states, for example, 80 to 90 percent of all requests are granted because safety problems are not identified. These State processes obviously provide reasonable access and would be certified as "substantially equivalent" to the proposed regulatory provisions. In other cases the facts may not be as clear, and FHWA would use its judgment to determine whether the State process is "substantially equivalent."

As explained below, FHWA intends to be very flexible in implementing the certification provision. Although many States have programs that do not comply with the specific provisions proposed under § 658.19 (d), (e), and (f), FHWA believes that all but a few of these States (fewer than eight) will meet the "substantially equivalent" test without significant modifications to their existing programs. This proposal

therefore relies heavily on the certification provision. Alternatively, FHWA could issue a less restrictive version of § 658.19 (d), (e), and (f), so that most State programs would automatically comply with the regulation without requiring specific FHWA approval. Commenters who support less reliance on the certification provision are encouraged to provide suggestions on how FHWA could revise the proposed rule to avoid the need to grant waivers to large numbers of States. Commenters are also invited to suggest ways that the certification process should be simplified so that it does not become onerous on States.

#### Federalism Impact on States

State practices regarding reasonable access vary considerably. Western States tend to restrict longer semitrailer combinations while eastern States tend to restrict twin trailer combinations. State controls are premised on a combination of length and width limitations with the length limitation varying by vehicle type. For example, a preliminary evaluation of State access provisions indicate 13 States allow STAA vehicles to operate on all roads. Twenty-two States have adopted 102-inches as the legal width limit on all roads. Twenty-nine States have a 65-foot or greater overall length provision for roads not on the National Network which is, to a large extent, equivalent to no restriction. Nineteen States have, essentially, no restriction on STAA twin trailers off the National Network.

The FHWA has historically tried to avoid preemption and has instead sought to reconcile problems through negotiation. In the case of reasonable access, this has been attempted for over 6 years. Our evaluation of the ANPRM docket comments indicated that further rulemaking may be needed in order to achieve the statutory requirements of the STAA.

The proposed amendments have "federalism" implications and have been developed in accordance with the principles and policymaking criteria of Executive Order 12612, *Federalism*, of October 26, 1987. They allow alternative State requirements and are intended to minimize regulatory preemption of State law.

A specific set of criteria for reasonable access has been proposed under § 658.19 (d), (e), and (f) which establish standard requirements. Almost half the States have reasonable access policies that meet or exceed these criteria, and they will not be impacted by the regulatory requirements. Moreover, a regulatory option without specific criteria for § 658.19 (f) (beyond 5

miles) is also proposed for comment, in keeping with the Executive Order.

The alternative approach provided under § 658.19(g) for States that have developed their own policies and do not choose to adopt the proposed standard requirements permits States to apply for Federal certification that their policies meet the objectives of the reasonable access provisions of the STAA.

Approximately 28 States and the District of Columbia appear to have some current vehicle class or access requirements which are different from the standard we propose and which, taken at face value, appear to be more limiting than the proposed standard. However, in practice, many of these States administer their procedures in a way that appears to provide a level of access substantially equivalent to the proposed standard. Thus, the certification alternative should provide an opportunity for them to demonstrate that their procedures provide an equivalent degree of access in practice. For example, one State may, by statute or regulation, limit access to 1 mile, but employ the permitting process liberally. Such a system would be a likely candidate for certification. A review of the number of requests, complaints, approvals of permits, and time to process requests could be used to determine substantially equivalent levels of access. Thus, the proposed rule should only impact State access provisions for specific vehicle classes (i.e., twins or longer semitrailer combinations) or overall length limitations.

The FHWA recognizes that a number of States have worked with the motor carrier industry to reach accommodations and agreements on issues of access, and intends to accommodate those positive efforts to avoid preemptive action. Therefore, the certification process should ultimately reduce the number of States significantly affected by the preemptive Federal standard requirements to less than eight. These (eight or fewer) States may argue that they are complying with the minimum that the 1982 STAA requires. Should FHWA nonetheless preempt their laws or regulation to ensure additional access?

Thus, the proposed amendments would not impact all States, but rather establish minimum national reasonable access requirements for large commercial vehicles. Further, they would not preempt a State's authority to restrict or deny access on specific routes when that State has valid reasons for the limitations.

#### Congressional Interest and Direction

The broad issue of reasonable access for all STAA vehicles has generated considerable congressional interest.

On April 2, 1987, Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987, section 158, which mandated a 30-month study of motor vehicle issues, including nationwide reasonable access policy, by the Transportation Research Board (TRB). Most recently, the Conference Committee on the Department of Transportation and Related Agencies Appropriations Act of 1988 (Pub. L. 100-202, 101 Stat. 1329) accelerated the time table for completion of the Reasonable Access portion of the study and report. The TRB has been directed to complete its study of the Reasonable Access provisions and report within 18 months (July 1989). The committee report further directed the DOT to "accord substantial weight to the findings and recommendations contained in the Board report" (H.R. Rept. No. 498, 100th Cong., 1st Sess. 1131(1987)).

Based on the comments received on the ANPRM, the FHWA recognizes the urgency in addressing the reasonable access issue. While the committee report directs the Department to refrain from issuing a final rule on this issue until after the TRB has issued its report, it further states that, "The Department may proceed with its current efforts in this area, including soliciting comments from interested parties through a notice of proposed rulemaking." The FHWA has decided to proceed and issue this NPRM containing proposed amendments to 23 CFR 658.

All comments received on the ANPRM and this NPRM will be provided to TRB to assist in this study. These comments, as well as the TRB study report, will be used by FHWA in preparing a final rule on Reasonable Access.

#### Request for Comments

The FHWA solicits comments from all interested persons on the proposed amendments to 23 CFR 658.19. The FHWA is particularly interested in comments by individual State transportation agencies on how this amendment would impact their current State requirements.

The FHWA welcomes comments and suggestions that could be helpful to the TRB and the FHWA as they explore the issues of reasonable access. The FHWA also seeks comment on whether the proposed approach is necessary in order to solve the problem of reasonable access. Since the problem is currently limited to a few States, will a regulatory approach impose unnecessary burdens

or decrease the flexibility of those who are already complying? Will those States already be in full compliance without any extra effort? Would it be more effective to use the current process of negotiation with litigation against non-complying States to ensure fulfillment of the statutory objectives? Would the use of litigation/negotiation provide the necessary clarity with respect to the statute's objectives? Would it be sufficient in providing timely implementation of the statutory objectives? Overall, which approach (regulation or litigation) would provide the States with the most flexibility? Which would most effectively implement the statutory objectives? Why?

Those desiring to comment on this NPRM are asked to submit their views in writing to the docket. The docket comments will be available for public inspection before and after the closing date at the above address. All comments received before the closing date will be considered before further rulemaking action is taken. A copy of the NITLeague petition is available for inspection and copying in the FHWA Docket Room or may be obtained by contacting the Docket Room Clerk at (202) 366-1387.

#### Regulatory Impact

The FHWA has considered the impacts of this notice and has determined that it is not a major rulemaking action within the meaning of Executive Order 12291. However, this rulemaking has been included in DOT's Regulatory Program for significant rulemakings. These determinations by the FHWA are based on the nature of the rulemaking. The FHWA proposes to amend the June 5 final rule by establishing minimum criteria and procedures for the implementation of the reasonable access provisions required by the STAA. The impacts of the revisions addressed in the proposed rulemaking do not significantly alter the impacts initially projected. A Regulatory Impact Analysis was prepared for the June 5, 1984, rulemaking and is available for inspection in the Headquarters Office of FHWA, 400 Seventh Street, SW., Washington, DC 20590. Copies may be obtained by contacting Mr. Kevin E. Heanue, Mr. John F. Grimm, or Mr. David C. Oliver, at the address provided under the heading "FOR FURTHER INFORMATION CONTACT." For the same reason, and under the criteria of the regulatory Flexibility Act, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.

In consideration of the foregoing, the FHWA proposes to amend Chapter 1 of

Title 23, Code of Federal regulations, by revising Part 658 as set forth below.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultations on Federal programs and activities apply to this program.)

A regulatory information number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

#### List of Subjects in 23 CFR Part 658

Grant programs—transportation, Highways and roads, Motor Carriers—size and weight.

Issued on December 23, 1988.

Lowell B. Jackson, P.E.,  
Deputy Administrator.

#### PART 658—TRUCK SIZE AND WEIGHT, ROUTE DESIGNATIONS—LENGTH, WIDTH AND WEIGHT LIMITATIONS

1. The authority citation for 23 CFR Part 658 continues to read as follows:

Authority: Secs 133, 411, 412, 413, and 416 of Pub. L. 97-424, 96 Stat. 2097; (23 U.S.C. 127; and 49 U.S.C. 2311, 2312, 2313 and app. 2316), as amended by Pub. L. 98-17, 97 Stat. 59, and Pub. L. 98-554, 98 Stat. 2629; 23 U.S.C. 315; and 49 CFR 1.48.

2. Section 658.19 is amended by adding new paragraphs (d), (e), (f), and (g) as follows:

#### § 658.19 Reasonable access.

(d) *Terminals*. The term "terminals" includes, at a minimum, facilities at which one or more of the following criteria apply:

- (1) Freight enroute to other destinations is transferred, warehoused, or temporarily stored; or
  - (2) STAA vehicles are completely loaded or completely unloaded; or
  - (3) STAA vehicles are manufactured, stored, or maintained. States may define terminals to include additional facilities.
- (e) *Reasonable access—5 miles*. (1) Except as provided herein, reasonable access for a terminal or a facility for food, fuel, repairs, and rest includes, at a minimum, the use of the shortest feasible route up to 5 road miles from the National Network.

(2) States may prohibit the operation of STAA vehicles on particular roads for specific safety reasons. Such roads shall



be clearly posted as being unavailable to STAA vehicles.

(3) States, at their option in lieu of posting, may elect to erect positive signing to delineate access for STAA vehicles.

(f) Option 1: *Reasonable access—beyond 5 miles.* In addition to reasonable access provided under paragraph (e) of this section (the 5-mile provision) or under general provision of State law, reasonable access includes a process for evaluating access requests for terminals beyond the established mileage limit from the National Network according to the following:

(1) Access routes shall not be prohibited for reasons other than safety.

(2) An access route request shall be deemed granted if not action is taken on the request within 90 days of its submittal.

(3) Access routes granted for any particular vehicle shall be available to all vehicles of the same type.

(f) Option 2: *Reasonable access—beyond 5 miles.* In addition to reasonable access provided under paragraph (e) of this section (the 5-mile provision) or under general provision of State law, reasonable access includes a process for evaluating access requests for terminals beyond the established mileage limit from the National Network.

(g) *Reasonable access—alternative approach—certification.* Any State with reasonable access provisions in conflict with those contained in this section, but which actually provide for a substantially equivalent level of access, may petition FHWA for certification of its procedures as being in compliance with 23 CFR 658.19. The FHWA will approve all such petitions which demonstrate the State has a process that provides for rational accommodation of STAA vehicles and does not impose an unreasonable burden on carriers.

[FR Doc. 88-30107 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-22-M

#### Saint Lawrence Seaway Development Corporation

#### 33 CFR Part 402

#### Tariff of Tolls; Proposed Revision

**AGENCY:** Saint Lawrence Seaway Development Corporation, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Saint Lawrence Seaway Development Corporation and the St. Lawrence Seaway Authority of Canada have jointly established and presently administer the St. Lawrence Seaway

Tariff of Tolls. This Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the Corporation and the Authority. The Authority is proposing to the Corporation that the commodity tolls and vessel charges be increased by approximately 4.5 percent for the 1989 and approximately 4.5 percent for the 1990 navigation seasons at the Welland Canal section and at the Montreal-Lake Ontario section of the St. Lawrence Seaway. All the Welland Canal revenues accrue to the Authority. The Authority is proposing that the Corporation receive 25 percent of the Montreal-Lake Ontario revenues, a change from the 27 percent it currently receives. All of the Corporation's share of these revenues, however, will be returned to the person paying the toll or charge in accordance with section 805 of the Water Resources Development Act of 1986.

The Authority also is proposing to the Seaway that lumber be reclassified from general cargo to bulk, that mill feed be removed from the classification "feed grains", and that the provision concerning the Welland Canal lockage charge for vessels in tandem be changed to specify cargo vessels in tandem. The Authority further proposes a reduction in the passenger charge on the Welland Canal and the Corporation proposes an elimination of the tariff for government aid cargoes and for nonprofit organization or cooperative food cargoes intended for humanitarian or development assistance overseas. Finally, the Authority proposes to delete the language in § 402.4(a) concerning the toll level reached in 1983 as it is superfluous.

**DATES:** The Corporation invites comments on the proposed revision to the Tariff of Tolls from any interested person(s) or organization(s). Any party wishing to present views or data on the proposed revision may file comments with the Corporation on or before February 13, 1989.

It is requested that, for comments concerning the tariff increases, data provided in written comments include total transportation costs for the movements of cargo via the St. Lawrence Seaway and should detail individually all pertinent components, including all inland freight costs (rail, truck, or water), terminal or elevator charges and handling costs, ocean freight costs and other significant transportation costs. It would be very helpful if each of these analyses also detailed similar transportation costs by alternative routes in order to adequately evaluate the potential for diversion.

**FOR FURTHER INFORMATION CONTACT:** Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-0091.

**SUPPLEMENTARY INFORMATION:** It is proposed to amend the definition of "bulk cargo" (at 33 CFR 402.3(b)(7)) to add lumber. Presently, lumber is included under general cargo, for which rates are higher. The change would result in an approximately \$1.47 per ton reduction throughout the system. The reduction would encourage certain lumber shipments to transit the seaway that otherwise would not because of the higher, present rate.

It also is proposed to amend the definition of "feed grains" (at 33 CFR 402.3(g)) to delete mill feeds containing not more than 35 percent of ingredients other than grain or grain products, which are a manufactured product and therefore should not be considered feed grains.

It is proposed further to amend the definition of "Government aid cargo" (at 33 CFR 402.3(j)) to include certain food cargoes that are owned or financed by nonprofit organizations or cooperatives and intended for use in humanitarian or development assistance overseas. These are the type of shipments presently covered in the United States by Title II of the Pub. L. 480 Food for Peace Program. In addition, it is proposed to eliminate the tolls for all "Government aid cargoes" (as set forth in the Tolls Schedule in 33 CFR 402.8) to encourage use of the system for both Canadian and United States Government owned or financed humanitarian relief programs and these nonprofit owned or financed programs in support of greater humanitarian and development assistance efforts.

It is proposed to the language under the "Tolls" provision in 33 CFR 402.4(a) concerning the toll level reached in 1983 as it is superfluous.

In addition to the elimination of tolls for Government aid cargoes, it is proposed to amend the Tolls Schedule (33 CFR 402.8) to eliminate the lockage fee for passenger vessels using the Welland Canal. Passenger vessels in the Montreal-Lake Ontario section only pay a per passenger fee. The amendment would make the treatment of passenger vessels using the Welland Canal equal. Relatedly, the provision in the Tolls Schedule concerning vessels in tandem would be amended to clarify that it pertains only to cargo vessels in tandem.

Finally, it is proposed that present division of tolls revenue between the Authority and the Corporation (33 CFR 402.4(c)) and, in addition to the changes

discussed in the foregoing and except the maintenance of the per passenger per lock charge for passenger vessels at \$1.00, the Tolls Schedule for the Welland Canal Section and the Montreal-Lake Ontario Section be revised (33 CFR 402.8). The increase in tolls will be approximately 4.5 percent for 1989 and 4.5 percent for 1990 on both the Welland Canal and Montreal-Lake Ontario Sections. For example, the current toll for bulk cargo for the Welland Section is \$0.42 and for the Montreal-Lake Ontario Section is \$0.85. Under the proposed changes, the 1989 charges would be \$0.44 and \$0.89 and the 1990 charges would be \$0.46 and \$0.93 for the Welland and Montreal-Lake Ontario Sections respectively. In addition, the division of tolls would be changed from the current 73 percent for the Authority and 27 percent for the Corporation to 75 percent for the Authority and 25 percent for the Corporation.

As provided in the 1978 Tolls Agreement between the Authority and the Corporation, the Joint Tolls Review Board has reviewed the estimated expenditures for 1989 and the projected revenues from tolls and other sources to determine the adequacy of the current toll structure and division in meeting the financial requirements of the Authority and the Corporation during fiscal year 1989. In the Montreal-Lake Ontario Section, the cargo forecast used for 1989 was 41.4 million tons. The tonnage projection for Canadian grain, however, is now believed to be less than that projected for 1988. Based upon this 1989 forecast, the present toll structure and division would result in a 4.9 million dollar shortfall to the Authority and a .9 million shortfall to the Corporation, or 18% and 9% respectively. In the Welland Canal Section, the cargo forecast was 44.0 million tons. Based upon this, the Authority is forecasting a \$3.2 million dollar shortfall.

To avoid these shortfalls, the Authority needs an additional 18% in tolls revenue and the Corporation needs an additional 9% on the Montreal-Lake

Ontario Section and the Authority needs an additional 9% on the Welland Canal Section. Accordingly, The Authority and the Corporation are proposing the new toll increase and division of tolls described in the foregoing and set forth below.

**Regulatory Evaluation:** This proposed regulation involves a foreign affairs function of the United States, and therefore, Executive Order 12291 does not apply. This regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and the regulation is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

#### Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Tariff of Tolls relates to the activities of commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne by foreign vessels.

#### Environmental Impact

This proposed regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

#### List of Subjects in 33 CFR Part 402

Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation proposes to amend Part 402—Tariff of Tolls (33 CFR Part 402) as follows:

#### PART 402—[AMENDED]

1. The authority citation for 33 CFR Part 402 continues to read as follows:

Authority: 68 Stat. 93-98, 33 U.S.C. 981-990, as amended.

#### § 402.3 [Amended]

2. Section 402.3(b)(7), (g), and (j) are revised to read as follows:

(b) \* \* \*

(7) Lumber, pulpwood, poles and logs, loose or bundled;

(g) "Feed grains" means barley, corn, oats, flaxseed, rapeseed, soybeans, and other field crop seeds grain screenings;

(j) "Government aid cargo" means processed food products which have been donated by or the purchase of which has been financed on concessional terms by the Federal Government of either the United States or Canada for the purposes of nutrition, economic development, emergency, or disaster relief programs and any food cargo that is owned or financed by a nonprofit organization or cooperative and that is certified by the Customs Service of the United States or Canada as intended for use in humanitarian or development assistance overseas.

#### § 402.4 [Amended]

3. Section 402.4(a) and (c) are revised to read as follows:

(c) The tolls for the section between Montreal and Lake Ontario shall be paid 75 percent in Canadian dollars and 25 percent in United States dollars. Payments for transit through locks in Canada only shall be in Canadian dollars, and payments for transit through locks in the United States only shall be in United States dollars.

4. Section 402.8 is revised to read as follows:

#### § 402.8 Schedule of tolls.

	Tolls			
	Montreal to or from Lake Ontario		Lake Ontario to or from Lake Erie (Welland Canal)	
	1989	1990	1989	1990
(a) For transit of the Seaway, a composite toll, comprising:				
(1) A charge in dollars per gross registered ton, according to national registry of the vessel, applicable whether the vessel is wholly or partially laden, or is in ballast. (All vessels shall have an option to calculate gross registered tonnage according to prescribed rules for measurement in either Canada or the United States).....	0.09	0.09	0.11	0.11
(2) A charge in dollars per metric ton of cargo as certified on ship's manifest or other document, as follows:				
(i) Bulk cargo.....	0.89	0.93	0.44	0.46
(ii) General cargo.....	2.15	2.25	0.71	0.74
(iii) Containerized cargo.....	0.89	0.93	0.44	0.46



	Tolls			
	Montreal to or from Lake Ontario		Lake Ontario to or from Lake Erie (Welland Canal)	
	1989	1990	1989	1990
(iv) Government aid cargo.....	0.00	0.00	0.00	0.00
(v) Food grains.....	0.54	0.57	0.44	0.46
(vi) Feed grains.....	0.54	0.57	0.44	0.46
(3) A charge in dollars per passenger per lock.....	1.00	1.00	1.00	1.00
(4) A charge in dollars per lock for complete or partial transit of the Welland Canal in either direction by cargo vessels, which may be shared by cargo vessels in tandem:				
(i) Loaded: Per Lock.....	NA	NA	355.00	370.00
(ii) In ballast: Per Lock.....	NA	NA	260.00	275.00
(b) For partial transit of the Seaway:				
(1) Between Montreal and Lake Ontario, in either direction 15 percent per lock of the applicable toll.				
(2) Between Lake Ontario and Lake Erie, in either direction, (Welland Canal), 13 percent per lock of the applicable toll.				
(c) Minimum charge in dollars per vessel per lock transited for full or partial transit of the Seaway:				
(1) Pleasure craft.....	7.00	7.00	7.00	7.00
(2) Other vessels.....	13.00	13.00	13.00	13.00

Saint Lawrence Seaway Development Corporation.

James L. Emery,

Administrator.

[FR Doc. 88-29697 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-61-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 61

[AD-FRL-3500-1]

#### National Emission Standards for Hazardous Air Pollutants; Coke Oven Emissions From Wet-Coal Charged By-Product Coke Oven Batteries

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of reopening of public comment period.

**SUMMARY:** The period for receiving written comments on the proposed National Emission Standards for Hazardous Air Pollutants (NESHAP) for Coke Oven Emissions from Wet-Coal Charged By-Product Coke Oven Batteries is being reopened for the limited purpose of allowing public comment on data gathered by EPA on new technology for the control of emissions from coke oven door leaks. Available data suggest that this technology has the potential to reduce door leaks to 3 percent leaking doors (PLD) for 4-meter batteries and 7 PLD for 6-meter batteries based on three-run averages.

**DATE:** Comments must be postmarked on or before February 28, 1989.

**ADDRESS:** Comments on this notice should be submitted (in duplicate if possible) to: Central Docket Section (LE-131), Attention: Docket Number A-79-

15, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

#### FOR FURTHER INFORMATION CONTACT:

For further information concerning this notice, contact Mr. Doug Bell or Ms. Amanda Agnew, Standards Development Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina, 27711, telephone numbers (919) 541-5568 and (919) 541-5268, respectively.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On April 23, 1987 (52 FR 13586), the Agency proposed the NESHAP for coke oven emissions from wet-coal charged by-product coke oven batteries under Section 112 of the Clean Air Act (CAA). Following proposal, additional information was obtained by the Agency on recent technological advancements for the control of leaks from coke oven doors (Docket A-79-15, Docket Items IV-B-4, IV-B-5, IV-J-1, and IV-J-2). The evaluation of this technology indicates that door leaks can be controlled to levels of 3 PLD for 4-meter batteries and 7 PLD for 6-meter batteries based on three-run averages as compared to the 10 PLD for all sizes that was proposed. Consequently, the additional emission reduction provided by this technology can result in lower risks to human health from exposure to coke oven emissions.

Because of this new technical information and EPA's desire to ensure that the standards are based on the most complete and accurate information available, EPA is reopening the public comment period until February 28, 1989. The EPA will consider those comments that pertain to the applicability, control effectiveness, and costs associated with

the technology for the control of emissions from coke oven door leaks discussed in this notice or on the performance of any other new technologies. The EPA will also consider new performance data for the control of door leaks that were not previously addressed by EPA in the document titled "Coke Oven Emissions from By-Product Coke Oven Batteries—Background Information for Proposed Standards" (EPA 450/3-85-028a). The comment period for all other aspects of the rulemaking ended November 30, 1987.

This notice does not change in any way the standards as proposed on April 23, 1987 (52 FR 13586). In addition, this notice is not intended to address how the recent decision by the DC Circuit Court on the vinyl chloride standards (*Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1146 [1987]) affects the proposed standards for coke oven emissions. Any change in the proposed standards or response to the vinyl chloride standards decision will be addressed in future notices in the Federal Register.

##### II. Description of Technology

The controls for coke oven door leaks have continued to improve in recent years with the introduction of flexible coke oven doors, improved automatic cleaners for doors and jambs, and the use of sodium silicate as a supplementary sealant that is applied to reduce leakage. The flexible door technology includes a modified door designed by Krupp Wilputte, a new design that is being marketed by Saturn Machine & Welding Company, Inc., and a new door manufactured by Krupp Koppers. The new Saturn door incorporates several features that are

different from those of conventional doors and seals:

- **Flexibility:** The door and doorplug are constructed in two to three sections, which allows the door to flex (either in the concave or convex direction) more than the rigid conventional doors to conform to warped jambs with an outward or inward bow.
- **Seal:** The door seal is constructed of Inconel® (a durable, heat-resistant alloy that is flexible and easily repaired) mounted on a flexible diaphragm plate.
- **Leaf springs:** Pressure is maintained on the seal by leaf springs that provide continuous force around the door perimeter instead of the point loading of plungers (spaced at 4- to 8-in. intervals) used on conventional doors.

A major advantage of the Saturn door is in seal maintenance because the seal can be relatively easily repaired at the plant by replacing a damaged seal section or filing in place. Conventional doors generally are sent to outside contractors for seal replacement and repairs, and these repairs are usually more extensive and expensive. Another advantage is that the door can be more easily adjusted to conform to the deflections of warped jambs. The use of leaf springs instead of numerous spring-loaded plungers also improves seal performance by providing a uniform and continuous pressure on the seal against the jamb. This eliminates the need for manual adjustment of numerous spring-loaded plungers, which may result in too much or too little pressure on the seal.

The operation of Krupp Wilputte's flexible door is similar to the Saturn door in that the knife edge holder and knife edge can flex somewhat to mate with the jamb. The newer design does not use asbestos insulation between the plug and metal seal, the gas channel is larger, adjusting bolts are placed at 4-in. intervals (instead of 8-in.), and ¼-in. and ½-in. half-rounds are placed between the doorplug and doorframe to allow the door to flex. The door sealing may be supplemented with the use of sodium silicate prepared in a graphite base. For doors that are identified as leakers, the jamb can be sprayed with sodium silicate prior to door placement. Sodium silicate is also sprayed externally to stop door leaks that occur after door placement and charging.

Another flexible door design is one marketed by Krupp Koppers called the FLEXIT® door. This door has a flexible cast-iron body and flexible, spring-loaded seal elements that are supported by membranes. In addition, the ceramic plugs are designed to provide enlarged pressure relief canals. This door has been installed on an 8-meter battery in

the Federal Republic of Germany, and additional installations are planned for two more tall batteries. There are no known U.S. installations with the FLEXIT® door.

The routine cleaning of doors and jambs after every push is also an important component of a successful door leak control program. The use of automatic door and jamb cleaners can improve the quality and consistency of the cleaning effort. For example, the Saturn Company has developed a new jamb cleaner that provides good cleaning coverage, even on warped jambs, and is easier to maintain than some other automatic cleaners. The Saturn jamb cleaner maintains a constant hydraulic pressure of 125 psig, which allows it to follow warped jambs. The jamb cleaner also has a serrated-edge blade that is effective at cleaning the portion of the jamb inside the oven. Another advantage is that the head of the cleaner can be lowered to the bench level to make access for maintenance easier. The door cleaner developed by Saturn uses cut steel cables instead of blades for door cleaning and also has a scraper for the bottom plate. The frayed cable ends provide the proper amount of flexibility for door cleaning, and it will generally work on any door. The design makes cable replacement on the door cleaner straightforward, and it is a relatively minor maintenance item.

Another important part of the door leak control technology is worker performance in cleaning doors and jambs, proper door placement, and repairs for damaged door seals. For example, door seals may be damaged and subsequently leak if the metal seal is damaged when the door is improperly spotted for placement on the oven. Extensive worker training programs are used to minimize leaks that occur from human errors. In addition, door alignment devices are available to aid the workers in properly positioning the door before placement on the oven. Visible emission monitoring, with feedback to supervisory personnel, is also a critical component of a successful door leak control program. The monitoring identifies problem doors and the need for corrective actions. When door leaks are observed, it is important to identify the cause (e.g., seal damage, blocked gas passages, poor cleaning) and to take the necessary action to correct the problem.

##### III. Door Leak Control Performance

The only complete set of Saturn doors in place is on a 6-meter battery with 60 ovens. (Single experimental doors are currently being evaluated in trials at several other coke plants.) This battery

has several structural design problems and also has a leakage problem from warped jambs. The design problems are currently being remedied, and all of the jambs on the battery are being replaced. The design problems and warped jambs are unrelated to the installation or indicated emission performance of the Saturn doors. The door installation was completed in January 1988, and the company has conducted 58 observations of door leaks since then. These observations did not include any leaks due to design problems or the warped jambs. Leaks associated with these situations are expected to be eliminated when the repair work is completed. These data show an overall average of 4.5 PLD and an upper 95-percent confidence level of 7 PLD (based on a three-run average). The EPA's previous evaluation of coke oven emissions has shown that there is considerable variability over time and from battery to battery even when the equipment, operation, and maintenance programs are apparently identical. The ratio of the 95-percent confidence level to the overall average noted in this case is typical of this variability. In the past, EPA has chosen the 95-percent confidence level as the basis for the not-to-be exceeded standard. However, annual emission estimates that are used to estimate risks are based on overall average levels. These data were collected from observations from the bench instead of the yard as specified in EPA Method 109. Consequently, these observations may include a few leaks that would not be observed from the yard and may yield results for PLD slightly higher than those obtained by the EPA method.

Data were available for a coke plant that used the flexible Krupp Wilputte doors supplemented with sodium silicate spraying. Chuck doors (level doors) at this plant are routinely sealed by spraying with sodium silicate. Prior experience at this plant had been that sodium silicate was difficult to remove after it had set up; however, no problems have been experienced with the sodium silicate in a graphite base because it releases more easily and removal of the residue is not difficult. A total of nine observations performed during official State inspections at this plant in the period from 1984 to 1988 and four observations performed during official EPA inspections in 1988 revealed a range of 0 to 2.5 PLD with a projected upper 95-percent confidence level of about 3 PLD. These very low levels are apparently achieved by the use of sodium silicate as needed to stop door leaks.



The data for the new Saturn door suggest that door leak control levels of 7 PLD or less are achievable for a high percentage of the time on 6-meter batteries. Door leak control is more difficult on tall batteries; consequently, this same technology applied to short batteries (less than 5-meters in height) may result in even lower PLD levels. The flexible Krupp Wilputte door and sodium silicate appear to offer an alternative means to obtain an additional reduction in leaks. The plant using this technology reported no leaks observed in many cases, and the highest observation was only 2.5 PLD during 13 official inspections. The use of the sodium silicate spray may make door leak control similar to that for topside leaks. On the topside, leaks are controlled by applying a luting mixture to seal the leak when a leak is observed. If sodium silicate can be used routinely on doors, exceptional door leak control may be attained by conscientiously sealing any leaking doors with the sodium silicate regardless of the type of door.

The data from the two coke plants suggest that PLD levels on the order of 3 to 7 PLD are achievable for a high percentage of the time. A level of 3 PLD is apparently achievable based on a 95-percent confidence level and three-run averages for a 4-meter battery with flexible doors supplemented by sodium silicate spraying. The new Saturn door should continually achieve 7 PLD or less on a 6-meter battery, and it may achieve lower levels on shorter batteries that are not as difficult to control. These very low performance levels are not achievable by the control equipment technology alone. The level of control also is affected directly by the ability to identify and correct leak control problems. A vigorously implemented program of monitoring, trouble-shooting, more frequent seal repairs, jamb replacement as necessary, extensive worker training, worker incentives, and regulatory enforcement can improve performance to levels not currently achieved on other batteries.

The data on emission control performance for the two plants with flexible door technology represent somewhat limited data on newly installed equipment. However, EPA has no information that indicates that the control performance should deteriorate over time.

#### IV. Costs

The use of the Saturn door technology could require the replacement of existing doors with the new flexible

doors. No major modifications to existing door machines are expected. However, the installation and routine use of automatic door and jamb cleaners are highly recommended to achieve consistent control performance. The capital cost for a new door for short ovens ranges from about \$10,000 to \$12,000 per door and about \$160,000 each for a door or jamb cleaner. For a typical 60-oven battery, the capital cost for the doors would be about \$1.3 million, and the cost of door and jamb cleaners (four at \$160,000) would add about \$0.64 million for a total of about \$2 million per short battery. For a 6-meter battery with 60 ovens, the capital cost of the doors is estimated as \$2 million with an additional \$1.2 million for the cleaners. For batteries that use manual cleaning, the cost of the automatic cleaners may be offset somewhat by reduced labor requirements for the manual cleaning of doors and jams.

The cost to modify doors to the flexible Krupp Wilputte design includes \$2,500 for material and \$1,500 for labor. For a 60-oven battery, the installed capital cost for the modified doors is estimated as roughly \$480,000. The major cost component for supplemental sealing with sodium silicate is the additional labor required for preparing the material, spraying the doors, respraying to seal leaks as necessary, and removal of the residue after pushing. Some plants may be able to redirect worker efforts with a minimal increase in labor, and other plants may need to add a worker specifically for this function. Assuming the labor increase is one person per shift for a 60-oven battery, the annual labor costs would be roughly \$200,000 per year (including fringe benefits and overhead for a total of four persons). The annual material cost (sodium silicate) is estimated at \$10,000 for a total annual cost of \$210,000.

#### V. Request for Comments

It is important that the Agency receive comments from the owners and operators of coke ovens. The Agency is aware that there are many factors that a plant operator must consider in determining control strategies. The information collected on relatively recent door leak control technology suggest that levels of 3 and 7 PLD (based on the average of three observations) can be achieved on short and tall batteries, respectively, with the flexible door design, a vigorously implemented door leak control program, and perhaps supplementary control by spraying sodium silicate. It would be very helpful

for the Agency to learn what steps each plant would take to meet the cited performance levels. Therefore, comments on the information presented in this notice are requested from the public and the affected industry. Specific comments are requested on the following areas:

- Is the technology applicable to the industry in general?
- Does it represent improvements over conventional technology used for door leak control?
- Are the cited performance levels achievable and adequately demonstrated? Is better performance possible?
- Is the estimate of cost accurate? (For example, are there cost savings or additional expenses that should be included?)
- What impacts on maintenance and operational procedures would occur as a result of installing the new door technology?
- Describe in detail other technologies or procedures that could be used in lieu of the new door technology to achieve the cited performance levels.
- What specific battery characteristics (e.g., type and age of equipment, existing control technology, etc.) would impact on a plant's ability to achieve the cited performance levels? Describe how and why the impact would occur.

The EPA will consider only those comments that pertain to the technologies for the control of coke oven door leaks discussed in this notice or on the performance of any other technologies for the control of door leaks not previously addressed by EPA in the document titled "Coke Oven Emissions from By-Product Coke Oven Batteries—Background Information for Proposed Standards" (EPA 450/3-85-028a).

#### List of Subjects in 40 CFR Part 61

Asbestos, Benzene, Beryllium, Blast furnaces and steel mills, Hazardous substances, Incorporation by reference, Inorganic arsenic, Intergovernmental relations, Mercury, Radionuclides, Reporting and recordkeeping requirements, Vinyl chloride.

Date: December 22, 1988.

Don R. Clay,

Assistant Administrator for Air and Radiation.

[FR Doc. 88-30082 Filed 12-29-88; 8:45 am]

BILLING CODE 6560-50-M

#### 40 CFR Part 180

[PP 8E3661/P475; FRL-3501-2]

#### Pesticide Tolerance For Fluazifop-Butyl

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

**SUMMARY:** This document proposes that a tolerance be established for residues of the herbicide fluazifop-butyl in or on the raw agricultural commodity coffee. The proposed regulation to establish a maximum permissible level for residues of the herbicide in or on the commodity was requested in a petition submitted by the Interregional Research Project No. 4 (IR-4).

**DATE:** Comments, identified by the document control number [PP 8E3661/P475], must be received on or before January 30, 1989.

**ADDRESS:** By mail, submit written comments to: Public Docket and Freedom of Information Section, Field Operations Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:** By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (TS-767C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716B, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2310.

**SUPPLEMENTARY INFORMATION:** The Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903,

has submitted pesticide petition 8E3661 to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR-4 Project, and the Agricultural Experiment Station of Hawaii.

The petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the establishment of a tolerance for residues of the herbicide (R)-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoic acid (resolved isomer of fluazifop), both free and conjugated, and of butyl [R]-2-[4-[[5-(trifluoromethyl)-2-pyridinyl]oxy]phenoxy]propanoate (resolved isomer of fluazifop-p-butyl), all expressed as fluazifop, in or on the raw agricultural commodity coffee at 0.10 part per million (ppm).

The petitioner proposed that use of this commodity be limited to Hawaii based on the geographical representation of the residue data submitted. Additional residue data will be required to expand the area of usage. Persons seeking geographically broader registration should contact the Agency's Registration Division at the address provided above.

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the proposed tolerance include:

1. A 2-year chronic feeding/ oncogenicity study in rats which was negative for oncogenic potential under the conditions of the study at all feeding levels of 0.1, 0.3, 1.0, and 3.0 milligrams (mg) per kilogram (kg) of body weight (bw) per day (equivalent to 2, 6, 20, and 60 ppm) and a systemic no-observed-effect level (NOEL) of 1 mg/kg/day.
2. A 90-day rat feeding study with a NOEL of 0.5 mg/kg/day (equivalent to 10 ppm).
3. A 90-day dog feeding study with a NOEL of 25 mg/kg/day (equivalent to 1,000 ppm).
4. A rat oral lethal dose LD<sub>50</sub> of 3,300 mg/kg.
5. A rat teratology study with a teratogenic and maternal toxicity NOEL of 10 mg/kg/day (equivalent to 200 ppm) and a NOEL for fetotoxicity of 1 mg/kg/day.
6. A rabbit teratology study with a no teratogenic effect level at 90 mg/kg/day (highest dose tested) and a NOEL for fetotoxicity of 10 mg/kg/day (equivalent to 330 ppm).
7. A two-generation rat reproduction study with a NOEL of 4 mg/kg/day (80 ppm).

8. A 1-year dog feeding study with a NOEL of 5 mg/kg/day.

9. An 18-month mouse chronic feeding/oncogenicity study with no observed oncogenic potential under conditions of the study at all feeding levels of 0.1, 0.3, 1.0, and 3.0 mg/kg/day and a NOEL for systemic toxicity of 1.0 mg/kg/day (equivalent to 7 ppm).

10. An Ames test (negative), a rat cytogenetic study (negative), and an in-vitro transformation assay (negative).

11. An acute delayed neurotoxicity study in hens (negative).

The acceptable daily intake (ADI), based on the 2-year rat feeding study (NOEL of 1.0 mg/kg/day) and using a 100-fold safety factor, is calculated to be 0.01 mg/kg of body weight (bw)/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg daily diet is calculated to be 0.002095 mg/kg/day; the current action will increase the TMRC by 0.000005 mg/kg/day (0.2 percent). Published tolerances utilize 20.85 percent of the ADI; the current action will utilize an additional 0.05 percent.

The nature of the residues is adequately understood and adequate analytical methods, high-pressure liquid chromatography using an ultraviolet detector, are available in the *Pesticide Analytical Manual*, Vol. II (PAM-II), for enforcement purposes.

Based on the above information considered by the Agency, the tolerance established by amending 40 CFR 180.411 would protect the public health. No secondary residues in meat, milk, poultry, or eggs are expected since coffee is not considered a livestock feed commodity.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this document in the *Federal Register*, that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [PP 8E3661/P475]. All written comments filed in response to this petition will be available in the Public Docket and Freedom of Information Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.



The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 20, 1988.

Anne E. Lindsay,  
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR Part 180 be amended as follows:

#### PART 180—[AMENDED]

1. The authority citation for Part 180 continues to read as follows:  
Authority: 21 U.S.C. 346a.

2. In § 180.411(d), by adding and alphabetically inserting the raw agricultural commodity coffee, to read as follows:

§ 180.411 Fluazifop-butyl; tolerances for residues.

Commodity	Parts per million
Coffee.....	0.1

[FR Doc. 88-30080 Filed 12-29-88; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Part 180

[PP 7E3555/P445; FRC-3500-9]

#### Pesticide Tolerance for Thiophanate-Methyl

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document proposes that a tolerance be established for the combined residues of the fungicide

thiophanate-methyl, its oxygen analog, and its benzimidazole-containing metabolites in or on the raw agricultural commodity potatoes. The proposed regulation to establish a maximum permissible level for residues of the fungicide in or on the commodity was requested in a petition submitted by the Interregional Research Project No. 4 (IR-4).

DATE: Comments, identified by the document control number [PP 7E3555/P445], must be received on or before January 30, 1989.

ADDRESS: By mail, submit written comments to: Public Docket and Freedom of Information Section, Field Operations Division (TS-757C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 246, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 246 at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt Jamerson, Emergency Response and Minor Use Section (TS-767C), Registration Division, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716C, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-2310.

SUPPLEMENTARY INFORMATION: The Interregional Research Project No. 4 (IR-4), New Jersey Agricultural Experiment Station, P.O. Box 231, Rutgers University, New Brunswick, NJ 08903, has submitted pesticide petition 7E3555 to EPA on behalf of Dr. Robert H. Kupelian, National Director, IR-4 Project and the Agricultural Experiment Stations of Colorado, Florida, Idaho, Maine, and Washington.

This petition requested that the Administrator, pursuant to section 408(e) of the Federal Food, Drug, and Cosmetic Act, propose the

establishment of a tolerance for the combined residues of the fungicide thiophanate-methyl (dimethyl-[(1,2-phenylene)bis(iminocarbonothioyl)]bis(carbamate)), its oxygen analog dimethyl-4,4'-o-phenylene bis(allophanate), and its benzimidazole-containing metabolites (calculated as thiophanate-methyl) in or on the raw agricultural commodity potatoes at 0.2 part per million (ppm).

The data submitted in the petition and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerance is sought. The toxicological data considered in support of the proposed tolerance include:

1. A 6-month rat feeding study with a NOEL of 64 ppm (3.2 mg/kg/day).

2. A 6-month mouse feeding study with a NOEL of 1,600 ppm (240 mg/kg/day).

3. A 2-year rat feeding/oncogenicity study with a no-observed-effect level (NOEL) of 160 ppm (equivalent to 8 milligrams (mg)/kilogram (kg) of body weight per day) for systemic effects and no oncogenic effects observed at the dosage levels tested (0, 10, 40, 160, and 640 ppm, equivalent to 0.5, 2, 8, and 32 mg/kg/day).

4. A 2-year dog feeding study with a systemic NOEL of 50 mg/kg/day (2,000 ppm).

5. A rat teratology study with no compound-related teratogenic or fetal effects observed at the dosage levels tested (0, 250, 1,200 and 2,500 ppm).

6. A three-generation rat study with a reproductive NOEL of 160 ppm (8 mg/kg/day).

7. Mutagenicity studies including one that was negative for point mutations in *Salmonella typhimurium* with and without liver microsomal activation, and another that was negative for DNA damage as indicated by differential toxicity in repair proficient and deficient strains of *Bacillus subtilis*.

Data considered desirable but lacking are a mouse oncogenicity study, a teratology study in a second species, and mutagenicity assays in mammalian systems to determine thiophanate methyl's potential to cause point mutations, chromosomal change, and DNA damage.

A comprehensive review of the data available for thiophanate-methyl was conducted in connection with a Special Review (formerly called rebuttable presumption against registration (RPAR)) for the chemical, which was published in the Federal Register of December 7, 1977 (42 FR 61970). This presumption against thiophanate-methyl was based on information indicating

that its metabolite, methyl 2-benzimidazole carbamate (MBC), had the potential to cause mutagenic effects and to result in local population reduction in nontarget organisms (earthworms). In the Federal Register of October 11, 1979 (44 FR 58798), the Agency published a Preliminary Notice of Determination, which concluded that available evidence did not clearly demonstrate a risk to humans or the environment as a result of registered uses.

Prior to the publication of the final regulatory decision, the Agency received limited evidence that dietary exposure to the MBC metabolite might pose an oncogenic risk. The Agency's position concerning the RPAR issues with thiophanate-methyl was published in the Federal Register of October 20, 1982 (47 FR 46747). In the Notice of Determination Concluding the Rebuttable Presumption Against Registration (PD-4), the Agency determined that the potential oncogenic and mutagenic risks of thiophanate-methyl were exceeded by the benefits associated with its use.

Thiophanate-methyl was subsequently classified as a Group D carcinogen (inadequate information available for classification as a carcinogen), and the metabolite MBC was classified as a Group C carcinogen (limited evidence of carcinogenicity). MBC was classified as a Group C carcinogen based on the following considerations: (1) MBC has been shown to cause liver tumors solely in the mouse; (2) the liver tumors were observed in two closely related strains of mice (CD-1 and Swiss), whereas no liver tumors were produced by MBC in another strain of mice (NMRKf SPF-71); (3) MBC showed no oncogenic response in Chr-CD rates; and (4) MBC produced weak mutagenic effects consistent with spindle poison activity rather than gene mutation of DNA repair activity.

The oncogenic risk from dietary exposure to MBC resulting from existing uses of thiophanate-methyl is expected to be less than that for the fungicide benomyl, which has similar use patterns. The upper limit of oncogenic risk for dietary exposure to tolerance-level residues of MBC is calculated at  $10^{-5}$ . The proposed use on potatoes will contribute a negligible incremental increase of  $10^{-7}$  to the oncogenic risk estimate for the metabolite.

The provisional acceptable daily intake (PADI) for thiophanate-methyl, based on the 2-year rat feeding study NOEL of 8 mg/kg/day (160 ppm) and using a 100-fold safety factor, is calculated to be 0.08 mg/kg of body weight (bw)/day. The maximum

permitted intake (MPI) for a 60-kg human is calculated to be 4.8 mg/day. The theoretical maximum residue contribution (TMRC) from existing tolerances for a 1.5-kg daily diet is calculated to be 0.24002 mg/day; the current action will increase the TMRC by 0.000170 mg/kg/day (0.71 percent). Published tolerances utilize 30.00 percent of the PADI; the current action will utilize an additional 0.21 percent.

For purposes of the proposed use on potatoes, the nature of the residues is adequately understood and an adequate analytical method, high-pressure liquid chromatography, is available for enforcement purposes in the Pesticide Analytical Manual (PAM), Vol. II. There are currently no actions pending against the continued registration of this chemical.

Based on the above information considered by the Agency and the fact that currently established tolerances for meat and milk are adequate to cover any residues on animal feed resulting from the proposed use, the tolerance established by amending 40 CFR 180.371 would protect the public health. Therefore, it is proposed that the tolerance be established as set forth below.

Any person who has registered or submitted an application for registration of a pesticide, under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended, which contains any of the ingredients listed herein, may request within 30 days after publication of this notice in the Federal Register that this rulemaking proposal be referred to an Advisory Committee in accordance with section 408(e) of the Federal Food, Drug, and Cosmetic Act.

Interested persons are invited to submit written comments on the proposed regulation. Comments must bear a notation indicating the document control number, [pp 7E3555/P445]. All written comments filed in response to this petition will be available in the Public Docket and Freedom of Information Section, at the address given above from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96-354, Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial

number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

#### List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recording and recordkeeping requirements.

Dated: December 19, 1988.

Anne E. Lindsay,  
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR Part 180 be amended as follows:

#### PART 180—[AMENDED]

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

2. Section 180.371 is amended in the table therein by adding and alphabetically inserting the raw agricultural commodity potatoes to read as follows:

§ 180.371 Thiophanate-methyl; tolerances for residues.

Commodities	Parts per million
Potatoes.....	0.2

[FR Doc. 88-30084 Filed 12-29-88; 8:45 am]  
BILLING CODE 6560-50-M

#### 40 CFR Parts 180, 185, and 186

[PP 7F3476 and FAP 7H5524/R997; FRL-3501-1]

#### Pesticide Tolerances for Myclobutanil

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This document propose that tolerances be established for the combined residues of the fungicide myclobutanil and certain of its metabolites in or on certain raw agricultural commodities, food additives, and feed additives. This proposal to establish maximum permissible levels of combined residues of myclobutanil and certain of its metabolites in or on the commodities, food additives, and feed additives, was requested in petitions submitted by Rohm and Haas Co.



**DATE:** Comments, identified by the document control number [PP 7F3476/R997], must be received on or before January 17, 1989.

**ADDRESS:** Written objections, identified by the document control number [PP 7F3476 and FAP 7H5524/R997], may be submitted to the: Hearing Clerk (A-110), Environmental Protection Agency, Rm. M-3708, 401 M St., SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:**

Lois A. Rossi, Product Manager (PM) 21, Registration Division (TS-767C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 227, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-1900.

**SUPPLEMENTARY INFORMATION:** EPA issued a notice, published in the Federal Register of January 29, 1987 (52 Fr 2989), which announced that Rohm and Haas Co. of Independence Mall West, Philadelphia, PA 19105, had submitted pesticide petition (PP) 7F3476 and food additive petition (FAP) 7H5524 to EPA proposing the establishment of tolerances for the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile] and its metabolites containing both the chlorophenyl and triazole rings in or on the following: apples (whole fruit) at 0.5 part per million (ppm), wet apple pomace at 1.0 ppm, and dry apple pomace at 5.0 ppm; grapes (whole fruit) at 1.0 ppm, wet grape pomace at 2.0 ppm, dry grape pomace at 10.0 ppm, raisins at 10.0 ppm, and raisin waste at 25 ppm; milk at 0.1 ppm; meat and meat by-products (bmy) (except liver) at 0.04 ppm; liver of cattle, goats, hogs, horses, and sheep at 0.5 ppm; and eggs at 0.04 ppm.

Subsequently, Rohm and Haas amended the petitions by: Reducing the tolerance for eggs to 0.02 ppm; and the tolerance for liver of cattle, goats, hogs, horses, and sheep to 0.3 ppm; and milk to 0.05 ppm; proposing increases in the tolerances for meat and meat by-products (except liver) to 0.05 ppm; amending the tolerance expression of meat and meat by-products (except liver) to include fat and to specify cattle, goats, hogs, horses, and sheep; combining the tolerances for residues in apple pomace (wet and dry) at 5.0 ppm and grape pomace (wet and dry) at 10.0 ppm; proposing a tolerance for meat; fat, and meat by-products of poultry at 0.02 ppm; and by amending the tolerance expressions to specify the metabolite(s) to be regulated in the raw and processed commodities.

Former Parts 193 and 561 of Title 21 of the Code of Federal Regulations, in which FAP 7H5524 proposed regulations, have been recodified into 40 CFR Parts 185 and 186, respectively by a document published in the Federal Register of June 29, 1988 (53 FR 24666).

There were no comments received in response to the notice of filing.

The data submitted in support of the petitions and other relevant material have been evaluated. The pesticide is considered useful for the purpose for which the tolerances are sought. The toxicological data considered in support of the tolerances include the following:

1. A 1-year dog feeding study using doses of 0, 10, 100, 400, and 1,600 parts per million (equivalent to doses of 0, 0.34, 3.09, 14.28, and 54.22 milligrams/kilograms (mg/kg) body weight (bwt)/day in males, and 0, 0.40, 3.83, 15.68, and 58.20 mg/kg bwt/day in females. The no-observed-effect level (NOEL) is 100 ppm (3.09 mg/kg/day for males and 3.83 mg/kg/day for females) based upon hepatocellular hypertrophy, and the LOEL is 400 ppm (14.28 mg/kg/day for males and 15.68 mg/kg/day for females).

2. A 2-year chronic feeding/oncogenicity study in rats using dietary concentrations of 0, 50, 200, and 800 ppm (equivalent to doses of 0, 2.49, 9.84, and 39.21 mg/kg bwt/day in males and 0, 3.23, 12.66, and 52.34 mg/kg bwt/day in females). The NOEL for chronic effects other than oncogenicity is 2.49 mg/kg/day, and the LOEL is 9.84 mg/kg/day based on testicular atrophy in males. No other significant effects were observed in either sex at dose levels ranging from 50 to 800 ppm (2.49 to 39.21 mg/kg bwt/day in males and 3.23 to 52.34 mg/kg bwt/day in females) over a 2-year period. In addition, no oncogenic effects were observed in either sex at any of the dose level tested. Based on the toxicological findings, the Maximum Tolerated Dose (MTD) selected for testing (based on the 90-day feeding study) was not high enough to fully characterize the compound's oncogenic potential, and for this reason, the rat study (both sexes) is required to be repeated.

3. A 2-year oncogenicity study in mice using dietary concentrations of 0, 20, 100, and 500 ppm (equivalent to doses of 0, 2.7, 13.7, and 70.2 mg/kg bwt/day in males; and 0, 3.2, 16.5, and 85.2 mg/kg bwt/day in females). The NOEL for chronic effects other than oncogenicity was 20 ppm (or 3.2 mg/kg/day in females and 2.7 mg/kg/day in males). The LOEL was 100 ppm (13.7 mg/kg bwt/day in males and 16.5 mg/kg bwt/day in females) (slight increase in liver mixed function oxidase). Microscopic changes in the liver were evident in both

sexes at 500 ppm (70.2 mg/kg bwt/day in males and 85.2 mg/kg bwt/day in females). There were no oncogenic effects in either sex at any dose level tested.

The selected dose (500 ppm) (70.2 mg/kg bwt/day in males and 85.2 mg/kg bwt/day in females) is satisfactory for evaluating the oncogenic potential in male mice. However, this dose was less than a MTD level in the female mice and therefore, not sufficiently high enough to fully evaluate the compound's oncogenic potential. Therefore, the female portion of the mouse oncogenicity study must be repeated.

4. A rabbit teratology study was negative for teratogenic effects at all levels up to 200 mg/kg/day, the highest dose level tested. The NOEL for maternal toxicity was 20.0 mg/kg/day, and the NOEL for developmental toxicity was 60.0 mg/kg/day.

5. A rat teratology study was negative for teratogenic effects up to and including 489 mg/kg/day (highest dose level tested). The NOEL for maternal toxicity was 313 mg/kg/day, and the NOEL for developmental toxicity was 31 mg/kg/day.

6. A two-generation rat reproduction study with a NOEL of 16 mg/kg/day for reproductive effects and a NOEL of 4 mg/kg/day for systemic effects.

7. A reverse mutation assay (Ames), point mutation in CHO/HGPRT cells, *in vitro* and *in vivo* (mouse) cytogenetic assays, unscheduled DNA synthesis, and a dominant-lethal study in rats, all of which were negative for mutagenic effects. Myclobutanil was not carcinogenic in either the rat or mouse chronic/oncogenic feeding studies. In the mouse study, increases in liver mixed-function oxidase activity, hepatic microsomal protein content, and absolute and relative liver weights were observed in both sexes at 500 ppm in the diet (highest level tested). In addition, increased incidences of hepatocellular basophilic, clear-cell, eosinophilic, and vacuolated cell foci were also observed in both sexes at this dose level as well as increased incidences of multifocal hepatocellular vacuolation at terminal sacrifice. At the interim sacrifices and in animals that died prior to terminal sacrifice, but not at the terminal sacrifice, increased incidences of hepatocellular centrilobular hypertrophy, Kupffer cell pigmentation and periportal punctate vacuolation, and individual cell hepatocellular necrosis were also observed at 500 ppm, but primarily in males. These effects were not considered to be of sufficient toxicological significance to indicate

that the animals were tested at the maximum tolerated dose (MTD). However, in the 90-day feeding study in mice, body-weight gains in males at 1,000 ppm (150 mg/kg bwt/day) (the lowest dose tested) were 37-percent less than that of the controls. Bodyweight gains of females were unaffected at this dose level. Therefore, although 500 ppm (75 mg/kg bwt/day) in the mouse chronic study was considered to be sufficiently high enough for an adequate negative study in males, it was not considered to be high enough for females.

The main toxicological effect seen in the rat chronic feeding study was testicular atrophy, seen at both the mid- and high-dose levels (9.84 and 39.21 mg/kg bwt/day in males). Increases in liver mixed-function oxidase activity and in liver weights were also observed in the study. Again, these effects were not considered to be adequate evidence that the animals were tested at the MTD.

Both studies need to be repeated because a MTD was not achieved. However, no preneoplastic lesions were observed in either study to suggest possible carcinogenic activity, and myclobutanil did not induce either genotoxic effects or chromosomal aberrations in a series of mutagenicity tests. In addition, no strong structural activity correlation to other carcinogens has been found.

The acceptable daily intake (ADI) based on the 2-year rat chronic feeding study (NOEL of 2.49 mg/kg bwt/day), and using a hundredfold uncertainty factor, is calculated to be 0.025 mg/kg bwt/day. The theoretical maximum residue contribution of the proposed tolerances is 0.001469 mg/kg bwt/day and utilize 5.9 percent of the ADI.

The nature of the residue is adequately understood, and adequate analytical methods, gas liquid chromatography using nitrogen/phosphorus and electron capture detectors, are available for enforcement. Prior to their publication in the Pesticide Analytical Manual, Vol. II, the enforcement methodology is being made available in interim to anyone who is interested in pesticide enforcement when requested from: By mail: Information Services Section (TS-757C), Program Management and Support Division, Office of Pesticide Programs, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460. Office location and telephone number: Room 223, CM#2, 1921 Jefferson Davis Highway, Arlington, VA 22202, (703)-557-3262.

The pesticide is considered useful for the purposes for which the tolerances are sought. Based on the information

and data considered, the Agency concludes that the establishment of the tolerances will protect the public health. Therefore, the tolerances are proposed as set forth below.

Any person adversely affected by this regulation may, within 15 days after publication of this document in the Federal Register, file written objections with the Hearing Clerk, at the address given above. Such objections should specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing and the grounds for the objections. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

Pursuant to the requirement of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601-612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

The Office of Management and Budget has exempted this rule from the requirement of section 3 of Executive Order 12291.

**List of Subjects in 40 CFR Parts 180, 185, and 186**

Administrative practice and procedures, Agricultural commodities, Food additives, Feed additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 20, 1988.

Anne E. Lindsay,  
Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, it is proposed that Chapter I of Title 40 of the Code of Federal Regulations be amended as follows:

**PART 180—[AMENDED]**

1. In Part 180:  
a. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

b. New § 180.443 is added to read as follows:

**§ 180.443 Myclobutanil; tolerances for residues.**

(a) Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-

propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free and bound) in or on:

Commodity	Parts per million
Apples.....	0.5
Grapes.....	1.0

(b) Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile] and its metabolites, alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free and bound) and alpha-(4-chlorophenyl)-alpha-(3,4-dihydroxybutyl)-1H-1,2,4-triazole-1-propanenitrile, in:

Commodity	Parts per million
Milk.....	0.05

(c) Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free) in:

Commodity	Parts per million
Cattle, fat.....	0.05
Cattle, liver.....	0.3
Cattle, meat.....	0.05
Cattle, mby.....	0.05
Eggs.....	0.02
Goats, fat.....	0.05
Goats, liver.....	0.3
Goats, meat.....	0.05
Goats, mby.....	0.05
Hogs, fat.....	0.05
Hogs, liver.....	0.3
Hogs, meat.....	0.05
Hogs, mby.....	0.05
Horses, fat.....	0.05
Horses, liver.....	0.3
Horses, meat.....	0.05
Horses, mby.....	0.05
Poultry, fat.....	0.02
Poultry, meat.....	0.02
Poultry, mby.....	0.02
Sheep, fat.....	0.05
Sheep, liver.....	0.3
Sheep, meat.....	0.05
Sheep, mby.....	0.05

**PART 185—[AMENDED]**

2. In Part 185:  
a. The authority citation for Part 185 continues to read as follows:

Authority: 21 U.S.C. 348.



b. By revising § 185.4350, to delete the existing temporary food additive tolerance on raisins and replace it with a regulation to read as follows:

**§ 185.4350 Myclobutanil.**

Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free and bound) in or on the following food additive commodity:

Commodity	Parts per million
Raisins .....	10.0

**PART 186—[AMENDED]**

**3. In Part 186:**

a. The authority citation for Part 186 continues to read as follows:

Authority: 21 U.S.C. 348.

b. By revising § 185.4350, to delete the existing temporary feed additive tolerances on apple pomace, grape pomace, and raisin waste and replace them with a regulation to read as follows:

**§ 186.4350 Myclobutanil.**

Tolerances are established for the combined residues of the fungicide myclobutanil [alpha-butyl-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile] and its metabolite alpha-(3-hydroxybutyl)-alpha-(4-chlorophenyl)-1H-1,2,4-triazole-1-propanenitrile (free and bound) in or on the following feed additive commodities:

Commodities	Parts per million
Apple pomace (wet and dry).....	8.0
Grape pomace (wet and dry).....	10.0
Raisin waste .....	25.0

[FR Doc. 88-30081 Filed 12-29-88; 8:45 am]  
BILLING CODE 8550-80-M

**GENERAL SERVICES  
ADMINISTRATION**

**41 CFR Part 101-6**

[FPMR Amendment A-40]

**Federal Advisory Committee  
Management**

**AGENCY:** Office of Administration, GSA.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule provides administrative and interpretive

guidelines and management controls for Federal agencies concerning the implementation of the Federal Advisory Committee Act, as amended (5 U.S.C., App.) (hereinafter "the Act"). In a previous issue of the Federal Register, GSA published a final rule on the management of Federal advisory committees (52 FR 45926; December 2, 1987). This new proposed rule consists of revisions to the final rule which are intended to improve the management and use of Federal advisory committees in the Executive Branch of the Federal Government. These revisions (1) clarify the guidelines applicable to achieving committee memberships which are balanced in a way that is fair and consistent with section 5(b) of the Act; (2) add new language which cross-references regulations relating to Federal conflict-of-interest statutes and standards of conduct within the final rule; (3) clarify the procedures for transmitting follow-up reports to the Congress as required by section 6(b) of the Act on Presidential advisory committee recommendations; and (4) provide that annual agency fiscal year reports to GSA shall also include information requested to carry out the annual comprehensive review required by section 7(b) of the Act. Corrections of minor errors in the text of the final rule have also been made in this proposed rule.

**DATE:** Comments must be received on or before: February 28, 1989.

**ADDRESS:** Comments should be addressed to: General Services Administration, Committee Management Secretariat (CTM), Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Charles F. Howton, Senior Committee Management Specialist, Committee Management Secretariat, Office of Management Services, Office of Administration, General Services Administration, Washington, DC 20405 (202) 523-4884.

**SUPPLEMENTARY INFORMATION:**

**Background**

GSA's authority for administering the Act is contained in section 7 of the Act and Executive Order 12024 (42 FR 61445, 3 CFR, 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all of the functions vested in the President by the Act, as amended, except that the Annual Report to the Congress required by section 6(c) shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

**Prior Comments**

GSA issued a final rule on December 2, 1987, outlining policies and guidelines to be followed in the administration of the Act. Comments used in developing the final rule were received in response to the publication of a proposed rule by GSA in the Federal Register on May 19, 1987 (52 FR 18774). Copies of all comments received are available for public inspection in room 7030 of the General Services Building, 18th and F Streets, NW., Washington, DC.

**Additional Comments**

Since publication of the final rule, GSA has been made aware of Congressional and other concerns that the provision in the final rule covering balanced membership of advisory committees may give rise to erroneous impressions regarding agency responsibilities under the Act. GSA believes this matter should be clarified in the rule and in additional explanatory comments. These improvements will further ensure that agencies obtain the advice and expertise they need to accomplish their missions.

In addition, concerns raised by the Congress and the Federal community regarding the application of Federal conflict-of-interest statutes to advisory committee members have prompted GSA to assess the desirability of issuing guidance in this area.

Finally, as stated in explanatory comments accompanying GSA's final rule published on December 2, 1987 (52 FR 45926), other actions are necessary to implement fully the requirements contained in section 6(b) of the Act, relating to actions taken by the Executive Branch concerning the public recommendations produced by Presidential advisory committees.

**Discussion of Proposed Revisions**

**Provisions Relating to Balanced Membership of Advisory Committees**

In a joint letter to GSA, dated December 17, 1987, the Chairman of the Senate Committee on Governmental Affairs and the Chairman of the Subcommittee on Oversight of Government Management expressed concern over the impact of language contained in § 101-6.1007(b)(2)(iii) of the final rule. That language provides that agencies, in fulfilling the Act's requirement for consultation with GSA in the establishment, reestablishment, or renewal of an advisory committee, shall include a "description of the agency's plan to attain balanced membership." The section further provides that "For the purposes of attaining balance,

agencies shall consider for membership interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This shall be construed neither to limit the participation, nor compel the selection of any particular individual or group to obtain divergent points of view that are relevant to the business of the advisory committee."

This language differed from that contained in the Notice of Proposed Rulemaking of May 19, 1987 primarily by including the words "nor compel the selection" [of any particular individual or group to obtain divergent points of view].

It appears that this addition could be read to suggest that agencies are not obligated to fully implement the intent of the Congress in requiring that advisory committees be "fairly balanced in terms of points of view represented." The legislative history shows that the requirement for "fairly balanced" membership was intended to mitigate the "great danger" that "special interest groups may use their membership \* \* \* to promote their private concerns."

Given the lack of a precise definition of those elements which constitute balance under the Act, GSA believes it would be impractical to provide an all-inclusive list of considerations to be applied in selecting the membership of every advisory committee. The membership of a committee necessarily depends on its functions. For example, the membership of a committee whose sole function is to consider scientific questions may be limited to qualified scientists. However, as appropriate to the functions and tasks to be performed, a cross-section of scientists representing different points of view should be considered for membership, such as representatives from academia as well as from industry. For other committees, the inclusion of those who would be directly affected by the committee's recommendations and activities, and of other interested parties, may be appropriate. The rule is written so as to ensure that a cross-section of parties is considered for membership, as appropriate to the committee's business.

Accordingly, the language in paragraph (c) of § 101-6.1002 and in paragraph (b)(2)(iii) of § 101-6.1007 has been strengthened to require "fairly balanced" advisory committee membership and to require that an agency's description of its plan to attain fairly balanced membership ensure appropriate consideration of a cross-section of parties. Paragraph (a)(1) of § 101-6.1015 has been expanded to require that an agency's Federal

Register notice for a new committee also contain the description of this plan.

**Provision Relating to Federal Conflict-of-Interest Statutes and Standards of Conduct Applicable to Advisory Committee Members**

With regard to concerns expressed by the Congress and Executive Branch agencies relating to the application of Federal conflict-of-interest statutes to advisory committee members, GSA believes it would be useful to cross-reference existing regulations in this area within the final rule. GSA believes that the responsibility for issuing regulations on conflicts of interest and standards of conduct is within the purview of the Office of Government Ethics (OGE). Given the importance of such considerations to the operations of advisory committees, however, GSA and OGE have agreed that a cross-reference would be useful in improving the administration of the Act.

Therefore, § 101-6.1009 has been amended through the addition of a new subsection (j) which reinforces existing requirements of the Office of Government Ethics and each agency for reviewing conflicts of interest which may arise through membership on a Federal advisory committee.

**Provisions Relating to Follow-up Reports on Presidential Advisory Committee Recommendations**

In the discussion of comments in the final rule (see 52 FR 45926, SUPPLEMENTARY INFORMATION), GSA indicated that it would propose further guidance in a future revision of this rule clarifying the procedures for transmitting follow-up reports to the Congress as required by section 6(b) of the Act on the public recommendations of Presidential advisory committees.

GSA believes that the role of the Administrator of General Services, as the President's delegate in accordance with section 2 of Executive Order 12024 for certain functions vested in the President by section 6(b) of the Act is to assure that such reports are made to the Congress in a timely manner by an appropriate and responsible agency or organization consistent with the policies of the President. GSA has determined, therefore, after consultation with the Office of Management and Budget (OMB) and certain affected agencies, that unless otherwise specified by the President, follow-up reports on Presidential advisory committee recommendations should be prepared and transmitted to the Congress by the agency responsible for providing support to the committee. In the case of an independent Presidential advisory

committee, which normally terminates following the submission of its report to the President, GSA proposes to designate the responsible agency or organization to implement this requirement following consultation with the chairperson of the committee.

Accordingly, § 101-6-1008 has been expanded by the addition of a new subsection (d) which outlines the role of GSA in assuring that the requirements of section 6(b) of the Act are fully implemented and provides for consultation with OMB in the matter of follow-up reports. Also, § 101-6-1009 has been amended further through the addition of a new subsection (k) which provides that the head of the agency responsible for the support of a Presidential advisory committee shall carry out the provisions of section 6(b) of the Act. Furthermore, § 101-6.1011 has been amended through the addition of a new subsection (c) which requires that the chairperson of an independent Presidential advisory committee consult with the Administrator in identifying the agency or organization to be responsible for complying with section 6(b) of the Act.

Finally, paragraph (a) of § 101-6.1035 has been modified to reflect the policy established by the addition of paragraph (d) to § 101-6.1008 in this new proposed rule and to provide that follow-up reports shall be consistent with specific instructions issued periodically by the Secretariat.

**Provision Relating to the Annual Comprehensive Review of Federal Advisory Committees**

Beginning in 1982, in order to simplify the annual agency fiscal year reporting requirements, and to improve the quality of the information furnished to GSA, the Secretariat has required only the submission of a single annual report on each Federal advisory committee in existence during the reporting year. This report requires agencies to furnish both quantitative and qualitative information respectively, to enable the Secretariat to carry out the requirements of section 6(c) of the Act, relating to the President's annual report to the Congress, and the requirements of section 7(b) of the Act, relating to the annual comprehensive review of committees.

Paragraph (b) of § 101-6.1035, therefore, has been modified to state specifically that information required for the conduct of the annual comprehensive review of each advisory committee is included in the annual agency fiscal year reporting requirements.



### Discussion of Corrections Required in the Final Rule

Paragraph (a) of § 101-6.1001, the heading of § 101-6.1009, and paragraph (e) of § 101-6.1009 contain minor errors in the text of the final rule. The affected language has been corrected and appears in the new text of this proposed rule.

### Executive Order 12291

GSA has determined that this proposed regulatory action is not a major rule for the purposes of Executive Order 12291 of February 17, 1981, because it will not result in an annual effect on the economy of \$100 million or more, will not cause a major increase in costs to consumers or others, and will not have significant adverse effects. GSA has based all administrative decisions on this proposed action on adequate information concerning the need for and consequences of this proposed rule. GSA has also determined that the potential benefits to society from this proposed rule far outweigh the potential costs, has maximized the net benefits, and has chosen the alternative involving the least cost to society.

### Regulatory Flexibility Act

These regulations are not subject to the regulatory flexibility analysis or other requirements of 5 U.S.C. 603 and 604.

### List of Subjects in 41 CFR Part 101-6

Civil Rights, Government property management, Grant programs, Intergovernmental relations, Surplus Government property, Relocation assistance, Real property acquisition, Federal advisory committees.

Accordingly, it is proposed to amend 41 CFR Part 101-6 as follows:

### PART 101-6—MISCELLANEOUS REGULATIONS

1. The authority citation for 41 CFR Part 101-6 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); sec. 7, 5 U.S.C., App., and E.O. 12024, 3 CFR 1977 Comp., p. 158.

2. Section 101-6.1001 is amended by revising the first sentence of paragraph (a) to read as follows:

#### § 101-6.1001 Scope.

(a) This subpart defines the policies, establishes minimum requirements, and provides guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Federal Advisory Committee Act, as amended.\*\*\*

3. Section 101-6.1002 is amended by revising paragraph (c) to read as follows:

#### § 101-6.1002 Policy

(c) An advisory committee shall be fairly balanced in its membership in terms of the points of view represented and the functions to be performed; and

4. Section 101-6.1007 is amended by revising the introductory text of paragraph (b)(2) and paragraph (b)(2)(iii) to read as follows:

#### § 101-6.1007 Agency procedures for establishing advisory committees.

(b) \* \* \*

(2) Submit a letter and the proposed charter to the Secretariat proposing to establish or use, reestablish, or renew an advisory committee. The letter shall include the following information:

(iii) A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee. Committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

5. Section 101-6.1008 is amended by adding paragraph (d) to read as follows:

#### § 101-6.1008 The role of GSA.

(d) The Secretariat shall assure that follow-up reports required by section 6(b) of the Act are prepared and transmitted to the Congress as directed by the President; either by his delegate, by the agency responsible for providing support to a Presidential advisory committee, or by the responsible agency or organization designated pursuant to paragraph (c) of § 101-6.1011. In performing this function, GSA may solicit the assistance of the Office of Management and Budget and other appropriate organizations, as deemed appropriate.

6. Section 101-6.1009 is amended by revising the heading and paragraphs (e), (h) and (i); and by adding paragraphs (j) and (k) to read as follows:

#### § 101-6.1009 Responsibilities of an agency head.

(e) A review, at least annually, of the need to continue each existing advisory committee, consistent with the public interest and the purpose and functions of each committee;

(h) The opportunity for reasonable public participation in advisory committee activities;

(i) That the number of committee members is limited to the fewest necessary to accomplish committee objectives;

(j) That the interests and affiliations of advisory committee members are reviewed consistent with regulations published by the Office of Government Ethics in 5 CFR Parts 734, 735, and 737, and additional requirements, if any, established by the sponsoring agency pursuant to Executive Order 11222, as amended, the conflict-of-interest statutes, and the Ethics in Government Act, as amended, 5 U.S.C., App.; and

(k) Unless otherwise specified by the President, the preparation and transmittal of a follow-up report to the Congress detailing the disposition of the public recommendations of a Presidential advisory committee supported by the agency in accordance with section 6(b) of the Act.

7. Section 101-6.1011 is amended by revising paragraphs (a) and (b); and by adding paragraph (c) to read as follows:

#### § 101-6.1011 Responsibilities of the chairperson of an independent Presidential advisory committee.

(a) Consult with the Administrator concerning the role of the Designated Federal Officer and Committee Management Officer;

(b) Fulfill the responsibilities of an agency head as specified in paragraphs (d), (h) and (j) of § 101-6.1009; and

(c) Unless otherwise specified by the President, consult with the Administrator regarding the designation of an agency or organization responsible for implementing section 6(b) of the Act.

8. Section 101-6.1015 is amended by revising the last sentence of paragraph (a)(1) to read as follows:

#### § 101-6.1015 Advisory committee information which must be published in the Federal Register.

(a) \* \* \*

(1) \* \* \* For a new committee, such notice shall also describe the nature and purpose of the committee and the agency's plan to attain fairly balanced membership, and shall include a statement that the committee is necessary and in the public interest.

9. Section 101-6.1035 is amended by revising paragraphs (a) and (b) to read as follows:

#### § 101-6.1035 Reports required for advisory committees.

(a) Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report will be prepared and transmitted to the Congress as determined under paragraph (d) of § 101-6.1008, detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act. Reports shall be consistent with specific instructions issued periodically by the Secretariat;

(b) The President's annual report to the Congress shall be prepared by GSA based on reports filed on a fiscal year basis by each agency consistent with the information specified in section 6(c) of the Act. Reports from agencies shall be consistent with instructions provided annually by the Secretariat. Agency reports shall also include information requested to enable the Secretariat to carry out the annual comprehensive review of each advisory committee as required by section 7(b) of the Act. These reports have been cleared in accordance with FIRM 201-45.6 in 41 CFR Chapter 201 and assigned interagency report control number 0304-GSA-XX.

Dated: December 22, 1988.

Paul T. Weiss,

Associate Administrator for Administration.

[FR Doc. 88-30059 Filed 12-29-88; 8:45 am]

BILLING CODE 8820-34-M

### DEPARTMENT OF HEALTH AND HUMAN SERVICES

#### Health Care Financing Administration

#### 42 CFR Part 405

(BERC-458-P)

#### Medicare Program; Physician Liability on Non-Assigned Claims

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish in regulations the circumstances in which a nonparticipating physician who does not accept Medicare assignment of a claim is required to refund to the beneficiary any amounts collected for physicians' services determined to be not reasonable and necessary. The purpose

of this provision is to extend limitation of liability protection to beneficiaries with non-assigned claims when the physician knew or should have known that the items or services will not be covered by Medicare. Physician appeal rights are also specified.

These changes would conform our regulations to section 9332(c) of the Omnibus Budget Reconciliation Act of 1986. The purpose of this provision is to extend limitation of liability protection to beneficiaries when physicians do not accept assignment.

DATE: To be considered, comments must be mailed or delivered to the appropriate address, as provided below, no later than 5:00 p.m. on February 28, 1989.

ADDRESS: Mail comments to the following address:

Health Care Financing Administration,  
Department of Health and Human  
Services, Attention: BERC-458-P, P.O.  
Box 26676, Baltimore, Maryland 21207

If you prefer, you may deliver your comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey  
Building, 200 Independence Ave., SW,  
Washington, DC,

or

Room 132, East High Rise Building, 6325  
Security Boulevard, Baltimore,  
Maryland.

If comments concern information collection or recordkeeping requirements, please address a copy of comments to:

Office of Management and Budget,  
Office of Information and Regulatory  
Affairs, Room 3208, New Executive  
Office Building, Washington, DC  
20503, Attention: Allison Herron.

In commenting, please refer to file code BERC-458-P. Comments received timely will be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, in Room 309-G of the Department's offices at 200 Independence Ave., SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5:00 p.m. (phone: 202-245-7890).

FOR FURTHER INFORMATION CONTACT:  
Denis Garrison, (301)-966-5643.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Under section 1862(a)(1) of the Social Security Act (the Act), Medicare does not cover any services that are not reasonable and necessary for the diagnosis or treatment of an illness or injury or to improve the functioning of a malformed body member (see Medicare

regulations at § 405.310(k)(1)). Prior to October 1, 1987, a physician who did not accept Medicare assignment (as defined in § 405.802(e)), was permitted to collect monies from the beneficiary for services that were determined subsequently to be not reasonable and necessary under section 1862(a)(1) of the Act even though the beneficiary may not have known that Medicare would not pay for the services.

Under section 1879 of the Act, when a physician agrees to accept assignment, either on an individual claims basis or by entering into a Medicare participating physician agreement, the physician is effectively precluded by the indemnification procedures under the limitation of liability provision found in Medicare regulations at § 405.332 from receiving payment for certain denied services if it is established that the physician knew or could reasonably have been expected to know that Medicare would not pay for the services and the beneficiary did not know. However, under this limitation of liability provision, program payment may be made to the physician if neither the physician nor the beneficiary knew, or could reasonably have been expected to know, that Medicare would not pay for the services.

##### II. Summary of Provision

Under section 9332(c) of Pub. L. 99-509, which adds section 1842(l) to the Act, nonparticipating physicians who do not accept payment on an assignment-related basis must refund to beneficiaries any amounts collected for physicians' services found to be not reasonable and necessary by reason of section 1862(a)(1) of the Act. However, refund is not required if the physician did not know and could not reasonably have been expected to know that Medicare would not pay for the services, or if the beneficiary (or the person acting on behalf of the beneficiary, hereafter referred to as the other person) was informed in advance that Medicare would not pay for the services and agreed to pay for them. Unlike claims submitted on an assigned basis, there is no provision for program payment in the event that neither the physician nor the beneficiary knew or could have reasonably been expected to know that Medicare would not pay for the services because they were not reasonable and necessary. If a refund is required, it must be made within the time limits established in the statute as discussed below. Physicians who knowingly and willfully fail to refund erroneously collected amounts within the allowable time limits may be subject



to civil money penalties, exclusion from the Medicare program, or both. This provision is applicable only to physicians; it does not apply to suppliers and other non-physician providers of Part B services.

The provisions of section 1842(l) of the Act are effective for physicians' services furnished on or after October 1, 1987. In view of the short time frame for implementing the statutory requirements, HCFA has issued instructions in the Medicare Carriers Manual (HCFA Pub. 14-3). These instructions were effective for claims for services furnished on or after October 1, 1987. Upon the publication of final regulations that implement section 9332(c) of Pub. L. 99-509, HCFA will revise its program instructions as needed to reflect any differences between those final regulations and the instructions. The final regulations will be effective 30 days after the publication date of the final regulations.

### III. Refund Procedures

In accordance with the provisions of section 1842(l)(1)(B) of the Act, these regulations would require a refund of incorrectly collected amounts to be made to the beneficiary within the following time limits:

- In the case of a physician who does not request review of the denial within that period, the refund would be made to the beneficiary within 30 days after the date of the physician receives notice that Medicare will not pay for the services.

- In the case of a physician who requests review of the denial within 30 days of receipt of the initial determination, the refund would have to be made to the beneficiary within 15 days after the date on which the physician receives notice of adverse determination on the review.

A physician who knowingly and willfully fails to make a refund within the time limits enumerated may be subject to sanctions such as, civil money penalties, and or exclusions from the Medicare program (title XVIII of the Social Security Act) and State health care programs (titles V, XIX, and XX of the Social Security Act). This section of the regulation would be monitored by the Office of Inspector General (OIG) and implementing regulations may be found in Chapter V, Parts 1001, 1002 and 1003 of this Title.

When the beneficiary files a request for review of the denial of payment within 30 days of receipt of the initial determination, the physician's time limit for making the refund would not be extended. The refund would have to be

made to the beneficiary within 30 days after the date the physician receives notice that Medicare will not pay the services.

Under section 1842(l)(1)(C) of the Act, a refund would not be required of the physician if either one of the following conditions is met:

- The physician did not know and could not reasonably have been expected to know that payment would not be made for the services because they were not reasonable and necessary as defined by section 1862(a)(1) of the Act; or
- Before the service was provided, the beneficiary (or other person) was informed by the physician that Medicare payment would not be made for the specific services and, after being so informed, the beneficiary (or other person) agreed to pay the physician for the services.

Although not specifically required by the statute, the proposed rule requires that the physician's advance notice to the beneficiary that Medicare is likely to deny payment for the service must be in writing and must give the physician's reasons for believing that Medicare will deny payment. In addition, the beneficiary (or someone who is eligible to sign for the beneficiary under § 424.36(b)) must sign a statement to the effect that he or she agrees to pay for the service. We believe this would be the most effective way of protecting the interests of both the beneficiary and the physician in cases when the physician furnishes services for which he or she believes Medicare is likely to deny payment. In fact, it would strengthen the protection available to the physician since it would eliminate disputes as to whether proper notices was given. It also would conform the rules on unassigned claims to those applicable in assigned claims (existing rules on limitation of liability for assigned claims (§ 405.334(b)) permit a finding of physician nonliability in situations when the physician informs the beneficiary in writing that Medicare will not pay for the services).

Section 1842(l) provides that a refund is not required if the physician informs the beneficiary in advance that Medicare will not pay for the service and the beneficiary (or other person) agrees to pay. We considered the possibility of finding physicians not liable for refunds on the basis of equivocal notices (that is, notices to the effect that there is a possibility that Medicare may not pay for the services and that, should Medicare deny payment, the beneficiary agrees to pay). However, that approach would be

fundamentally inconsistent with the intent of the provision, which is to discourage physicians from furnishing services that are not reasonable and necessary and to protect beneficiaries from liability when they do. The practice of providing notices on a routine basis that do no more than state that there is a possibility that Medicare will not pay for the services is not acceptable, because these notices do not provide any information that would permit the beneficiary (or other person) to make an informed decision as to whether or not to receive the service and to agree to pay for it, thereby entirely removing the beneficiary protection that advance notice is meant to provide.

For these reasons, the proposed rule specifies that in order to be found not liable for refund, the physician would have to inform the beneficiary (or other person), in writing, using approved notice language as specified in program instructions, that the physician believes that Medicare is likely to deny payment for the particular service. In addition, the physician must give in writing, his or her reasons for believing that Medicare is likely to deny payment for the service. This requirement assures that the beneficiary (or other person), actually receives sufficient relevant information so that he or she can make a truly informed decision. The beneficiary needs to understand the circumstances of denial that the physician foresees in order to make his or her decision regarding the likelihood of denial. The statutory protection of beneficiaries from liability when they, the good faith, receive services from physicians on an unassigned basis that are denied as not reasonable and necessary is only achieved when a beneficiary (or other person), having been duly informed of the circumstances and of his or her options, decides whether or not to receive the services and agrees to pay for them (if necessary).

As part of an overall educational effort to familiarize nonparticipating physicians with the provisions of section 1842(l) of the Act, we plan to send to all nonparticipating physicians a letter informing them about the advance notice requirements. The letter will specify acceptable advance notice language and will also include a list of reasons for physicians use in informing beneficiaries when they believe Medicare is likely to deny payment for specified services. The list of reasons will essentially conform to the reasons currently given on beneficiary and physician denial notices when services are denied as not reasonable and necessary.

### IV. Physician Appeal Rights

While section 1842(l) of the Act implicitly grants appeal rights to nonparticipating physicians on unassigned claims by referring to physicians requesting reconsideration or seeking appeal, it does not specifically delineate the extent of those rights. Under these regulations, nonparticipating physicians would have the right to appeal determinations on unassigned claims denied because the services were determined to be not reasonable and necessary. The right of appeal also extends to a determination that a refund is required because a physician either knew or could have reasonably been expected to know that Medicare would not pay for the services because they were not reasonable and necessary. Additionally, the right of appeal would extend because the beneficiary (or other person) was not informed in advance that Medicare was likely to deny payment for the services or, if so informed, did not agree to pay for the service. Since the statute requires a refund within 30 days after receipt of the initial determination or 15 days after receipt of an adverse determination on reconsideration or appeal, we considered limiting the time within which a physician can appeal to the same 30-day period with no further appeal rights beyond the review level. We decided, however, to extend to these physicians the existing appeals process for claims under Part B, in 42 CFR Part 405, Subpart H, and the additional rights to an Administrative Law Judge (ALJ) review and judicial review granted by section 9341 of OBRA 86. However, to assure that refunds are made promptly, we would require that they be made within 15 days of receipt of the review determination as described in section III above.

### V. Regulatory Impact Statement

#### A. Executive Order 12291

Executive Order (E.O.) 12291 requires us to prepare and publish an initial regulatory impact analysis for any proposed rule that meets one of the E.O. criteria for a "major rule"; that is, that would be likely to result in: An annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Section 9332(c) of Pub. L. 99-509 shifts liability for unassigned services denied as not reasonable and necessary from the Medicare beneficiary to the providing physician, subject to the conditions specified elsewhere in the preamble to this proposed rule. We exercised discretion in implementing certain provisions of the statute. First, we addressed the appeal rights of affected physicians, and the review and hearing procedures used by carriers to adjudicate these appeals. The statute implicitly grants these rights to affected physicians, and, in the interest of equity, we propose to give these physicians review rights similar to those that beneficiaries and participating physicians already have under Part 405, Subpart H of our regulations relating to reviews and hearings under the Supplementary Medical Insurance program and the additional rights to ALJ and judicial review granted by section 9341 of OBRA 86. Second, we specified that in order to be found not liable for refunds, a physician needs to inform the beneficiary (or other person), in writing, using approved notice language, that the physician believes Medicare is likely to deny payment for a particular service. The physician would be required to give in writing, his or her reasons for believing that Medicare is likely to deny payment for the service. In addition, the beneficiary (or other person) was informed by the physician that Medicare payment would not be made for the specific services and, after being so informed, the beneficiary (or other person), agreed to pay the physician for the service. These provisions, of themselves, would not result in impacts meeting any of the criteria specified above. For these reasons, we have determined that a regulatory impact analysis is not required.

#### B. Regulatory Flexibility Act

We generally prepare an initial regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612), unless the Secretary certifies that a proposed regulation would not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, we treat all physicians as small entities. However, carriers, as our contractors, and beneficiaries, as individuals, are not small entities within the definitions established by the RFA.

In addition, section 1102(b) of the Act requires the Secretary to prepare a regulatory impact analysis for any rule that may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis

also must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital with fewer than 50 beds located outside a Metropolitan Statistical Area.

We are not certain of the effects section 9332(c) of Pub. L. 99-509 may have on physicians. One possible effect of this law is that more physicians may enter into participation agreements, because physicians may no longer bill beneficiaries for unassigned services denied under section 1862(a)(1) of the Act. Additionally, by signing a participation agreement (or by routinely accepting assignment for services provided), the physician may receive payment for denied services in some cases under the limitation of liability provision. Of course, physicians must weigh many factors when deciding whether to enter into Medicare participation agreements, such as the local prevailing charge structure, the annual change in the Medicare economic index, and the timeliness with which the carrier processes claims for payment.

The proposed procedure for implementing section 9332(c) of Pub. L. 99-509 would require physicians who do not accept assignment to complete one additional form. It is possible that some physicians may choose not to provide services to Medicare beneficiaries when faced with the uncertain prospect of either providing refunds to beneficiaries or risking legal sanctions for violation of Medicare requirements. We believe that most physicians may choose to continue providing services to Medicare beneficiaries on an unassigned basis.

Physicians affected by this change would be able to file appeals contesting both carrier denials of payment and carrier determinations that the physician should have known that Medicare would not pay for the service. Physicians providing services on an unassigned basis in the past have not possessed this right. While this legislative change would not affect Medicare program expenditures (it affects only the placement of liability for services that are denied under current standards), we do expect Medicare carriers to incur some incremental administrative costs for the increase in review and hearings workload. These costs would be paid for through the contractor budget development process.

Although the proposed rule would impose an additional administrative requirement on physicians (by requiring physicians to give written notice to beneficiaries that Medicare is like to deny payment), we do not believe it



would result in a significant economic impact. Therefore, we have determined, and the Secretary certifies, that this proposed rule would not have a significant economic impact on a substantial number of small entities, or on the operations of a substantial number of small rural hospitals and we have therefore not prepared a regulatory flexibility analysis or an impact analysis for small rural hospitals.

#### VI. Other Required Information

##### A. Response to Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments that we receive by the date and time specified in the "Date" section of this preamble, and, when we proceed with a final rule, we will respond to the comments in the preamble of that rule.

##### B. Paperwork Reduction Act

Section 405.339 and the physician advance notice to the beneficiary that Medicare is likely to deny payment which is provided for in this section contain information collection requirements that are subject to the Office of Management and Budget approval under the Paperwork Reduction Act of 1980 as amended, 44 U.S.C. 3507-3511. Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the agency official whose name appears in the "ADDRESS" section of this preamble.

##### List of Subjects in 42 CFR Part 405

Administrative practice and procedure. Health facilities, Health professions, Kidney diseases, Laboratories, Medicare, Nursing homes, Reporting and recordkeeping requirements, Rural areas, X-rays.

For the reasons set out in the preamble, Title 42, Part 405 would be amended as follows:

#### PART 405—FEDERAL HEALTH INSURANCE FOR THE AGED AND DISABLED

1. The authority citation for Part 405, Subpart C continues to read as follows:

Authority: Secs. 1102, 1815, 1833, 1842, 1861, 1862, 1866, 1870, 1871, and 1879 of the Social Security Act (42 U.S.C. 1302, 1395g, 1395i, 1395u, 1395x, 1395y, 1395cc, 1395gg, 1395hh, and 1395pp) and 31 U.S.C. 3711.

2. A new § 405.339 is added to read as follows:

#### § 405.339 Refunds of amounts collected for physician services not reasonable and necessary, payment not accepted on an assignment-related basis.

(a) *Basic rule.* Except as provided in paragraph (d) of this section, a physician who furnishes services to an individual on other than an assignment-related basis, must refund to the individual any amounts the physician has collected for services furnished for which Medicare payment is denied because they are not reasonable and necessary under § 405.310(k).

(b) *Time limits for making refunds.* A timely refund of any incorrectly collected amounts of money must be made to the beneficiary to whom the services were furnished. A refund is timely if—

(1) In the case of a physician who does not request review of the denial within that period, the refund is made within 30 days after the date the physician receives the notice of denial; or

(2) When a request for review is filed within 30 days after the physician receives notice of the denial, the refund is made within 15 days after the date the physician receives notice of an adverse determination on his or her request for review of the denial.

(c) *Notices and appeals.* If payment is denied for nonassignment-related claims because the services are found to be not reasonable and necessary, a notice of denial will be sent to both the physician and the beneficiary. The physician will have the same rights as the beneficiary, as detailed in Subpart H of this part, to appeal the determination, and will be subject to the same time limitations.

(d) *When a refund is not required.* A refund of any amounts collected for services not reasonable and necessary is not required if—

(1) The physician did not know, and could not reasonably have been expected to know, that Medicare would not pay for the service; or

(2) Before the service was provided, the physician informed the beneficiary, or someone acting on his or her behalf, in writing that the physician believed that Medicare was likely to deny payment for the specific service and the beneficiary (or someone who is eligible to sign for the beneficiary under § 424.36(b)) signed a written statement agreeing to pay for that service.

(e) *Criteria for determining that a physician knew that services were excluded as not reasonable and necessary.* A physician will be determined by the Medicare carrier to have known that furnished services were excluded from coverage as not reasonable and necessary if one or more

of the conditions in § 405.336 of this subpart are met.

(f) *Acceptable evidence of prior notice to a beneficiary that Medicare was likely to deny payment for a particular service.* To qualify for waiver of the refund requirement under paragraph (d)(2) of this section, the physician must inform the beneficiary (or person acting on his or her behalf) in writing, using approved notice language, that the physician believes that Medicare is likely to deny payment, citing the particular service for which payment is likely to be denied, and citing the physician's reasons for this belief. The notice is not acceptable evidence if—

(1) The physician routinely gives this notice to all beneficiaries for whom he or she furnishes services; or

(2) The notice is no more than a statement to the effect that there is a possibility that Medicare may not pay for the service.

(g) *Applicability of sanctions to physicians who fail to make refunds under this section.* A physician who knowingly and willfully fails to make refunds as required by this section may be subject to sanctions as provided for in Chapter V, Parts 1001, 1002, and 1003 of this Title.

(Catalog of Federal Domestic Assistance Program No. 13.774; Medicare—Supplementary Medical Insurance)

Dated: August 3, 1988.

William L. Roper,  
Administrator, Health Care Financing Administration.

Approved: September 23, 1988.

Otis R. Bowen,  
Secretary.  
[FR Doc. 88-30114 Filed 12-29-88; 8:45 am]

BILLING CODE 4120-01-M

#### FEDERAL EMERGENCY MANAGEMENT AGENCY

##### 44 CFR Part 72

##### National Flood Insurance Program

AGENCY: Federal Insurance Administration (FIA), Federal Emergency Management Agency (FEMA).

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the National Flood Insurance Program (NFIP) regulations dealing with reimbursement procedures for the review of proposed projects to determine if they would qualify for NFIP map revisions upon their completion. The rule would increase the rates for review services and change the payee.

This change is necessary because the source of funding utilized to provide these services has been changed, by Congress, from the General Revenue appropriations to transfers from the National Flood Insurance Fund.

DATE: The period for comments will be thirty days from the date of publication of this proposed rule in the Federal Register.

ADDRESS: Send comments to: Charles A. Lindsey, Chief, Technical Operations Division, Federal Insurance Administration, Federal Emergency Management Agency, Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Charles A. Lindsey (202) 646-2760.

SUPPLEMENTARY INFORMATION: On January 1, 1986, the Federal Insurance Administration implemented 44 CFR, Part 72—Procedures and Fees for Obtaining Conditional Approval of Map Changes. Its purpose was to provide cost recovery for engineering review and administrative processing associated with the issuance of conditional Letters of Map Amendment (LOMAs) and conditional Letters of Map Revision (LOMRs) for proposed floodplain modification projects. The fee structure for the issuance of these conditional LOMAs and LOMRs was based upon the then prevailing private sector labor rate of \$25.00 per hour.

Based on a cost analysis conducted during February of 1988, it is proposed that §§ 72.3 and 72.4 be revised to reflect the currently prevailing private sector labor rate of \$30.00 per hour. An additional fee category, Structural measures on alluvial fans, will be added under § 72.3, along with a corresponding fee. Alluvial fans are defined as geomorphic features characterized by a cone or fan-shaped deposit of boulders, gravel, and fine sediments that have been eroded from mountain slopes, transported by flood flows, and then deposited on the valley floors, and are subject to flash flooding, high velocity flows, debris flows, erosion, sediment movement and deposition, and channel migration. The number of hours allotted for the review of proposed structures on alluvial fans is 40, and the corresponding fee, at \$30.00 per hour, will be \$1,200.00. Section 72.4 will also be revised to specify payment of both the initial fee and the final cost to the National Flood Insurance Program as opposed to the United States Treasury. This change is necessary because the source of funding utilized to provide these services has been changed, by Congress, from General Revenue appropriations to transfers from the National Flood Insurance Fund.

FEMA has determined, based upon an Environmental Assessment, that this rule will not have significant impact upon the quality of the human environment. As a result, an Environmental Impact Statement will not be prepared. A finding of no significant impact is included in the formal docket file and is available for public inspection and copying at the Rules Docket Clerk, Office of General Counsel, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

This rule will not have a significant economic impact on a substantial number of small entities and, hence, has not undergone regulatory flexibility analysis.

This rule is not a "major rule" as defined in Executive Order 12291, dated February 27, 1981, and, hence, no regulatory analysis has been prepared.

FEMA has determined that this rule does not contain a collection of information as described in section 3504(h) of the Paperwork Reduction Act.

##### List of Subjects in 44 CFR Part 72

Flood insurance, Flood plains.

Accordingly, the proposed changes to 44 CFR Chapter I, Subchapter B, are as follows:

#### PART 72—PROCEDURE AND FEES FOR OBTAINING CONDITIONAL APPROVAL OF MAP CHANGES

The authority citation for Part 72 will continue to read as follows:

Authority: 42 U.S.C. 4001, et seq.; Reorganization Plan No. 3 of 1978; E.O. 12127.

1. Section 72.3(a) (1) and (2) and (b) (1) through (4) will be revised and § 72.3(b)(5) will be added as follows:

##### § 72.3 Initial fee schedule.

(a) \* \* \*

(1) Single-lot .....	\$150
(2) Multi-lot/Subdivision .....	210
(b) * * *	
(1) New bridge or culvert (no channelization) .....	420
(2) Channel modifications only .....	480
(3) Channel modification and new bridge or culvert .....	630
(4) Levees, berms or other structural measures .....	810
(5) Structural measures on alluvial fans .....	1,200

##### § 72.4 [Amended]

2. Section 72.4(c) introductory text will be amended by replacing "\$25.00" with "\$30.00".

3. Section 72.4(e) will be amended by replacing "United States Treasury" with "National Flood Insurance Program".

Harold T. Duryee,

Federal Insurance Administrator.

[FR Doc. 88-29921 Filed 12-29-88; 8:45 am]

BILLING CODE 6718-03-M

#### INTERSTATE COMMERCE COMMISSION

##### 49 CFR Part 1103

[Ex Parte No. 55 (Sub-No. 70)]

##### Practitioners

AGENCY: Interstate Commerce Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Commission proposes to change its policies and procedures regarding the licensing of nonattorney ICC practitioners. The Commission requests comments on various proposals enumerated below, and solicits any other proposals for altering its current licensing of practitioners.

DATE: Comments must be received by January 30, 1989.

ADDRESS: An original and 15 copies of comments (and any replies) should be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Kathleen King, Assistant Secretary, (202) 275-7429, Interstate Commerce Commission, Washington, DC 20423.

(TDD for hearing impaired (202) 275-1721).

SUPPLEMENTARY INFORMATION: The number of applicants for the annual practitioner's examination (see 49 CFR 1103.3) has waned dramatically in recent years, to the point that there were only four applicants for the July 1988 examination. Because persons from virtually every bureau of the Commission are involved in the preparation, administration, and grading of the examination, the Commission (and ultimately taxpayer) resources which must be devoted to the examination seem excessive for so few candidates.

The Commission will consider various alternatives to address this situation, including: (1) Continuing to offer an examination each year, but reducing the expenditure of Commission resources associated with it; (2) amending its present regulations to allow the annual examination to be canceled when the demand for the examination is



insufficient to justify the staff resources involved; (3) allowing the examination to be administered by the ICC practitioners bar, rather than the Commission; (4) eliminating the examination requirement for practitioners and instead requiring general standards of fitness; and (5) discontinuing the licensing of new nonattorney practitioners. In addition to comments on these proposals, the Commission would like to receive any other suggestions from the public (and in particular the Association of Transportation Practitioners) addressing the matter.

#### Environmental and Energy Considerations

We preliminarily conclude that the proposed action will not significantly affect either the quality of the human environment or the conservation of energy resources. However, we specifically invite parties to comment on these issues.

#### Initial Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. 603, the Commission is required to examine specifically the impact of a proposed action on small business and small organizations. We preliminarily conclude that this decision will not have a significant impact on a substantial number of small entities.

#### List of Subjects in 49 CFR Part 1103

Administrative practice and procedure.

Decided: December 20, 1988.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley and Phillips.

Noreta R. McGee,  
Secretary.

[FR Doc. 88-29754 Filed 12-29-88; 8:45 am]  
BILLING CODE 7035-01-M

#### DEPARTMENT OF THE INTERIOR

##### Fish and Wildlife Service

##### 50 CFR Part 17

##### Endangered and Threatened Wildlife and Plants; Findings on Petitions and Initiation of Status Reviews

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of petition findings and status review.

**SUMMARY:** The Fish and Wildlife Service (Service) announces 90-day findings for three Endangered Species Act listing petitions filed with respect to: (1)

*Limnanthes floccosa* subsp. *californica* (Butte County meadowfoam), (2) Suisun song sparrow (*Melospiza melodia maxillaris*), (3) Buena Vista Lake shrew (*Sorex ornatus relictus*), Santa Catalina shrew (*Sorex ornatus willetti*), Suisun shrew (*Sorex ornatus sinuosus*), and salt marsh wandering shrew (*Sorex vagrans halicoetes*). All three petitions were found to present substantial information indicating that the requested actions may be warranted. A status review of the Suisun song sparrow (*Melospiza melodia maxillaris*) is initiated herewith. Comments and data on this and the other species (for which status review is already in progress) are requested.

**DATES:** The findings announced in this notice were made during the period from March 20, 1988, to June 28, 1988. Comments and information should be submitted by February 28, 1989.

**ADDRESSES:** Information, comments, or questions should be submitted to the Field Supervisor, Endangered Species, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room E-1823, Sacramento, California 95825. The petitions, findings, supporting data, and comments are available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Harlow, Acting Field Supervisor, at the above address (916/978-4866 or FTS 460-4866).

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, (Act) as amended in 1982 (16 U.S.C. 1531 et seq.), requires that the Service make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petition action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the Federal Register. If the finding is positive, the Service is also required to promptly commence a review of the status of the involved species.

In recent months the Service has received and made 90-day findings on the following petitions:

Charlice Danielsen, president of the California Native Plant Society, submitted a petition to the Service to emergency list *Limnanthes floccosa* subsp. *californica* (Butte County meadowfoam) as an endangered species. This petition was dated

February 12, 1988, and received by the Service on February 22, 1988. The petition reported that only four of the original eight known populations remain of this subspecies, which is restricted to vernal pool habitats in Butte County, California. A field survey to precisely delimit the number and distribution of meadowfoam populations recently has been completed. Although reportedly additional population sites were located, the final report regarding the survey result has not been released. All information now available to the Service tends to confirm the petition claim. Therefore, the Service found that this petition did present substantial information indicating that the requested action may be warranted. In the case of positive findings, the Service is required to initiate a status review of the involved species. However, a status review of this taxon already is in progress, as it was included as a category 1 species on the Service's Review of Plants in the Federal Register of September 27, 1985 (50 FR 39559).

Dr. Joe T. Marshall and nine associates jointly submitted a petition to list as endangered the Suisun song sparrow (*Melospiza melodia maxillaris*). An incomplete version of this petition was submitted on November 23, 1987, and a complete petition was received by the Service on December 22, 1987. This subspecies of song sparrow is endemic to the tidal marshes of Suisun Bay, Solano County, California. The petition contained documentation that the subspecies has suffered a loss of approximately 90 percent of its historical habitat from diking and filling activities, and that it currently faces lesser threats from a variety of factors, such as predation and pollution. All information presently available to the Service tends to confirm these claims. The Service, therefore, found that this petition presented substantial information indicating that the required action may be warranted. Additional information is needed, particularly on current threats to this subspecies, before proper status determination can be made. In the case of positive findings, the Service is required to initiate a status review of the involved species. Hence, the Service seeks additional information concerning this song sparrow.

Ms. Doris Dixon, representing The Interfaith Council for the Protection of Animals and Nature, submitted a petition to list four species of California shrews, the Buena Vista lake shrew (*Sorex ornatus relictus*), Santa Catalina shrew (*Sorex ornatus willetti*), Suisun shrew (*Sorex ornatus sinuosus*), and salt

marsh wandering (vagrant) shrew (*Sorex vagrans halicoetes*). This petition was dated April 15, 1988, and was received by the Service on April 18, 1988. Materials attached to the petition, excerpted from a contract report completed for the California Department of Fish and Game, indicated that these shrews have been severely impacted by conversion or degradation of habitats resulting from wetland modification for urban or agricultural purposes, water diversion, and/or introduction of exotic animal species. Information available from Service-funded status surveys for the Catalina shrew, salt marsh wandering shrew, and Suisun shrew, substantiates this claim. Recent sightings of two Buena Vista lake shrews confirm that the subspecies is still extant. The rarity of these animals, however, has restricted the ability of investigators to gather information relating to current distribution and population trends. The Service found that substantial information was presented in the petition and the petitioned action may be warranted for these four taxa. In the case of positive findings, the Service is required to initiate status reviews of the involved species. However, status reviews of the shrews covered by the subject petition already are in progress, as these taxa were included as category 2 species in the Service's Review of Vertebrate Wildlife that was published in the Federal Register of September 18, 1985 (50 FR 37958-37967).

The Service would appreciate any additional data, comments, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the status of these species, particularly the Suisun song sparrow.

#### Author

This notice was prepared by Dr. Kathleen E. Franzreb, Endangered Species Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Room E-1823, Sacramento, California 95825 (916/978-4866 or FTS 460-4866).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411; Pub. L. 100-478, 102 Stat. 2306; Pub. L. 100-653, 102 Stat. 3825 (16 U.S.C. 1531 et seq.); Pub. L. 99-625, 100 Stat. 3500, unless otherwise noted.

#### List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Dated: December 22, 1988.

Becky Norton Dunlop,  
Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 88-30100 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-56-M

#### DEPARTMENT OF COMMERCE

##### National Oceanic and Atmospheric Administration

##### 50 CFR Part 602

[Docket No. 81011-8211]

##### Guidelines for Fishery Management Plans

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule.

**SUMMARY:** NOAA issues this proposed rule to revise the national standard guidelines for fishery conservation and management issued in February 1983 under section 301(b) of the Magnuson Fishery Conservation and Management Act (the Magnuson Act). The national standards represent statutory criteria and principles with which all fishery management plans (FMPs) must be judged consistent by the Secretary of Commerce (Secretary). The Magnuson Act requires the Secretary to issue guidelines based on the national standards to assist in the development and review of FMPs, their amendments, and regulations. Pub. L. 97-453 amended section 301(b) to make the national standard guidelines advisory only. The guidelines are intended to improve the quality of FMPs by providing comprehensive guidance for Regional Fishery Management Councils (Councils) to use in developing FMPs and amendments, and to produce a more uniform understanding of the Secretary's basis for FMP review and implementation. These proposed rules revise the guidelines for national standards 1 and 2 only.

**DATE:** Comments must be received by February 28, 1989.

**ADDRESSES:** Send comments on these proposed guidelines to: Richard H. Schaefer, Office of Fisheries Conservation and Management,

National Marine Fisheries Service, 1335 East West Highway, Silver Spring, Maryland 20910.

**FOR FURTHER INFORMATION CONTACT:** Richard H. Schaefer, telephone 301-427-2334.

**SUPPLEMENTARY INFORMATION:** Revision of the national standard guidelines was precipitated, in part by recommendations of the NOAA Fishery Management Study (the Study), commissioned by the Under Secretary of Commerce for Oceans and Atmosphere, and undertaken to assess and improve the Magnuson Act fishery management system. In June 1988, this Study recommended that NOAA assume the responsibility for determining the biologically acceptable catch (ABC) for each managed fishery. By ABC the Study meant the total allowable removals from the resource which would maintain a healthy and productive resource into the future. As used in this context, the ABC would be the maximum possible quota for the species or species complex in the fishery. It should be noted that this is different from the manner in which the term ABC is used in proposed paragraph 602.11(e). The Study's intent was that stocks be maintained at some level above that which protects the minimum spawning stock from recruitment overfishing. The Study sought a "conservation standard" such that stocks are not continually driven to, or maintained at, the threshold of overfishing.

In April 1987, NOAA distributed for Council/National Marine Fisheries Service (NMFS) pre-publication review and comment a draft revision of the uniform standards governing the organization, practices, and procedures of the Councils and the guidelines for FMPs. That draft revision included a section providing that a maximum fishing mortality (MFM) be established which would maintain the current spawning stock size with consideration of the variabilities in spawning stock estimates, and that ABC be specified so as not to exceed MFM. Again, ABC was to be used as a maximum annual quota for the fishery. Council and NMFS comments concerning the MFM proposal made it clear that this proposal was not universally applicable for a variety of reasons.

Accordingly, in August 1987, NOAA convened a technical workshop of NMFS fishery scientists and managers, and academic scientists recommended by the Councils, to address the Study's recommendations for a conservation standard and the comments on the April draft. In October 1987, in order to allow



time for a thorough examination of the issues raised by the workshop, the decision was made to separate the revisions concerning the conservation standard from those addressing the organization and administrative questions. In the spring of 1988, a series of Council/NMFS regional workshops was held to discuss the feasibility of the conservation standard concept, using as a basis for discussion the proposed revision of national standard guidelines 1 and 2 produced by the August 1987 technical workshop. Following the workshops, the guidelines were further revised, and served as the basis for discussion at a Council Chairmen's meeting in July 1988.

The proposed guideline revision that follows is responsive to the workshop series and the Council Chairmen's meeting, and sets forth a series of definitions and procedures, which together, are intended to provide the conservation standard.

Comments at the workshops centered primarily on the need for flexibility with regard to: (a) The mandatory nature of any definition of overfishing; (b) the difficulty or impossibility of applying any rigid or universal definition to a large number of diverse species; (c) the fact that the ABC concept is not used by all Councils; (d) the bureaucratic chaos that might result from the proposed Secretarial exemption process; and (e) the burden imposed by the proposed Stock Assessment and Fishery Evaluation (SAFE) requirement.

Concern was also expressed at the workshops that identification of thresholds might serve to establish targets for harvest rather than provide for conservation of the resources. Several Councils stated a need to: (a) Identify measurable "conditions of concern" for each stock, with monitoring and review procedures; (b) allow for conservative approaches when there is uncertainty because of lack of data; and (c) retain ability to take appropriate restrictive management actions at stock levels above the threshold.

Comments at the Council Chairmen's meeting focused primarily on: (a) The division of responsibility between the Councils and NMFS regarding providing data for, and preparing, The SAFE report; (b) including in the SAFE report a recommendation for a threshold level or other definition of overfishing; (c) establishing an OY "reserve", releasable to domestic and foreign fishermen as necessary, to solve operational problems and allow for uncertainties in stock estimates; and (d) several needed editorial clarifications.

Section 602.11 proposes an overall overfishing concept within which each

Council must define a specific, measurable definition of overfishing for each stock or stock complex covered by an FMP. That concept is based on the premise that irreversible damage to a resource's ability to recover in a reasonable period of time is unacceptable, and to allow fishing on a stock at a level that severely compromises that stock's future productivity is counter to the goals of the Magnuson Act. As used in this revision, ABC is not meant as a quota for the fishery, but rather, may be used as a step in deriving OY from MSY. (See § 602.11(e).) In this context, the ABC is set by a Council, not NOAA. Since ABC is not necessarily applicable to all fisheries, Councils may establish an ABC level, but are not required to do so. Councils are provided with the flexibility needed to develop a definition of overfishing appropriate to the individual stock or species characteristics, and general criteria are set for them as a basis for Secretarial review. Comments are particularly solicited on the provision made for phasing-in implementation of the guidelines.

NOAA believes that, although it is difficult to define precisely the level at which overfishing jeopardizes recovery of a stock, there are indicators of existing or impending overfishing that should be heeded. If these conditions exist, the best scientific advice may conclude that immediate remedial action should be taken. Councils are encouraged, but not required, to identify these conditions.

As management regimes become more comprehensive, the interrelationships of fishing pressures on target and non-target (both major and minor) species need to be addressed more directly. NOAA believes that in determining allowable fishing levels Councils should consider all sources of mortality on a stock, including both targeted and non-targeted fishing mortality, and levels of compliance. Because all removals from the stock, whether landed or unlanded, will affect spawning stock biomass levels now or in the near future, the Councils should attempt to obtain estimates of all sources of mortality and consider the estimates in adjusting directed fishing levels. Total fishing mortality on a stock should be managed such that overfishing does not occur.

In selected situations, a Council may determine that overfishing of a minor component species of a multi-species fishery is warranted based on net benefits expected for the fishery as a whole. Although fishing any stock to the extent that it requires protection under the Endangered Species Act should

never be allowed to occur, some very limited overfishing may be acceptable if it is identified, and sufficiently analyzed and justified. However, in all cases, alternatives should be considered that would prevent such overfishing.

Section 602.12(e) proposes that a periodic SAFE document or set of documents be prepared or aggregated whereby Councils can obtain an objective periodic overview of the status of stocks and fisheries under management. Several Councils currently produce such fishery reviews annually, which generally provide the kinds of information called for in the SAFE report. The SAFE report would be expected to provide a summary of the best biological, social, and economic information available to a Council when needed: (a) To determine annual harvest levels or optimum yields (OYs) for species in each fishery management unit (FMU), and (b) to evaluate the effectiveness of its management in preventing overfishing as defined by the Council.

The SAFE report would thus provide a useful tracking tool for assessing the relative achievement of FMP objectives. It would establish a time-series data base indicating the relative health of stocks and the industry dependent on them. Including social and economic information in the same document or set of documents with biological information does not diminish the integrity of either type of information. By providing the best scientific information available for each type of data required in the determination of OY, subject to Council and outside peer review, the SAFE report is designed to improve the ability of Councils to derive OY or any specified harvest level as the Magnuson Act prescribes.

While the Secretary would have the responsibility for assuring that the SAFE report is produced, it is not intended to be exclusively authored by NOAA. The SAFE report could be produced by any combination of talent from Council, academic, government, or other sources. The SAFE reports would not be required to be revised annually, except as there have been new developments or significant changes in a fishery. Although the contents of SAFE reports would not be mandatory, certain basic descriptive data on the stocks and industry should be included.

#### Classification

The guidelines indicate how NOAA interprets the fishery management principles in the national standards of the Magnuson Act. They describe a range of acceptable management

measures that could be adopted by the councils, approved by the Secretary, and subsequently translated into regulations. The impact upon the public occurs through specific management measures contained within specific FMPs; until a specific FMP is developed, there is no basis for evaluating the consequences of these guidelines.

These amendments to the national standard guidelines do not themselves affect the human environment. Thus, NOAA has determined that no environmental impact statement (EIS) or environmental assessment (EA) is required. FMPs and FMP amendments developed as a result of these guidelines will require EISs or EAs.

Because these guidelines will not have any direct regulatory impact upon the public, the Under Secretary of Commerce for Oceans and Atmosphere has determined that this proposed rule is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. The proposed rule will not have an annual effect on the economy of \$100 million or more; it will not result in a major increase in costs for consumers, individual industries, Federal, State, or local governmental agencies, or geographic regions; and it will not result in significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. A regulatory impact review (RIR) was not prepared.

This proposed rule has been submitted to the Director, Office of Management and Budget, pursuant to E.O. 12291.

Because the proposed guidelines will have no direct regulatory impact on the public, the General Counsel of the Department of Commerce has certified to the Small Business Administration that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. As a result, a regulatory flexibility analysis (RFA) was not prepared. Any economic impacts on small entities will be addressed through RFAs for individual FMPs.

This rule contains no collection-of-information requirements subject to the Paperwork Reduction Act.

Because the proposed guidelines will have no direct regulatory impact upon the public, NOAA has determined that this proposed rule does not directly affect the coastal zone of any State with an approved coastal zone management program.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

Dated: December 22, 1988.

James W. Brennan,  
Assistant Administrator For Fisheries,  
National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR 602 is proposed to be amended as follows:

#### PART 602—GUIDELINES FOR FISHERY MANAGEMENT PLANS

1. The authority citation for Part 602 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. Section 602.11 is revised, § 602.12(a) is republished, and § 602.12(e) is added to read as follows:

##### § 602.11 National Standard 1—Optimum Yield.

(a) *Standard 1.* Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(b) *General.* The determination of OY is a decisional mechanism for resolving the Act's multiple purposes and policies, for implementing an FMP's objectives, and for balancing the various interests that comprise the national welfare. OY is based on MSY, or on MSY as it may be adjusted under paragraph (d)(3) of this section. The most important limitation on the specification of OY is that the choice of OY—and the conservation and management measures proposed to achieve it—must prevent overfishing.

(c) *Overfishing.* (1) Overfishing is a level or rate of fishing mortality that jeopardizes the long-term capacity of a stock or stock complex to produce MSY on a continuing basis. Each FMP must specify, to the maximum extent possible, an objective and measurable definition of overfishing for each stock or stock complex covered by that FMP, and provide an analysis of how the definition was determined and how it relates to reproductive potential.

(2) The definition of overfishing for a stock or stock complex may be developed or expressed in terms of a minimum level of spawning biomass ("threshold"); maximum level or rate of fishing mortality; or formula, model, or other measurable standard designed to ensure the maintenance of the stock's productive capacity. Overfishing must be defined in a way to enable the Council and the Secretary to monitor and evaluate the condition of the stock or stock complex relative to the definition.

(i) If data indicate that an overfished condition exists, a program must be established for rebuilding the stock over

a period of time specified by the Councils which is acceptable to the Secretary.

(ii) Councils should identify what actions or combination of actions will be undertaken if it is determined that a stock or stock complex is approaching an overfished condition.

(iii) If overfishing is defined in terms of a threshold biomass level, the Council must ensure that targeted fishing effort does not cause spawning biomass to fall or remain below that threshold.

(iv) If overfishing is defined in terms of a maximum fishing mortality rate, the Councils must ensure that targeted fishing effort on that stock does not cause the maximum rate to be exceeded.

(3) Overfishing definitions must be based on the best scientific information available. Councils should build into the definition appropriate consideration of risk, taking into account uncertainties in estimating domestic harvest, stock conditions, or the effects of environmental factors (see section 602.16). In cases where scientific data are severely limited, the Councils' informed judgment must be used, and effort should be directed to identifying and gathering the needed data (see sections 602.12 and 605.14 of this chapter).

(4) Secretarial approval or disapproval will be based on consideration of whether the proposal:

(i) Has sufficient scientific merit;

(ii) Is likely to result in effective Council action to prevent the stock from closely approaching or reaching an overfished status;

(iii) Provides a basis for objective measurement of the status of the stock against the definition; and

(iv) Is operationally feasible.

(5) Changes in environment/habitat conditions can produce the appearance of overfishing. Significant adverse alterations in the environment increase the possibility that fishing effort will contribute to a stock collapse. Care should be taken to identify the cause of any downward trends in spawning stock sizes or average annual recruitment. Whether these trends are caused by environmental changes or by fishing effort, the only direct control provided for by the Act is to reduce fishing mortality. Unless the Council asserts, as supported by appropriate evidence, that reduced fishing effort would not alleviate the problem, the FMP must include measures to reduce fishing mortality regardless of the cause of the low population level. If man-made environmental changes are contributing to the downward trends, in addition to controlling effort Councils should



recommend restoration of habitat and other ameliorative programs, to the extent possible.

(6) An FMP must prevent overfishing, except in certain limited situations. For example, harvesting the major component of a mixed fishery at its optimum level may result in the overfishing of a minor (smaller or less valuable) stock component in the fishery management unit. A Council may decide to permit this type of overfishing if it is demonstrated by analysis (paragraph (f)(5) of this section) that it will result in net benefits to the fishery as a whole, and if the Council's action will not cause any stock component to require protection under the Endangered Species Act.

(7) Fishing can produce a variety of effects on local and areawide abundance, availability, size, and age composition of a stock. Some of these effects have been called "growth", "localized", or "pulse" overfishing; however, these effects are not necessarily "overfishing" under the national standard 1 definition, which focuses on recruitment and long-term reproductive capacity. A Council may recommend conservation and management measures to prevent or permit these effects, depending on the objectives of a particular FMP, and the specific definition of overfishing established for the stock or stock complex under management. (See Appendix A to Subpart B of this part, which offers cautionary, explanatory material.)

(8) Implementation. (i) All new FMPs and the first amendment for existing FMPs submitted after [insert date six months after the effective date of these guidelines] should include a proposed definition of overfishing for the stock or stock complex managed under the affected FMP.

(ii) An amendment proposing an overfishing definition for each FMP not containing such a definition should be submitted before [insert date 18 months after the effective date of these guidelines].

(d) *MSY*. (1) *MSY* is an estimate of the largest average annual catch or yield that can be taken over a significant period of time from each stock under prevailing ecological and environmental conditions.

(2) *MSY* may be presented as a range of values. One *MSY* may be specified for a related group of species in a mixed-species fishery. Since *MSY* is a long-term average, it need not be specified annually, but must be based on the best scientific information available.

(3) *MSY* may be only the starting point in providing a realistic biological

description of allowable fishery removals. *MSY* may need to be adjusted because of environmental factors, stock peculiarities, or other biological variables, prior to the determination of *OY*. An example of such an adjustment is determination of *ABC*.

(e) *ABC*. (1) *ABC* is a preliminary description of the acceptable harvest (or range of harvests) for a given stock or stock complex. Its derivation focuses on the status and dynamics of the stock, environmental conditions, other ecological factors, and prevailing technological characteristics of the fishery.

(2) When *ABC* is used, its specification constitutes the first step in deriving *OY* from *MSY*. Unless the best scientific information available indicates otherwise (see section 602.12), *ABC* should be no higher than the product of the stock's natural mortality rate and the biomass of the exploitable stock. If a threshold has been specified for the stock, *ABC* must equal zero when the stock is at or below that threshold (see paragraph (c)(2) of this section). *ABC* may be expressed in numeric and/or non-numeric terms.

(f) *OY*. (1) *Definition*. The term "optimum" with respect to the yield from a fishery, means the amount of fish which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and which is prescribed as such on the basis of the maximum sustainable yield from each fishery, as modified by any relevant economic, social, or ecological factors (section 3(18)(b) of the Act).

(2) *Values in determination*. In determining the greatest benefit to the Nation, two values that should be weighed are food production and recreational opportunities (section 3(18)(a) of the Act). They should receive serious attention as measures of benefit when considering the economic, ecological, or social factors used in modifying *MSY* to obtain *OY*.

(i) "Food production" encompasses the goals of providing seafood to consumers at reasonable prices, maintaining an economically viable fishery, and utilizing the capacity of U.S. fishery resources to meet nutritional needs.

(ii) "Recreational opportunities" includes recognition of the importance of the quality of the recreational fishing experience, and of the contribution of recreational fishing to the national, regional, and local economies and food supplies.

(3) *Factors relevant to OY*. The Act's definition of *OY* identifies three categories of factors to be used in

modifying *MSY* to arrive at *OY*: economic, social, and ecological (section 3(18)(b)). Not every factor will be relevant in every fishery; for instance, there may be no Indian treaty rights. For some fisheries, insufficient information may be available with respect to some factors to provide a basis for corresponding modifications to *MSY*.

(i) *Economic factors*. Examples are promotion of domestic fishing, development of unutilized or underutilized fisheries, satisfaction of consumer and recreational needs, and encouragement of domestic and export markets for U.S.-harvested fish. Some other factors that may be considered are the value of industrial fisheries, the level of capitalization, operating costs of vessels, alternate employment opportunities, and economies of coastal areas.

(ii) *Social factors*. Examples are enjoyment gained from recreational fishing, avoidance of gear conflicts and resulting disputes, preservation of a way of life for fishermen and their families, and dependence of local communities on a fishery. Among other factors that may be considered are the cultural place of subsistence fishing, obligations under Indian treaties, and world-wide nutritional needs.

(iii) *Ecological factors*. Examples are the vulnerability of incidental or unregulated species in a mixed-species fishery, predator-prey or competitive interactions, and dependence of marine mammals and birds or endangered species on a stock of fish. Equally important are environmental conditions that stress marine organisms, such as natural and man-made changes in wetlands or nursery grounds, and effects of pollutants on habitat and stocks.

(4) *Specification*. (1) The "amount of fish" that constitutes the *OY* need not be expressed in terms of numbers or weight of fish. The economic, social, or ecological modifications to *MSY* may be expressed by describing fish having common characteristics, the harvest of which provides the greatest overall benefit to the Nation. For instance, *OY* may be expressed as a formula that converts periodic stock assessments into quotas or guideline harvest levels for recreational, commercial, and other fishing. *OY* may be defined in terms of an annual harvest of fish or shellfish having a minimum weight, length, or other measurement. *OY* may also be expressed as an amount of fish taken only in certain areas, or in certain seasons, or with particular gear, or by a specified amount of fishing effort. In the case of a mixed-species fishery, the incidental species *OY* may be a function

of the directed catch, or absorbed into an *OY* for related species.

(ii) If a numerical *OY* is chosen, a range or average may be specified.

(iii) In a fishery where there is a significant discard component, the *OY* may either include or exclude discards, consistent with the other yield determinations.

(iv) The *OY* specification can be converted into an annual numerical estimate to establish any *TALFF* and to analyze impacts of the management regime. There should be a mechanism in a multiyear plan for periodic reassessment of the *OY* specification, so that it is responsive to changing circumstances in the fishery. (See § 602.12(e).)

(v) The determination of *OY* requires a specification of *MSY*. However, where sufficient scientific data as to the biological characteristics of the stock do not exist, or the period of exploitation or investigation has not been long enough for adequate understanding of stock dynamics, or where frequent large-scale fluctuations in stock size make this concept of limited value, the *OY* should be based not on a fabricated *MSY* but on the best scientific information available.

(5) *Analysis*. An FMP must contain an analysis of how its *OY* specification was determined (section 303(a)(3) of the Act). It should relate the explanation of overfishing in paragraph (c) of this section to conditions in the particular fishery, and explain how its choice of *OY* and conservation and management measures will prevent overfishing in that fishery. If overfishing is permitted under paragraph (c)(6) of this section, the analysis must contain a justification in terms of overall benefits and an assessment of the risk of the species or stock component reaching a "threatened" or "endangered" status. A Council must identify those economic, social, and ecological factors relevant to management of a particular fishery, then evaluate them to arrive at the modification (if any) of *MSY*. The choice of a particular *OY* must be carefully defined and documented to show that the *OY* selected will produce the greatest benefit to the Nation.

(g) *OY as a target*. (1) The specification of *OY* in an FMP is not automatically a quota or ceiling, although quotas may be derived from the *OY* where appropriate. *OY* is a target or goal; an FMP must contain conservation and management measures, and provisions for information collection, that are designed to achieve *OY*. These measures should allow for practical and effective implementation and enforcement of the

management regime, so that the harvest is allowed to reach but not to exceed *OY* by a substantial amount. The Secretary has an obligation to implement and enforce the FMP so that *OY* is achieved. If management measures prove unenforceable—or too restrictive or not rigorous enough to realize *OY*—they should be modified; an alternative is to reexamine the adequacy of the *OY* specification.

(2) Exceeding *OY* does not necessarily constitute overfishing, although they might coincide. Even if no overfishing resulted, continual harvest at a level about a fixed-value *OY* would violate national standard 1 because *OY* was exceeded (not achieved) on a continuing basis.

(3) Part of the *OY* may be held as a reserve to allow for uncertainties in estimates of stock size and of *DAH* or to solve operational problems in achieving (but not exceeding) *OY*. If an *OY* reserve is established, an adequate mechanism should be included in the FMP to permit timely release of the reserve to domestic or foreign fishermen, if necessary.

(h) *OY and foreign fishing*. Section 201(d) of the Act provides that fishing by foreign nations is limited to that portion of the *OY* that will not be harvested by vessels of the United States.

(1) *DAH*. Councils must consider the capacity of, and the extent to which, U.S. vessels will harvest the *OY* on an annual basis. Estimating the amount that U.S. fishing vessels will actually harvest is required to determine the surplus.

(2) *DAP*. Each FMP must identify the capacity of U.S. processors. It must also identify the amount of *DAP*, which is the sum of two estimates:

(i) The amount of U.S. harvest that domestic processors will process. This estimate may be based on historical performance and on surveys of the expressed intention of manufacturers to process, supported by evidence of contracts, plant expansion, or other relevant information; and

(ii) The amount of fish that will be harvested, but not processed (e.g., marketed as fresh whole fish, used for private consumption, or used for bait).

(3) *JVP*. When *DAH* exceeds *DAP*, the surplus is available for *JVP*. *JVP* is a part of *DAH*.

#### § 602.12 National Standard 2—Scientific Information.

(a) *Standard 2*. Conservation and management measures shall be based upon the best scientific information available.

\* \* \*

(e) *Stock Assessment and Fishery Evaluation (SAFE) Report*. (1) The *SAFE* report is a document or set of documents that provides Councils with a summary of the most recent biological condition of species in the fishery management unit (FMU), and the social and economic condition of the recreational and commercial fishing industries and the fish processing industries. It summarizes, on a periodic basis, the best available scientific information concerning the past, present, and possible future condition of the stocks and fisheries being managed under Federal regulation.

(i) The Secretary has the responsibility to assure that a *SAFE* report or similar document is prepared, reviewed annually, and changed as necessary for each FMP. The Secretary or Councils may utilize any combination of talent from Council, State, university, or other sources (but at a minimum must include Council and NMFS representatives) to acquire and analyze data and produce the *SAFE* report.

(ii) The *SAFE* report provides information to the Councils for determining annual harvest levels from each stock, documenting significant trends or changes in the resource and fishery over time, and assessing the relative success of existing State and Federal fishery management programs. In addition, the *SAFE* report may be used to update or expand previous environmental and regulatory impact documents, and ecosystem and habitat descriptions.

(iii) Each *SAFE* report must be scientifically based, cite data sources and interpretations.

(2) Each *SAFE* report should contain information on which to base harvest specifications, such as:

(i) Estimates of total biomass and/or spawning biomass for each stock in the FMU;

(ii) Estimates of the annual surplus production (*ASP*) and *MSY* for each stock in the FMU;

(iii) Description of the estimated biomass, *ASP*, and *MSY* in previous years relative to those estimates for the current or next year;

(iv) Description of the model or assumptions on which these estimates are based and a discussion of the reliability of each estimate;

(v) If a stock is below the level which will produce *MSY*, estimated time necessary to allow the stock to rebuild to *MSY*, threshold or other specified level under various harvest levels and prevailing environmental conditions; and



(vi) Significant changes (if any) in the habitat or ecosystem since it was last described in the FMP, an amendment to the FMP, or previous SAFE report.

(3) Each SAFE report should contain information on which to assess the condition of the recreational and commercial fishing industries and fish processing industries, such as:

(i) Estimate of the amount of fish harvested from each stock in the FMU, by gear type and area, in the most recent three years and in the year immediately prior to implementation of the FMP governing fisheries for (or in) the FMU. If applicable, the amount of fish harvested in the same time period by wholly domestic, joint venture and foreign fisheries;

(ii) The approximate exvessel value of the harvested fish described in paragraph (e)(3)(i) of this section;

(iii) Amounts and estimated value of each type of processed products derived from the harvested fish described in paragraph (e)(3)(i) of this section;

(iv) Estimates of the numbers of commercial vessels, by gear type and in terms of individual vessels, involved in each fishery for (or in) the FMU;

(v) Estimates of the number of commercial fishermen employed in each fishery for (or in) the FMU;

(vi) The numbers of processing plants, floating and shore based, individual and by product type, involved in processing the harvested fish described in paragraph (e)(3)(i) of this section;

(vii) Estimates of the number of individuals employed in the processing plants described in paragraph (e)(3)(vi) of this section.

(viii) Estimates of the amount of fish harvested by recreational fishermen from the FMU;

(ix) Estimates of the numbers of recreational fishermen who harvested fish from the FMU;

(x) Estimates of the number of charter vessels and party boats involved in the recreational fishery; and

(xi) The estimated value of the recreational fishery for (or in) the FMU.

(4) Each SAFE report may contain additional economic, social, and ecological information pertinent to the success of management or the achievement of objectives of each FMP, such as:

(i) Enforcement actions taken and penalties assessed and collected over the most recent three years under an implemented FMP;

(ii) Significant changes (if any) in State regulations pertinent to the FMU and their known or anticipated effects on stocks in the FMU;

(iii) Significant changes (if any) in related fisheries which may affect the fishing effort for (or in) the FMU; and

(iv) Potential conservation and management problems, their possible causes and solutions.

[FR Doc. 88-30007 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-22-M

## Notices

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

### DEPARTMENT OF AGRICULTURE Food Safety and Inspection Service (Docket No. 88-031N)

#### National Advisory Committee on Microbiological Criteria for Foods; Solicitation for Membership Nominations

This notice announces the Department's intent to solicit nominations for membership on the National Advisory Committee on Microbiological Criteria for Foods.

The Committee was established in April 1988 as a result of a recommendation by a 1985 report of the National Academy of Sciences Committee on Food Protection, Subcommittee on Microbiological Criteria, entitled "An Evaluation of the Role of Microbiological Criteria for Foods."

The Committee provides advice and recommendations to the Secretaries of Agriculture and Health and Human Services concerning the development of microbiological criteria by which the safety and wholesomeness of food can be assessed, including criteria for microorganisms that indicate whether food has been processed using good manufacturing practices.

Nominations for membership are being sought from individuals with scientific expertise in the fields of Epidemiology, Food Technology, Microbiology, Packaging, Pathology, Public Health, and/or Toxicology.

Appointment(s) to the Committee will be made by the Secretary of Agriculture. Because of the complexity of the issues to be addressed, full Committee meetings will be held quarterly and subcommittees will meet as deemed necessary.

Interested persons are invited to submit a typed resume to Catherine M. DeRoever, Director, Executive Secretariat, Food Safety and Inspection Service, Room 3175-South Building, 14th and Independence Avenue, SW.,

Washington, DC 20250. Nominations for membership must be postmarked no later than January 30, 1989. For additional information, please contact Ms. DeRoever at the above address, or by telephone on (202) 447-9150.

Done at Washington, DC, on December 27, 1988.

Lester M. Crawford,  
Administrator, Food Safety and Inspection Service.

[FR Doc. 88-30071 Filed 12-29-88; 8:45 am]  
BILLING CODE 3410-DM-M

### Forest Service

#### Lake Bradford Land Exchange; Apalachicola National Forest, FL

AGENCY: Forest Service, USDA.

ACTION: Environmental Impact Statement Cancellation Notice.

**SUMMARY:** Airport Properties, Inc., has withdrawn its proposal to exchange 3,100 acres of private land for 330 acres of National Forest System land located in the Wakulla Ranger District, Apalachicola National Forest, Leon County, Florida.

The Notice of Intent, published in the Federal Register of August 5, 1988, is hereby rescinded (53 FR 29504).

**FOR FURTHER INFORMATION CONTACT:** Direct questions about the proposed environmental impact statement cancellation to Raymond K. Mason, Planning Staff Officer, National Forests in Florida, 227 N. Bronough St., Suite 4061 Tallahassee, Florida 32301, phone 904-681-7265.

Date: December 20, 1988.

John E. Alcock,  
Regional Forester.

[FR Doc. 88-30063 Filed 12-29-88; 8:45 am]  
BILLING CODE 3410-11-M

### Soil Conservation Service

#### Soap Creek Watershed, IA; Availability of a Record of Decision

December 13, 1988.

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of availability of a record of decision.

**SUMMARY:** J. Michael Nethery, Responsible Federal Official for projects administered under the provisions of

### Federal Register

Vol. 53, No. 251

Friday, December 30, 1988

Pub. L. 83-566, 16 U.S.C. 1001-1008, in the State of Iowa, is hereby providing notification that a record of decision to proceed with the installation of the Soap Creek Watershed project is available. Single copies of their record of decision may be obtained from J. Michael Nethery at the address shown below.

**FOR FURTHER INFORMATION CONTACT:** J. Michael Nethery, State Conservationist, Soil Conservation Service, 693 Federal Building, 210 Walnut Street, Des Moines, Iowa 50309, Telephone: 515-284-4261.

J. Michael Nethery,  
State Conservationist.  
December 13, 1988.

#### Record of Decision Soap Creek Watershed

Appanoose, Davis, Monroe, and Wapello Counties, Iowa

#### 1. Purpose

As State Conservationist for the Soil Conservation Service, I am the Responsible Federal Official (RFO) for all Soil Conservation Service projects in Iowa.

The recommended plan for Soap Creek Watershed involves works of improvement to be installed under authorities administered by the Soil Conservation Service. This project will install 154 floodwater retarding structures. These are all single-purpose structures for flood prevention.

The Soap Creek Watershed plan was prepared under the authority of the Watershed Protection and Flood Prevention Act (Pub. L. 83-566, 83rd Congress, 66 Stat. 666, as amended) by the Appanoose, Davis, Monroe, and Wapello Soil and Water Conservation Districts. The scoping meetings, held during May 1985, established the Soil Conservation Service (SCS), U.S. Department of Agriculture as lead agency, and with the Forest Service—USDA and the Fish and Wildlife Service—USDI as cooperating agencies.

#### 2. Measures Taken To Comply with National Environmental Policies

The Soap Creek Watershed project has been planned in accordance with existing Federal legislation concerned with the preservation of environmental values. The following actions were taken to ensure that the Soap Creek Watershed plan is consistent with national goals and policies.



Inter-agency meetings conducted by an inter-disciplinary team under the direction of SCS, were held prior to the May, 1985 scoping meeting as part of the on-going environmental evaluation process. The inter-disciplinary team concluded that significant impacts on the human environment may occur because of the complexity and public interest of the proposed action. As RFO, I directed that a draft environmental impact statement (EIS) be prepared.

The inter-disciplinary environmental evaluation of the Soap Creek Watershed project was conducted by the sponsors, cooperating agencies, and Soil Conservation Service. Information was obtained from many groups and agencies. Reviews were held with the Environmental Protection Agency, Fish and Wildlife Service, Iowa Department of Natural Resources, State Historic Preservation Officer, and the Iowa State Archeologist. Input from these reviews were included in the EIS.

Public meetings were held on July 9, 1982; July 18, 25, 30, August 1, 16, and September 4, 5, 1984 to solicit public participation in the environmental evaluation process, to assure that all interested parties had sufficient information to understand how their concerns are affected by water resource problems, to afford local interests an opportunity to express their views regarding the plans which can best solve these problems, and to provide all interested parties an opportunity to participate in the plan selection. More than 180 parties were notified by mail of the joint public meeting. A transcript of the minutes was developed and is on file.

The formal environmental evaluation was held on May 7, 1985. Eighty letters of invitation were mailed to local, State, and Federal agencies and to environmental groups. Residents of the watershed were invited by newspaper and radio notices.

Testimony and recommendation were received relative to the following subjects:

- a. Type, location, and size of structures to be used for flood water damage reduction.
- b. Potential impacts on fish and wildlife.

A draft environmental impact statement was prepared in March, 1988 and made available for public review. The recommendations and comments obtained from public meetings held during project planning and assessment were considered in the preparation of the statement. Projects of other agencies were included only when they related to the Public Law 566 project, and they were not evaluated with regard to their individual merit.

A public meeting to review the draft environmental impact statement was held on April 12, 1988 with 114 people in attendance.

More than 100 copies of the draft environmental impact statement were distributed to agencies, conservation groups, organizations. The draft environmental impact statement was filed with the Environmental Protection agency of June 20, 1988.

All existing data and information pertaining to the project's probable environmental consequences were obtained with assistance from other scientists and engineers. Documentary information as well as the views of interested Federal, State, and local agencies and concerned individuals and organizations having special knowledge of, competence over, or interest in the project's environmental impact were sought. This process continued until it was felt that all the information necessary for a comprehensive, reliable assessment had been gathered.

A complete picture of the project's current and probable future environmental setting was assembled to determine the proposed project's impact and identify unavoidable adverse environmental impacts that might be produced.

The consequences of a full range of reasonable and viable alternatives to specific project features were considered, studied, and analyzed. In reviewing these alternatives, all courses of action that could reasonably accomplish the project purposes were considered. Attempts were made to identify the economic, social, and environmental values affected by each alternative. In accordance with existing policy and procedures, the possibilities of structural and nonstructural alternatives for the project were considered.

The one alternative considered a reasonable alternative to accomplish the project's objectives was the NED plan which was the selected plan. It consists of the installation of 154 floodwater retarding structures on small drainageways later to the main streams.

### 3. Conclusions

The following conclusions were reached after carefully reviewing the proposed Soap Creek Watershed project in light of all national goals and policies, particularly those expressed in the National Environmental Policy Act, and after evaluating the overall merit of possible alternatives to the project:

A. The Soap Creek Watershed project will employ a reasonable and practicable means that is consistent with the National Environmental Policy

Act while permitting the application of other national policies and interests. These means include, but are not limited to, a project planned and designed to minimize adverse effects on the natural environment, while accomplishing an authorized project purpose. Project features designed to preserve existing environmental values for future generations include:

(1) Establishment of wildlife habitat areas adjacent to floodwater-retarding structures, along the main streams, and other areas in the watershed to offset losses due to the structures; and

(2) Establishment of grasses and legumes on dams and offsite borrow areas to protect them from erosion and provide food and cover for wildlife.

b. The Soap Creek Watershed project was planned using a systematic interdisciplinary approach involving integrated uses of the natural and social sciences and environmental design arts. The results of this review constitutes the basis for the conclusions and recommendations. All conclusions concerning the environmental impact of the project and overall merit of existing plans were based on a review of data and information that would be reasonably expected to reveal significant environmental consequences of the proposed project. These data included additional studies prepared specifically for the project and comments and views of all interested Federal, State, and local agencies and individuals. The project will not affect any cultural resources eligible for inclusion in the National Register of Historic Places. Nor will the project affect any species of fish, wildlife, or plant or their habitats that have been designated as endangered or threatened.

c. In studying and evaluating the environmental impact of the Soap Creek Watershed project, every effort was made to express all environmental values quantitatively. Any failure to quantify particular environmental amenities and values is the result of the absence of a methodology having general scientific acceptance. Nevertheless, every effort was made to identify and give appropriate weight and consideration of nonquantifiable environmental values.

d. Every possible effort has been made to identify those adverse environmental effects which cannot be avoided if the project is constructed.

e. The long-term and short-term resource uses, long-term productivity, and the irreversible and irretrievable commitment of resources are accurately described in the final environmental impact statement.

f. All reasonable and viable alternative to project features and to the project itself were studied and analyzed with reference to national policies and goals, especially those expressed in the National Environmental Policy Act and the Federal waters resource

development legislation under which the project was planned. Each possible course of action was evaluated as to its possible economic, technical, social, and overall environmental consequences to determine the tradeoffs necessary to accommodate all national policies and interests. However, no alternative or combination of alternatives will afford greater protection of the environmental values while accomplishing the other project goals and objectives.

g. I conclude, therefore, that the proposed project will be the most effective means of meeting national goals and serving the public interest.

### 4. Recommendations

Having concluded that the proposed Soap Creek Watershed project uses all practicable means, consistent with other essential considerations of the national policy, to meet the goals established in the National Environmental Policy Act, that the project will thus serve the overall public interest, that the final environmental impact statement has been prepared, reviewed, and accepted in accordance with the provisions of the National Environmental Policy Act, that the project will thus serve the overall public interest, that the final environmental impact statement has been prepared, reviewed, and accepted in accordance with the provisions of the National Environmental Policy Act as implemented by Departmental regulations for the preparation of environmental impact statements, and that the project meets the needs of the project sponsors, I propose to implement the Soap Creek Watershed project.

J. Michael Nethery,  
State Conservationist, Soil Conservation  
Service, U.S. Department of Agriculture.

Date: December 13, 1988.

[FR Doc. 88-30060 Filed 12-29-88; 8:45 am]

BILLING CODE 3410-10-M

### COMMISSION ON CIVIL RIGHTS

#### North Carolina Advisory Committee; Agenda and Notice of Public Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Forum Subcommittee of the North Carolina Advisory Committee to the Commission will convene at 2:30 p.m. and adjourn at

6:30 p.m. on Friday, January 20, 1989, in the Sheraton Hotel, 301 North Elm Street, Greensboro, N.C. 27401. The Subcommittee will discuss plans for a community forum on equal educational opportunity in public schools in the State.

Persons desiring additional information, or planning a presentation to the Subcommittee, contact Subcommittee Chairperson Dr. Richard Robbins or John I. Binkley, Director, Eastern Regional Division at (202) 523-5264, TDD (202) 376-8117. Hearing impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Eastern Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, December 23, 1988.

Melvin L. Jenkins,  
Acting Staff Director.

[FR Doc. 88-30065 Filed 12-29-88; 8:45 am]

BILLING CODE 6335-01-M

### DEPARTMENT OF COMMERCE

#### Export Now Advisory Committee; Open Meeting

AGENCY: Department of Commerce.

A meeting of the Export Now Advisory Committee will be held on January 11, 1989, 1:45 p.m.-3:00 p.m. at the U.S. Department of Commerce, Room 4830, 14th Street and Constitution Avenue, NW., Washington, DC 20230. This meeting will be in lieu of the January 12, 1989, meeting previously announced in the Federal Register (53 FR 46101, November 18, 1988). The meeting will be open to the public with a limited number of seats available. Any member of the public may submit written comments concerning the Committee's affairs at any time before or after the meeting.

The Committee was established by the Secretary of Commerce on February 25, 1988 to advise Department officials on the objectives and conduct of the Export Now Program, including methods of increasing public awareness of the advantages of exporting, improving Federal coordination with state, local and private sector export activities, and implementing programs of education and training to increase the export effectiveness of all segments of the U.S. economy.

The purpose of the meeting is to report on the status of the Export Now Program and to receive advice from the

public on the conduct and future implementation of the program. A more specific agenda will be available to the public at the beginning of the meeting.

For further information or copies of the minutes, contact Alan R. Severson or John Hayes, Export Now Program, Herbert C. Hoover Building, Room 1066, 14th Street and Constitution Avenue, NW., Washington, DC 20230, (202) 377-2073.

Date: December 27, 1988.

Robert H. Brumley,  
General Counsel.

[FR Doc. 88-30088 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-CW-M

### Foreign-Trade Zones Board

[Order No. 411]

#### Resolution and Order Approving the Application of the Huntsville-Madison County Airport Authority for a Special- Purpose Subzone at the Chrysler Plant in Huntsville, AL

Proceedings of the Foreign-Trade  
Zones Board, Washington, DC.

#### Resolution and Order

Pursuant to the Authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Huntsville-Madison County Airport Authority, grantee of FTZ 83, filed with the Foreign-Trade Zones Board (the Board) on February 24, 1988, and amended on April 29, 1987, requesting special-purpose subzone status at the auto electronic components plant of Chrysler Corporation in Huntsville, Alabama, the Board finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations are satisfied, and that the proposal is in the public interest, approves the application.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

#### Grant of Authority To Establish a Foreign-Trade Subzone at the Chrysler Plant in Huntsville, Alabama

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the



Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Huntsville-Madison County Airport Authority, grantee of Foreign-Trade Zone No. 83, has made application (filed February 24, 1988, FTZ Docket 8-86, 51 FR 9235, and amended on April 29, 1987, 52 FR 16426) in due and proper form to the Board for authority to establish a special-purpose subzone at the automobile electronic components manufacturing plant of Chrysler Corporation in Huntsville, Alabama;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations are satisfied;

Now, therefore, in accordance with the application filed on February 24, 1988, and amended on April 29, 1987, the Board hereby authorizes the establishment of a subzone at Chrysler's Huntsville plant, designated on the records of the Board as Foreign-Trade Subzone No. 83A at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and Regulations issued thereunder, to the same extent as though the same were fully set forth herein, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, D.C. this 21st day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan W. Mares,

*Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.*

Attest:

John J. Da Ponte, Jr.,  
*Executive Secretary.*

[FR Doc. 88-30117 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

#### [Order No. 415]

#### **Resolution and Order Approving the Application of the State of Hawaii for a Subzone at the Chevron U.S.A., Inc., Refinery in Ewa, Oahu, HI**

Proceedings of the Foreign-Trade Zones Board, Washington, DC.

#### **Resolution and Order**

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the State of Hawaii (Department of Business and Economic Development), grantee of FTZ 9, filed with the Foreign-Trade Zones Board (the Board) on December 30, 1987, requesting special-purpose subzone status for the crude oil refinery of Chevron U.S.A., Inc., located in Ewa, Oahu, Hawaii, adjacent to the Honolulu Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest, if approval is subject to certain conditions, approves the application subject to the following conditions:

1. Foreign crude oil used as fuel for the refinery shall be dutiable.
2. Chevron shall elect privileged foreign status on foreign crude oil and other foreign merchandise admitted to the subzone.
3. The U.S. Customs Service shall inform the Foreign-Trade Zones Board on or before July 1, 1991, that a satisfactory control system has been implemented so that the revenue

can be fully protected; otherwise, the authority under this grant shall expire on that date.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

#### **Grant of Authority to Establish a Foreign-Trade Subzone at the Chevron U.S.A., Inc. Refinery in Ewa, Oahu, Hawaii**

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the State of Hawaii (Department of Business and Economic Development), grantee of Foreign-Trade Zone No. 9, has made application (filed December 30, 1987, FTZ Docket 49-87, 53 FR 784) in due and proper form to the Board for authority to establish a special-purpose subzone at the oil refinery of Chevron U.S.A., Inc. (Chevron), located in Ewa, Oahu, Hawaii;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations are satisfied and that the proposal would be in the public interest if approval is given subject to the conditions in the resolution accompanying this action;

Now, therefore, in accordance with the application filed December 30, 1987, the Board hereby authorizes the establishment of a subzone at the Chevron refinery, designated on the records of the Board as Foreign-Trade Subzone No. 9E, at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and the Regulations issued thereunder.

and those stated in the resolution accompanying this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness whereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, DC, this 21st day of December, 1988, pursuant to Order of the Board.

Foreign-Trade Zones Board.

Jan. W. Mares,

*Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.*

Attest:

John J. Da Ponte, Jr.,  
*Executive Secretary.*

[FR Doc. 88-30115 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

#### [Order No. 414]

#### **Resolution and Order Approving the Application of the Port of Corpus Christi Authority for a Subzone at the Valero Refining Company Refinery in Nueces County, TX**

Proceedings of the Foreign-Trade Zones Board, Washington, DC

#### **Resolution and Order**

Pursuant to the authority granted in the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) has adopted the following Resolution and Order:

The Board, having considered the matter, hereby orders:

After consideration of the application of the Port of Corpus Christi Authority, grantee of FTZ 122, filed with the Foreign-Trade Zones Board (the Board) on December 30, 1987, requesting special-purpose subzone status for the crude oil refinery of Valero Refining Company, located in Nueces County, Texas, adjacent to the Corpus Christi Customs port of entry, the Board, finding that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied, and that the proposal would be in the public interest, if approval is subject to certain conditions, approves the application subject to the following conditions:

1. Foreign crude oil used as fuel for the refinery shall be dutiable.
2. Valero shall elect privileged foreign status on foreign crude oil and other foreign merchandise admitted to the subzone.
3. The U.S. Customs Service shall inform the Foreign-Trade Zones Board on or before July 1, 1991, that a satisfactory control system has been implemented so that the revenue can be fully protected; otherwise, the authority under this grant shall expire on that date.

The Secretary of Commerce, as Chairman and Executive Officer of the Board, is hereby authorized to issue a grant of authority and appropriate Board Order.

#### **Grant of Authority To Establish a Foreign-Trade Subzone at the Valero Refining Company in Nueces County, Texas**

Whereas, by an Act of Congress approved June 18, 1934, an Act "To provide for the establishment, operation, and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes", as amended (19 U.S.C. 81a-81u) (the Act), the Foreign-Trade Zones Board (the Board) is authorized and empowered to grant to corporations the privilege of establishing, operating, and maintaining foreign-trade zones in or adjacent to ports of entry under the jurisdiction of the United States;

Whereas, the Board's regulations (15 CFR 400.304) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and where a significant public benefit will result;

Whereas, the Port of Corpus Christi Authority, grantee of Foreign-Trade Zone No. 122, has made application (filed December 30, 1987, FTZ Docket 47-87, 53 FR 783) in due and proper form to the Board for authority to establish a special-purpose subzone at the oil refinery of Valero Refining Company

(Valero) located in Nueces County, Texas;

Whereas, notice of said application has been given and published, and full opportunity has been afforded all interested parties to be heard; and

Whereas, the Board has found that the requirements of the Act and the Board's regulations would be satisfied and that the proposal would be in the public interest if approval is given subject to the conditions in the resolution accompanying this action;

Now, therefore, in accordance with the application filed December 30, 1987, the Board hereby authorizes the establishment of a subzone at the Valero refinery, designated on the records of the Board as Foreign-Trade Subzone No. 122J, at the location mentioned above and more particularly described on the maps and drawings accompanying the application, said grant of authority being subject to the provisions and restrictions of the Act and the Regulations issued thereunder, and those stated in the resolution accompanying this action, and also to the following express conditions and limitations:

Activation of the subzone shall be commenced within a reasonable time from the date of issuance of the grant, and prior thereto, any necessary permits shall be obtained from Federal, State, and municipal authorities.

Officers and employees of the United States shall have free and unrestricted access to and throughout the foreign-trade subzone in the performance of their official duties.

The grant shall not be construed to relieve responsible parties from liability for injury or damage to the person or property of others occasioned by the construction, operation, or maintenance of said subzone, and in no event shall the United States be liable therefor.

The grant is further subject to settlement locally by the District Director of Customs and District Army Engineer with the Grantee regarding compliance with their respective requirements for the protection of the revenue of the United States and the installation of suitable facilities.

In witness thereof, the Foreign-Trade Zones Board has caused its name to be signed and its seal to be affixed hereto by its Chairman and Executive Officer or his delegate at Washington, DC, this 21st day of December, 1988, pursuant to Order of the Board.



## Foreign-Trade Zones Board.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates.

Attest

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88-30018 Filed 12-29-88; 8:45 am]

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## [Order No. 410]

**Approval for Amendment of Zone Plan of Foreign-Trade Zone No. 84, Harris County, TX, Within the Houston Customs Port of Entry**

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, the Port of Houston Authority (PHA), Grantee of Foreign-Trade Zone No. 84, has applied to the Board for authority to amend its zone plan by including an additional private site for the petroleum and chemical storage and blending facilities of GATX Terminals Corporation, located in Harris County, Texas, within the Houston Customs port of entry;

Whereas, the application was accepted for filing on October 25, 1985, and notice inviting public comment was given in the *Federal Register* on November 12, 1985 (FTZ Doc. 41-85, 50 FR 46678);

Whereas, an examiners committee has investigated the application in accordance with the Board's regulations and recommends conditional approval;

Whereas, the Board has found that the requirements of the Foreign-Trade Zone Act, as amended, and the Board's regulations would be satisfied if approval is given subject to the conditions stated below;

Now, therefore, the Board hereby orders:

That the Grantee is authorized to amend its zone plan in accordance with the application filed October 25, 1985, subject to the following conditions:

1. Operations at this site shall be subject to the restrictions applicable to FTZ 84 by virtue of Board Order 214 (7/15/83).
2. Full zone benefits for blending and processing shall be available only for export activity.
3. Privileged foreign status (19 CFR 146.65) shall be elected for any foreign merchandise prior to any blending or processing operation.

4. This approval is for a period ending January 15, 1989, subject to Board action on the pending PHA application for a permanent extension of the "B" sites of the Houston zone (FTZ Doc. 8-88).

The Grantee shall notify the Board for approval prior to the commencement of any manufacturing or blending operation not specifically described in the application. The authority given in this Order is subject to settlement locally by the District Director of Customs and the District Army Engineer regarding compliance with their respective requirements relating to foreign-trade zones.

Signed at Washington, DC, this 21st day of December 1988.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary

[FR Doc. 88-30118 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

## [Order No. 409]

**Approval for Amendment of Zone Plan of Foreign-Trade Zone No. 84, Harris County, TX, Within the Houston Customs Port of Entry**

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, the Port of Houston Authority (PHA), Grantee of Foreign-Trade Zone No. 84, has applied to the Board for authority to amend its zone plan by including an additional private site for the petroleum and chemical storage and blending facilities of Oiltanking of Texas, Inc., located in Harris County, Texas, within the Houston Customs port of entry;

Whereas, the application was accepted for filing on July 14, 1987, and notice inviting public comment was given in the *Federal Register* on July 23, 1987 (FTZ Doc. 7-87, 52 FR 27696);

Whereas, an examiners committee has investigated the application in accordance with the Board's regulations and recommends conditional approval;

Whereas, the Board has found that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied if approval is given subject to the conditions stated below;

Now, therefore, the Board hereby orders:

That the Grantee is authorized to amend its zone plan in accordance with the application filed July 14, 1987, subject to the following conditions:

1. Operations at this site shall be subject to the restrictions applicable to FTZ 84 by virtue of Board Order 214 (7/15/83).
2. Full zone benefits for blending and processing shall be available only for export activity.
3. Privileged foreign status (19 CFR 146.65) shall be elected for any foreign merchandise prior to any blending or processing operation.

4. This approval is for a period ending January 15, 1989, subject to Board action on the pending PHA application for a permanent extension of the "B" sites of the Houston zone (FTZ Doc. 8-88).

The Grantee shall notify the Board for approval prior to the commencement of any manufacturing or blending operation not specifically described in the application. The authority given in this Order is subject to settlement locally by the District Director of Customs and the District Army Engineer regarding compliance with their respective requirements relating to foreign-trade zones.

Signed at Washington, DC, this 21st day of December 1988.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88-30119 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

## [Order No. 406]

**Approval for Amendment of Zone Plan of Foreign-Trade Zone No. 84, Harris County, TX, Within the Houston Customs Port of Entry**

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), and the Foreign-Trade Zones Board Regulations (15 CFR Part 400), the Foreign-Trade Zones Board (the Board) adopts the following order:

Whereas, the Port of Houston Authority (PHA), Grantee of Foreign-Trade Zones No. 84, has applied to the Board for authority to amend its zone plan by including an additional private site for the petroleum and chemical

storage and blending facilities of Intercontinental Terminals Company, located in Harris County, Texas, within the Houston Customs port of entry;

Whereas, the application was accepted for filing on June 9, 1986, and notice inviting public comment was given in the *Federal Register* on June 28, 1986 (FTZ Doc. 20-86, 51 FR 23252);

Whereas, an examiners committee has investigated application in accordance with the Board's regulations and recommends conditional approval;

Whereas, the Board has found that the requirements of the Foreign-Trade Zones Act, as amended, and the Board's regulations would be satisfied if approval is given subject to the conditions stated below;

Now, therefore, the Board hereby orders:

That the Grantee is authorized to amend its zone plan in accordance with the application filed June 9, 1986, subject to the following conditions:

1. Operations at this site shall be subject to the restrictions applicable to FTZ 84 by virtue of Board Order 214 (7/15/83).
2. Full zone benefits for blending and processing shall be available only for export activity.
3. Privileged foreign status (19 CFR 146.65) shall be elected for any foreign merchandise prior to any blending or processing operation.

4. This approval is for a period ending January 15, 1989, subject to Board action on the pending PHA application for a permanent extension of the "B" sites of the Houston zone (FTZ Doc. 8-88).

The Grantee shall notify the Board for approval prior to the commencement of any manufacturing or blending operation not specifically described in the application. The authority given in this Order is subject to settlement locally by the District Director of Customs and the District Army Engineer regarding compliance with their respective requirements relating to foreign-trade zones.

Signed at Washington, DC, this 21st day of December 1988.

Jan W. Mares,

Assistant Secretary of Commerce for Import Administration, Chairman, Committee of Alternates, Foreign-Trade Zones Board.

Attest:

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 88-30120 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-DS-M

**International Trade Administration  
(A-588-015)****Television Receivers, Monochrome and Color, from Japan; Preliminary Results of Antidumping Duty Administrative Review**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of preliminary results of antidumping duty administrative review.

**SUMMARY:** In response to requests by the petitioners and the respondents, the Department of Commerce has conducted an administrative review of the antidumping finding on television receivers from Japan. The review covers five manufacturers/exporters of this merchandise to the United States and various periods from April 1, 1981 through February 29, 1988. The review indicates the existence of dumping margins for certain firms during certain periods.

As a result of the review, the Department has preliminarily determined to assess antidumping duties equal to the differences between United States price and foreign market value.

If we received no company-supplied information or if information was inadequate or untimely, we used the best information available for assessment and cash deposit purposes.

Interested parties are invited to comment on these preliminary results.

**EFFECTIVE DATE:** December 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Wendy J. Frankel, Michael J. Heaney, or John R. Kugelmann, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2923/3601.

**SUPPLEMENTARY INFORMATION:****Background**

On August 18, 1983 and September 27, 1983, the Department of Commerce ("the Department") published in the *Federal Register* tentative determinations to revoke in part the finding on television receivers, monochrome and color, from Japan (36 FR 4597, March 10, 1971) as regards Matsushita and Victor (48 FR 37506), and Toshiba (48 FR 44100). On February 11, 1988, the Department published in the *Federal Register* (53 FR 4050) the final results of its last administrative review of the finding.

The petitioners and respondents requested in accordance with 19 CFR 353.53a(a) that we conduct administrative reviews. We published notices of initiation of the antidumping

duty administrative reviews on November 27, 1985 (50 FR 44825), July 9, 1986 (51 FR 24883), November 20, 1987 (52 FR 44621), and March 8, 1988 (53 FR 7383). As required by section 751 of the Tariff Act of 1930 ("the Tariff Act"), the Department has now conducted these administrative reviews. NEC Corporation ("NEC") failed to respond to our sales questionnaire for the ninth review period. Therefore, we used NEC's most recent rate as the best information available.

We verified in Japan and in the U.S. questionnaire responses, submitted by Matsushita Electric Industrial Company, Ltd. ("Matsushita"), and Victor Company of Japan ("Victor"), covering various periods. In accordance with section 776(b) of the Tariff Act we verified the information used in making our preliminary determination. We used standard verification procedures including examination of relevant accounting records and original source documents.

**Scope of the Review**

Imports covered by the review are shipments of television receiving sets, monochrome and color, from Japan. Television receiving sets include, but are not limited to, units known as projection televisions, receiver monitors, and kits (containing all parts necessary to receive a broadcast television signal and produce a video image). Not included are certain monitors not capable of receiving a broadcast signal, certain combination units (combination television receivers with other electrical entertainment components such as tape recorders, radio receivers, etc.), and certain subassemblies not containing the components essential for receiving a broadcast television signal and producing a video image.

This review covers five manufacturers/exporters of Japanese television receivers, monochrome and color, and various periods from April 1, 1981 through February 29, 1988. All reviewed periods are identified in the *Preliminary Results of Review*.

**United States Price**

In calculating United States price the Department used purchase price or exporter's sales price ("ESP"), both as defined in section 772 of the Tariff Act, as appropriate. Purchase price and ESP were based on the packed f.o.b., c.i.f., or delivered price to unrelated purchasers in the United States. We made adjustments, as applicable, for ocean freight, marine insurance, U.S. and Japanese inland freight, inland freight insurance, U.S. and Japanese brokerage

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fees, Japanese customs clearance fees, wharfage, export license fees, forwarding and handling charges, export selling expenses incurred in Japan, discounts, royalties, rebates, commissions to unrelated parties, and the U.S. subsidiaries' selling expenses. For Matsushita for periods three and four, we used best information available to calculate indirect selling expenses for ESP sales. We accounted for taxes imposed in Japan, but rebated or not collected by reason of the exportation of the merchandise to the United States, by multiplying the ex-factory price of the televisions sold in the United States by the tax rate and adding the result to the U.S. price.

#### Foreign Market Value

In calculating foreign market value ("FMV") the Department used home market price, as defined in section 773 of the Tariff Act, when sufficient quantities of such or similar merchandise were sold in the home market to provide a basis for comparison. When the quantities of such or similar merchandise sold in the home market were insufficient to provide a basis for comparison, we used constructed value, as defined in section 773 of the Tariff Act. A petitioner, Zenith, alleged sales below cost in the home market by Fujitsu General, Matsushita, and Victor during the eighth review.

For Matsushita's sales during the eighth review, when we found more than 10 percent, but less than 90 percent, of the sales of a comparison model were below the cost of production, we excluded those sales and used the remaining sales to calculate FMV. For the fifth and eighth reviews, we used constructed value when there were no sales of such or similar home market models.

For Victor's sales during the eighth review, we used constructed value when all sales of a comparison model were below the cost of production and when there were no sales of such or similar home market models. When we found more than 10 percent, but less than 90 percent, of the sales of a comparison model were below the cost of production, we excluded those sales and used the remaining sales to calculate FMV.

We calculated constructed value as the sum of material and fabrication costs, general expenses, profit, and the cost of packing. Since Matsushita's and Victor's actual general expenses were greater than the statutory minimum of 10 percent of the sum of materials and fabrication costs, we used their actual general expenses. Since actual profits

for these two firms were less than eight percent of the sum of material costs, fabrication costs, and general expenses, we used the eight percent statutory minimum, as provided by section 773 of the Tariff Act.

For all firms except Toshiba Corporation ("Toshiba"), home market price was based on the packed, ex-factory or delivered price to unrelated purchasers in the home market. For Toshiba we used the price to both related and unrelated purchasers in the home market because we are satisfied that they were of an arms-length nature. As applicable, we made adjustments for inland freight, insurance, rebates, discounts, and for differences in credit expenses, warranties, advertising, sales promotion, royalties, physical characteristics of the merchandise, and packing. We made further adjustments, as applicable, for indirect selling expenses to offset U.S. commissions to unrelated parties and U.S. selling expenses for ESP calculations. Finally, we made circumstances-of-sale adjustments for commodity tax differences, where appropriate.

For Matsushita, for periods three and four, we did not deduct a discount and a rebate granted to related credit companies because we consider such transactions between related parties as intracorporate transfers of funds rather than selling expenses. We disallowed the following claimed adjustments as differences in circumstances of sales because they were not directly related to reviewed sales: "dealer help activity," "sales training," "marketing information, etc.," "assistance to Matsushita Dealer's Association members," and indirect warranty, service, and repair costs. However, we allowed them as indirectly-related selling expenses. Further, we did not have quantities sold either in the home market or in the U.S. Thus, we have provided simple averages for these periods for Matsushita.

For Matsushita and Victor, for periods five and eight, we did not consider their technical service fees as directly-related selling expenses because neither firm was able to show what portions of these expenses were directly related to sales; rather, we consider these expenses to be indirect selling expenses.

For periods five and eight we considered Victor's related service companies' warranty labor expenses as indirectly-related selling expenses because these firms are related. We disallow those portions of Victor's claimed discounts, advertising, and sales promotion expenses that we could not verify.

No other adjustments were claimed or allowed.

#### Preliminary Results of Review

As a result of our review, we preliminarily determine that the following margins exist:

Manufacturer	Review No.	Period of review	Margin (percent)
Funai Electric..	9	03/01/87 to 02/29/88.	21.93
Matsushita.....	3	04/01/81 to 03/31/82.	0.03
Do.....	4	04/01/82 to 03/31/83.	2.94
Do.....	5	04/01/83 to 08/18/83.	4.73
Do.....	8	03/01/86 to 02/28/87.	27.92
NEC.....	9	03/01/87 to 02/29/88.	18.32
Toshiba.....	4	04/01/82 to 03/31/83.	0.00
Victor.....	3	04/01/81 to 03/31/82.	0.00
Do.....	4	04/01/82 to 03/31/83.	0.00
Do.....	5	04/01/83 to 08/18/83.	0.40
Do.....	8	03/01/86 to 02/28/87.	16.21

<sup>1</sup> No shipments during the period; rate from last review in which there were shipments.

Interested parties may request disclosure and/or an administrative protective order within 5 days of the date of publication of this notice and may request a hearing within 8 days of publication. Any hearing, if requested, will be held on January 27, 1989. Pre-hearing briefs and/or written comments from interested parties may be submitted not later than January 13, 1989. Rebuttal briefs and rebuttal comments, limited to issues raised in those comments, may be filed not later than January 20, 1989. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any such written comments or at a hearing.

We preliminarily find margins for Matsushita and Victor in this review. If we continue to find more than de minimis margins for these two firms in the final results of this review, we will not consider them further for revocation.

The Department will determine, and the Customs Service will assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages stated above. The Department will issue appraisal instructions on each exporter directly to the Customs Service.

Further, as provided for by § 353.48(b) of the Commerce Regulations, a cash deposit of estimated antidumping duties based on the most recent of the above margins will be required for the above

firms. For any shipments of this merchandise manufactured by Fujitsu General Ltd. (Fujitsu General), Mitsubishi Electric Corporation (Mitsubishi), Hitachi Ltd. (Hitachi), Sanyo Electric Company, Ltd. (Sanyo), or Sharp Corporation (Sharp), the cash deposit will continue to be at the rates published in the final results of the last administrative review for these firms (Fujitsu General and Mitsubishi, 53 FR 4050, February 11, 1988; Hitachi and Sanyo, 52 FR 6940, March 20, 1987; Sharp, 50 FR 24278, June 10, 1985).

For any future entries of this merchandise from a new exporter, not covered in this or prior reviews, the first shipments of which occurred after February 29, 1987 and which is unrelated to any reviewed firm or any previously reviewed firms, a cash deposit of 27.92 percent shall be required. These deposit requirements are effective for all shipments of Japanese television receivers, monochrome or color, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.53a.

Date: December 21, 1988.

Jan W. Mares,  
Assistant Secretary for Import  
Administration.  
[FR Doc. 88-30122 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-DS-M

#### [C-201-015]

#### Unprocessed Float Glass from Mexico; Preliminary Results of Countervailing Duty Administrative Review and Tentative Determination To Terminate Suspension Agreement

**AGENCY:** International Trade Administration, Import Administration, Department of Commerce.

**ACTION:** Notice of preliminary results of countervailing duty administrative review and tentative determination to terminate suspension agreement.

**SUMMARY:** The Department of Commerce has conducted an administrative review of the agreement suspending the countervailing duty investigation on unprocessed float glass from Mexico. We preliminarily determine that the signatories to the suspension agreement have complied with the terms of the suspension agreement during the period January 1, 1986 through December 31, 1986. We

also tentatively determine to terminate the suspension agreement. We invite interested parties to comment on these preliminary results.

**EFFECTIVE DATE:** December 30, 1988.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Moore or Paul McGarr, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-2786.

#### SUPPLEMENTARY INFORMATION:

##### Background

On December 10, 1986, the Department of Commerce ("the Department") published in the Federal Register (51 FR 44503) the final results of its last administrative review of the suspension agreement on unprocessed float glass from Mexico (49 FR 7267; February 28, 1984). On February 27, 1987, the Government of Mexico requested an administrative review in accordance with § 355.10 of the Commerce Regulations and also requested termination of the suspension agreement in accordance with § 355.42. We published the initiation on March 19, 1987 (52 FR 8636). The Department has now conducted that administrative review in accordance with section 751 of the Tariff Act of 1930 ("the Tariff Act").

##### Scope of Review

The United States has developed a system of tariff classification based on the international harmonized system of Customs nomenclature. On January 1, 1989, the U.S. tariff schedules will be fully converted to the Harmonized Tariff Schedule (HTS). All merchandise entered, or withdrawn from warehouse, for consumption on or after this date will be classified solely according to the appropriate HTS item number(s). Until that time, however, the Department will be providing both the appropriate Tariff Schedules of the United States Annotated ("TSUSA") item number(s) and the appropriate HTS item number(s) with our product descriptions. As with the TSUSA, the HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

We are requesting petitioners to include the appropriate HTS item number(s) as well as the TSUSA item number(s) in all new petitions filed with the Department. A reference copy of the HTS schedule is available for consultation at the Central Records Unit, Room B-099, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Additionally, all Customs offices have reference copies, and petitioners may

contact the Import Specialist at their local Customs office to consult the schedule.

Imports covered by this review are shipments of Mexican unprocessed float glass, a type of flat glass produced by floating molten glass over a bed of molten tin. Such merchandise is currently classifiable under TSUSA item numbers 543.2100 through 543.8900. These products are currently classifiable under HTS item numbers 7005.29.05, 7005.29.15, 7005.29.25 and 7005.10.00. We invite interested parties to comment on these HTS classifications.

The review covers the period January 1, 1986 through December 31, 1986 and ten programs. The review covers two exporters, Vitro Flotado, S.A. (Vitro Flotado) and Vidrio Plano de Mexico, S.A. (Vidrio Plano) ("the signatories").

#### Analysis of Programs

##### (1) FOMEX

The Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX") is a trust of the Mexican Treasury Department, with the National Bank of Foreign Trade acting as trustee for the program. The National Bank of Foreign Trade, through financial institutions, makes FOMEX loans available at preferential rates to manufacturers and exporters for two purposes: pre-export financing and export financing. We consider both pre-export and export FOMEX loans to be export bounties or grants since these loans are given only on merchandise destined for export.

Neither Vitro Flotado nor Vidrio Plano received benefits from FOMEX loans based on exports to the United States. Therefore, we preliminarily determine that the signatories did not benefit from this program during the period of review.

##### (2) CEPROFI

Certificates of Fiscal Promotion ("CEPROFI") are tax certificates used to promote the goals of the National Development Plan ("NDP"). CEPROFI's are granted in conjunction with investments in designated industrial activities or geographic regions and can be used to pay a variety of federal tax liabilities.

The signatories did not receive or use CEPROFI's nor did they benefit indirectly by the transfer to other firms in the Vitro group of CEPROFI benefits earned on their exports of float glass during the period of review. Therefore, we preliminarily determine that the signatories received no benefits from this program.



## (3) FICORCA

On December 20, 1982, the Government of Mexico and the Banco de Mexico established the Trust Fund for Coverage of Risks ("FICORCA"), which operates through credit institutions. All Mexican firms with registered long-term debt in foreign currency and payable abroad to foreign financial institutions or suppliers were able to purchase, at a controlled rate, the amount in dollars necessary to pay the principal on that debt.

In the final determination (49 FR 23097; June 14, 1984), we determined that the FICORCA program was available to all Mexican firms with foreign indebtedness and that it was not targeted to a specific industry or region, and that it was not tied to exports. Therefore, we determined that it was not countervailable.

The petitioner, PPG Industries, Inc. ("PPG"), requested that the Department reevaluate FICORCA in light of new information and/or changes to existing regulations. PPG asserts that: (1) Capitalization of unpaid interest on FICORCA debt provides a benefit equalling the difference between what the float glass companies would have paid in the commercial sector and the amounts they actually paid; (2) special permission from the Mexican government is required to enroll nonbank debt, such as commercial paper, in FICORCA; (3) the Mexican government allowed companies in the Vitro group to provisionally enroll unrescheduled debt in the program; (4) companies in the Vitro group converted a portion of the FICORCA debt into floating rate notes to avoid the 15 percent withholding tax levied on interest payments; and (5) Mexican firms with foreign debt enrolled in FICORCA could capitalize this debt and benefit from the sale of their FICORCA contracts.

All FICORCA contracts are structured so that regular, minimum interest payments are required. In the early stages of the loan, the minimum payment is less than the interest payment due. The remaining unpaid interest is capitalized and added to the outstanding principal. As a result, the debt increases and subsequent interest payments are computed based on a larger balance. In the latter stages of repayment, the firm is faced with a balloon payment and higher interest amounts. We find no benefit with this method of payment because the firm is not relieved of any debt obligations. The capitalization of interest is no different from what would happen on a commercial loan.

According to the terms of the FICORCA regulations, there is no special permission required to enroll nonbank debt. Mexican firms with foreign debt payable to banks, finance companies or suppliers, were eligible to participate in the FICORCA program.

When the period for registering debt into FICORCA closed, some companies had not yet concluded their FICORCA negotiations. The creditors issued a "provisional" notice that the debt was in a rescheduling process, which many firms referred to as provisional enrollment in FICORCA. The Vitro group reported long-term foreign debt "provisionally" enrolled in FICORCA in notes to its 1984 financial statements. This merely meant that, until the creditors submitted a written statement to FICORCA advising that the debt had been rescheduled, FICORCA contracts would not be issued to the company or group. As stipulated in the FICORCA regulations, foreign debt had to be rescheduled prior to enrollment in the FICORCA program.

On fixed-interest rate notes, the Mexican government taxes the interest income of the Foreign bank at the rate of 15 percent, so that 15 percent of the company's interest payment goes to the Government of Mexico and 85 percent goes to the foreign banks. Floating rate notes are exempt from the 15 percent tax on interest income, and all of the interest paid on floating rate notes goes to the foreign bank. In either case, the Mexican firms continue to pay the full amount of the interest. Therefore, we preliminarily determine that there is no benefit to Mexican firms in the conversion of FICORCA debt into floating rate notes.

FICORCA contracts are negotiable instruments. As such, FICORCA does not participate in the transfer or sale of such contracts and only requires that the new firm have foreign debt registered with the Secretaria de Hacienda y Credito Publico. Approval from the foreign creditor must also be obtained. When a FICORCA contract is sold, a new contract is not issued to the new firm, and the terms and conditions on the original contract remain in force.

The information PPG presented on new programs or changes to existing programs contains various features of the FICORCA program that are part of the original regulations. We believe that this information does not change the Department's understanding of the operation of the program or the reasoning that led to our decision in the final determination. Therefore, we preliminarily reaffirm our prior

determination that FICORCA is not countervailable.

## (4) Lease of Government Land

PPG contends that Vidrio Plano is leasing land at an artificially low fee from the Government of Mexico. This contention is based on a disclosure in the notes to the 1984 financial statements. PPG infers from this information that the low fee charged by the government for land occupied by the company was a bounty or grant.

Vidrio Plano has leased a small strip of land from the Ministry of Property and Industrial Development since March 1, 1965. The "leased" land is actually an easement (right of passageway) obtained by Vidrio Plano in order to gain access to the company's property from a public road. The easement is a fee paid in exchange for the right to use government land. There is no "commercial" benchmark to use as a point of comparison to determine preferentiality, and there is no flat rate charged by the government for easements. Each one depends on the size of the piece of land and the purpose of the easement. We consider the levy of an easement fee to be a normal government function that is in no way connected to the promotion of exports or the development of specific enterprises or industries. Therefore, we preliminarily determine that Vidrio Plano received no benefit from this program.

## (5) Other Programs

We also examined the following programs and preliminarily determine that the signatories did not use them during the period of review:

- (A) Import duty reductions and exemptions;
- (B) NDP preferential discounts;
- (C) Delay of payment to PEMEX of fuel charges;
- (D) Preferential state investment incentives;
- (E) State tax incentives;
- (F) CEDI tax certificates; and
- (G) Debt/Equity swaps.

## Preliminary Results of Review and Tentative Determination To Terminate Suspension Agreement

As a result of our review, we preliminarily determine that Vitro Flotado and Vidrio Plano have compiled with the terms of the suspension agreement for the period January 1, 1986 through December 31, 1988.

The signatories have requested that the Department terminate the suspension agreement based on the absence of a bounty or grant for at least

two years, as provided in 19 CFR 355.42(b). Furthermore, in accordance with 19 CFR 355.42(e), the signatories have agreed in writing to an immediate suspension of liquidation and continuation of the investigation if circumstances develop which indicate that the merchandise thereafter imported into the United States is benefiting from a bounty or grant on its manufacture, production or exportation. Because the signatories have complied with the terms and conditions of the suspension agreement for at least a two-year period, we tentatively determine to terminate the suspension agreement. The termination will not become final until the completion of an administrative review establishing that no bounty or grant was received during the period January 1, 1987 through the date of publication of this notice.

Interested parties may submit written comments on these preliminary results and tentative determination to terminate within 30 days of the date of publication of this notice and may request disclosure and/or a hearing within 10 days of the date of publication. Any hearing, if requested, will be held 30 days from the date of publication, or the first workday afterwards. Any request for an administrative protective order must be made no later than five days after the date of publication. The Department will publish the final results of its analysis of issues raised in any such written comments or at a hearing.

This administrative review, tentative determination to terminate and notice are in accordance with sections 751 (a)(1) and (c) of the Tariff Act (19 U.S.C. 1675 (a)(1) and (c)) and 19 CFR 355.10 and 355.42.

Date: December 22, 1988.

Jan W. Mares,  
Assistant Secretary for Import  
Administration.

[FR Doc. 88-30123 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-DS-M

## Enforcement of Export Limits for Certain Machine Tools Produced in Japan or in the Territory Represented by the Coordination Council for North American Affairs, and Destined for Consumption in the United States Between January 1, 1987, and December 31, 1991

AGENCY: Import Administration,  
International Trade Administration,  
Commerce.

ACTION: On October 14, 1988, the Secretary of Commerce requested the Secretary of the Treasury to enforce agreements concerning trade in certain

machine tools. It is the Department of Commerce's intent under paragraph two of the letter cited below that the Customs Service use all authority under Customs laws and regulations, including the seizure and forfeiture of merchandise, to enforce the provisions of the agreements, including the export licensing requirements for covered machine tool products entered, or withdrawn from warehouse, for consumption in the United States in violation of laws enforced by Customs.

SUMMARY: Supplemental instructions to Commissioner of Customs on enforcement of the Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Certain Machine Tools, and the Arrangement Between the Coordination Council for North American Affairs and the American Institute in Taiwan Concerning Trade in Certain Machine Tools.

EFFECTIVE DATE: January 1, 1989.

Authority: Section 1501(c) of the Omnibus Trade and Competitiveness Act of 1988.

FOR FURTHER INFORMATION CONTACT: Nicholas C. Tolerico, Director, Office of Agreements Compliance, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue, NW., Washington, DC 20230 (202) 377-3793.

October 14, 1988

Honorable Nicholas F. Brady,  
Secretary of the Treasury, Washington, DC 20220.

Dear Mr. Secretary: Pursuant to an Arrangement between Japan and the United States, dated December 18, 1988, and an Arrangement between the Coordination Council for North American Affairs (CCNAA) and the American Institute in Taiwan, dated December 15, 1988, concerning trade in certain machine tools, the parties have agreed to establish a system of export licensing with respect to machine tool products specified under these Arrangements, which are exported to or destined for consumption in the United States between January 1, 1987, and December 31, 1991.

Accordingly, under section 1501(c) of the Omnibus Trade and Competitiveness Act of 1988, I request that effective immediately, you monitor and enforce the measures provided for under these Arrangements, by requiring the presentation of valid export certificates or licenses issued by the appropriate authorities of Japan or the territory represented by CCNAA, when required under the Arrangements, as a condition of entry into the United States of machine tool products specified by the Arrangements.

If you would like more information concerning this matter, please call the Assistant Secretary for Import Administration, Jan W. Mares, at 377-1780.

Sincerely,

C. William Verity,  
Secretary of Commerce.

December 22, 1988.

Jan W. Mares,  
Assistant Secretary for Import  
Administration.

[FR Doc. 88-30121 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-DS-M

## Minority Business Development Agency

## American Indian Business Consultants Applications; Continental U.S.

AGENCY: Minority Business  
Development Agency, Commerce.  
ACTION: Notice.

SUMMARY: The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under the American Indian Business Consultant (AIBC) component of its American Indian Program (AIP) to operate an AIBC for a 3-year period, subject to available funds. The cost of performance for the first 12 months is estimated at \$200,000 for the budget period May 1, 1989 to April 30, 1990. The AIBC will operate in the Continental U.S.

The funding instrument for the AIBC will be a cooperative agreement and competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The AIBC component of the AIP is designed to provide specialized consultant services to minority business community in general and, in particular, to American Indian clients who are interested in becoming owners of businesses, or are owners of business firms, and are located in the Continental U.S. To this end, MBDA funds AIBC projects under its AIP that can coordinate and broker public and private resources on behalf of American Indian and other minority individuals and firms; offer a full range of specialized consultant services; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: the experience and capabilities of the firm and its staff in addressing the needs of the minority business community in general and, specifically, the special needs of American Indian businesses, individuals and organizations (50 points); the resources available to the firm in providing management and technical



assistance (10 points); the firm's approach to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to each evaluation criteria category to be considered programmatically acceptable and responsive.

The AIBC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an AIBC's satisfactory performance, the availability of funds and Agency priorities.

**Closing Date:** The closing date for applications is January 31, 1989. Applications must be postmarked on or before January 31, 1989.

**ADDRESS:** Chief, Business Development Division, Minority Business Development Agency, Dept. of Commerce, Rm. 5099-C, Washington, DC 20230, Area Code/Telephone Number: 202/377-2366.

**FOR FURTHER INFORMATION CONTACT:** Luis G. Encinias at the above address.

**SUPPLEMENTARY INFORMATION:** Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.801 Minority Business Development (Catalog of Federal Domestic Assistance)

Date: December 15, 1988.

Luis G. Encinias,

Chief, Business Development Division.

[FR Doc. 88-30142 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-21-M

#### Business Development Center Applications: Ponce, Puerto Rico

**AGENCY:** Minority Business Development Agency Commerce.

**ACTION:** Notice.

**SUMMARY:** The Minority Business Development Agency (MBDA) announces that it is soliciting competitive applications under its Minority Business Development Center (MBDC) program to operate an MBDC for approximately a 3 year period, subject to the availability of funds. The

cost of performance for the first 12 months is estimated at \$184,260 in Federal funds and a minimum of \$32,516 in non-Federal contributions for the budget period June 1, 1989 to May 31, 1990. Cost-sharing contributions may be in the form of cash contributions, client fees for services, in-kind contributions, or combinations thereof. The MBDC will operate in the Ponce, Puerto Rico SMSA geographic service area.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can coordinate and broker public and private resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated on the following criteria: the experience and capabilities of the firm and its staff in addressing the need of the business community in general and, specifically, the special needs of minority business, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodology) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive.

MBDCs shall be required to contribute at least 15% of the total project cost through non-Federal contributions. Client fees for billable management and technical assistance (M&TA) rendered must be charged by MBDCs. Based on a standard rate of \$50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of \$500,000 or less and 35% of the total cost for firms with gross sales of over \$500,000.

The MBDC may continue to operate, after the initial competitive year, for up to 2 additional budget periods. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if

funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's satisfactory performance, the availability of funds and Agency priorities.

**CLOSING DATE:** The closing date for applications is February 13, 1989. Applications must be postmarked on or before February 13, 1989.

**ADDRESS:** New York Regional Office, Minority Business Development Agency, Jacob K. Javits Federal Building, Room 3720, New York, New York 10278, Area Code/Telephone Number (212) 264-3262.

**FOR FURTHER INFORMATION CONTACT:** Gina A. Sanchez, Regional Director, New York Regional Office. (212) 264-3262.

**SUPPLEMENTARY INFORMATION:** Anticipated processing time of this award is 120 days. Executive Order 12372 "Intergovernmental Review of Federal Programs" is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development. (Catalog of Federal Domestic Assistance)

William R. Fuller,

Deputy Regional Director, New York Regional Office.

Date: December 20, 1988.

[FR Doc. 88-30038 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-21-M

#### National Institute of Standards and Technology

##### National Voluntary Laboratory Accreditation Program; Public Workshop

**AGENCY:** National Institute of Standards and Technology, Commerce.

**ACTION:** Notice of public workshop.

The National Institute of Standards and Technology (NIST) will host a public workshop on March 28, 1989 to provide interested parties an opportunity to participate in the development of technical requirements for accrediting laboratories that perform airborne asbestos analysis.

**DATES:** The workshop will be held from 9:00 a.m. to 5:00 p.m. on March 28, 1989. Persons planning to attend the workshop should inform Harvey Berger, NVLAP, National Institute of Standards and Technology, Admin. A527, Gaithersburg, MD 20899 by February 28, 1989, in order to obtain draft technical

documents to be reviewed at the workshop.

**Place:** The workshop will be held at the Inn at the Park in Anaheim, CA in conjunction with the National Asbestos Council's 6th Annual Asbestos Abatement Conference and Exposition to be held March 29-31, 1989 in Anaheim.

#### SUPPLEMENTARY INFORMATION: Background

This notice is issued in accordance with the NVLAP Procedures (15 CFR Part 7). In a Federal Register Notice dated October 26, 1987 [52 CFR 39977-39978] the National Institute of Standards and Technology (formerly the National Bureau of Standards (NBS)) announced the establishment of an accreditation program for laboratories that perform analyses for asbestos content in (1) bulk insulation and building material collected during public school inspections, and (2) airborne particulates collected following asbestos abatement projects.

Establishment of the program is pursuant to section 206d of Pub. L. 99-519, the Asbestos Hazard Emergency Response Act (AHERA) of October 1986. Accreditation will be offered to all laboratories under procedures of the National Voluntary Laboratory Accreditation Program (NVLAP).

Technical criteria, requirements, and procedures for accreditation of laboratories performing analysis of airborne asbestos content by Transmission Electronic Microscopy (TEM) are being developed and will be presented at the workshop. All interested parties will have an opportunity to comment on all phases of the program. The workshop is part of the NVLAP process of assuring that accreditation programs are of high technical quality and are relevant to the needs of those affected by accreditation.

1. **Purpose:** The workshop will provide all interested person with an opportunity to: (1) Participate in the development of technical criteria, requirements, and procedures for evaluation and accreditation of laboratories that perform analysis of airborne asbestos by Transmission Electronic Microscopy (TEM); and (2) discuss standards and/or other protocols applicable to the accreditation program.

2. **Procedure:** The workshop will be an informal meeting. The presiding NIST chairperson will allocate the time available for discussion of each issue to be addressed, and exercise such authority as may be necessary to insure the equitable and efficient conduct of

the workshop and to proceed in an orderly manner.

3. **Provisions:** This workshop will be open to the public. No registration is required for the public workshop; housing is the responsibility of the attendees.

#### Documents in Public Record

Summary minutes of the meeting will be prepared and made available for inspection and copying in the NVLAP program office, Room A527, Administration Building, Gaithersburg, Maryland.

Raymond G. Kammer,  
Acting Director.

Date: December 22, 1988.

[FR Doc. 88-30029 Filed 12-29-88; 8:45 am]

BILLING CODE 3510-13-M

#### National Oceanic and Atmospheric Administration

##### Findings Regarding the Issuance of a Notice of Designation for the Proposed Cordell Bank National Marine Sanctuary, CA

**AGENCY:** Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

**ACTION:** Notice.

**SUMMARY:** The Secretary of Commerce is required to issue a Notice of Designation under section 304(b)(1) of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1431 *et seq.*), as amended, with respect to the proposed Cordell Bank National Marine Sanctuary, as generally described in the Federal Register notice of June 30, 1983, not later than December 31, 1988 (Ref. section 202, Pub. L. 100-627). This notice contains findings regarding why the Notice of Designation will not be published by December 31, 1988, in adherence to the intent of section 202, Pub. L. 100-627. A Notice of Designation for the proposed Cordell Bank National Marine Sanctuary will be issued by March 31, 1989.

**EFFECTIVE DATE:** December 31, 1988.

**FOR FURTHER INFORMATION CONTACT:** Joseph A. Uravitch, Chief, or Franklin D. Christilf, Regional Manager, Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue, NW., Washington, DC 20235 (202) 673-5126.

**SUPPLEMENTARY INFORMATION:** Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (The Act, 1431 *et seq.*) authorizes the Secretary of Commerce to designate ocean waters as National Marine Sanctuaries for the purpose of preserving or restoring their conservation, recreational, ecological, historical or esthetic values. The purpose of this notice is to comply with section 304(b)(1) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (16 U.S.C. 1434(b)(1)) with respect to the publication of findings regarding why a Notice of Designation for the proposed Cordell Bank National Marine Sanctuary has not been issued by December 31, 1988.

The waters surrounding Cordell Bank were nominated for status as a National Marine Sanctuary in July 1981. On June 30, 1983, NOAA declared the area an active candidate for further consideration as a National Marine Sanctuary. A public scoping meeting to gather information to determine the range and significance of issues related to Sanctuary designation and management was held on April 25, 1984.

On August 28, 1987, NOAA published proposed regulations for the Sanctuary in the Federal Register (52 FR 32563) and at the same time issued a Draft Environmental Impact Statement and Management Plan (DEIS/MP) which described in detail the proposed regulatory regime and alternatives to it. On the same date, in accordance with section 304(a)(1)(C) of the Act (16 U.S.C. 1433(a)(1)(C)), a Designation Prospectus for the proposed Cordell Bank National Marine Sanctuary was sent to the House Merchant Marine and Fisheries Committee and the Senate Commerce, Science and Transportation Committee for review and approval.

Public hearings to receive comments on the proposed designation were held in Bodega, California, on September 29, 1987, and in San Francisco, California, on September 30, 1987. Comments received by NOAA on the DEIS/MP were reviewed and, where appropriate, were incorporated into the Final Environmental Impact Statement and Management Plan (FEIS/MP).

The Amendments to the National Marine Sanctuaries Program (Pub. L. 100-627), which became law on November 7, 1988, require the Secretary of Commerce to issue a Notice of Designation with respect to Cordell Bank National Marine Sanctuary by December 31, 1988. In view of a delay in issuing the notice of Designation, and in adherence with the intent of section 202



of Pub. L. 100-627, this notice issues findings regarding why the Secretary of Commerce will be unable to issue the notice of Designation for Cordell Bank National Marine Sanctuary on or before December 31, 1988. A Notice of Designation for the Cordell Bank National Marine Sanctuary will be issued by March 31, 1989.

Congress pursuant to section 304(b) of the Act then has the opportunity to review the designation and regulations before they take effect. The designation and regulations shall take effect and become final after the close of a review period of forty-five days of continuous session of Congress beginning on the day on which the Sanctuary Designation Document is published unless the designation or any of its terms is disapproved by Congress through enactment of a joint resolution.

#### Findings

Because of the complexity of the issues in the DEIS/MP, a large number of comments were received which supported diverse views on what should and should not be regulated. More time was required to respond to all of the comments and to determine an appropriate balance with regard to regulations than was anticipated. Further, when the Congressionally mandated deadline of December 31, 1988, for issuing a Designation Document became law on November 7, 1988, there was not sufficient time available to meet the mandatory procedural provisions of both the National Environmental Policy Act and the Marine Protection, Research and Sanctuaries Act by that date. The Secretary of Commerce will issue the Notice of Sanctuary Designation including the final Sanctuary regulations, the final environmental impact statement and management plan by March 31, 1989.

Thomas J. Maginnis,  
Assistant Administrator for Ocean Services  
and Coastal Zone Management.

Date: December 27, 1988.  
Federal Domestic Assistance Catalog  
Number 11.429

National Marine Sanctuary Program  
[FR Doc. 88-30101 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-08-M

#### Marine Mammals: Issuance of Permit; Dr. Randall S. Wells (319B)

On October 19, 1988, notice was published in the Federal Register (53 FR 40941) that an application has been filed by Dr. Randall S. Wells, Dolphin Biology Research Associates, c/o Long Marine Laboratory, 100 Shaffer Road, Santa

Cruz, California, to capture, sample, mark and release as many as 150 Atlantic bottlenose dolphin (*Tursiops truncatus*) for scientific research.

Notice is hereby given that on December 20, 1988, as authorized by the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), the National Marine Fisheries Service issued a Permit for the above taking subject to certain conditions set forth therein.

The Permit is available for review by interested persons in the following offices:

Office of Protected Resources,  
National Marine Fisheries Service, 1335  
East-West Highway, Room 7330, Silver  
Spring, Maryland 20910;

Director, Southeast Region, National  
Marine Fisheries Service, 9450 Koger  
Boulevard, St. Petersburg, Florida 33702;  
and

Director, Southwest Region, National  
Marine Fisheries Service, 300 South  
Ferry Street, Terminal Island, California  
90731-7415.

Date: December 20, 1988.

Nancy Foster,  
Director, Office of Protected Resources and  
Habitat Programs.

[FR Doc. 88-30104 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-22-M

#### National Telecommunications and Information Administration

[Docket No. 81267-8267]

#### Study of the Impact of the Restrictions Prohibiting the Bell Companies from Engaging in Research and Development, and Product Design for the Manufacturing of Telecommunications and Related Equipment

AGENCY: National Telecommunications  
and Information Administration (NTIA),  
Commerce.

ACTION: Notice of inquiry.

In accordance with House Report 100-979, the National Telecommunications and Information Administration (NTIA) will conduct a study to evaluate the impact on the U.S. telecommunications marketplace, and in particular on the provision of new and innovative information services, resulting from the AT&T consent decree prohibitions on Bell companies' participation in research and development, and product design for the manufacturing of telecommunications and related equipment. NTIA seeks information focusing on these issues.

DATE: Comments in response to this notice must be received by Tuesday,

January 31, 1989, in order to receive full consideration.

ADDRESS: Send comments to: Alfred C. Sikes, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, Room H4898, U.S. Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT:  
Alfred Lee, Acting Associate  
Administrator, Office of Policy Analysis  
and Development, National  
Telecommunications and Information  
Administration, Room H4725, U.S.  
Department of Commerce, Washington,  
DC 20230, (202) 377-1880.

Alfred C. Sikes,  
Assistant Secretary of Commerce for  
Communications and Information.  
[FR Doc. 88-30141 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-80-M

#### CONSUMER PRODUCT SAFETY COMMISSION

#### Request for Approval of Survey of Consumers Who Own or Operate All- Terrain Vehicles

AGENCY: Consumer Product Safety  
Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Consumer Product Safety Commission has submitted a request to the Office of Management and Budget for approval of a collection of information in the form of a telephone survey of 1,000 consumers who own or operate all terrain vehicles (hereinafter ATVs). ATVs are three- and four-wheeled motorized vehicles intended for off-road use.

The survey will seek current information about the various kinds of ATVs now in use, characteristics of operators, and frequency and patterns of ATV use.

The Commission will use the information obtained from this survey in conjunction with current information about injuries associated with ATVs to determine what factors contribute to injuries from accidents associated with ATVs.

#### Additional Information About the Proposed Collection of Information

Agency Address: Consumer Product  
Safety Commission, Washington, DC  
20207.

Title of Information Collection: ATV  
Consumer Exposure Survey.

Type of Request: New collection.

Frequency of Collection: One time.  
General Description of Respondents:  
Consumers who own or use ATVs.  
Estimated Number of Respondents:  
1,000.

Number of Responses per  
Respondent: 1.

Estimated Average Number of Hours  
per Response: 0.33.

Estimated Number of Hours for All  
Respondents: 333.

Comments: Comments about this request for approval of a collection of information should be addressed to Pamela Barr, Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; telephone (202) 395-7340. Copies of the request for approval of a collection of information are available from Francine Schacter, Office of Planning and Evaluation, Consumer Product Safety Commission, Washington, DC 20207; telephone: (301) 492-6416.

This is not a proposal to which 44 U.S.C. 3504(b) is applicable.

Dated: December 27, 1988.

Sheldon D. Butts,  
Deputy Secretary, Consumer Product Safety  
Commission.

[FR Doc. 30138 Filed 12-29-88; 6:45 am]  
BILLING CODE 6355-01-M

#### DEPARTMENT OF EDUCATION

[CFDA No.: 84.003J]

#### Notice Inviting Applications for New Awards under the Bilingual Education; Family English Literacy Program for Fiscal Year 1989

Purpose: Provides grants to local educational agencies, institutions of higher education, including junior or community colleges, and private nonprofit organizations. Eligible applicants may apply separately or jointly. The purpose of the awards is to establish, operate, and improve family English literacy programs.

Deadline for Transmittal of  
Applications: February 24, 1989.

Deadline for Intergovernmental  
Review Comments: April 24, 1989.

Applications Available: January 9,  
1989.

Available Funds: \$2,000,000.  
Estimated Range of Awards: \$100,000-  
\$150,000.

Estimated Average Size of Awards:  
\$125,000.

Estimated Number of Awards: 16.  
Project Period: 36 months.

Applicable Regulations: (a) The  
Bilingual Education: Family English  
Literacy Program Regulations, (34 CFR

Part 525), and (b) the Education  
Department General Administrative  
Regulations, (34 CFR Parts 74, 75, 77, and  
79, and 80).

Additional Factors: In accordance  
with 34 CFR 525.32(b) the Secretary—in  
evaluating applications under the  
published criteria—distributes an  
additional 15 points among the factors  
listed in § 525.32(a) as follows: (1)  
Historically underserved (4 points); (2)  
Geographic distribution (4 points); (3)  
Need (4 points); (4) Relative number and  
proportion of children from low-income  
families (3 points).

For Applications or Information  
Contact: Office of Bilingual Education  
and Minority Languages Affairs, U.S.  
Department of Education, 400 Maryland  
Avenue, SW. (Room 5628, Mary E.  
Switzer Building), Washington, DC  
20202-6642. Telephone (202) 732-5722.

Program Authority: 20 U.S.C. 3231(a)(5).  
Dated: December 23, 1988.

Alicia Caro,  
Acting Director, Office of Bilingual Education  
and Minority Languages Affairs.  
[FR Doc. 88-30140 Filed 12-29-88; 8:45 am]  
BILLING CODE 4000-01-M

#### Intergovernmental Advisory Council on Education; Meeting

AGENCY: Intergovernmental Advisory  
Council on Education, Education.

ACTION: Notice of meetings.

SUMMARY: This notice sets forth the  
schedule and proposed agenda of  
forthcoming meetings of the  
Intergovernmental Advisory Council on  
Education and its Executive Committee.  
This notice also describes the functions  
of the Council. Notice of these meetings  
is required under section 10(a)(2) of the  
Federal Advisory Committee Act. This  
document is intended to notify the  
general public of their opportunity to  
attend.

DATES: January 18-19, 1989.

ADDRESS: Bethesda Holiday Inn, Gallery  
Room, 8120 Wisconsin Avenue,  
Bethesda, Maryland 20814.

FOR FURTHER INFORMATION CONTACT:  
Gwen A. Anderson, Executive Director,  
Intergovernmental Advisory Council on  
Education, Room 3036, 400 Maryland  
Avenue, SW., Washington, DC 20202-  
7576, 202-732-3844.

SUPPLEMENTARY INFORMATION: The  
Intergovernmental Advisory Council on  
Education was established under  
section 213 of the Department of  
Education Organization Act (20 U.S.C.  
3423). The Council was established to  
provide assistance and make  
recommendations to the Secretary and

the President concerning  
intergovernmental policies and relations  
pertaining to education.

On January 18, the Executive  
Committee of the Intergovernmental  
Advisory Council on Education will  
meet from 9:30 a.m. to 2:00 p.m. (hours  
are tentative). Interested parties may  
call the information contact on January  
17 for the exact hours. The meeting is  
open to the public. The proposed agenda  
of the meeting includes discussion of the  
status of dissemination of the Absent  
Parent Report, a budget review, and  
planning for the 1989 conference.

On January 19, the full Council will  
meet from 9:30 a.m. to 2:30 p.m. The  
meeting is open to the public. The  
proposed agenda of the meeting includes  
the introduction of new Council  
members, a review of the history of the  
Council and Council conferences, and a  
status report on and planning for the  
1989 conference on business/education  
partnerships in Texas.

Records are kept of all Council  
proceedings, and are available for  
public inspection at the Office of the  
Intergovernmental Advisory Council on  
Education, 400 Maryland Avenue, SW.,  
Room 3036, Washington, DC, 20202-  
7576, from the hours of 9:00 a.m. to 5:00  
p.m.

Dated: December 16, 1988.

Michelle Easton,  
Deputy Under Secretary for  
Intergovernmental and Interagency Affairs.  
[FR Doc. 88-30136 Filed 12-29-88; 6:45 am]  
BILLING CODE 4000-01-M

#### National Advisory Council on Indian Education; Meeting

AGENCY: National Advisory Council on  
Indian Education, Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the  
schedule and proposed agenda of a  
forthcoming meeting of the National  
Advisory Council on Indian Education.  
This notice also describes the functions  
of the Council. Notice of this meeting is  
required under section 10(a)(2) of the  
Federal Advisory Committee Act. This  
document is intended to notify the  
general public of opportunity to attend.  
DATE: January 17-19, 1989, 9:00 a.m. until  
conclusion of business each day.

ADDRESS: Holiday Inn Bethesda, 8120  
Wisconsin Avenue, Bethesda, Maryland  
20814 (301) 652-2000.

FOR FURTHER INFORMATION CONTACT:  
Jo Jo Hunt, Executive Director, National  
Advisory Council on Indian Education,  
330 C Street, SW., Room 4072, Switzer



Building, Washington, DC 20202-7558 (202/732-1353).

**SUPPLEMENTARY INFORMATION:** The National Advisory Council on Indian Education is established under section 5342 of the Indian Education Act of 1988 (25 U.S.C. 2642). The Council is established to, among other things, assist the Secretary of Education in carrying out responsibilities under the Indian Education Act of 1988 (Title V, Part C of Pub. L. 100-297) and to advise Congress and the Secretary of Education with regard to federal education programs benefiting Indian children and adults.

On January 17, 1989, beginning at approximately 9 a.m., the full Council will meet in open discussion with Indian educators, representatives of Indian tribes and organizations, and others interested in the education of Indian children and adults to identify issues and problems, determine the best solutions, and develop action plans to address these concerns. This session will end at approximately 12 noon.

On January 17, 1989, beginning at approximately 1:30 p.m., the full Council will meet in open session for a general business session, including reports of the Chairman and Executive Director, action on previous minutes, approval of the FY'88 annual report, discussion of the new Council charter, and other business.

On January 18, 1989, beginning at approximately 9 a.m., the full Council will meet to hear reports from the Acting Director of the Office of Indian Education of the Department of Education, the Director of the Indian Health Service Scholarship Program, the Director of the Office of Education of the Bureau of Indian Affairs, and others. This session will end at approximately 12 noon.

On January 18, 1989, beginning at approximately 1:30 p.m., the full Council will meet for discussion and to make committee assignments. The Council standing committees will then meet until conclusion of business and will meet from 9 a.m. until 10:30 a.m. on January 19, 1989.

On January 19, 1989, the full Council will meet beginning at 10:30 a.m. until the conclusion of business to plan Council activities for the remainder of FY'89 and to discuss other Council business.

Records shall be kept of all Council proceedings and shall be available for public inspection at the Office of the National Advisory Council on Indian Education located at 330 C Street, SW., Room 4072, Washington, DC 20202-7558.

Date: December 27, 1988.

Signed at Washington, DC.

Jo Jo Hunt,

Executive Director, National Advisory Council on Indian Education.

[FR Doc. 88-30155 Filed 12-29-88; 8:45 am]

BILLING CODE 4000-01-M

## DEPARTMENT OF ENERGY

### Intent To Prepare an Environmental Impact Statement for Completion of West Valley Demonstration Project Activities and Closure of the Western New York Nuclear Service Center

**AGENCY:** U.S. Department of Energy.

**ACTION:** Notice of intent to prepare an Environmental Impact Statement.

**SUMMARY:** Notice is hereby given that the United States Department of Energy (DOE) and the New York State Energy Research and Development Authority (NYSERDA) intend to prepare an Environmental Impact Statement (EIS) in accordance with section 102(2)(C) of the National Environmental Policy Act (NEPA) and Section 8-0109 of the New York State Environmental Quality Review Act (SEQRA). The EIS is to provide environmental information for consideration in Federal and State decision-making related to West Valley Demonstration Project (WVDP or Project) completion activities by DOE and State decision-making on closure of the Western New York Nuclear Service Center (Center) by NYSERDA. DOE is the lead Federal agency for purposes of compliance with NEPA. NYSERDA is the lead State agency for purposes of compliance with SEQRA. If necessary, to effectively and efficiently fulfill their respective mandated obligations, the DOE or NYSERDA may elect at any time to proceed independently.

As mandated by the West Valley Demonstration Project Act (Pub. L. 96-368), DOE, in cooperation with NYSERDA, is currently carrying out the solidification of the estimated 600,000 gallons (2.2 million liters) of liquid high level radioactive waste (HLW) stored at the Center into a form suitable for transportation to a Federal repository. The processing of this HLW is expected to result in approximately 300 solid borosilicate glass logs contained in steel canisters. The decisions to incorporate processed HLW into this terminal waste form and contain it in steel canisters were based on the environmental review in DOE/EIS-0081, "Final Environmental Impact Statement—Long-Term Management of Liquid High Level Radioactive Waste Stored at the Western New York Nuclear Service Center, West Valley", dated June 1982,

and a supplemental analysis dated March, 1983.

A large volume of radioactive waste that is not high-level waste will result from WVDP solidification and decontamination and decommissioning activities. Disposal of most of this waste was evaluated in an Environmental Assessment (DOE/EA-0295, April 1986). Consistent with a settlement agreement resolving litigation regarding the on-site disposal of this waste, DOE is temporarily storing it and will review disposal alternatives within the scope of this EIS.

In accordance with the provisions of the West Valley Demonstration Project Act, decontamination and decommissioning of the facilities used by the Project, shipment of the solidified HLW to an appropriate Federal repository for permanent disposal, and disposal of transuranic (TRU) wastes and low-level radioactive wastes (LLW) resulting from the Project represent the remaining major tasks for completion of the Project. It is these Project completion activities together with NYSERDA's repossession of the Premises used by DOE for the WVDP, decontamination and decommissioning of the balance of the Center as a whole, and site closure and/or long-term management that are the subject of the ensuring NEPA and SEQRA process.

The purpose of this notice (being published in both the Federal Register and the New York State Environmental Notice Bulletin) is to present pertinent background information on the proposed scope and content of the EIS and to solicit comments and suggestions for consideration in its preparation. Upon completion of a draft EIS (DEIS), its availability will be announced in the Federal Register and the New York State Environmental Notice Bulletin, at which time comments from the public will again be solicited. Comments received during the DEIS public review period will be used in preparing the final EIS.

### Invitation To Comment

To ensure that the full range of issues related to this proposal are addressed, comments on the proposed scope and content of the EIS are invited from all interested parties. Written comments or suggestions to assist DOE and NYSERDA in identifying significant environmental issues and the appropriate scope of the EIS should be postmarked by February 23, 1989. Comments received after that date will be considered to the extent practicable. Agencies, organizations, and the general public are also invited to present oral

comments or suggestions pertinent to preparation of this EIS at the public scoping meeting scheduled as indicated below. A transcript will be prepared. Written and oral comments will be given equal weight in the scoping process. Comments and suggestions received during the scoping period will be considered in preparing the draft EIS. When the DEIS is completed, its availability will be announced in the Federal Register and the New York State Environmental Notice Bulletin and public comments will be solicited. Comments on the DEIS will be considered in preparing the final EIS.

**ADDRESSES:** Questions concerning the Project completion activities should be directed to: Mr. Charles Ljungberg, West Valley Project Office, U.S. Department of Energy, P.O. Box 191, West Valley, New York 14171-0191, (716) 942-4800.

Questions concerning the Center closure should be directed to: Mr. Richard G. Spaunburgh, Program Manager, New York State Energy Research and Development Authority, P.O. Box 191, West Valley, New York 14171-0191, (716) 942-4800.

Written comments or suggestions on the scope of the EIS, or requests to speak at the scoping meeting, should be directed to either Mr. Ljungberg or Mr. Spaunburgh.

Those persons who wish to receive a copy of the draft EIS should make their request to either Mr. Ljungberg or Mr. Spaunburgh.

**FOR FURTHER INFORMATION CONTACT:** Those seeking general information on the NEPA process should contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Project Assistance (EH-25), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-4600.

Those seeking general information on the SEQRA process should contact: Mr. Howard A. Jack, Esq., General Counsel and Secretary, New York State Energy Research and Development Authority, Agency Building No. 2, Empire State Plaza, Albany, New York 12223, (518) 465-6251.

**DATES:** Written comments and suggestions on the proposed scope of the EIS should be postmarked by February 23, 1989, to assure consideration in the preparation of the EIS. Comments received after that date will be considered to the extent practicable. The scoping meeting will be held at St. Aloysius Church Hall, 190 Franklin Street, Springville, NY on February 9, 1989, at 2:00 p.m. and at 7:00 p.m.

### Background Information

The Center consists of a 3,345 acre (1,335 hectare) reservation in rural western New York. The site and the principal facilities on it are the property of the State of New York. The Center is the site of the only commercial nuclear fuel reprocessing facility to have operated in the United States.

In May of 1963, the Atomic Energy Commission (AEC), under authorities now vested in the Nuclear Regulatory Commission (NRC), issued a permit authorizing construction for the reprocessing facility. Construction was completed in early 1966, and on April 19th of that year the AEC issued a license to the newly formed Nuclear Fuel Services, Inc. (NFS), as operator, and the State of New York, as owner, by and through a predecessor of the New York State Energy Research and Development Authority (NYSERDA).

The reprocessing facility operated from 1966 to 1972 when it was shut down for modifications and never resumed operations. During the six year period of operation, approximately 600,000 gallons (2.2 million liters) of HLW (containing roughly 31 million curies) were produced which are now stored in two steel tanks in underground vaults at the facility. (All reported curie levels in this notice represent 1987 levels). In addition, approximately 5,800 cubic yards (4,300 cubic meters) of lower activity solid wastes generated in conjunction with the reprocessing activity were disposed of by shallow land burial in an area currently referred to as the NRC-licensed Disposal Area (NDA). The NDA is on the Project Premises (see below). The NDA may further be divided into two subareas: One received the above described waste (about 110,000 curies) from the former reprocessing facility through 1981, and the second received plant waste (less than 1,000 curies in radioactivity level, but about 5,200 cubic yards or 4,000 cubic meters in volume) from WVDP activities since the Department of Energy's takeover of site operations until 1986. The NDA has not been used for disposal of waste since 1988.

However, the NDA has been expanded to include a cell for storage of drums of cement-stabilized radioactive waste resulting from WVDP activities.

Adjacent to and in the vicinity of the NDA, but not on Project Premises (see below), is an area referred to as the State Licensed Disposal Area (SDA). From 1963 to 1975, NFS operated the SDA as a commercial LLW disposal area. This site was licensed by New York State under authority granted by the Atomic Energy Act of 1954 by the

AEC. It has not been used for disposal since 1975 and is currently maintained by NYSERDA. Approximately 87,000 cubic yards (67,000 cubic meters) of radioactive waste have been disposed of by shallow land burial at this commercial facility, with an estimated radioactivity level of 200,000 curies.

On October 1, 1980, the President signed the West Valley Demonstration Project Act (WVDP Act) into law for the purpose of demonstrating solidification techniques which can be used for preparing HLW for disposal. The WVDP Act directs the Secretary of Energy to:

1. "solidify, in a form suitable for transportation and disposal, the high level radioactive waste at the Center";
2. "develop containers suitable for the permanent disposal of the high level radioactive waste solidified at the Center;
3. "as soon as feasible, transport, in accordance with applicable provisions of law, the waste solidified at the Center to an appropriate federal repository for permanent disposal;
4. "dispose of the low level radioactive waste and transuranic waste produced by solidification of the high level radioactive wastes under the project; and
5. "decontaminate and decommission—(A) the tanks and other facilities of the Center in which the high level radioactive waste solidified under the project was stored, (b) the facilities used in the solidification of the wastes, and (c) any material and hardware used in connection with the project, in accordance with such requirements as the Commission (NRC) may prescribe.

Pursuant to the WVDP Act, DOE and NYSERDA entered into a Cooperative Agreement effective October 1, 1980, that specifies the responsibilities and conditions agreed upon by each for the purpose of carrying out the WVDP. Under the agreement, NYSERDA has made available, without transfer of title, an approximately 200 acre (80 hectare) portion of the Center known as the "Project Premises," which includes the high level waste located at the Center. The Project Premises consist primarily of the complex of facilities constructed and operated by NFS to reprocess spent nuclear fuel. This complex included a chemical reprocessing plant, a spent nuclear fuel receiving and storage area, liquid HLW storage tanks, a liquid LLW treatment facility with associated lagoons, the NDA, and some other minor support facilities. The State of New York retained possession and the right to use of the "Retained Premises," which comprise the remaining portion of the 3,345 acre (1,355 hectare) Center. As set forth in the WVDP Act, the Cooperative Agreement requires NYSERDA to pay 10 percent of Project costs.



In accordance with the requirements of the WVDP Act, the DOE executed a Memorandum of Understanding (MOU) with the NRC on September 27, 1981 (46 FR 56960-56962, November 19, 1981). The MOU established (1) arrangements for NRC review and consultation, (2) responsibilities for NRC review of issues related to safety and environmental documentation, and (3) provisions for NRC monitoring of Project activities to assure protection of public health and safety. On September 30, 1981, the NRC issued an amendment to the facility license which permitted transfer of a portion of the Center, now known as the Project Premises, to DOE for purposes of carrying out the WVDP (46 FR 49237). Under the provisions of the Cooperative Agreement, NYSDERDA is to apply to the NRC for any licensing action that may be required for repossession of the Project Premises after completion of the WVDP.

The Department of Energy published a Final Environmental Impact Statement (FEIS) in June of 1982 (DOE/EIS-0081), "Final Environmental Impact Statement—Long-Term Management of Liquid High Level Radioactive Waste Stored at the Western New York Nuclear Service Center, West Valley." The FEIS assessed the environmental impacts of the alternatives for long-term management of the estimated 600,000 gallon (2.2 million liters) of HLW stored in underground steel tanks at the Center. Preparation of the FEIS was coordinated with New York State to ensure that it met the requirements of SEQRA.

In DOE's Record of Decision (47 FR 40705, September 15, 1982), DOE determined it would construct and operate facilities at the Center to solidify the HLW stored in underground tanks. The FEIS stated that because of their advanced state of development, borosilicate glass monoliths would be utilized as the reference terminal waste form, noting that a different terminal waste form would not be selected unless it had equal or better processing or product characteristics. A final determination was deferred pending completion of a number of on-going studies on alternate waste forms. Based upon a subsequent Environmental Assessment (DOE/EA-0179, July 1982) which reviewed the results of these studies, DOE analyzed the options and selected borosilicate glass as the terminal waste form for immobilizing the liquid HLW (March 1983). The borosilicate glass will be contained in approximately 300 large steel canisters. DOE reviewed the WVDP canister configuration in WVDP-056 (July 1986), "Description of WVDP Reference High

Level Waste Form and Canister," and confirmed the ability of the canister to meet repository specifications (October 9, 1986). These borosilicate glass logs will be temporarily stored on-site in a decontaminated portion of the chemical processing plant pending shipout.

Approximately 17,000 cubic yards (13,000 cubic meters) of radioactive waste (not HLW) totaling about 58,000 curies are expected to result from WVDP solidification activities. About two-thirds of this waste volume (containing less than a tenth of one percent of its activity) will result from decontamination activities and Project systems operations and will be classified as Class A waste under current NRC regulations. It consists of material such as contaminated protective clothing. The remaining third of the waste volume will result from the processing of the 600,000 gallons (2.2 million liters) of HLW. This waste will be stabilized in cement and placed in an estimated 15,000 seventy-one gallon (270 liter) drums. Additional radioactive waste (not HLW) will result from other post-solidification decontamination and decommissioning activities associated with Project completion and site closure.

Disposal of radioactive wastes, not classified as HLW, resulting from solidification was subjected to review in an Environmental Assessment (DOE/EA-0295, dated April 1986). The proposed on-site disposal was challenged in the United States District Court for the Western District of New York, *Coalition on West Valley Nuclear Wastes et al. v. U.S. Department of Energy et al.*, Civil Action No. 86-1052-C. Consistent with Stipulation of Compromise Settlement (Stipulation), approved by the Court in that case, DOE is including within the scope of the current EIS a review of disposal alternatives for this waste. DOE is also seeking a determination or prescription from the NRC as to whether the cement-stabilized wastes are TRU or LLW as provided in the WVDP Act. DOE presently maintains these wastes in a retrievable and temporarily-stored status.

In addition, very small amounts of TRU may result from decontamination activities. Disposal of this TRU is within the scope of this EIS.

Although DOE's post-solidification responsibilities were reviewed by the 1982 FEIS in general, detailed review and subsequent implementation decisions were deferred until more technical information was available and major institutional issues were wholly or partially resolved. The FEIS stated that the DOE's decisions concerning

final decontamination and decommissioning of the facilities used for the solidification project must take into account current NRC requirements for decommissioning nuclear facilities and the status and plans of the State of New York for other parts of the Center, particularly in the State Licensed Disposal Area. The FEIS identified that DOE has no authority with respect to final disposition of those parts of the Project Premises not used in the solidification project, nor does DOE generally have any authority with regard to facilities not on Project Premises. Any decisions in these areas would have to be based on further environmental analyses by the responsible State agency.

At this time, NYSDERDA intends to enter into its own decision-making processes to support taking repossession of Project Premises upon completion of the WVDP and to effect closure of the Center as a whole in accordance with the provisions of SEQRA. These activities will relate to decontamination, decommissioning, stabilization or remediation of non-WVDP facilities, and other necessary follow-on or complementary actions to DOE's completion of Project activities at the Center.

DOE and NYSDERDA wish to cooperate to the fullest extent possible in these decision-making processes. The aim is to reduce duplication of efforts consistent with NEPA and SEQRA, to ensure integration of the environmental evaluation of WVDP completion and closure of the Center into State and local planning processes and to promote consistency and efficiency in the Federal and State decision-making processes. To fulfill these objectives, DOE and NYSDERDA intend to prepare cooperatively an EIS to cover comprehensively the issues relating to the Federal and State decisions which will involve joint planning processes, joint environmental studies, and joint public hearings.

It is recognized that although DOE and NYSDERDA have common interests, they have separate and distinct missions regarding the site. DOE's authorities and responsibilities for carrying on the WVDP are limited by the terms of the WVDP Act. For example, DOE is mandated to decontaminate and decommission only those facilities and hardware it uses for the WVDP. DOE has no authority under the WVDP Act toward the SDA.

Decision-making and resulting implementation actions of DOE and NYSDERDA regarding various evaluated alternatives are expected to share

elements of common timing and geography. In addition, the interrelated nature of the Federal and State activities and the cumulative impacts that would result encourage formulation of a comprehensive plan for the site. DOE and NYSDERDA intend to adopt a flexible cooperative approach which will ultimately provide a basis to promote consistent decision-making and coordinated implementation taking into account separate responsibilities and authorities. Cost participation, responsibilities, and procedures will be defined by separate agreement consistent with existing legislative mandate. Nothing in this cooperative process is intended to result in any alteration to DOE's and NYSDERDA's respective statutory authorities, including the requirements of the NEPA or SEQRA processes. If necessary, to effectively and efficiently fulfill their separate mandated obligations, the DOE or NYSDERDA may elect at any time to proceed independently, in whole or in part.

The items that will be evaluated for Project completion and Center closure are generally confined to the approximately 200 acre (80 hectare) developed area of the Center and are described below.

The primary items that will be evaluated for Federal and State decision-making related to Project completion are as follows:

- Primary and auxiliary buildings, structures, and system components at the Center including:
    - The former reprocessing plant together with the newly installed systems (e.g., Liquid Waste Treatment System, Cement Solidification System and the HLW Interim Storage Facility.)
    - The HLW storage tanks and vaults
    - The Supernatant Treatment System
    - The HLW Vitrification Facility
    - Miscellaneous auxiliary structures and systems (e.g. sewage treatment plants, warehouses, administrative buildings)
    - Solid and liquid waste management or disposal units:
      - Several radioactive waste storage structures
      - Temporarily stored solidified HLW, LLW and TRU waste resulting from Project activities.
    - The portion of the NDA used for disposal and/or storage of Project waste
    - The original low-level liquid radioactive waste treatment facility
- The primary items that will be evaluated for State decision-making related to Center closure are as follows:

- The portion of the NDA used for disposal of non-Project waste
- The shut down State-licensed disposal area (SDA)
- The Center grounds outside the Project Premises
- The Project Premises after Project completion and surrender of the Project Premises to NYSDERDA by DOE.

Federal and State laws and regulations will apply to the proposed actions including those regarding radioactive and hazardous materials; radioactive, hazardous, and mixed (radioactive and hazardous) waste; and air and water pollution. The proposed Project activities will also be subject to DOE Orders which establish policies, procedures, and standards that govern DOE operations. In addition to these requirements, and pursuant to the WVDP Act, the Project is subject to NRC prescription of the requirements to be applied for decontamination and decommissioning of tanks, facilities, material and hardware used in connection with the Project.

#### Proposed Actions:

In accordance with the provisions of the West Valley Demonstration Project Act, the proposed actions to be evaluated are transportation of solidified HLW to a Federal repository for permanent disposal, disposal of Project TRU and LLW waste, some of which may be mixed waste; and decontamination and decommissioning of tanks, facilities, material and hardware used in connection with the Project. These Federal Project activities, in the context of NYSDERDA's activities on closure of the Center, are the subject of the NEPA process. Proposed New York State actions to be evaluated are repossession of the Premises used by DOE for the WVDP, decontamination and decommissioning of the balance of the Center as a whole, and site closure and/or long-term management. These State center activities, in the context of DOE's activities on Project completion, are the subject of the SEQRA process. These actions, in total, will seek to effect comprehensive, integrated site closure.

#### Alternatives for the Proposed Actions

Each component of the WVDP and the Center presents several alternative courses of action (in addition to the no action alternative) that will be considered both individually and in combination with the alternatives for other components in order to assess potential cumulative impacts of the proposed action. Corrective, removal, or remedial actions pursuant to the

Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act will be evaluated. The applicability of other State and Federal environmental statutes, regulations, and other requirements, will also be evaluated. All applicable requirements will be met. Evaluation of DOE's Project completion activities and evaluation of NYSDERDA's repossession and site closure activities will be coordinated to the maximum extent practical.

The major components and their related individual alternatives are listed below.

#### I. Decontamination, Decommissioning and Closure

- The primary buildings, structures and systems at the Center (e.g., former reprocessing plant, HLW tanks, vitrification facility.)
- Decontamination for unrestricted use
- Decontamination and sealing for restricted access, surveillance and site monitoring
- Decontamination, demolition and in situ disposal
- Decontamination, demolition and off-site disposal
- No action, restricted access, surveillance and site monitoring
- The solid and liquid waste management or disposal units (e.g., NDA, SDA, lagoons.)
- Stabilization and closure
- Exhumation, repackaging and disposal
- No action, restricted access, surveillance and site monitoring

#### II. Disposal of Radioactive Waste Other than HLW

- On-site disposal
- Off-site disposal
- Interim storage pending availability of disposal capacity
- No action, restricted access, surveillance and site monitoring

#### III. Transportation for Disposal of the Stored HLW

- Early shipout to an interim storage site
  - On-site storage awaiting availability of a licensed repository
  - No action, restricted access, surveillance and site monitoring
- These alternatives will likely have sub-alternatives which relate to different technical approaches to their accomplishment and will require considerable effort to describe, analyze and evaluate individually and in the various possible combinations. Analysis of the no action alternative is required under NEPA and SEQRA and provides a



baseline for comparison of the other alternatives.

#### Preliminary List of Potential Issues

Items to be addressed for the proposed action and alternatives during preparation of the EIS include the following:

- Potential impacts to the general population and on-site workers from radiological and nonradiological releases caused by Project completion and overall site closure;
- Potential environmental impacts, including air and water quality impacts, caused by Project completion and site closure;
- Potential transportation impacts caused by shipments of radioactive or hazardous material or radioactive, hazardous, or mixed waste;
- Potential impacts caused by postulated accidents;
- Potential socioeconomic impacts to surrounding communities;
- Short-term vs. long-term land use impacts;
- Irretrievable and irreversible commitment of resources;
- Characterization of the wastes previously disposed of at the Center;
- Potential impacts from on-site and off-site waste disposal;
- The potential impacts of interim storage of wastes at locations other than the Center pending availability of repositories or disposal sites;
- The concentration limits of transuranic radionuclides for waste disposal purposes;
- Decontamination and decommissioning criteria for facilities at the Center;
- The influence of, and potential interactions of, wastes remaining at the Center after Project completion and site closure;
- The institutional issues associated with closure, post closure monitoring and maintenance, and subsequent control;
- The means and extent of erosion protection;
- Other cumulative impacts not implicit in the categories listed above.

In addition to these unique considerations, the impacts common to most construction or demolition activities such as disruption of existing vegetation, stream siltation, dust and noise, are to be expected and will require analyses. This list should not be considered all inclusive; additions or deletions to this list may occur as a result of the scoping process.

The disposition of HLW will be subjected to separate NEPA reviews in conjunction with the development of the facilities in the integrated disposal

system, including any interim storage facilities and a repository, by the Office of Civilian Radioactive Waste Management. Development of casks and related transportation issues are being reviewed as part of this other program. The WVDP anticipates that storage and transportation issues will be better defined by documentation developed by the Office of Civilian Radioactive Waste Management, and the Project will use that documentation to the extent possible.

#### Comments and Scoping

All interested parties are invited to submit written comments or suggestions concerning the scope of the issues that should be addressed in the DEIS. They may also attend the public scoping meeting at which oral comments and suggestions will be received and written comments may be submitted.

This will be an informal meeting with a moderator. DOE and NYSDERDA will establish procedures governing the conduct of the public scoping meeting. The meeting will not be conducted as an evidentiary hearing, and those who choose to make statements may not be cross-examined by other speakers. To provide DOE and NYSDERDA with as much pertinent information as possible and as many views as can be reasonably obtained, and to provide interested persons with equitable opportunities to express their views, the following procedures will be used:

Those individuals desiring to make oral comments should mail their requests to Mr. Charles Ljungberg or Mr. Richard G. Spaunburgh at the addresses listed above. DOE and NYSDERDA reserve the right to arrange the times and schedules of presentations to be heard and to establish procedures governing the conduct of the meeting. Interested individuals and organizations should notify DOE or NYSDERDA in writing of their desire to speak at least two weeks in advance of the scoping meeting.

Before the meeting, DOE and NYSDERDA will, in turn, notify prospective speakers of the times and schedules for presentations. Requests for time should include a telephone number for such notification. Those persons wishing to speak on behalf of an organization should identify their affiliation in their request. Also, persons who have not submitted a request to speak in advance may register to speak at the scoping meeting and will be called on to present their comments if time permits. To assure that all persons wishing to make presentations can be heard, a five minute limit for each individual may be established.

If subsequent to the meeting, any person or organization desires to provide further information for the record, it may be submitted to Mr. Charles Ljungberg or Mr. Richard G. Spaunburgh at the addresses listed above within two weeks after the scoping meeting. Comments received after that date will be considered to the degree practicable.

A transcript of the meeting will be prepared, retained by DOE, and made available for public review at the locations given below. In addition, anyone may make arrangements with the reporter to purchase a copy of the transcript.

Those not desiring to submit comments or suggestions at this time, but who would like to receive a copy of the Draft EIS for review and comment when it is issued, should notify Mr. Charles Ljungberg or Mr. Richard G. Spaunburgh at the addresses listed above. When the DEIS is complete, its availability will be announced in the Federal Register and the New York State Environmental Notice Bulletin and in local news media, and comments will again be solicited.

#### Other Documentation

Copies of the "Final Environmental Impact Statement—Long-Term Management of Liquid High Level Radioactive Wastes Stored at the Western New York Nuclear Service Center, West Valley" (dated 1982, DOE/EIS-0081, referenced in this notice) and other documentation that is planned to be used in preparing the EIS, as well as other related background information, will be available for inspection at the following locations:

U.S. Department of Energy,  
Forrestal Building, Freedom of  
Information Reading Room,  
IE-190, 1000 Independence Avenue,  
SW.,  
Washington, DC 20585,  
(202) 586-6020.  
U.S. Department of Energy,  
West Valley Demonstration Project  
Technical Library,  
P.O. Box 191,  
West Valley, New York 14171,  
(716) 942-4387.  
Legislative and Governmental Services  
Office,  
Cultural Education Center,  
Empire State Plaza,  
Albany, New York 12230,  
(518) 474-3940.  
Concord Public Library,  
23 North Buffalo Street,  
Springville, New York 14141,  
(716) 592-7742.

Issued in Washington, DC, on December 27, 1988.

Ernest C. Baynard, III,  
Assistant Secretary, Environment, Safety and  
Health.

[FR Doc. 88-30160 Filed 12-28-88; 11:13 am]

BILLING CODE 6450-01-M

#### Nuclear Waste Repositories; the Site Characterization Plan (SCP) for the Yucca Mountain Site, NV

AGENCY: Office of Civilian Radioactive Waste Management, DOE.

ACTION: Notice on the availability of the Site Characterization Plan; announcement of public hearings and solicitation of comments.

SUMMARY: The Department of Energy (DOE) has published, distributed, and made available to the public the Site Characterization Plan (SCP) for the Yucca Mountain, Nevada, site for 90 days of public comment to begin January 15, 1989. Section 113(b) of the Nuclear Waste Policy Act of 1982 (NWPA) requires that the SCP provide "a general plan for site characterization activities" to be conducted. The purpose of site characterization is to obtain the information necessary to evaluate whether the site is suitable for a repository and, if suitable, to allow DOE to prepare a license application and obtain from the Nuclear Regulatory Commission (NRC) authorization to construct a repository.

The Yucca Mountain site was designated for site characterization in the Nuclear Waste Policy Amendments Act of 1987. The SCP includes a description of the candidate site, a description of planned site characterization tests and activities, plans for decontamination and decommissioning should the site not be found suitable for development as a repository, and criteria to be used to determine suitability. The SCP also describes the conceptual design for a repository at the site and the possible packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such a repository.

DATE: Written comments should be received at DOE by April 15, 1989.

ADDRESS: Written comments on the SCP should be addressed to: SCP Comments, Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193-8518.

#### FOR FURTHER INFORMATION CONTACT:

Stephen H. Kale, Associate Director,  
Office of Facilities Siting and  
Development, Office of Civilian  
Radioactive Waste Management, U.S.

Department of Energy, RW-20, 1000  
Independence Avenue, SW.,  
Washington, DC 20585.

or

Carl P. Gertz, Project Manager, Yucca  
Mountain Project Office, U.S.  
Department of Energy, Box 98518, Las  
Vegas, Nevada 89193-8518

In addition to sending copies of the SCP to individuals upon request, DOE will make the SCP available for public inspection in local libraries in surrounding areas, the Yucca Mountain Information Office, the public reading rooms at DOE Operations Offices, and DOE Headquarters.

Public Hearings will be held at several locations in Nevada to receive oral and written comments on the SCP. The schedule and procedures for those hearings are presented later in this Notice.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

At the direction of the U.S. Congress, DOE has been conducting a program for siting the Nation's first geologic repository for high-level radioactive waste. The process and the schedule for this program were set forth in the Nuclear Waste Policy Act of 1982. In May 1986, DOE recommended and the President approved the Yucca Mountain site as one of the three candidate sites for detailed study. In the Nuclear Waste Policy Amendments Act of 1987, the Congress directed that only the Yucca Mountain candidate site be characterized for a permanent geologic repository.

Section 113 of the NWPA, as amended, specifies that, before starting to construct exploratory shafts at Yucca Mountain, DOE must meet the following two requirements: (1) Submit to the NRC, as well as the Governor and the legislature of the State of Nevada, a Site Characterization Plan for their review and comment and (2) make the SCP available to the public and hold public hearings to inform residents in the vicinity of the site of the SCP and to receive their comments.

To meet both of these requirements, DOE has submitted copies of the SCP to the NRC and to the Governor and the legislature of Nevada. In addition, DOE has submitted the SCP to the affected units of local government in Nye, Clark, and Lincoln Counties, Nevada. To ensure that the SCP is available to the public, DOE has placed copies of the SCP in selected public libraries in Nevada and in its public reading rooms across the country. Individual copies are available upon request. To assist the

public in the review of the SCP, DOE has prepared an SCP Overview and an SCP Public Handbook and has widely circulated both of these documents. In addition, DOE will inform the public about the SCP and public comment process through its regular Project Update Meetings, and brief Federal, State, and local officials upon request, as well as conduct public hearings to receive comments.

The release of the SCP follows nearly a year of interaction on a consultation draft SCP that was developed by DOE and issued in January 1988 to solicit comments from the State of Nevada and the NRC. Workshops were held in Nevada and Washington, DC, to discuss SCP technical concerns and means to resolve them. Comments on the consultation draft received during the comment period were considered in preparing the SCP that now has been issued for public comment. The SCP incorporates the results of this consultation process.

Comments received on the SCP during the public comment period will be considered by DOE, and changes made in the plans described in the SCP as a result of these comments will be addressed in semiannual progress reports to be issued by DOE. These progress reports will also summarize the results of site characterization activities and will explain any changes that may be made in the test program as information is collected and evaluated.

The site characterization program is expected to take a number of years to complete, and during this time DOE will be issuing semiannual progress reports. The public will be kept informed and involved throughout the process, and comments on the program will continue to be accepted and considered. Consequently, DOE encourages the NRC, the State of Nevada, and others, during this particular 90-day comment period, to focus on issues related to the start of the exploratory shaft. All comments received during the 90-day comment period will be considered before commencing construction of the exploratory shaft. Comments received after the close of the comment period will be considered to the extent practicable before starting the exploratory shaft, but will nevertheless be considered as part of subsequent semiannual progress reports.

##### II. Public Meetings

The DOE Yucca Mountain Project Office will conduct public Project Update Meetings to inform interested parties of DOE's planned activities and the site characterization process. These



meetings will be held at the following locations and times and are for informational purposes only and not for the presentation of comments. Comments should be provided at the public hearings discussed later in this Notice.

February 15, 1989, at 7-10 p.m. in Beatty, at Beatty Community Center  
 February 16, 1989, at 7-10 p.m. in Las Vegas, at Aladdin Hotel  
 February 21, 1989, at 7-10 p.m. in Caliente, at Caliente Girls Training Center  
 February 23, 1989, at 7-10 p.m. in Reno, at Reno-Sparks Convention Center

### III. Comment Procedures

#### a. Availability

Copies of the SCP have been distributed directly to a number of interested Federal, State, and local agencies. The SCP is available for public inspection at the following DOE Reading Rooms:

1. DOE Headquarters, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585.
2. Albuquerque Operations Office, U.S. DOE, Pennsylvania & H Streets, Kirkland Air Force Base, Albuquerque, NM 87115
3. Chicago Operations Office, U.S. DOE, 9800 South Cass, Avenue, Argonne, IL 60439
4. Idaho Operations Office, Technical Library, 785 DOE Place, Idaho Falls, ID 83402
5. Nevada Operations Office, U.S. DOE, 2753 So. Highland Drive, Las Vegas, Nevada 89193-8518
6. Oak Ridge Operations Office, U.S. DOE, 200 Administration Road, Oak Ridge, TN 37830
7. Richland Operations Office, U.S. DOE, 825 Jadwin Avenue, Richland, WA 99352
8. San Francisco Operations Office, U.S. DOE, 1333 Broadway, Oakland, VA 94612
9. Savannah River Operations Office, U.S. DOE, University of South, Carolina-Aiken, Gregg-Graniteville, Library, 171 Parkway, Aiken, SC 29801

In addition to the reading rooms, the SCP will be available for public inspection at the following locations in Nevada.

1. Yucca Mountain Information Office, U.S. Department of Energy, U.S. Route 95 and State Route 374, Beatty, NV 89003
2. Amargosa Valley Community Library, HCR 69-2, BOX 401-T, Amargosa Valley, NV 89020
3. Beatty Community Library, P.O. Box 128, Fourth and Ward Street, Beatty, NV 89003

4. Clark County Library District, Reference Department, 1401 E. Flamingo Road, Las Vegas, NV 89119
5. Getchell Library, University of Nevada, Reno, Reno, NV 89557-0044
6. Nevada State Library, 401 North Carson Street, Carson City, NV 89710
7. Tonopah Public Library, 171 Central, Tonopah, NV 89049
8. University of Nevada, Las Vegas, James R. Dickinson Library, 4505 Maryland Parkway, Las Vegas, NV 89154
9. U.S. DOE/NV Technical Library, 2753 South Highland Drive, Las Vegas, NV 89193-8518
10. Washoe County Library, 301 S. Center, Reno, NV 89501

The SCP is a 9-volume document, approximately 6,300 pages in length. To assist the public in the review of the SCP, DOE has developed the SCP Public Handbook and the SCP Overview. These documents serve to introduce the reader to the SCP and assist the reader in understanding where in the SCP areas of particular interest may be located. Copies of the SCP, SCP Public Handbook or the SCP Overview are available upon request from:

Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193-8518 or:  
 Office of Civilian Radioactive Waste Management Program (RW-43) U.S. Department of Energy 1000 Independence Avenue, SW. Washington, DC 20585

#### b. Written Comments

Interested parties are invited to provide written comments on the SCP to: SCP COMMENTS, Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193-8518

The comments should be received at this address by April 15, 1989, to assure consideration prior to the Department's commencement of exploratory shaft construction.

#### c. Public Hearings

Following the public Project Update Meetings, DOE will hold public hearings to receive comments at the following times and locations:

March 20, 1989 at 2-5 p.m. and 7-10 p.m. at Amargosa Valley Community Center  
 March 21, 1989 at 2-5 p.m. and 7-10 p.m. at Aladdin Hotel in Las Vegas  
 March 23, 1989 at 2-5 p.m. and 7-10 p.m. at Reno Hilton Hotel

#### IV. Presentation Procedure

Any person or representative of a group may submit a written request for

an opportunity to make an oral presentation at a public hearing. Such requests should be addressed to Yucca Mountain Project Office, U.S. Department of Energy, Box 98518, Las Vegas, Nevada 89193-8518, and will be accepted up to 10 days in advance of each hearing. Specific times for presentations during the hearing may be requested; otherwise, presentation times will be assigned by the moderator. Anyone making a request to speak should provide a telephone number where he or she may be contacted during business hours; this telephone number will be used to confirm the time assigned to the speaker. All written requests for opportunities to present comments will be acknowledged by DOE. Each person making a presentation is requested to bring a written copy of his or her statement for submission for the hearing record.

At the hearing, those who have registered in advance will be heard first or at times reserved for them. Anyone present at the hearing who would like to speak but did not preregister may request an opportunity to speak. The moderator at the hearing will determine if such requests can be accommodated within the time period scheduled for the hearing.

#### V. Conduct of Hearings

DOE reserves the right to arrange the schedule of presentations to be heard and to establish additional procedures governing the conduct of the hearing. To ensure that as many interested persons as possible are given the opportunity to present oral comments, the length of each presentation will be limited to no more than 10 minutes, and may be further limited by the moderator for a particular hearing depending upon the number of persons requesting to be heard.

Clarification questions may be asked only by those conducting each hearing, and there will be no cross-examination of persons presenting statements. Any further procedural rules needed for the proper conduct of the hearing will be announced by the moderator at the start of the hearing.

Issued in Washington, DC, December 28, 1988.

Samuel Rouso,  
 Acting Director, Office of Civilian  
 Radioactive Waste Management.

[FR Doc. 88-30201 Filed 12-29-88; 8:45 am]

BILLING CODE 6450-01-M

### Assistant Secretary for International Affairs and Energy Emergencies

#### Proposed Subsequent Arrangement; Atomic Energy

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Agreement for Cooperation between the Government of the United States of America and the Government of Canada concerning Civil Uses of Atomic Energy, as amended.

The subsequent arrangement to be carried out under the above-mentioned agreement involves approval of the following contract: Contract Number DE-SC05-88UEO 7168, for the supply of 4.05 kilograms of uranium, enriched to 93.15 percent in the isotope uranium-235, for use as fuel in the McMaster Nuclear Research Reactor, McMaster University, Canada.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication of this notice.

For the Department of Energy.

Date: December 27, 1988.

George J. Bradley, Jr.,

Principal Deputy Assistant Secretary for  
 International Affairs and Energy  
 Emergencies.

[FR Doc. 88-30128 Filed 12-29-88; 8:45 am]  
 BILLING CODE 6450-01-M

#### Proposed Subsequent Arrangement; Atomic Energy

Pursuant to section 131 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2160), notice is hereby given of a proposed "subsequent arrangement" under the Additional Agreement for Cooperation between the Government of the United States of America and the European Atomic Energy Community (EURATOM) concerning Peaceful Uses of Atomic Energy, as amended, and the Agreement for Cooperation between the Government of the United States of America and the Government of Norway concerning Peaceful Uses of Nuclear Energy.

The subsequent arrangement to be carried out under the above-mentioned agreements involves approval of the following retransfer: RTD/NO(EU)-56, for the transfer of 5 pressurized water reactor fuel rod segments containing

1.207 kilograms of uranium, enriched to 1.3 percent in the isotope uranium-235 and 11 grams of plutonium from the Federal Republic of Germany to Halden, Norway for irradiation experiments in the Halden boiling water reactor.

In accordance with section 131 of the Atomic Energy Act of 1954, as amended, it has been determined that this subsequent arrangement will not be inimical to the common defense and security.

This subsequent arrangement will take effect no sooner than fifteen days after the date of publication to this notice.

For the Department of Energy.

Dated: December 27, 1988.

George J. Bradley, Jr.,

Principal Deputy Assistant Secretary for  
 International Affairs and Energy  
 Emergencies.

[FR Doc. 88-30127 Filed 12-29-88; 8:45 am]

BILLING CODE 6450-01-M

### Energy Information Administration

#### Annual Report for Enhanced Oil Recovery Incentive Program

AGENCY: Energy Information Administration, DOE.

ACTION: Request for comments on a proposed extension of the Annual Report for Enhanced Oil Recovery Incentive Program, Form FE-748.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Energy Information Administration (EIA), as required by the Paperwork Reduction Act, conducts a consultation program to provide the public with an opportunity to comment on proposed and continuing reporting forms. This program helps to ensure that requested data can be provided in the desired format, reporting burden is minimized, reporting forms are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

At this time, EIA requests comments on the extension of the Annual Report for Enhanced Oil Recovery (EOR) Incentive Program, Form FE-748, for three years. The form is described in the Supplementary Information Section of this Notice. Interested persons are asked to review the form and its instructions and provide comments to the information contact listed below.

DATES: Written comments must be submitted on or before January 30, 1989.

ADDRESS: Comments should be sent to Ms. Edith Allison at the address listed immediately below.

### FOR FURTHER INFORMATION OR COPIES OF THE FORM AND INSTRUCTIONS

CONTACT: Ms. Edith Allison, Project Manager, Reservoir Data and Analysis, Bartlesville Project Office, P.O. Box 1398, Bartlesville, OK 74005. Telephone (918) 338-4390.

### SUPPLEMENTARY INFORMATION:

- I. Background
- II. Comment Procedures

#### I. Background

The EIA announces a proposed extension of the Form FE-748, "Annual Report for Enhanced Oil Recovery (EOR) Incentive Program." The information on Form FE-748 is requested annually from all individuals or companies that had EOR projects approved for the Incentive Program. This form provides DOE and industry with the only readily available source of data with which to assess the performance and success of the projects in the Incentive Program. The form provides information on changes in oil well data and description of operation, and average monthly production and injection.

#### II. Comment Procedures

The EIA invites prospective respondents and users of the data from this collection to comment within 30 days of the publication of this notice. The following general guidelines are provided to assist in the responses. (As a potential data provider:)

- A. Are the instructions and definitions clear and sufficient? If not, which instructions require clarification?
- B. Can the data be submitted using the definitions included in the instructions?
- C. Can the data be submitted in accordance with the response time specified in the instructions?
- D. Public reporting burden (estimated average hours per response) for this collection is .71 hours per response. How much time, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information do you estimate it will require you to complete and submit this form.

E. What is the estimated cost of completing the form, including direct and indirect costs associated with the data collection? Direct costs should include all costs, such as administrative costs, development, assembly, equipment, ADP, and any other one-time or recurring costs.

F. How can this form be improved?

G. Do you know of other Federal, State, or local agencies that collect



similar data? If yes, specify the agency, the data elements, and the means of collection.

(As a potential data user:)

A. Can you use data at the levels of detail indicated on the form?

B. For what purpose would you use these data? (Be specific.)

C. How could the form be improved to better meet your specific data needs?

D. Are there alternative sources of data, and do you now use them? What are their deficiencies?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this survey and will become a matter of public record.

**Statutory Authorities:** Sections 5(a), 5(b), 13(b), and 52 of Pub. L. 93-275, Federal Energy Administration Act of 1974, as amended. (15 U.S.C. 764(a), 764(b), 772(b), and 790(a).)

Issued in Washington, DC, on December 23, 1988.

**Yvonne M. Bishop,**

*Director, Statistical Standards, Energy Information Administration.*

[FR Doc. 88-30125 Filed 12-29-88; 8:45 am]

BILLING CODE 6450-01-M

## ENVIRONMENTAL PROTECTION AGENCY

[EPA-FRL-3501-3]

### Environmental Impact Statements; Availability

Responsible Agency: Office of Federal Activities, General Information (202) 382-5076 or (202) 382-5075.

Availability of Environmental Impact Statements Filed December 19, 1988 Through December 23, 1988 Pursuant to 40 CFR 1506.9.

EIS No. 880422, DSUPPL, OSM, REG, Office of Surface Mining Reclamation and Enforcement (OSMRE) Revisions to Permanent Program Regulations Implementing Section 552(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Due February 13, 1989, Contact: Catherine Roy (202) 343-5143.

EIS No. 880423, Draft, FHW, IN, US 24 Relocation, IN-13 to IN-9/37, Funding and 404 Permits, Wabash and Huntington Counties, IN, Due February 27, 1989, Contact: James E. Threlkeld (317) 269-7494.

EIS No. 880424, Final FHW, NY, Southwest Lockport Bypass Construction, Robinson Road to NY-31, Funding, Section 10, 404 and Coast Guard Bridge Permits, Niagara County, NY, Due: January 30, 1989, Contact: Harold J. Brown (518) 472-3618

Dated: December 27, 1988.

**Richard E. Sanderson,**

*Director, Office of Federal Activities.*

[FR Doc. 88-30133 Filed 12-29-88; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3500-4]

### Environmental Engineering Committee; Open Meeting; January 26 and 27, 1989

Under Pub. L. 92-463, notice is hereby given that the Science Advisory Board's Products Incomplete Combustion Subcommittee will meet January 26-27, 1989 in the Administrator's Conference Room, 1101 West Tower, 401 M Street, SW., Washington, DC. The meeting will begin at 9:00 a.m. on Thursday and adjourn no later than 5:00 p.m. on Friday.

The purpose of the meeting is to review the Agency's proposed controls for emissions of Products of Incomplete Combustion (PICs) for hazardous waste incineration.

The meeting is open to the public. This is the second public meeting on this subject. The first meeting was held on December 15-16, 1988 (See 53 FR 44658—November 4, 1988).

Any member of the public wishing further information on the meeting, or those who wish to submit written comments should contact Dr. K. Jack Kooyoomjian, Executive Secretary, Science Advisory Board (A101-F) U.S. Environmental Protection Agency, Washington, DC 20460 at 202/382-2552 by January 9, 1989. Seating at the meeting will be on first come basis.

**Donald G. Barnes,**

*Director, Science Advisory Board.*

Date: December 22, 1988.

[FR Doc. 30087 Filed 12-29-88; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3500-5]

### Virginia's Application To Administer the National Pollutant Discharge Elimination System (NPDES) Pretreatment Program

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule; notice of application.

**SUMMARY:** The State Water Control Board of the Commonwealth of Virginia has requested approval of its Pretreatment Program, and submitted a

signed Attorney General's statement, dated October 3, 1988, stating that the Commonwealth of Virginia has the necessary authority to operate the program, along with copies of the legal authority, a program description dated May, 1988 that describes how the State proposes to operate the program and a Memorandum of Agreement to be entered into with EPA. This notice provides for a comment period on Virginia's request. Under U.S. EPA regulations the Administrator shall approve or disapprove this request after taking into consideration all comments received. The Administrator has delegated this authority to the Regional Administrator.

**DATES:** To be considered, comments must be received on or before January 30, 1989. Interested persons may also request a public hearing on the Commonwealth's request. If there is significant public interest expressed in the comments, U.S. EPA will schedule such a hearing. In the event U.S. EPA decides to hold a public hearing, prior notice of the date, time, and location of such a hearing will be given. Any requests for a public hearing must be submitted on or before the expiration of the comment period.

**ADDRESS:** Comments should be addressed to: U.S. EPA, Region III, 841 Chestnut Building, Philadelphia, PA 19107, Attention: Mr. Kenneth J. Cox, Permits Enforcement Branch (3WM52).

**FOR FURTHER INFORMATION CONTACT:** Kenneth J. Cox, Permits Enforcement Branch (3WM52), U.S. EPA, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; 215/597-7099.

**SUPPLEMENTARY INFORMATION:** On June 28, 1978, the United States Environmental Protection Agency (U.S. EPA) promulgated the general Pretreatment Regulations (40 CFR Part 403). Amendments to the General Pretreatment Regulations were promulgated on January 28, 1981. These regulations mandated by the Clean Water Act of 1977 (Pub. L. 95-217), govern the control of industrial wastes introduced into Publicly Owned Treatment Works (POTWs), commonly referred to as municipal sewage treatment plants. The objectives of the regulations are to: (1) Prevent introduction of pollutants into POTWs which will interfere with plant operations and/or disposal or use of municipal sludges; (2) prevent introduction of pollutants into POTWs which will pass through treatment works in unacceptable amounts to receiving waters; and (3) improve the feasibility of recycling and reclaiming

municipal and industrial wastewaters and sludges.

The Commonwealth of Virginia received NPDES permit authority on March 31, 1975. One of the keystones of the industrial waste control program as set forth in the general Pretreatment Regulations is the establishment of Pretreatment Programs as a supplement to the existing State National Pollutant Discharge Elimination System (NPDES) Permit program. In order to be approved, a request for State Pretreatment Program approval must demonstrate that the State has legal authority, procedures, available funding, and qualified personnel to implement a State Pretreatment Program as specified in § 403.10 of the Regulations. Generally, local Pretreatment Programs are the primary vehicle for administering, applying, and enforcing Pretreatment Standards for Industrial Users of POTWs. States are required to apply and enforce Pretreatment Standards directly against industries that discharge to POTWs where local programs are not required or have not been developed.

The Regional Administrator's decision to approve or disapprove the proposed treatment program will be based on a determination on whether the proposed program meets the requirements of the Clean Water Act and 40 CFR Part 403 and on the comments received.

The Virginia submission may be reviewed by the public at the Commonwealth of Virginia, State Water Control Board, 2111 Hamilton Street, Richmond, Virginia 23230-1143 and the U.S. EPA office in Philadelphia at the address appearing at the beginning of the notice. Copies of the submittal may also be obtained (at a cost of 20 cents a page) from these offices.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

### List of Subjects in 40 CFR Part 403

Confidential business information, Reporting and recordkeeping requirements, Waste treatment disposal, Water pollution control.

Dated: December 10, 1988.

**James M. Seif,**

*Regional Administrator, Region III.*

[FR Doc. 88-30086 Filed 12-29-88; 8:45 am]

BILLING CODE 6560-50-M

## FEDERAL MARITIME COMMISSION

The Federal Maritime Commission hereby gives notice that the following agreement(s) has been filed with the Commission pursuant to section 15 of

the Shipping Act, 1916, and section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments and protests are found in § 560.7 and/or § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time, deliver a copy of that document to the person filing the agreement at the address shown below.

**Agreement No.:** 224-200201.

**Title:** Florida Coast Stevedores

**Terminal Agreement.**

**Parties:**

Cooper/T. Smith  
Palmetto Shipping and Stevedoring Co., Inc.

**Filing Party:** John P. Meade, O'Connor & Hannan, 1919 Pennsylvania Avenue, NW., Suite 800, Washington, DC 20006-3483.

**Synopsis:** The agreement provides for the establishment and operation of a partnership to perform stevedoring and terminal services for the port of Jacksonville, Florida, and such other ports within the state of Florida as the partners may agree to, and related assistance functions with respect to such ports.

By Order of the Federal Maritime Commission.

Dated: December 27, 1988.

**Tony P. Kominoth,**

*Assistant Secretary.*

[FR Doc. 88-30039 Filed 12-29-88; 8:45 am]

BILLING CODE 6730-01-M

## Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC

20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

**Agreement No.:** 224-010774-002.

**Title:** Georgia Ports Authority

**Terminal Agreement.**

**Parties:**

Georgia Ports Authority (GPA)  
Evergreen Marine Corporation (Taiwan), Ltd.  
Costa Container Lines SPA

**Synopsis:** The agreement amends Agreement No. 224-010774, a terminal lease and services agreement. The agreement sets forth the rate schedule which will apply for the services to be provided by GPA.

**Agreement No.:** 224-010774-003.

**Title:** Georgia Ports Authority

**Terminal Agreement.**

**Parties:**

Georgia Ports Authority  
Evergreen Marine Corporation (Taiwan), Ltd.  
Costa Container Lines SPA  
Italia D. Navigation S.P.A. (IDN)

**Synopsis:** The agreement amends Agreement No. 224-010774, a terminal lease and services agreement by adding IDN as a party to the Agreement. It also adds a field services consolidated rate that applies only to IDN.

**Agreement No.:** 224-200109-002.

**Title:** City of Long Beach Terminal Agreement.

**Parties:**

City of Long Beach  
Cooper/T. Smith Stevedoring Co., Inc.

**Synopsis:** The Agreement extends the term of the basis preferential assignment agreement for Pier A Facilities in the Harbor District of the City of Long Beach of April 30, 1989.

By Order of the Federal Maritime Commission.

**Joseph C. Polking,**

*Secretary.*

Dated: December 27, 1988.

[FR Doc. 88-30040 Filed 12-29-88; 8:45 am]

BILLING CODE 6730-01-M

## Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the



Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

**Agreement No.:** 224-200202.

**Title:** City of Los Angeles Marine Terminal Agreement.

**Parties:**

City of Los Angeles (The City)  
American President Lines, Ltd. (APL)

**Synopsis:** The agreement provides that the City will provide APL with five (5) acres of land within the City of Los Angeles Harbor District to be used for the storage of chassis and containers, and purposes incidental thereto.

**Agreement No.:** 224-200203.

**Title:** New Orleans Terminal Agreement.

**Parties:**

The port of New Orleans (NO)  
Trans Ocean Terminal Operators, Inc. (TTO)

**Synopsis:** The agreement provides for TTO's five (5) year lease of NO property for use in the marshalling, storage and transfer of containers and the storage of stevedoring and cargo handling equipment.

**Agreement No.:** 224-200200.

**Title:** Port of Vancouver Marine Terminal Management Agreement.

**Parties:**

Port of Vancouver (Port)  
Marine Terminal Corporation (MTC)

**Synopsis:** The agreement provides for MTC to furnish terminal services and non-exclusive stevedore services at the Port's Terminal 3 facility for a five year term. The Port and MTC shall share gross receipts from wharfage, storage charges and certain miscellaneous items assessed under the Port's tariff. MTC guarantees to pay the Port an annual minimum of \$800,000 for the first year, and \$650,000 for the second year. For the remaining one year periods of the term, the minimum guarantee shall be adjusted by the parties based on the amount the Port adjusts its wharfage and dockage charges in its published tariff.

By Order of the Federal Maritime Commission.

Tony P. Kominoth,  
Assistant Secretary.

Dated: December 27, 1988.

[FR Doc. 88-30041 Filed 12-29-88; 8:45 am]

BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

### Federal Open Market Committee; Domestic Policy Directive of November 1, 1988

In accordance with § 271.5 of its Rules Regarding Availability of Information (12 CFR 271, *et seq.*), there is set forth below the domestic policy directive issued by the Federal Open Market Committee at its meeting held on November 1, 1988.<sup>1</sup> The directive was issued to the Federal Reserve Bank of New York as follows:

The information reviewed at this meeting indicates that the expansion in economic activity has moderated from the vigorous pace earlier in the year. Total nonfarm payroll employment grew considerably in the third quarter but the gains were less than those registered in the first half of the year and employment in manufacturing declined in August and September. The civilian unemployment rate fell to 5.4 percent in September, remaining in the narrow range that has prevailed since early spring. Industrial production advanced only slightly on balance in August and September after a sharp increase in July, while housing construction has been flat in recent months. Consumer spending increased substantially on average in the third quarter but apparently slowed in recent months. Indicators of business capital spending suggest considerably slower expansion in the third quarter, following very rapid growth in the first half of the year. Preliminary data for the nominal U.S. merchandise trade deficit in August showed a greater deficit than in July, but the average for July-August was slightly less than the second-quarter rate. The latest information on prices and wages suggests little if any change from recent trends.

Interest rates in long-term debt markets have declined a little further since the Committee meeting on September 20, while rates in short-term markets have edged higher. The trade-weighted foreign exchange value of the dollar in terms of the other G-10 currencies declined appreciably over the intermeeting period from the high level of last summer.

Expansion of M2 has slowed considerably in recent months; growth of M3 moderated in August and September but appears to have strengthened somewhat in October. Thus far this year, M2 has grown at a rate somewhat below, and M3 at a rate somewhat above, the

midpoint of the ranges established by the Committee for 1988. M1 has increased only slightly on balance in recent months after registering relatively strong growth in June and July. Expansion of total domestic nonfinancial debt for the year thus far appears to be at a pace somewhat below that in 1987.

The Federal Open Market Committee seeks monetary and financial conditions that will foster price stability over time, promote growth in output on a sustainable basis, and contribute to an improved pattern of international transactions. In furtherance of these objectives, the Committee at its meeting in late June reaffirmed the ranges it had established in February for growth of 4 to 8 percent for both M2 and M3, measured from the fourth quarter of 1987 to the fourth quarter of 1988. The monitoring range for growth of total domestic nonfinancial debt was also maintained at 7 to 11 percent for the year.

For 1989, the Committee agreed on tentative ranges for monetary growth, measured from the fourth quarter of 1988 to the fourth quarter of 1989, of 3 to 7 percent for M2 and 3½ to 7½ percent for M3. The Committee set the associated monitoring range for growth of total domestic nonfinancial debt at 6½ to 10½ percent. It was understood that all these ranges were provisional and that they would be reviewed in early 1989 in the light of intervening developments.

With respect to M1, the Committee reaffirmed its decision in February not to establish a specific target for 1988 and also decided not to set a tentative range for 1989. The behavior of this aggregate will continue to be evaluated in the light of movements in its velocity, developments in the economy and financial markets, and the nature of emerging price pressures.

In the implementation of policy for the immediate future, the Committee seeks to maintain the existing degree of pressure on reserve positions. Taking account of indications of inflationary pressures, the strength of the business expansion, the behavior of the monetary aggregates, and developments in foreign exchange and domestic financial markets, somewhat greater reserve restraint would, on slightly lesser reserve restraint might, be acceptable in the intermeeting period. The contemplated reserve conditions are expected to be consistent with growth of M2 and M3 over the period from September through December at annual rates of about 2½ and 6 percent, respectively. The Chairman may call for Committee consultation if it appears to the Manager for Domestic Operations that reserve conditions during the period before the next meeting are likely to be associated with a federal funds rate persistently outside a range of 8 to 10 percent.

By order of the Federal Open Market Committee, December 22, 1988.

Normand Bernard,

Assistant Secretary Federal Open Market Committee.

[FR Doc. 88-30032 Filed 12-29-88; 8:45 am]

BILLING CODE 6210-01-M

### Change in Bank Control Notice; Acquisition of Shares of Banks or Bank Holding Companies; Arlen H. Andelson

The notificant listed below has applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 13, 1989.

A. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. Arlen H. Andelson, and Arlen H. Andelson Family Trust, Beverly Hills, California; to acquire 3.0 percent of the voting shares of BKLA Bancorp, Inc., West Hollywood, California, and thereby immediately acquire Bank of Los Angeles, Los Angeles, California.

Board of Governors of the Federal Reserve System, December 23, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-30030 Filed 12-29-88; 8:45 am]

BILLING CODE 6210-01-M

### Antrim Financial Corp., et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the

Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than January 20, 1989.

A. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Antrim Financial Corporation, Mancelona, Michigan; to acquire 100 percent of the voting shares of First of America Bank-Grand Traverse, National Association, Traverse City, Michigan.

2. First of America Bank Corporation, Kalamazoo, Michigan; to acquire 100 percent of the voting shares of Antrim Financial Corporation, Mancelona, Michigan, and thereby indirectly acquire Antrim County State Bank, Mancelona, Michigan.

B. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 101 Market Street, San Francisco, California 94105:

1. Napa Valley Bancorp, Napa, California; to acquire 100 percent of the voting shares of Suisun Valley Bank, Fairfield, California.

Board of Governors of the Federal Reserve System, December 23, 1988.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 88-30031 Filed 12-29-88; 8:45 am]

BILLING CODE 6210-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

#### Agency Forms Submitted to the Office of Management and Budget for Clearance

Each Friday the Department of Health and Human Services (HHS) publishes a list of information collection packages it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). The following are those packages submitted to OMB since the last list was published on December 23, 1988.

#### Public Health Service

(Call Reports Clearance Officer on 202-245-2100 for copies of package)

1. Premarket Notification Submission (510(k)), Subpart E-0910-0120—Manufacturers wishing to distribute new or changed medical devices must submit a premarket notification to FDA 90 days before marketing. FDA reviews the notification and determines whether the product is substantially equivalent to a preamendments device. Those which are equivalent may be marketed immediately, and those which are not may not be marketed without further evaluation. Respondents: Businesses or other for-profit, Small businesses or organizations; Number of Respondents: 5,000; Number of Responses per Respondent: 1; Average Burden per response: 15.6; Estimated Annual Burden: 78,000 hours.

2. Medical Device Conformance Assessment to Voluntary Standards—NEW—The conformance assessment program will evaluate the extent that certain high priority medical devices adhere to voluntary standards and will assess the impact of these on the safety and effectiveness of these devices. Conformance will be accomplished by review and analysis of information obtained from manufacturers. Respondents: Businesses or other for-profit; Small businesses or organizations; Number of Respondents: 200; Number of Responses per Respondent: 1; Average Burden per Response: 4; Estimated Annual Burden: 800.

Case-Control Study of Drug Use and Syphilis—NEW—This study will investigate to what extent the association between illegal drug use and syphilis is responsible for the syphilis increases from 1986 and 1987. Ten Sexually Transmitted Disease (STD) clinic sites around the U.S. will be central points where syphilis patients will be asked to participate as cases. Controls are selected from patients of the clinics who do not have syphilis. 240 controls will also be selected from communities surrounding two of the sites. Respondents: Individuals and households; Number of Respondents: 4,680; Number of Responses per Respondent: 1; Average Burden per Response: .288; Estimated Annual Burden: 1,350.

4. Product License Application for the Manufacture of Human Immunodeficiency Virus for In-Vitro Diagnostic Use—0910-0211—This report is mandated by section 351 of the Public Health Act; The Federal Food, Drug and Cosmetic Act, sec. 502 and 505; and Title 21 CFR, Part 600—"No license may be granted unless this completed application has been received." Respondents: Businesses or other for-

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profit, Non-profit institutions, Small businesses or organizations:

1st information collection	2nd information collection
Reporting: Title: Product license application for the manufacture of human immunodeficiency virus for in-vitro diagnostic use. Number of respondents 9. Number of responses per respondent 2. Average burden per response 12.8. Total annual burden: 414..	Recordkeeping: Title: Product license application for the manufacture of human immunodeficiency virus for in-vitro diagnostic use. 9. 1. 20.4.

OMB Desk Officer: Shannah Koss-McCallum.

#### Health Care Financing Administration

(Call Reports Clearance Officer on 301-966-2088 for copies of package)

1. Indirect Cost or Medical Information—0938-0457—Hospitals are required to submit an annual report on the number of interns and residents furnishing services. This report will facilitate final adjustments to cost reports. Respondents: Businesses or other for-profit; Number of Respondents: 1,015; Annual Frequency 1; Average Burden per Response: 2; Estimated Annual Burden: 2,030 hours.

2. Attending Physicians Certification of Medical for Home Oxygen Therapy—NEW—Coverage of oxygen for use in a patient's home requires that certain medical documentation be submitted to HCFA Carriers to support the payment of claims. The provisions ensure consistent coverage determinations by the Medicare carriers. Respondents: Small businesses or organizations; Number of Respondents: 600,000; Annual Frequency: 1; Average Burden per Response: 25 minutes; Estimated Annual Burden: 250,000 hours.

#### Office of the Secretary

(Call Reports Clearance Officer on 202-245-6511 for copies of package)

1. Survey of Beneficiary Response to Social Security Messages Included on Bank Account Statements—NEW—Information on beneficiary responses to Social Security messages included on bank account statements is necessary to determine the effectiveness of using this method to contact beneficiaries about Social Security matters and to decide on possible expanded use. Respondents: Individuals or households; Number of Respondents: 381; Annual Frequency: 1; Average Burden per Response: 10

minutes; Estimated Annual Burden: 64 hours.

OMB Desk Officer: Shannah Koss-McCallum.

As mentioned above, copies of the information collection clearance packages can be obtained by calling the Reports Clearance Officer on one of the following numbers:

PHS: (202) 245-2100  
HCFA: (301) 966-2088  
SSA: (301) 965-4149  
OS: (202) 472-4415

Written comments and recommendations for the proposed information collections should be sent directly to the appropriate OMB Desk Officer designated above at the following address:

OMB Reports Management Branch,  
New Executive Office Building, Room  
3208, Washington, DC 20503.

Date: December 27, 1988.

James E. Larson,

Acting Deputy Assistant Secretary for  
Information Resources Management.

[FR Doc. 88-30110 Filed 12-29-88; 8:45 am]

BILLING CODE 4150-04-M

#### Alcohol, Drug Abuse, and Mental Health Administration

##### Short-Term Clinical Training Grants in Diagnosis and Treatment of Depressive Disorders

AGENCY: National Institute of Mental Health.

ACTION: Notice of Restricted Eligibility.

SUMMARY: The National Institute of Mental Health (NIMH) announces the availability of Short-Term Clinical Training Grants in Diagnosis and Treatment of Depressive Disorders, MH-88-07. These grants will be made under the authority of section 303, of the Public Health Service Act, 42 U.S.C. 242a, which authorizes grants for clinical training.

The goals of this program are to improve the knowledge of mental health professionals and primary care physicians regarding the diagnosis and treatment of clinical depression by promoting continuing education for such professionals, particularly in rural or other underserved areas. Each grantee will be required to provide training for a maximum of five days duration at each of the six different sites. The training is intended to provide health professionals with a didactic and experiential program that will increase their capacity to recognize, diagnose, and treat clinical depression effectively. Training must include major research findings on

psychosocial and pharmacological aspects of treatment.

In fiscal year 1989, NIMH will fund approximately 4 grants at a maximum of \$100,000 per grant (direct and indirect costs). Each grant will be for a twelve month period, with a maximum of three years support.

NIMH is limiting potential applicants under this announcement to university-based departments of psychology offering doctoral training in clinical psychology, or a school of professional psychology with appropriate accreditation for doctoral training in clinical psychology; college or university schools of nursing which offer graduate programs in psychiatric nursing; graduate schools of social work; departments of psychiatry in, or associated with, schools of medicine or free standing mental health institutions with an approved psychiatric residency program and; schools of medicine. The reasons for limitation of eligibility to academic departments are threefold: First, such departments are experienced in the provision of continuing education, and are able to develop outreach programs focused on the needs of specific target audiences. Second, they are able to utilize multidisciplinary faculty which models desirable professional working relationships, and third, they have experience in implementing training that is based on sound research and clinical knowledge.

For additional program guidance, potential applicants should contact: Harold Goldstein, Ph.D., Director of Training

or

Ms. Joyce B. Lazar, Director, Depression Awareness, Recognition, and Treatment Program (D/ART)

National Institute of Mental Health, 5600 Fishers Lane, Room 14-105, Rockville, Md. 20857, Telephone: (301) 443-4140

The Catalog of Federal Domestic Assistance number for this program is 13.244.

Frederick K. Goodwin,

Administrator, Alcohol, Drug Abuse, and Mental Health Administration.

[FR Doc. 88-30061 Filed 12-29-88; 8:45 am]

BILLING CODE 4150-20-M

##### ADAMHA Small Instrumentation Program

AGENCY: Alcohol, Drug Abuse, and Mental Health Administration.

ACTION: Notice of Limited Competition.

SUMMARY: The Alcohol, Drug Abuse, and Mental Health Administration

(ADAMHA) is announcing the establishment of an ADAMHA Small Instrumentation Program. This grant program was authorized by section 501(m) of the Public Health Service Act, as amended, in response to findings that much of the research instrumentation in the Nation's principal universities is either obsolete or poorly maintained. These findings identified the need for upgrading equipment currently in use. The most significant need was for relatively low-cost pieces of equipment. The purpose of the program is to help fund items of equipment which are difficult to justify within the context of an individual research project, but which will upgrade the institution's research infrastructure.

Eligible institutions or institutional components are those that had, in FY 1988, three or more active ADAMHA research grants (types R01, R23, R29, or R37) or cooperative agreements (types U01 or U10) totaling at least \$640,000 in direct costs. Competition is being limited as stated above to ensure that the equipment will be provided to the most research-intensive institutions.

The equipment requested must be available for use by more than one project either currently or in the future. The primary user(s) of the equipment must be one or more principal investigators of active ADAMHA-supported research grants. The total purchase price of a requested piece of equipment may not be less than \$5,000 or more than \$100,000, regardless of source of support. The program will provide awards which will range from \$20,000 to \$60,000. One-year awards will be made. A Catalog of Federal Domestic Assistance number is being obtained for this program.

Additional information may be obtained from:

National Institute on Alcohol Abuse and Alcoholism

Dr. Louise Hsu, Division of Basic Research, NIAAA, Room 14C-20, (301) 443-4223.

National Institute on Drug Abuse

Dr. Stephen Szara, Division of Preclinical Research, NIDA, Room 10A-31, (301) 443-6300.

National Institute of Mental Health

Mr. James Moynihn, Division of Basic Sciences, NIMH, Room 11-95, (301) 443-3107.

Dr. Leonard Lash, Division of Clinical Research, NIMH, Room 10-95, (301) 443-3264.

Dr. Kenneth Lutterman, Division of Biometry and Applied Sciences, NIMH, Room 18C-26, (301) 443-3685.

The mailing address for the above individuals is: 5600 Fishers Lane, Rockville, Maryland 20857.

Joseph R. Leone,  
Associate Administrator for Management,  
ADAMHA.

[FR Doc. 88-30062 Filed 12-29-88; 8:45 am]

BILLING CODE 4150-20-M

#### Office of Human Development Services

##### Child Abuse and Neglect Prevention and Treatment; Proposed Research and Demonstration Priorities for Fiscal Year 1989

AGENCY: Office of Human Development Services (OHDS), Department of Health and Human Services (DHHS).

ACTION: Notice of Proposed Fiscal Year 1989 Child Abuse and Neglect Research and Demonstration Priorities for the Office of Human Development Services.

SUMMARY: This notice identifies proposed priorities for research programs related to the causes, prevention, identification and treatment of child abuse and neglect and for demonstration or service programs and projects designed to prevent, identify and treat child abuse and neglect. Comments on these priorities and suggestions for other topics are invited. The actual solicitation of grant applications will be published separately, at a later date in the Federal Register. No proposals, concept papers or other forms of application should be submitted at this time.

Section 6(a)(2)(B) of the Child Abuse Prevention and Treatment Act of 1988 requires the Department to publish proposed priorities for research and demonstration activities for the purpose of soliciting comments from individuals knowledgeable in the field of prevention and treatment of child abuse and neglect. Final priorities selected will reflect the expertise and recommendations received from the field in response to this notice.

DATE: In order to be considered, comments must be received no later than February 28, 1989.

ADDRESS: Comments shall be sent to: Commissioner, Administration for Children, Youth and Families, Attention: National Center on Child Abuse and Neglect, P.O. Box 1182, Washington, DC 20013 (202) 245-2859.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The National Center on Child Abuse and Neglect (NCCAN) is located in the Children's Bureau within the

Administration for Children, Youth and Families.

NCCAN conducts activities designed to assist and enhance national, State and community efforts to prevent, identify and treat child abuse and neglect. These activities include: Conducting research and demonstrations; supporting service improvement projects; gathering, analyzing and disseminating information through a national clearinghouse; providing grants to eligible States for strengthening and improving child protective service programs; and coordinating Federal activities related to child abuse and neglect through an Advisory Board on Child Abuse and Neglect and an Interagency Task Force on Child Abuse and Neglect composed of Federal agencies.

The Child Abuse Prevention, Adoption, and Family Services Act of 1988 (Pub. L. 100-294) amended the Child Abuse Prevention and Treatment Act (the Act). Pursuant to section 6(a)(2)(B) of the Act, this notice identifies proposed priorities for research on the causes, prevention, identification and treatment of child abuse and neglect and on demonstration or service programs and projects designed to prevent, identify, and treat child abuse and neglect. The demonstration and service projects include priorities for training, innovative programs and other projects which show promise for addressing these issues.

Fourteen research priorities are proposed as well as two research symposia. Seven demonstration or service projects are proposed as well as one demonstration symposium. Final priorities selected for child abuse and neglect efforts for fiscal year (FY) 1989 will be supported either by grant or contract. Announcement of the final discretionary grant priorities will be published in the Federal Register.

In addition to projects funded under priority areas selected as a result of this announcement, in FY 1989 NCCAN intends to continue the Clearinghouse on Child Abuse and Neglect Information and the National Information Clearinghouse for Infants with Disabilities and Life Threatening Conditions, and to support development of a system for collecting data from official State reports on child abuse and neglect. Four special studies mandated by Pub. L. 100-294 will also be supported: (1) Child Abuse and Disability—the incidence of and relationship between child abuse and neglect and children with handicapping conditions; (2) Child Abuse and



Alcoholic Families—the incidence of and relationship between child abuse and neglect and familial alcoholism; (3) Study of Guardians Ad Litem—State data related to models of legal representation utilized for children in abuse and neglect cases and their effectiveness; and (4) High Risk Study—identification of underserved and/or unserved groups and the incidence of child abuse and neglect within these populations.

NCCAN also intends to support a competitively awarded project to plan and administer the ninth National Conference on Child Abuse and Neglect, which will take place in 1991.

## II. Recent Research and Demonstration Topics

Research and demonstration projects supported by NCCAN in fiscal years 1987 and 1988 have addressed the following topics:

### NCCAN Priority Areas Funded in FY 1987

- Models to Assist Teenage Parents on Preventing Child Abuse and Neglect.
  - Chronic Neglect of Children.
  - Training of Foster Parents to Deal with Sexually Abused Children.
  - Improving Protective Services Administration and Performance.
  - Coordination of Court Actions on Child Abuse and Neglect Cases.
  - Improving Child Protective Services on Indian Reservations.
  - Prevention of Abuse and Neglect in Infants of Chemically Dependent Mothers.
  - Risk Assessment Systems Utilized by Child Protective Services in the Decision-Making Process.
  - Abused and Neglected Children Involved in Court Actions.
  - Methods Used in Interviewing Child Victims.
  - Removal of the Perpetrator Versus Removal of the Victim from the Home: Effects on the Victim and the Family.
  - The Relationship of Child Maltreatment to Children's Social and Emotional Development and School Performance.
  - Assessing the Impact of Child Abuse and Neglect on Victims.
  - Effectiveness of Child Abuse and Neglect Prevention Programs.
  - Child Abuse and Neglect Interdisciplinary Training.
- NCCAN Priority Areas Funded in FY 1988
- Advocates for Children in Criminal Court Proceedings.
  - Prevention of Serious or Fatal Maltreatment.

- Minority Organizations Assisting in Combating Child Abuse and Neglect.
- Public/Private Partnerships to Combat Child Abuse and Neglect.
- Child Sexual Abuse Curricula Adapted for use by Native Americans.
- Treatment Approaches for Intra-Familial Child Sexual Abuse.
- Diagnosing and Treating Chronic Neglect.
- Child Fatalities Resulting from Child Abuse and Neglect.
- Impact of Investigations on Families where Child Abuse and Neglect was Not Substantiated.
- Relationship Between Child Abuse and Teenage Pregnancy.
- Field Initiated Research on Child Abuse and Neglect.

Because the project periods for many of the grants funded to address these topics may extend for two or three years, the above subject areas, with two exceptions, are not being considered for repetition or further elaboration in FY 1989. The two exceptions are: (1) Child Sexual Abuse Curricula Adapted for Use by Native American Populations, which is being republished with a broader category of eligible applicants, and (2) Field Initiated Research on Child Abuse and Neglect, which is being repeated.

In addition, although NCCAN published a priority area for conducting a planning project for a Longitudinal Study on Child Abuse and Neglect in FY 1988, the proposals submitted lacked strong methodological approaches and sought data from too limited a number of sites. Therefore, no projects were funded in this area in FY 1988, and a new priority area for Longitudinal Studies will be included as an FY 1989 priority area.

## III. Proposed Child Abuse and Neglect Research and Demonstration Priorities for FY 1989

OHDS solicits specific comments and suggestions concerning each of the proposed priorities for FY 1989 described below. We also solicit suggestions for topics not covered in this announcement, but which are timely and relate to specific needs in the field of child abuse and neglect. Any suggestions of new topics should keep in mind the issues already being addressed in current projects, as listed above, and build on the current base of knowledge in child abuse and neglect and its prevention, identification and treatment. Proposed research and demonstration priorities should benefit the field and lead to improved services for children and families.

One half of the funds available for discretionary research and

demonstration grants will be made available for a broad range of activities pertaining to prevention of child abuse and neglect.

No acknowledgement will be made of the comments in response to this notice, but all comments received by the deadline will be considered in preparing the final funding priorities in child abuse and neglect activities for FY 1989. Copies of the final program announcement will be sent to all persons who comment on these proposed priorities.

### A. Proposed Research Priorities

NCCAN conducted three Research Symposia in FY 1988 on the topics of child neglect, sexual abuse and systems issues at the community level. Approximately 24 specific research priority areas were recommended by participants in these symposia. Fourteen of these priorities are being published here for comment. Where the symposia participants described specific techniques or methodologies which they believed were germane to their recommendations, such techniques and methodologies are included. Respondents are encouraged to comment on the content as well as to suggest time periods and recommendations for prioritization of these issues, since it will not be feasible to include all of these priorities in the FY 1989 solicitation announcement in the Federal Register.

#### 1. Research Priorities for Soliciting Discrete Projects

a. *Intervening Variables That Moderate the Influence of Child Neglect on the Child.* It is important to understand the factors in the child, the family system and the environment that help to explain differences in functioning, or mastery of age-appropriate tasks and social relationships. Proposals should focus on one or more age levels, using cross-sectional and/or longitudinal designs and have a theoretical base and outcomes that relate to hypotheses generated by the theory. Alternative models can be tested.

Research issues to be addressed include the development of parental competence in child nurturing and the effects of different types of neglect as follows:

- What are the components of parental competence and how does parental competence develop? What is the relationship between particular aspects (or models) of parental competence and the recovery of children and families from child neglect?

- How do different types of neglect differentially affect children? Do these effects vary by children's age, sex and birth order, and/or other characteristics?

b. *Family Functioning.* Within the framework of families as systems, there are several tasks or functions that all families should perform to meet the basic needs of individual family members, for example: Economic support, parenting function, and social control. Although general information is available about types of neglect in families, there is little information about the ways that neglectful families function in comparison with non-neglectful families. There are many issues that need to be researched within the family framework to enhance an understanding of neglectful families and provide more information for prevention and intervention strategies. There are also many methodological issues which should be addressed in developing research proposals, including the use of clear and relevant operational definitions and addressing potentially compounding factors in sampling and/or analysis, such as socioeconomic status and ethnicity.

Research questions proposed in this area are:

- Can distinguishable differences in functioning be identified between neglectful and non-neglectful families?
- What are the characteristics of the men in neglectful vs. non-neglectful families? What functions do they serve in the family, and how do they impact on family functioning?
- What is the impact of mental health problems and/or all forms of substance abuse on family functioning and neglectful families?
- Can minimal levels of performance be identified that define at what point families begin to neglect?

c. *Community-Based Prevention of Child Maltreatment.* A number of prevention strategies have been utilized and there is the need to examine the knowledge and experience of the field to date. Research in this area should include a three-part literature review and evaluation of approaches to ongoing community-based prevention of child maltreatment, as follows:

- Review and analyze literature and materials on the development of community prevention programs for child abuse and neglect and other fields with respect to the following issues: Community planning and development, planning models, effective fund-raising, and types of community leadership.
- Identify and classify existing community-based prevention programs, including those developed under

Children's Trust Funds and Challenge Grants. The study should attempt to measure the program's relative effectiveness, the area of the State covered, funding sources, groups targeted, and other factors.

• Synthesize materials and findings in a manual (and/or dissemination modes) on how to plan, fund, initiate, implement and maintain community-wide prevention programs, with emphasis on empirical findings on ways of producing change.

d. *Joint Police/Child Protective Services Investigations of Complaints of Child Maltreatment.* Child protective service agencies and law enforcement agencies have differing responsibilities related to the investigation of child maltreatment cases. There is very little guidance or objective knowledge about how these two agencies can work together to improve outcomes for children and their families.

The research should include a review of the literature to determine the state-of-the-art. The study should be designed to address such questions as: Are joint investigations effective? If so, for which types of cases? What are the case or system factors that trigger joint investigations?

The study should further compare outcomes of those cases using police/social worker teams with matched cases using single agency investigation to answer the following questions:

- Which cases involved more successful prosecutions and/or reunifications?
- Did the use of joint teams require fewer interviews?
- Was there a reduction in the length of time required for system decisions about placement, prosecution, or family reunification?
- What are the police/social worker team and client perceptions of the joint investigation process?
- When joint investigative teams are used, are there different outcomes depending on the type of abuse?

e. *Prosecution of Child Maltreatment Cases.* Little data have been aggregated regarding the number, type and outcomes of judicial handling of child abuse cases. NCCAN is interested in approaching this informational need by proposing the following research questions related to sexual abuse, physical abuse, and neglect, by level of risk. An experimental or quasi-experimental design is recommended using cases matched by type of abuse, age of child, family composition, and severity of injury.

- What kinds of cases are referred for prosecution?

• How does early prosecutorial involvement affect conviction or reunification rates?

- How does the composition of a multidisciplinary team affect prosecutorial decision making?
- How can multidisciplinary teams be managed to maximize interagency communication between child protective services and criminal justice systems?

f. *Risk Assessment.* Considerable resources have been diverted in many States to the use of risk assessment as a tool for helping agencies to set priorities for investigation of reports of child abuse and neglect, to measure and evaluate the results of the investigation, and to determine intervention priorities. The following additional efforts are proposed to address this priority area:

- Conduct additional validity studies to determine whether risk factors are actually predictive of likely future harm.
- Develop audience-specific syntheses of current research on risk assessment and treatment services. Audiences would include judges, the legal profession, schools, medical professions, counseling services, and others. The project would develop a systematic mechanism to disseminate information in pilot communities. This component would include pre- and post-data collection to determine whether there was a shift in practices based on the information.

g. *Judicial Review Process.* Needy, abused and neglected children who are placed in foster care as a protective measure are thereafter also covered by the provisions of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, which has a goal of permanency for the child either through rehabilitation of the child's own home or through an alternative placement.

Public Law 96-272 requires periodic judicial review of foster care cases to insure that goals are met in a timely manner. Research is needed to determine how these judicial reviews are being conducted in various jurisdictions and how this review process specifically addresses and contributes to treatment and rehabilitation of abusive and/or neglecting families, including support of these children in foster care. Questions to be addressed include:

- How do States and jurisdictions implement the judicial review process and how are the child abuse and neglect issues considered in this process (e.g.,



how are the frequency of the review, sources of data for the review, and progress towards goals affected by the type and severity of the incident of child abuse and neglect)?

- What are the outcomes of judicial reviews for abused and neglected children (e.g., redirection of services, increased monitoring, additional legal sanctions, reduced recidivism, length of foster care, proportion returned home or freed for adoption, etc.)?

- What are the relationships among various types of reviews (e.g., judicial, administrative, and citizen) and which approach is more effective in serving abused and neglected children?

h. *Effectiveness of Child Protective Services Intervention.* While some efforts have been made to study the effectiveness of various Child Protective Services (CPS) interventions, there is a need to better classify areas of family dysfunction, the types of interventions used, and the variety of outcome measures appropriate for evaluation research in this field. The purpose of these new classification schemes should be to identify effective interventions for specific problem areas.

This multiyear priority area will require several studies over time. The studies should proceed sequentially (those in the last area depend on the successful completion of the previous three) as follows:

(i) *Classification of Areas of Dysfunction*

This study should review the literature and current research to develop and validate a classification system of the types of family and individual problems typical of the CPS referrals and caseloads. Accepted statistical techniques should be used on at least two separate populations. It may be necessary to conduct several small studies in different geographic locations, using similar classification systems, to validate the findings for various populations.

(ii) *Classification of Intervention Systems*

This study should examine various techniques in use in CPS and develop a classification system for interventions to be used in future research. This system should also include information regarding the potential impacts of the various interventions.

(iii) *Identification of Outcome Measures*

This study should relate the goals of specific interventions to *observable* and *measurable* case or individual outcomes. While the measures considered appropriate will vary

depending on the service goals defined, it would be useful to define a basic set of outcome measures consistently collected on all interventions. This study would be critical in that it links the client and intervention classification systems developed in research areas (i) and (ii) to valid measures. The selection of measures should be based on a review of available literature, assessment tools, and interviews with CPS workers.

(iv) *Evaluation of Effectiveness of Intervention*

Using the classification systems and outcome measures resulting from the three research areas outlined above, several studies should be developed to evaluate the effectiveness of different types of interventions for various populations and problem types. While each investigator may have an idea of specific issues to be examined, all should agree to use at least a minimal list of variables and measures derived from previous research. Preference should be given to experimental or quasi-experimental designs where there is some ability to control the intervention system on some known purity of techniques in already existing systems.

i. *Peer and Sibling Sexual Abuse.* Data suggest that peer and sibling sexual abuse may be a substantial component of the total child victimization problem. This study would determine the prevalence and characteristics of peer and sibling abuse. In particular, the following indicators need to be addressed:

- Scope of victimization;
- Sex of victim;
- Sex of offender;
- Relationship between victim and offender; and
- Cultural variables.

In addition, this study would need to explore:

- How does this type of abuse differentiate itself from normal sibling and peer social interaction?
- Are either victim or offender involved in other abusive family contexts?
- Are the offenders also in victim roles as well?

j. *Impact of Treatment Approaches for Intra-familial Child Sexual Abuse.*

There are little objective data on the use of incarceration and diversion programs for cases of intra-familial sexual abuse and how treatment approaches can be used effectively with these programs to improve the outcomes for children and families. This priority proposes to conduct a comparative multi-site study

on intra-familial sexual abuse that would include:

- Incarceration—without treatment;
- Incarceration—with treatment;
- Diversion program—pre-trial and post-trial; and
- No formal intervention program

The study should focus on the outcome indicators for victim, offender, and family unit. In particular, the outcomes need to address recidivism, cost of the program, and victim and family functioning. An advisory committee, to include juvenile/family court judges and women's groups as well as appropriate professionals, is recommended. The purpose of this study would be to provide information for decreasing child victimization and critical and useful information for the judiciary system to assist them in making effective sentencing decisions.

k. *Utilizing Results of Research on Child as Witness Projects.* NCCAN has funded several projects to research different interviewing techniques used with children who have been abused. A rigorous analysis of this topic is needed to closely examine issues related to evidentiary testimony; the use of hearsay exceptions; and the validation of anatomically correct dolls as an interviewing technique, especially for child victims under the age of six.

An effort is needed to research and interpret the available data, to synthesize the results, and to propose strategies for disseminating findings on the utility of different techniques. The Department of Justice has also funded projects with a similar objective and all applicants would be expected to include these project findings in the synthesis.

l. *Status of Measurement Development in the Study of Child Abuse and Neglect.* A substantial body of research knowledge has accumulated through the use, development and adaptation of an array of measurement techniques. There is the need for a state-of-the-art review of the measures and instruments utilized in studies of child abuse and neglect. These measures may concern children, their families, and communities and include their demographic characteristics and environmental settings; parent-child and family interactions; child social-emotional development and school performance; family strengths, needs, resources, and stress factors; social and economic support systems; and service availability and provision. This review of measures should cover psychometric properties including validity and reliability, the domains addressed for the instruments, identification of any

gaps and next steps to be taken in their use, and adaptation or development of new measures.

Anticipated products from this project would consist of a paper on the state-of-the-art on instrument development, a directory of measurements/instruments established as a computer file with a proposed strategy for ongoing maintenance, a hard copy reference directory for research applications and a manual for practitioners, a recommended set of common data elements to be collected across studies to enable comparability, and a library set of these measures and manuals for their utilization.

m. *Field Initiated Research for Child Abuse and Neglect.* NCCAN is interested in supporting new research initiated by researchers in the child abuse and neglect field to carry out the legislative responsibilities established for the National Center on Child Abuse and Neglect by the Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. 100-294. One of these responsibilities is to conduct research on the causes, prevention, identification and treatment of child abuse and neglect, and on appropriate and effective investigative, administrative and judicial procedures in cases of child abuse.

Basic research in the behavioral and social sciences which contributes to theory development is not within the purview of this announcement. Also, it is not intended for program evaluation and demonstration projects to be included in this category. Current issues having widespread impact on the field of child abuse and neglect and on the target population are of particular interest. Secondary analyses of data from the 1988 study of the national incidence and prevalence of child abuse and neglect will also be considered.

n. *Longitudinal Study.* NCCAN proposes to support a consortium of longitudinal studies to address aspects of the life course of families at risk of child maltreatment. These studies are expected to contribute to our knowledge of the etiology and ecology of child maltreatment and contribute new insights into prevention, treatment and the organization of protective services.

The consortium of longitudinal studies would have two parts: (1) A central grantee to oversee methodological issues and perform data analyses, and (2) satellite grantees who would identify data sources, collect data and turn these data over to NCCAN for analysis. A two phased funding approach is anticipated for this priority. During Phase One, NCCAN proposes to fund a planning grant for a central grantee and up to

three planning grants for satellite grantees. The central grantee would be asked to provide an experimental longitudinal study design which addresses sampling and data analysis plans, and to pilot test instruments. The satellite grantees would be asked to propose the location of sources of data, obtain agreements to participate, propose a data collection procedure and pilot test the subjects. They would have the opportunity to develop their own special analyses along with those about which they collaborate with the central grantee. Subsequent Federal funding for Phase Two, the implementation of a consortium of longitudinal studies, would be based on a determination of the feasibility of the total effort.

2. *Research Symposia*

In addition to soliciting applications for the above described studies, during FY 1989 NCCAN will continue to convene research symposia with knowledgeable groups of selected experts on subject areas of critical concern to the field. Selection of topics for the symposia will focus on issues on which some research and demonstration efforts have occurred but for which there is no clear direction for further development.

The purpose of the research symposia is to review what is known to the field which needs further exploration, and what is unknown and needs close examination.

The symposia may also provide advice on multi-year strategies to implement the needed research. This will be accomplished by bringing together small groups of selected experts who will assess the major issues, identify trends and problems in the field, and prepare substantive symposia reports of publishable quality.

NCCAN successfully convened three of the four symposia announced for FY 1988 as follows:

- (a) Child Neglect;
- (b) Child Sexual Abuse;
- (c) Child Abuse and Neglect: Systems Issues at the Community Level.

In FY 1989, NCCAN will hold the fourth symposium as described in the proposed priorities for FY 1988 on *Intervention Approaches for Child Maltreatment* (FR, Vol. 52, No. 105, Tuesday June 2, 1987, p. 20647). In addition, one new research symposium will also be conducted focusing on *Ritualistic Abuse*. The purpose of this symposium will be to examine the knowledge and experience of the field in dealing with ritualistic abuse and to determine what areas of research should be conducted to fully identify and understand the problem.

B. *Proposed Demonstration and Service Priorities*

In recent years, NCCAN has funded numerous demonstration projects on a wide range of subjects relating to child abuse and neglect. For fiscal year 1989, NCCAN is interested in examining, in a disciplined and organized fashion, selected topics of interest. The purpose of these proposed demonstration and service priorities is to distill and disseminate project findings and the results of previously funded programs so that the field can have greater access to existing information and resources; and to further the demonstration and utilization of successful approaches to combating child maltreatment.

1. *Demonstration and Service Program Priorities for Soliciting Discrete Projects*

a. *Utilizing Results of Demonstration Grant Clusters.* Over the past several years NCCAN has provided support to clusters of grants relating to a common program theme and purpose in child abuse prevention and treatment. These projects are valuable to the communities they serve and for the knowledge and program expertise they have generated which can be transferred to other communities to improve child abuse and neglect services. The field needs to become more aware of successful, relevant programs that have reasonable costs and are easily adapted and implemented.

For several of the successful cluster grant programs there has been no final effort to consolidate the results of individual projects into a cluster report for the field, including a review of their individual final reports and other materials developed by the projects which reflect information about objectives, implementation strategies, costs and outcomes. There is a need for various experts in the field, who have special interests in the subject matter either by virtue of their professional or academic experience, to distill and synthesize the significant project findings into reports to the field, including development of utilization strategies. Dissemination strategies appropriate to the needs of various user groups also need to be addressed.

Four grant clusters which have a solid body of information suitable for this analysis include:

- (a) Residential Child Abuse and Neglect;
- (b) Parent Aide and Respite Care Programs;
- (c) Education of School-aged Children to Prevent Child Sexual Abuse and Development of Educational Materials



Geared to Preschool-aged Children and Adolescents;

(d) Models to Assist Teenage Mothers in Preventing Child Abuse and Neglect.

b. *Utilizing Results of the Central Registry Research Grant.* All States require that certain persons report child maltreatment and most States have established a Statewide central registry system to record these reports. However, the functions which the registries were established to perform in the 1960's have changed significantly. Their original goals focussed on diagnosis, teaching, research and case management. The registries continue to be evaluated on the basis of how they perform their original functions rather than on the basis of how they perform their current functions which now include record keeping, due process safeguards, and data utilization. In 1988, NCCAN awarded a research grant to the National Center for State Courts to evaluate the central registries' performance in these areas.

Two significant conclusions of the survey were: (1) That there is a tremendous variety in record keeping practices, due process safeguards, and data usage among central registries; and (2) that every registry is in the process of changing some aspect of its procedures, whether record keeping, risk assessment, central hotline or computer system. Because the state-of-the-art for central registries is in flux, many States would be highly motivated and interested in utilizing the information generated by this research to apply to various aspects of their central registry systems. Therefore, NCCAN is interested in developing a dissemination and utilization strategy to encourage States to use the research findings to improve or enhance various aspects of their registry systems.

c. *Demonstration of the Feasibility of a Child Abuse and Neglect Telecommunications Network.* The purpose of this priority area is to conduct a feasibility study on the design of a telecommunications network which will enable those in the field of child abuse and neglect (1) to communicate with each other and with NCCAN and (2) to have access to significant and appropriate databases on child abuse and neglect. The network would enable practitioners and researchers to address concerns in the field more effectively. Areas of interest to be addressed include: network justification and its uses; who can supply the necessary services; what are the system operator's responsibilities; who are the potential users; what hardware/software will be used; what training is necessary to access and utilize the system; what are

the timetables for phasing in implementation; and what are the implementation and maintenance costs.

d. *Adaptation of Child Sexual Abuse Training Curricula for Demonstration with Native American Populations.* Child sexual abuse is recognized as pervading modern society with estimates that, by the age of eighteen, 15-25 percent of girls and 3-10 percent of boys will be sexually abused.

Several curricula have been developed and used to train children, parents and teachers on: (1) How to talk about and cope with past child sexual abuse, and (2) how to prevent future child sexual abuse. Many experts believe that the manner of presentation and the environment in which the material is presented affects how children accept and incorporate the information. An educational setting is believed to be a non-threatening environment to children and a teacher is often viewed as a responsible person that the children will trust and will communicate with openly.

NCCAN is interested in funding projects to adapt existing child sexual abuse prevention training curricula for children in grades two through six on Indian reservations. Eligibility would be limited to Federally recognized Indian Tribes, national Indian organizations, historically Native American colleges and universities and other institutions of higher education which have a history of serving the educational needs of Native Americans.

e. *Dissemination and Utilization of Professional Child Abuse and Neglect Training Curricula.* Over the past several years, NCCAN has provided support for the development of a number of professional curricula on child abuse and neglect issues. These curricula have been prepared for educators, nurses, physicians, psychologists, judges, court personnel, social workers, prosecutors and law enforcement personnel. Some of the curricula have received wide publicity and some have not. They address a number of issues such as:

- Child sexual abuse issues related to the concerns of judges and court personnel;
- Continuing education programs for nurses, physicians, psychologists and social workers to increase awareness about the treatment and prevention of child sexual abuse;
- Curricula and other educational materials for use in law school, family law courses, juvenile clinical programming and continuing legal education programs; and
- Curricula for law enforcement officers for reporting and investigating child

sexual assaults in out-of-home child care settings.

In addition, outside of those efforts supported by NCCAN, other Federal government agencies, such as the Office of Juvenile Justice, have supported efforts for the development of curricula related to child maltreatment issues. NCCAN is interested in supporting a project to identify and review all the professional curricula developed over the past several years in order to learn what types of training have been emphasized, the target groups, the quality of the training curriculum and the results of the training. NCCAN wants to obtain an overview of the available curricula, an assessment of the quality of the curricula and a delineation of the efforts that need to be undertaken to ensure the dissemination of quality materials to interested professionals.

f. *Parents' Self-help Group.* From its inception, NCCAN has supported efforts of national networks of parent self-help groups that utilize techniques of self-help for the treatment of parents who abuse and neglect their children and also serve as a resource to other troubled parents who believe that without this help they might harm their children. As these groups have expanded in the States and local communities, they have become a significant part of the intervention strategy for working with these parents and their children.

NCCAN is interested in continuing to support a parent self-help program of demonstrated effectiveness which is national in scope. This program should include furthering the development of a national focus and network of parent self-help groups by establishing new groups and/or strengthening the capacity of existing groups.

Examples of activities that might be considered under this priority area are:

- Strengthening the relationships between parent self-help groups and public and private agencies which serve abused and neglected children in order to encourage consistent use of parent self-help as part of the intervention strategy;
  - Promoting the further development and expansion of local chapters which have limited resources;
  - Enhancing the capacity for local chapters and State organizations to network and participate in national leadership development and agenda building;
  - Supporting the preparation and dissemination of written materials for chapter leadership and development.
- g. *Prevention of Physical Child Abuse and Neglect.* Considerable evidence has

been amassed in recent years which suggests that reports of child abuse and neglect are growing and that the child protective services system does not have the capacity to effectively handle all these reports. Further, while a large percentage of these reports go unsubstantiated, a significant number of additional cases go unreported. There is the need, therefore, to once again focus on and support comprehensive community-based approaches to the prevention of child abuse and neglect which capture and use the knowledge developed over the past decade.

NCCAN has supported a large number of research and demonstration projects in the area of prevention. Additionally, Children's Trust Funds have been established in 46 States, and 44 States have received Challenge Grant funds to establish prevention programs in child abuse and neglect. Through these and other related efforts designed to prevent child maltreatment, a wide variety of prevention strategies are being utilized in communities across the United States. However, these are scattered and may not include the full range of components necessary to reach all children and families who may be at risk or in need of help.

NCCAN is interested in providing support in two phases for the planning and development of model comprehensive community-based physical child abuse and neglect prevention programs in a number of communities across the country reflecting urban, suburban and rural settings. These model programs would be designed to consist of the following components:

- Public awareness programs for citizens about positive family support;
- Home health visitor program for all newborns;
- Parent education;
- Resources such as child care, respite care, crisis nurseries, and self-help groups for parents who need help in parenting;
- School-based prevention education programs for all elementary school children;
- Hospital-based information and referral services for parents of children with handicaps and children who have been neglected or abused by their parents;
- Projects for the prevention of alcohol and drug-related child abuse and neglect;
- Multidisciplinary training programs for professionals involved in the planning and implementation of these model community programs;
- Establishment of a community-based interdisciplinary task force,

including the private sector, to plan, develop, implement, and oversee the model community program.

During the first phase, NCCAN would fund projects for up to nine months for the development of program plans. The second phase would consist of four year competitive grants which would be awarded to the extent that funds are available to applicants who have completed the planning study and submit successful applications for funds to establish a model program. During the second phase, successful applicants would be expected to participate in a common data collection and evaluation effort. It is not anticipated that funds would be used for direct services.

## 2. Demonstration Symposium

In addition to soliciting applications for the above described priorities supporting demonstration and service programs in FY 1989, the National Center on Child Abuse and Neglect is interested in convening one demonstration symposium on the subject of Child Abuse and Neglect in Divorce and Custody Cases. The purpose of this symposium would be to explore the research and demonstration findings already available in the literature and to develop recommendations for how to use what is known to improve the practice of agencies and courts in addressing the problems of child abuse and neglect which arise during divorce and custody proceedings.

(Catalog of Federal Domestic Assistance Program Number 13.670, Child Abuse and Neglect Prevention and Treatment.)

Dated: December 7, 1988.

Dodie Borup,

Commissioner, Administration for Children, Youth and Families.

Approved: December 23, 1988.

W. Douglas Badger,

Deputy Assistant Secretary for Human Development Services.

[FR Doc. 88-30109 Filed 12-29-88; 8:45 am]

BILLING CODE 4130-01-M

## Administration for Children, Youth and Families; Allotment Percentages for Child Welfare Services State Grants

AGENCY: Office of Human Development Services, HHS.

ACTION: Biennial publication of allotment percentages for States under the title IV-B Child Welfare Services State Grants program.

SUMMARY: As required by section 421(c) of the Social Security Act (42 U.S.C. 621(c)), the Department is publishing the allotment percentage for each State

under the title IV-B Child Welfare Services State Grants Program. Under section 421(a), the allotment percentages are one of the factors used in the computation of the Federal grants awarded under the program.

DATES: The table indicates the allotment percentages to be used for fiscal years 1990 and 1991.

## FOR FURTHER INFORMATION CONTACT:

Mrs. Ellen Fagins, Formula Grants Division, Children's Bureau, Administration for Children, Youth and Families, P.O. Box 1182, Washington, DC 20013, (202) 755-4780.

SUPPLEMENTARY INFORMATION: The allotment percentage for each State is determined on the basis of paragraphs (b) and (c) of section 421 of the Act. The allotment percentage for each State is as follows:

State	Allotment percentage
Alabama.....	61.42
Alaska.....	37.09
Arizona.....	53.45
Arkansas.....	62.42
California.....	42.44
Colorado.....	48.42
Connecticut.....	32.89
Delaware.....	46.81
District of Columbia.....	35.10
Florida.....	49.84
Georgia.....	54.10
Hawaii.....	49.72
Idaho.....	61.50
Illinois.....	46.94
Indiana.....	55.13
Iowa.....	54.37
Kansas.....	50.60
Kentucky.....	61.23
Louisiana.....	61.35
Maine.....	56.03
Maryland.....	41.98
Massachusetts.....	39.65
Michigan.....	49.74
Minnesota.....	48.76
Mississippi.....	66.81
Missouri.....	52.38
Montana.....	60.10
Nebraska.....	58.52
Nevada.....	47.15
New Hampshire.....	43.96
New Jersey.....	35.48
New Mexico.....	60.74
New York.....	42.46
North Carolina.....	57.48
North Dakota.....	57.52
Ohio.....	52.61
Oklahoma.....	58.02
Oregon.....	54.63
Pennsylvania.....	51.04
Rhode Island.....	50.09
South Carolina.....	61.32
South Dakota.....	58.79
Tennessee.....	58.93
Texas.....	53.59
Utah.....	62.51
Vermont.....	54.52
Virginia.....	47.24
Washington.....	49.38
West Virginia.....	63.96
Wisconsin.....	52.44
Wyoming.....	58.51



State	Allotment percentage
Guam	70.00
Northern Marianas	70.00
Puerto Rico	70.00
American Samoa	70.00
Virgin Islands	70.00

Dated: December 20, 1988.

**Dodie Truman Borup,**  
Commissioner, Administration for Children,  
Youth and Families.

Approved: December 21, 1988.

**Sydney Olson,**  
Assistant Secretary for Human Development  
Services.

[FR Doc. 88-30108 Filed 12-29-88; 8:45 am]

BILLING CODE 4130-01-M

#### Public Health Service

#### Statement of Organization, Functions, and Delegations of Authority; Food and Drug Administration

Part H, Chapter HF (Food and Drug Administration) of the Statement of Organizations, Functions, and Delegations of Authority for the Department of Health and Human Services (35 FR 3685, February 25, 1970, as amended most recently in pertinent parts at 51 FR 8033, March 7, 1986) is amended to update the functional statements of staffs within the Office of Health Affairs, Food and Drug Administration (FDA). The changes include adding descriptions of the Office's functions regarding patent term restoration, international drug scheduling, health hazard evaluation, and recall classification activities to the functional statements of the Health Assessment Policy Staff within OHA. Technology assessment and technology national policy coverage decisions functions are being added to OHA's Medicine Staff. Minor revisions are also being made to the functional statements of all three OHA staffs to update and clarify them.

Section HF-B, Organization and Functions is amended as follows:

1. Following paragraph (g) *Office of Health Affairs (HFA5)* delete subparagraphs (g-1) through (g-3) in their entirety and insert new subparagraphs (g-1) through (g-3) reading as follows:

(g-1) *International Affairs Staff (HFA56)*. Serves as the Agency focal point for developing and maintaining international communications, policies, and programs.

Establishes and provides an Agency liaison on international activities with

the Department, PHS, and other Federal Government agencies, foreign governments, including foreign embassies, and international organizations.

Represents the Agency at meetings, conferences, and symposia relating to international obligations; briefs Agency participants in such international activities.

Establishes, identifies, interprets, and clarifies, in cooperation with appropriate Agency components, the Agency's international obligations and needs, including those associated with bilateral programs which involve extra-budgetary support.

Establishes and maintains an international information exchange program concerning Agency policies and programs to provide interchange between FDA and counterpart agencies in foreign countries and international organizations.

Assists in the development, negotiation, and monitoring of agreements with foreign governments and international organizations in cooperation with appropriate Agency components; and acts as the Agency focal point for intergovernmental conferences.

Negotiates the preparation and implementation of technical assistance programs (including formal training programs and surveys) with foreign governments and international organizations in areas relating to the Agency mission. Coordinates ongoing technical assistance operations with the Department's Office of International Affairs, the PHS Office of International Health, and appropriate Agency components.

Directs the Agency's International Visitors Program, providing participants with policy briefings, technical training, and/or assistance in response to specific needs.

(g-2) *Medicine Staff (HFA51)*. Provides leadership and direction on medical issues; provides consultation and medical review of clinical/preclinical data for recalls and Agency and departmental reports, as requested by the Agency.

Represents the Agency in matters concerning technology assessment and national policy coverage decision on those technologies involving FDA-regulated products.

Provides an Agencywide focal point for communications with health professional organizations and their publications.

Maintains continual awareness of changing concepts in health care delivery and medical research.

Evaluates their impact on medical programs and policies of the Agency.

Provides medical/scientific reviews of hearing requests and of proposed Commissioner's decisions following initial decision by a public board of inquiry or by the Administrative Law Judge after formal evidentiary hearings.

Advises the Commissioner of the impact of major medical policy initiatives of the Department and makes recommendations for Agency implementation of these programs.

Represents the Agency on task forces, committees, and before Congress on medical policies and long-term program direction and goals of the Agency.

Initiates liaison and coordinates activities with medical, pharmacy, nursing, and related health professionals to promote understanding and support of Agency programs.

(g-3) *Health Assessment Policy Staff (HFA52)*. Serves as the focal point for Agency activities for implementation of Title II of the Drug Price Competition and Patent Term Restoration Act of 1984. Coordinates patent term restoration activities and provides eligibility assistance and regulatory review period determinations to the U.S. Patent and Trademark Office.

Under the provision of the FDA/NIDA Memorandum of Understanding, Provides staff coordination of domestic and international drug scheduling issues. Develops Agency international drug scheduling policies and strategies. Recommends Agency international and domestic scheduling positions to the Assistant Secretary for Health, in cooperation with the National Institute on Drug Abuse, the PHS Office of International Health, other Agency components, and other Federal agencies as appropriate.

Advises the Associate Commissioner and other key Agency officials, including the Commissioner, of the protection needs of human subjects of medical research and of initiatives which will affect Agency activities in regard to human protection. Serves as focal point for all Agency Institutional Review Board activities, including informational and educational activities. Provides staff support to the FDA Research Involving Human Subjects Committee.

Provides staff support in informal administrative hearings and appeals from formal evidentiary hearings. Organizes informal hearings regarding clinical investigators and regulated products and prepares documents for the presiding officer. Reviews initial decision by Public Board of Inquiry or the Administrative Law Judge on appeal

to the Commissioner. Assists in drafting issue memoranda and decisions for the Commissioner after formal evidentiary hearings. Coordinates responses to clinical investigators seeking reinstatement.

Provides reviews and recommendations of health hazard evaluations and recall classification, and recommends changes in the classification as appropriate, in cooperation with other appropriate Agency components.

Serves as the Agency focal point for the coordination of specific health issues, particularly those related to the cross-cutting activities of the Agency's centers and other federal agencies.

Provides assistance, advice, or recommendations to unresolved inter-agency and intra-agency issues and pending legislation affecting certain Agency policies and public health. Evaluates initiatives and actions affecting major health policies. Develops implementation plans for certain Agency actions required by new legislation.

**Robert E. Windom,**  
Assistant Secretary for Health.

Dated: December 20, 1988.

[FR Doc. 88-30069 Filed 12-29-88; 8:45 am]

BILLING CODE 4160-01-M

#### DEPARTMENT OF THE INTERIOR

##### Bureau of Land Management

[AZ-020-09-4212-15; AZA 23648]

#### Realty Action; Classification of Public Minerals for State Indemnity Selection; Arizona

The Arizona State Land Department has petitioned for classification and filed an application to acquire the public minerals, described below, under the provisions of the Enabling Act of June 20, 1910. The state owns the surface.

Gila and Salt River Meridian, Maricopa County

T. 3 N., R. 1 W.,  
Sec. 1, lot 2, SW 1/4 NE 1/4, E 1/2 SE 1/4.  
Containing 187.44 acres.

The Bureau of Land Management will determine the suitability of the mineral disposition including any statutory constraints that would bar transfer.

Classification of the mineral estate would be in accordance with the provisions of 43 CFR Part 2400 and section 7 of the Act of June 28, 1934.

Notice of Realty Action AZA 23330 is hereby terminated as it affects the mineral estate herein described.

For a period of sixty (60) days from the date of publication of this notice in

the Federal Register, interested parties may submit comments to the District Manager, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027. Any adverse comments will be evaluated by the Site Director who may sustain, vacate or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

**Henri R. Bisson,**  
District Manager.

Dated: December 22, 1988.

[FR Doc. 88-30097 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-32-M

[NM-03-09-7122-8004]

#### Intent To Prepare an Environmental Impact Statement on Federal Coal Leasing in the Fence Lake Area of Catron and Cibola Counties, NM

**AGENCY:** Bureau of Land Management, Las Cruces District, New Mexico.

**ACTION:** Notice of intent to prepare an environmental impact statement (EIS) and notice of scoping meetings.

**SUMMARY:** Pursuant to section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, the Bureau of Land Management (BLM), Las Cruces District, will be directing the preparation of an EIS to be prepared by a third-party contractor on the impacts of Federal coal leasing on public land and Federal mineral ownership in the Fence Lake Area of Catron and Cibola Counties, New Mexico.

**DATE:** Comments relating to scoping of this Federal coal leasing proposal will be accepted until February 10, 1989.

**ADDRESS:** Comments should be sent to: Charles Hodgins, Project Coordinator, Bureau of Land Management, Las Cruces District, 1800 Marquess, Las Cruces, New Mexico 88005.

**FOR FURTHER INFORMATION CONTACT:** Charles Hodgins, Project Coordinator, (505) 525-8228 or John Kenny, Environmental Specialist, (505) 988-6024.

**SUPPLEMENTARY INFORMATION:** The Salt River Project Agricultural Improvement and Power District (SRP) has submitted a Federal coal lease application for approximately 6,800 acres within the Fence Lake Area. The application was prepared pursuant to title 43 Code of Federal Regulations (CFR), subpart 3400 (Lease by Application). BLM has determined that an EIS must be prepared to comply with the provisions of NEPA, and all subsequent regulations implementing this law.

To expedite the leasing process, SRP and BLM signed, on May 9, 1988 a Memorandum of Agreement to allow a third-party environmental contractor to prepare the EIS as authorized by NEPA, 42 USC Part 4321 and 43 CFR 3400 and Section 307 of the Federal Land Policy and Management Act of 1976 (90 Statute 2765). The Fence Lake Project EIS will tier off the Socorro Resource Management Plan (RMP).

During the development of the Socorro RMP, all four land-use planning screens for coal (coal development potential, surface owner consultation, unsuitability criteria, and multiple use screens) were applied to the Fence Lake Area. The remaining public land and Federal mineral ownership containing approximately 31,640 acres will be carried forward for impact analysis in the Fence Lake Project EIS.

The San Juan River Regional Coal Team (RCT) decided at the August 9, 1988 meeting to recommend changing from a regional leasing mode to a lease by application mode. Acting upon that recommendation, the BLM Director opened the region to lease by application on December 7, 1988 (53 FR 44956, November 7, 1988). Under lease by application, a site-specific EIS would be completed to address cumulative impacts of Federal coal leasing in the Fence Lake Project Area.

The regulations set forth in Title 43 of the CFR, subpart 3400, provide the framework under which the Department of the Interior conducts leasing of the rights to extract Federal coal. The objectives of these regulations are to establish policies and procedures for considering development of coal deposits through a leasing system involving land-use planning and environmental impact analysis. Additionally, the regulations are intended to ensure that coal deposits are developed in consultation, cooperation, and coordination with the public, State and local governments, Indian tribes, and involved Federal agencies.

BLM's scoping process for the EIS will include: (1) Identification of issues to be addressed; (2) Identification of viable alternatives; and (3) Notification of interested groups, individuals, and agencies so that additional information concerning these issues can be obtained.

The scoping process will consist of a Notice of Intent in the Federal Register; a news release in State and local papers announcing the start of the EIS process; newsletters of invitation to participate in the scoping process; presentations to groups and governmental agencies; and public scoping meetings which will be



held at the following times and locations.

Date	Time	Meeting location
Jan. 30, 1989	7:00 p.m.	Quemado, New Mexico High School Multipurpose Room.
Jan. 31, 1989	7:00 p.m.	Reserve, New Mexico Reserve Community Center.
Feb. 1, 1989	7:00 p.m.	Zuni, New Mexico Tribal Assembly Room.
Feb. 2, 1989	7:00 p.m.	St. Johns, Arizona 4-H Community Center.
Feb. 7, 1989	7:00 p.m.	Albuquerque, New Mexico Marriott Hotel 2101 Louisiana Blvd., NE.

Larry L. Woodard,  
State Director.  
[FR Doc. 88-30054 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-FB-M

[Alaska AA-48675-0]

#### Proposed Reinstatement of a Terminated Oil and Gas Lease; Alaska

In accordance with Title IV of the Federal Oil and Gas Royalty Management Act (Pub. L. 97-451), a petition for reinstatement of oil and gas lease AA-48675-0 has been received covering the following lands:

Copper River Meridian, Alaska

T. 11 N., R. 10 W.,  
Sec. 35, E 1/2—(320 acres)

The proposed reinstatement of the lease would be under the same terms and conditions of the original lease, except the rental will be increased to \$5 per acre per year, and royalty increased to 16% percent. The \$500 administrative fee and the cost of publishing this Notice have been paid. The required rentals and royalties accruing from July 1, 1988, the date of termination, have been paid.

Having met all the requirements for reinstatement of lease AA-48675-0 as set out in section 31(d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective July 1, 1988, subject to the terms and conditions cited above.

Dated: December 12, 1988.  
Kay F. Kletka,  
Chief, Branch of Mineral Adjudication.  
[FR Doc. 88-30056 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-JA-M

[WY-920-09-4111-15; WYW97286]

#### Proposed Reinstatement of Terminated Oil and Gas Lease; Wyoming

December 19, 1988.

Pursuant to the provisions of Pub. L. 97-451, 96 Stat. 2462-2466, and Regulation 43 CFR 3108.2-3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW97286 for lands in Sweetwater County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at rates of \$5.00 per acre, or fraction thereof, per year and 16 2/3 percent, respectively.

The lessee has paid the required \$500 administrative fee and \$125 to reimburse the Department for the cost of this Federal Register notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW97286 effective February 1, 1988, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Andrew L. Tarshis,  
Chief, Leasing Section.  
[FR Doc. 88-30057 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-22-M

#### Realty Action; Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent to Prepare a Planning Amendment to the Royal Gorge Management Framework Plan and Notice of Realty Action COC-44110, Exchange of Public Land in Fremont County for Private Land in Fremont and Park Counties, Colorado. Availability of Environmental Assessment and Land Report.

SUMMARY: The following described public lands are to be considered for suitability for disposal by exchange under Section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716:

Sixth Principal Meridian, Colorado

T. 16 S., R. 73 W.,  
Sec. 6, Lots 2, 5, and 9—128.02 acres

New Mexico Principal Meridian

T. 51 N., R. 11 E.,  
Sec. 2, SW 1/4 SE 1/4—40 acres  
Sec. 15, S 1/2 S 1/2—160 Acres

T. 51 N., R. 12 E.  
Sec. 1, Lot 2—23.05 acres  
Sec. 3, Lots 3 and 4, S 1/2 SW 1/4—130.80 acres  
Sec. 4, Lot 1, SE 1/4 SE 1/4—64.47 acres  
Sec. 6, Lot 2, SW 1/4 SE 1/4—68.40 acres  
Sec. 9, E 1/2—E 1/2—160 acres  
Sec. 14, SW 1/4 NW 1/4, N 1/2 SW 1/4, SW 1/4 SW 1/4—160 acres  
Sec. 15, E 1/2—320 acres  
Sec. 18, E 1/2 SE 1/4—80 acres  
Sec. 19, NE 1/4 NE 1/4, NE 1/4 SW 1/4—80 acres  
Sec. 22, N 1/4 NE 1/4—80 acres  
Sec. 23, N 1/4 NW 1/4—80 acres  
Sec. 30, Lot 4, SW 1/4 SE 1/4, SE 1/4 SW 1/4—119.17 acres  
Sec. 31, Lot 1, NE 1/4 NW 1/4—79.39 acres  
Sec. 32, NE 1/4—160 acres  
Fremont County Total Selected Public Land—1833.30 acres

If these lands are found suitable for disposal, the United States will acquire by exchange the following described private land of equal value from Mr. Richard Gossage.

Sixth Principal Meridian

T. 15 S., R. 74 W.,  
Sec. 33, NW 1/4 SW 1/4, S 1/2 S 1/2, N 1/2 SE 1/4—280 acres  
Sec. 34, W 1/2 E 1/2, NE 1/4 NW 1/4, SW 1/4—360 acres  
Park County Total Offered Private Land—640 acres

New Mexico Principal Meridian

T. 51 N., R. 12 E.  
Sec. 4, Lots 3 and 4, S 1/2 SW 1/4—131.36 acres  
Sec. 5, Lots 1, 2, 3, and 4, S 1/2 S 1/2—266.00 acres  
Sec. 8, Lots 1 and 2, M.S. 16073, E 1/2, W 1/2 NW 1/4, SW 1/4—639.89 acres  
Sec. 9, NW 1/4, N 1/2 SW 1/4—240 acres  
Fremont County Total Offered Private Land—1277.25 acres  
Grand Total Offered Private Land—1917.25 acres

DATES: Interested parties may submit comments to the Bureau of Land Management, at the address shown below until February 17, 1989. For Further Information Contact: Mr. Mac Berta, Area Manager Royal Gorge Resource Area, 3170 East Main Street, P.O. Box 311, Canon City, Colorado 81212. (719) 275-0631.

SUPPLEMENTARY INFORMATION: A draft environmental assessment and land report will be available for review. Any adverse comments will be evaluated by the District Manager, who may sustain, vacate, or modify this realty action. In the absence of any action by the District Manager, this realty action will become final.

The publication of this notice segregates the public lands described above from the public land laws, including the mining laws, but not from exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976 for a period of 2 years from

the date of first publication. The exchange will be made subject to:

1. A reservation to the United States of a right-of-way for ditches or canals in accordance with 43 U.S.C. 945.

2. All valid existing rights.

Donnie R. Sparks,  
District Manager.  
[FR Doc. 88-30052 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-JB-M

#### Realty Action; Rio Grande County, CO; Correction

AGENCY: Bureau of Land Management, Interior.

ACTION: Correction.

SUMMARY: The legal description for the public lands classified for Recreation and Public Purposes in the notice published on August 9, 1988 (53 FR 29955), should read as follows:

New Mexico Principal Meridian, Colorado

T. 39 N., R. 6 E.,  
Sec. 11, E 1/2 NE 1/4.

Containing 60 acres.

Donnie R. Sparks,  
District Manager.  
[FR Doc. 88-30051 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-JB-M

[NV-930-09-4212-11; N-48049]

#### Realty Action; Orovida, NV

ACTION: Notice of realty action—direct sale of Public Lands for a waste water treatment facility to Humboldt County for community of Orovida, Nevada.

SUMMARY: Notice is hereby given that pursuant to the Act of October 21, 1976, Pub. L. 94-579, The Federal Land Policy and Management Act, Section 203, the Bureau of Land Management will sell to Humboldt County a parcel of public land for the construction and operation of a waste water treatment facility to serve the community of Orovida, Nevada. The following public lands are involved:

Mount Diablo Meridian, Nevada

T. 43 N., R. 37 E.,  
Sec. 34, SE 1/4 NE 1/4—40 acres

For a period of 45 days from the date of publication of this notice, interested parties may submit comments to the District Manager, Bureau of Land Management, 705 East 4th Street, Winnemucca, NV 89445.

DATE: January 30, 1989.

FOR FURTHER INFORMATION CONTACT: Hal Green, District Realty Specialist, Bureau of Land Management, 705 East 4th Street, Winnemucca, NV 89445 (702) 623-3676.

SUPPLEMENTAL INFORMATION: Publication of this notice in the Federal Register shall segregate the public lands

to the extent that the land will not be subject to appropriation under the public land laws, including the mining laws. Any subsequent application shall not be considered as filed and shall be returned to the applicant. This segregative effect of the notice of realty action shall terminate upon issuance of the patent or other document of conveyance to Humboldt County or publication of the notice of termination in the Federal Register or 270 days from the date of publication of this notice, whichever occurs first.

Dated: December 19, 1988.  
Ronald Wenker,  
District Manager, Winnemucca.  
[FR Doc. 88-30055 Filed 12-29-88; 8:45 am]  
BILLING CODE 4310-JC-M

[UT-020-89-4212-14; U-61694]

#### Realty Action; Sale of Public Land in Box Elder County, UT

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action—sale of public lands.

SUMMARY: The following described land has been examined and identified as suitable for disposal under section 203 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713), at no less than the appraised fair market value shown:

Parcel No.	Legal description	Acreage	Value	Preference right bidder
U-61694	T. 15 N., R. 6 W., SLM sec. 31, lots 14, 15, 16	100.77	\$7,550	T. Scott Tolman

The above described land will be sold in order to dispose of lands which because of location and other characteristics are difficult and uneconomical to manage. The sale is consistent with the Bureau's planning system and the public interest will be served by offering these lands for sale.

The lands described are hereby segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action.

The above described land will be offered for sale on March 8, 1989, by sealed bid under modified competitive procedures. The preference right bidder listed above will have the opportunity to meet the highest bid submitted for the parcel as shown. All bids must be received by 10 a.m. on March 8, 1989, at the Bureau of Land Management (BLM) Salt Lake District Office at 2370 South

2300 West, Salt Lake City, Utah 84119. Bids will be opened and a high bidder declared at 11 a.m. on March 8, 1989. No bids will be accepted for less than the appraised fair market value shown above.

Under modified competitive sale procedures, an apparent high bid will be declared at public auction. The apparent high bidder and the preference right bidder will be notified. The preference right bidder shall have 10 days from the date of the sale to exercise the preference consideration given to meet the high bid. Should the preference right bidder fail to submit a bid that matches the apparent high bid within which the specified time period, the apparent high bidder shall be declared high bidder.

Bids may be made by a principal or duly qualified agent. Qualified bidders include: citizens of the United States 18

years of age or over; a corporation subject to the laws of any state or of the United States; a state, instrumentality or political subdivision authorized to hold property; and any entities capable of holding lands or interests therein under the laws of the state within the lands to be conveyed are located. Entities include, but are not limited to, associations, partnerships, and other legal entities.

Each bid shall be accompanied by a certified check, postal money order, bank draft or cashier's check, made payable to the Department of the Interior, BLM, for not less than one-third of the amount bid and shall be enclosed in a sealed envelope clearly marked "Bid for Public Land, Tract Number U" (tract numbers are shown above). If two or more bids for the same amount are received, the apparent high



bidder shall be determined by supplemental bidding pursuant to 43 CFR 2711.3-1(c).

The terms and conditions applicable to the sale are:

1. The high bidder shall submit the remainder of the full bid amount within 180 days from date of sale. Failure to submit the full bid price prior to, but not including the 180th day following the sale, shall result in the disqualification of the bidder and the deposit shall be forfeited.

2. The authorized officer may reject the highest qualified bid and release the bidder from his/her obligation and withdraw the tract for sale, if he determines that consummation of the sale would be inconsistent with provisions of any existing law or collusive or other activities have hindered or restrained free and open bidding or consummation of the sale would encourage or promote speculation in public lands.

3. The patent will contain a reservation for ditches and canals and be subject to all valid existing rights.

4. All minerals will be reserved to the United States including the right of ingress or egress for mineral development.

5. The United States does not, by the terms of this sale, guarantee to any party physical or legal access to the tract of land being sold.

6. In the event that any of the lands offered for sale are not sold on the date of the sale, they shall continue to be offered for sale at the appraised fair market value on the third Wednesday of each succeeding month after that date until sold or until further notice. Any person wishing to purchase any of these lands after the initial date of sale must present his/her bid at the BLM office shown above accompanied by a certified check, postal money order, bank draft or cashier's check for not less than one-third of the amount bid. All applicable terms and conditions as listed above will continue to apply regardless of when the land is actually sold except there will be no preference right bidder privilege after the original date of sale.

For a period of 45 days after the date of publication of this notice, interested parties may submit comments to the District Manager, BLM, 2370 South 2300 West, Salt Lake City, Utah 84119. Any adverse comments will be evaluated by the State Director who may vacate or modify this realty action and issue a final determination. In the absence of any action by the State Director, this realty action will become the final

determination of the Department of the Interior.

Deane H. Zeller,

District Manager.

Date: December 14, 1988.

[FR Doc. 88-30135 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-DQ-M

[WY-060-09-4212-12: WYW114131]

#### Realty Action; Exchange; Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Realty Action for the Exchange of Public Lands in Crook and Weston Counties, Wyoming for State lands in Johnson County, Wyoming.

**SUMMARY:** The Bureau of Land Management (BLM) proposes to exchange public lands in Crook and Weston Counties, Wyoming for State lands in Johnson County, Wyoming. The following public lands administered by the BLM are being considered for disposal by exchange pursuant to section 206 of the Federal Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C. 1716:

T. 47 N., R. 60 W.,  
Sec. 9, NE¼, E½W¼;  
Sec. 10, lots 5 and 8;  
Sec. 15, lots 5-7 incl.;  
Sec. 21, NW¼NW¼.

T. 48 N., R. 60 W.,  
Sec. 4, lot 5;  
Sec. 7, lot 4;  
Sec. 15, lots 5-8 incl.;  
Sec. 17, lot 5;  
Sec. 18, lot 5;  
Sec. 22, lots 5-7 incl.

T. 46 N., R. 62 W.,  
Sec. 15, NW¼NW¼, N¼SW¼;  
Sec. 23, SW¼NE¼, SE¼NW¼;  
Sec. 25, NW¼;  
Sec. 27, NE¼SE¼, SW¼SE¼.

T. 55 N., R. 65 W.,  
Sec. 31, lots 8-10 incl.

T. 54 N., R. 66 W.,  
Sec. 25, SW¼SW¼;  
Sec. 26, S¼SE¼;  
Sec. 27, NE¼NW¼, SW¼SW¼;  
Sec. 35, N¼NE¼.

The above land aggregates 1701.25 acres.

In exchange, the United States proposes to acquire lands from the State of Wyoming described as:

Sixth Principal Meridian

T. 42 N., R. 84 W.,  
Sec. 21, S¼;  
Sec. 22, NE¼, S¼NW¼, SW¼,  
NW¼SE¼;  
Sec. 23, NW¼NE¼, N¼NW¼.

The above land aggregates 880 acres.

**FOR FURTHER INFORMATION CONTACT:** District Manager, Casper District Office, 1701 East 'E' Street, Casper, WY 82601 (307) 261-5101.

**SUPPLEMENTARY INFORMATION:** The BLM proposes to exchange public land with the State of Wyoming in order to achieve more efficient management of the public lands through consolidation of ownership. Conveyance of the lands would be subject to any valid rights identified during the evaluation process.

The EA/Land Report covering the proposed exchange when completed as well as the appropriate planning documents will be available for review at the following locations:

Bureau of Land Management, Casper District Office, 1701 East 'E' Street, Casper, WY 82601

Bureau of Land Management, Buffalo Resource Area, 189 North Cedar, Buffalo, WY 82834

Bureau of Land Management, Newcastle Resource Area, 1501 Highway 16 Bypass, Newcastle, WY 82701

The Bureau of Land Management administered public lands described above are segregated from entry under the mining laws, except the mineral leasing laws, effective upon publication of this Notice in the Federal Register. The segregation effect will terminate an issuance of the patent to the State of Wyoming, upon publication in the Federal Register of termination of the segregation, or 2 years from the date of this publication, whatever comes first.

For a period of 45 days from the date of this notice interested parties may submit comments on this action to the District Manager, Casper District, Bureau of Land Management, 1701 East 'E' Street, Casper, WY 82601. Any adverse comments will be evaluated by the State Director, who may vacate or modify the realty action and issue a final determination. In the absence of adverse comments or in the absence of any action by the State Director, this realty action will become final.

James W. Monroe,  
District Manager.

Date: December 22, 1988.

[FR Doc. 88-30064 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-22-M

[ID-942-09-4730-12]

#### Idaho; Filing of Plats of Survey

The plats of survey of the following described lands were officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 10:00 a.m., December 22, 1988.

The plat representing the dependent resurvey of a portion of the south and west boundaries and subdivisional lines, and the subdivision of certain sections in T. 11 S., R. 27 E., Boise

Meridian, Idaho, Group No. 665, was accepted December 12, 1988.

The supplemental plat prepared to show the subdivision of old lot 3 into lots 5 and 6 in section 3, T. 15 S., R. 22 E., Boise Meridian, Idaho, was accepted December 12, 1988.

The survey was executed and the supplemental plat was prepared to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Idaho State Office, Bureau of Land Management, 3380 Americana Terrace, Boise, Idaho, 83706.

December 22, 1988.

Duane E. Olsen,  
Chief Cadastral Surveyor for Idaho.

[FR Doc. 88-30058 Filed 12-29-88; 8:45 am]

BILLING CODE 4310-GG-M

#### INTERNATIONAL TRADE COMMISSION

[Investigation No. TA-131(b)-14]

#### Probable Economic Effect on U.S. Industries and Consumers of Modification of U.S. Tariffs and Modification or Removal of Certain U.S. Nontariff Measures

**AGENCY:** International Trade Commission.

**ACTION:** Institution of investigation and scheduling of public hearings.

**SUMMARY:** Following receipt on December 23, 1988, of a request from the U.S. Trade Representative (USTR), the Commission instituted investigation No. TA-131(b)-14 under section 131(b) of the Trade Act of 1974, as amended (19 U.S.C. 2151(b)).

As requested by USTR, the Commission, in accordance with section 131(b) of the Trade Act, will—

(1) Advise the President with respect to each article on a list to be supplied to the Commission shortly, of its judgment as to the probable economic effect of modification of the tariff on industries producing like or directly competitive articles and on consumers. It is anticipated that this list will cover substantially all tariff line items. In providing this advice the Commission will also identify in its report those articles for which no staging of duty reductions is required under paragraph 1102(a)(3)(B) of the Omnibus Trade and Competitiveness Act of 1988; and

(2) With respect to products of least-developed developing countries (LDDC's) and beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA), offer separate

advice on the additional effect of providing immediate duty-free treatment for products (other than textiles and apparel) of LDDC's as a group and CBERA countries as a group.

USTR also indicated that it would request advice on the modification or removal of certain U.S. nontariff measures which have been requested informally by other governments in the context of work in the Uruguay Round Negotiating Group on Nontariff Measures. USTR indicated that it would provide its list of such measures to the Commission in the near future.

USTR notes that its request by no means implies an intention to take action of these tariff and nontariff measures. It merely indicates an interest in obtaining factual advice from the Commission on the probable economic effects of their reduction or elimination.

As requested by USTR, the Commission will provide the advice with respect to U.S. duties not later than 6 months after receipt of the request and will provide as much advice at that time with respect to the nontariff measures as is practical. The Commission will structure its advice in terms of the *Harmonized Tariff Schedule of the United States Annotated for Statistical Reporting Purposes (HTS)*, First Edition, Supplement 3 (USITC publication 2030). Copies of the USTR request of December 22, 1988 and the lists of articles and nontariff measures (when available) may be obtained from the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

**EFFECTIVE DATE:** December 27, 1988.

**FOR FURTHER INFORMATION CONTACT:** Aaron Chesser (202-252-1380) or Sylvia McDonough (202-252-1393), Office of Industries, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. For information on the legal aspects of the investigation, contact William W. Gearhart of the Commission's Office of the General Counsel (202-252-1091). For information on a product basis, contact the appropriate member of the Commission's Office of Industries, as follows:

(1) Agriculture, Fisheries, and Forest Products Division, David Ingersoll, Chief (202-252-1309)

(2) Textiles, Leather Products, and Apparel Division, David Konkel, Chief, (202-252-1451)

(3) Energy and Chemicals Division, John Gersic, Chief (202-252-1342)

(4) Minerals and Metals Division, Larry Brookhart, Chief (202-252-1419)

(5) Machinery and Equipment Division, Aaron Chesser, Chief (202-252-1380)

(6) General Manufactures Division, Walter Trezevant, Chief, (202-252-1482)

#### Public Hearings and Prehearing Briefs

As previously announced on November 15, 1988 (53 FR 47589, November 23, 1988) and again by USITC Press Release on November 21, 1988, the Commission will hold a series of hearings throughout the United States to solicit the views and opinions of the business community, labor, consumers, and other interested parties in connection with this investigation.

All testimony and written briefs should relate only to the areas that the Commission will address in its report to the USTR. As the Commission has been requested to provide detailed advice on narrowly defined industries and product lines, testimony should focus on specific industries and products rather than on broad issues of trade policy and strategy.

#### Procedure for Conduct of Hearings

The individual hearings in connection with this investigation will be held at the hearing sites indicated below; the exact hearing room at each facility will be posted at an obvious location inside the main entrance at each location. All hearings will begin promptly at 9:30 a.m., local time, on the day indicated. Persons wishing to appear at one of the public hearings must file a request to appear not later than noon of the deadline date indicated for that particular hearing, and must file any prehearing briefs (original and 14 copies) on the date indicated with the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. All persons will have the right to appear in person or be represented by counsel, to present information, and to be heard. Such requests shall contain the following information:

a. A description of the article or articles on which testimony will be presented, including, if possible, the item number or numbers in the HTS covering the article or articles.

b. The name and organization of the witness or witnesses who will testify, and the name, address, telephone number, and organization of the person filing the request.

c. A statement indicating whether the testimony to be presented will be on behalf of importers, domestic producers, consumers, or other interests.

d. A careful estimate of the aggregate time desired for presentation of oral



testimony by all witnesses for whose appearances the request is filed.

#### Allotment of Time for Oral Presentation

Because the President's list will cover substantially all tariff line items, limitation of time for the presentation of oral testimony is in the public interest to ensure that all viewpoints are aired. Accordingly, in scheduling appearances at the hearing the time to be allotted to witnesses for the presentation of oral testimony will be limited. Individuals and individual groups are generally limited to 10 minutes for the presentation of direct testimony. Witnesses should be prepared to provide additional information in response to questions by the Commission and its staff. Supplemental written materials will be allowed in all cases, and may be submitted at the time of presentation of oral testimony.

To the extent practicable the hearings at each city will follow the numeric order of Chapters 1-99 of the HTS.

Questioning of witnesses will be limited to members of the Commission and its staff.

Witnesses should be aware that they need not appear at more than one Commission hearing to restate their views. In the interest of time conservation at the hearings, witnesses are requested to condense their presentations to summaries only.

#### Posthearing Submissions

Responses to Commission questions are due from witnesses no later than the close of business on the date specified for each hearing, which is 7 business days following the conclusion of the hearing.

#### Other Written Submissions

In lieu of, or in addition to, appearance at the public hearings, interested persons are invited to submit written statements concerning the investigation. Commercial or financial information which a submitting party desires the Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting confidential treatment must

conform with the requirements of section 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). All written submissions, except for confidential business information, will be made available for inspection by interested persons. To be assured of consideration by the Commission, written statements should be submitted at the earliest possible date, but not later than April 13, 1989. All submissions should be addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

Hearing-impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on (202) 724-0002.

#### Schedule of Hearings and Related Documentation

Following is the schedule of public hearings and deadlines for filing appropriate notices and other documentation in connection with the hearings:

SCHEDULE FOR MTN FIELD HEARINGS BY THE U.S. INTERNATIONAL TRADE COMMISSION

Hearing city and location	Hearing date (1989)	Deadline for notification to appear at hearing (1989)	Deadline for filing prehearing briefs (1989)	Deadline for posthearing submissions (1989)
Houston, TX: Houston Marriott Hotel at the Astrodome, 2100 S. Braeswood at Greenbriar, Houston, TX 77030.	Mon., Jan. 30.....	Noon, Jan. 19.....	Noon, Jan. 23.....	Feb. 8
New Orleans, LA: Clarion Hotel, 1500 Canal St., New Orleans, LA 70112	Wed., Feb. 1.....	.....do.....	Noon, Jan. 25.....	Feb. 10
Miami, FL: Miami Marriott Dadeland Hotel, 9090 South Dadeland Blvd., Miami, FL 33156	Fri., Feb. 3.....	.....do.....	Noon, Jan. 27.....	Feb. 14
Atlanta, GA: Lanier Plaza Hotel and Conference Center, 418 Armour Dr., NE., Atlanta, GA 30324	Mon., Feb. 6.....	.....do.....	.....do.....	Feb. 15
Los Angeles, CA: Hyatt Wilshire Hotel, 3515 Wilshire Blvd., Los Angeles, CA 90010	Mon., Feb. 13.....	Noon, Jan. 24.....	Noon, Feb. 6.....	Feb. 23
San Francisco, CA: Hyatt Regency San Francisco, 5 Embarcadero Center, San Francisco, CA 94111	Wed., Feb. 15.....	.....do.....	Noon, Feb. 8.....	Feb. 27
Portland, OR: The Greenwood Inn, 10700 SW. Allen Blvd., Beaverton, OR 97005	Fri., Feb. 17.....	.....do.....	Noon, Feb. 10.....	Mar. 1
Denver, CO: Hyatt Regency Denver, 1750 Welton St., Denver, CO 80202	Fri., Feb. 24.....	Noon, Feb. 6.....	Noon, Feb. 17.....	Mar. 7
Chicago, IL: Sheraton Plaza Chicago, 160 East Huron, Chicago, IL 60611	Mon., Feb. 27.....	.....do.....	.....do.....	Mar. 8
Minneapolis, MN: Minneapolis Metrodome Hilton Hotel, 1330 Industrial Blvd., Minneapolis, MN 55413	Wed., Mar. 1.....	.....do.....	Noon, Feb. 22.....	Mar. 10
Kansas City, MO: Adam's Mark Hotel, 9103 E. 39th St., Kansas City, MO 64133	Thurs., Mar. 2.....	.....do.....	Noon, Feb. 23.....	Mar. 13
New York, NY: Sheraton Centre Hotel and Towers, 7th Ave. at 52nd St., New York, NY 10019	Mon., Mar. 13.....	Noon, Feb. 21.....	Noon, Mar. 6.....	Mar. 22
Boston, MA: Thomas P. O'Neill Federal Building, 10 Cosway, Boston, MA 02107	Wed., Mar. 15.....	.....do.....	Noon, Mar. 8.....	Mar. 24
Pittsburgh, PA: Hyatt Pittsburgh, 112 Washington Pl., Pittsburgh, PA 15219	Fri., Mar. 17.....	.....do.....	Noon, Mar. 10.....	Mar. 28
Washington, DC: U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436	Mon., Apr. 3 and Tue., Apr. 4.	Noon, Mar. 13.....	Noon, Mar. 27.....	Apr. 13

By order of the Commission.

Issued: December 28, 1988.

Kenneth R. Mason,

Secretary.

[FR Doc. 88-30145 Filed 12-29-88; 8:45 am]

BILLING CODE 7035-02-M

#### INTERSTATE COMMERCE COMMISSION

##### Motor Carrier Applications To Consolidate, Merge, or Acquire Control

The following applications seek approval to consolidate, purchase, merge, lease operating rights and properties, or acquire control of motor carriers pursuant to 49 U.S.C. 11343 or 11344. Also, applications directly related to these motor finance applications (such as conversions, gateway eliminations, and securities issuances) may be involved.

The applications are governed by 49 CFR 1182.1.

Persons wishing to oppose an application must follow the rules under 49 CFR 1182.2. If the protest includes a request for oral hearing, the request shall meet the requirements of 49 CFR 1182.3 and shall include the required certification. Failure seasonably to oppose will be construed as a waiver of opposition and participation in the proceeding.

In the absence of legally sufficient protests as the finance application or any application directly related thereto filed within 45 days of publication (or, if the application later becomes unopposed), appropriate authority will be issued to each applicant (unless the application involves impediments) upon compliance with certain requirements which will be set forth in a notification of effective of this decision-notice.

Application(s) must comply with all conditions set forth in the grant or grants of authority within the time period specified in the notification of effectiveness of this decision-notice or the application of a non-complying applicant shall stand denied.

#### Findings

The finding for these application are set forth at 49 CFR 1182.6.

No. MC-F-19287, filed November 4, 1988.

Leisure Time Tours [Leisure] (4 Leisure Lane, Mahwah, NJ 07430)—Purchase (Portion)—All Jersey Trails, Inc. [Jersey] (284 Main Street, Butler, NJ 07405), and Atlantic Coast Tours, Inc. [Atlantic] (284 Main Street, Butler, NJ 07405); Gerdaneu, Inc. [Gerdaneu] (4 Leisure Lane, Mahwah, NJ 07430)—

Purchase (Portion)—All Jersey Trails, Inc.

Representative: Steven Morey Greenberg, Two University Plaza, Hackensack, NJ 07601; (201) 487-7755.

Leisure (MC-142011) seeks authority to purchase: (1) The operating authority held by Jersey in Certificate No. CB-95232 (Sub-No. 3), authorizing passenger transportation, over regular routes, extending generally between various points in northern New Jersey and southern New York and Atlantic City, NJ; (2) the New Jersey intrastate operating rights held by Jersey in Route File Nos. 668-520, 669-520, 670-520, 671-520, 672-520, 673-520, 686-520, and 551-520, authorizing regular-route passenger transportation within New Jersey and to and from hotels and casinos in Atlantic City, NJ; (3) Jersey's entire fleet of 5 buses; and (4) New York intrastate operating rights held by Atlantic in Case No. 25311, authorizing passenger transportation within New York as a contract carrier.

Gerdaneu, a noncarrier, seeks authority to purchase: (1) The operating authority held by Jersey in Certificate No. MC-95232 (Sub-No. 1), authorizing passenger transportation, in charter and special operations, between points in the United States (except Hawaii); and (2) the New Jersey intrastate operating rights held by Jersey in Docket No. 7311-906 NJPUC No. 255C, authorizing passenger transportation within New Jersey in charter and special operations.

In connection with the transaction, (a) Jersey will surrender Certificate No. MC-95232 (Sub-No. 2), authorizing passenger transportation, over regular routes, between certain points in New Jersey and New York, and (b) Atlantic will surrender Certificate No. MC-145784 (Sub-No. 1), authorizing passenger transportation, in charter and special operations, and Certificate No. MC-145784, authorizing passenger transportation over irregular routes. Both Jersey and Atlantic, accordingly, will cease operations.

Jersey and Atlantic are each wholly owned by Arthur Jordon, a noncarrier individual. Leisure and Gerdaneu are each owned by Gerald Mercadante (70 per cent), Daniel Mercadante (15 per cent), and Eugenia Opperman (15 per cent).

Decided: December 21, 1988.

By the Commission, Motor Carrier Board, Members Guyton, Barnes, and Hodge (Board Member Hodge not participating).

Noreta R. McGee,

Secretary.

[FR Doc. 30089 Filed 12-29-88; 8:45 am]

BILLING CODE 7035-01-M

#### DEPARTMENT OF JUSTICE

##### Antitrust Division

##### Notice Pursuant to the National Cooperative Research Act of 1984, Petroleum Environmental Research Forum

Notice is hereby given that, on December 1, 1988, pursuant to section 6(a) of the National Cooperative Research Act of 1984, 15 U.S.C. 4301 *et seq.* ("the Act"), the participants of the Petroleum Environmental Research Forum ("PERF") Project No. 87-05, titled "Microbiological Degradation of Petroleum Oily Sludges", filed a written notification simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to Project 87-05 and (2) the nature and objective of the research program to be performed in accordance with said project. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties participating in Project No. 87-05 together with the nature and objective of the research program are given below.

The current parties to Project 87-05 identified by this notice are: Amoco Oil Company; Chevron Research Company; Conoco Inc.; and Mobil Research & Development Corporation. The objective of this project is to conduct research and development toward establishing a commercially feasible process for the microbiological degradation of petroleum oily sludges. Participation in this project will remain open until May 15, 1989 or the completion of the First Step of the research and development, whichever is earlier, and the parties intend to file additional written notification disclosing all changes in membership of this project. The "First Step" is demonstration (on a bench scale) of a biotreatment process(es) for petroleum oily sludges. Information regarding participation in this project may be obtained from Chevron Corporation, P.O. Box 7141, San Francisco, California 94120-7141.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 88-30049 Filed 12-29-88; 8:45 am]

BILLING CODE 4410-01-M



## DEPARTMENT OF LABOR

Employment Standards  
Administration, Wage and Hour  
DivisionMinimum Wages for Federal and  
Federally Assisted Construction;  
General Wage Determination  
Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the Federal Register, or on the date written notice is received by the agency, whichever is

earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S-3504, Washington, DC 20210.

Modifications to General Wage  
Determination Decisions

The numbers of the decisions listed in the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and Related Acts" being modified are listed by Volume, State, and page number(s). Dates of publication in the Federal Register are in parentheses following the decisions being modified.

## Volume I:

None.

## Volume II:

None.

## Volume III:

None.

General Wage Determination  
Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across

the country. Subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 783-3238.

When ordering subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any of or all of the three separate volumes, arranged by State. Subscriptions include an annual edition (issued on or about January 10 which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed at Washington, DC, this 23 day of December 1988.

Robert V. Setera,  
Acting Director, Division of Wage  
Determinations.

[FR Doc. 88-29880 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-27-M

Employment and Training  
AdministrationInvestigations Regarding  
Certifications of Eligibility To Apply for  
Worker Adjustment Assistance;  
Alamco, Inc., et al.

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 9, 1989.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than January 9, 1989.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of

Labor, 601 D Street NW., Washington, DC 20213.

Signed at Washington, DC, this 5th day of December 1988.

Marvin M. Fooks,  
Director, Office of Trade Adjustment  
Assistance.

## APPENDIX

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Alamco, Inc. (Workers)	Clarksburg, WV	11/18/88	11/4/88	22,007	Oil & Gas.
Allegheny Nuclear Surveys, Inc. (Workers)	Weston, WV	11/18/88	11/16/88	22,008	Do.
Do.	Elderton, PA	11/18/88	11/16/88	22,009	Do.
Atlas Energy Group, Inc. (Workers)	Copopolis, PA	11/18/88	11/16/88	22,010	Do.
B.B.&K Oil Co. (Company)	Bradford, PA	11/18/88	11/10/88	22,011	Do.
Bechtel Construction, (UAJAPPI)	San Francisco, CA	11/18/88	11/14/88	22,012	Do.
Beu-Tex (Workers)	Morganton, NC	11/18/88	11/14/88	22,013	Fabric.
Bragg Crane & Rigging (Workers)	Long Beach, CA	11/18/88	11/1/88	22,014	Oil & Gas
Bullock Drilling, Inc. (Workers)	Casper, WY	11/18/88	11/17/88	22,015	Do.
Cedar (Workers)	Reno, NV	11/18/88	11/14/88	22,016	Do.
Century Drilling, Inc. (Company)	Pittsburgh, PA	11/18/88	11/17/88	22,017	Do.
Clarostat-Gorham, Inc. (Workers)	Gorham, ME	11/18/88	11/8/88	22,018	Resistors.
Clyde Sportswear, Inc. (Workers)	Brooklyn, NY	11/18/88	11/11/88	22,019	Skirts, Pants, Blouses & Jackets.
Commodore Oil & Gas (Workers)	Burkesville, KY	11/18/88	11/3/88	22,020	Oil & Gas.
Consolidated Oil Well Services, Inc. (Workers)	Chanute, KS	11/18/88	11/15/88	22,021	Do.
Consolidated Resources of America, Inc. (Company)	Cincinnati, OH	11/18/88	11/15/88	22,022	Do.
Crystal Springs Oil, Inc. (Workers)	Seneca, PA	11/18/88	11/17/88	22,023	Do.
Damac Drilling Inc. (Workers)	Great Bend, KS	11/18/88	11/17/88	22,024	Do.
Davis Frac Tanks & Supply Co. (Workers)	Wooster, OH	11/18/88	11/14/88	22,025	Do.
Dresser Industries, Inc. (USWA)	Huntington Park, CA	11/18/88	11/10/88	22,026	Do.
ELIASOF Bros., Inc. (Workers)	Closter, NJ	11/18/88	11/7/88	22,027	Childrens Sportswear.
EPIC International, Inc. (UAJAPPI)	San Francisco, CA	11/18/88	11/14/88	22,028	Oil & Gas.
East Tennessee Consultants, Inc. (Workers)	Sunbright, TN	11/18/88	11/14/88	22,029	Do.
Elmberg Exploration, Inc. (Workers)	Casper, WY	11/18/88	11/14/88	22,030	Do.
Emphasis Oil Operations (Workers)	Russell, KS	11/18/88	11/17/88	22,031	Do.
Eureka Crude Purchasing (Workers)	Eureka, KS 18	11/18/88	11/17/88	22,032	Do.
Excel Energy Corp. (Workers)	Denver, CO	11/18/88	11/18/88	22,033	Do.
Farrar Oil Co. (Workers)	Mt. Vernon, IL	11/18/88	11/15/88	22,034	Do.
Freeman Drilling (Company)	Bradford, PA	11/18/88	11/10/88	22,035	Do.
Freeman & Freeman (Company)	do	11/18/88	11/10/88	22,036	Do.
G&S Drilling (Workers)	Olney, IL	11/18/88	11/18/88	22,037	Do.
Gaulin Energy Service Corp. (Subdivision) (Laborer)	Titusville, PA	11/18/88	11/15/88	22,038	Do.
General Atlantic Energy Corp. (Workers)	Denver, CO	11/18/88	11/9/88	22,039	Do.
Gilmore, Howard & Provins Drilling Co. (Workers)	Traverse City, MI	11/18/88	11/18/88	22,040	Do.
H&S Rotary Drilling (Workers)	Bradford, PA	11/18/88	11/14/88	22,041	Do.
H&S Drilling (Workers)	do	11/18/88	11/14/88	22,042	Do.
Harpel Drilling Co. (Company)	Casper, WY	11/18/88	11/18/88	22,043	Do.
J.L. Beck Drilling Co. (Workers)	Pleasantville, PA	11/18/88	11/8/88	22,044	Do.
Johnson & Johnson (Workers)	Skilman, NJ	11/18/88	11/7/88	22,045	Adult Diapers.
Kaw Pipe Line (Workers)	Russell, KS	11/18/88	11/15/88	22,046	Oil & Gas.
Lingafelter Drill, Co. (Workers)	Wayne City, IL	11/18/88	11/14/88	22,047	Do.
Manning Drilling (Workers)	Mills, WY	11/18/88	11/15/88	22,048	Do.
Do.	Denver, CO	11/18/88	11/15/88	22,049	Do.
Mid-Kansas Acid, Inc. (Workers)	Russell, KS	11/18/88	11/14/88	22,050	Do.
O.H.&F., Inc. (Workers)	Grayville, IL	11/18/88	10/31/88	22,051	Do.
Ohio L&M Co., Inc. (Workers)	Reno, OH	11/18/88	11/18/88	22,052	Do.
Parsons Const. (UAJAPPI)	Pasadena, CA	11/18/88	11/14/88	22,053	Do.
Peacock, Williams & Co. (VEDC)	Pittsburgh, PA	11/18/88	11/14/88	22,054	Do.
Penn American Energy (Laborer)	Titusville, PA	11/18/88	11/15/88	22,055	Do.
Pfeiffer Well Service, Inc.	Hill City, KS	11/18/88	11/15/88	22,056	Do.
Pioneer Drilling Co. Inc. (Company)	Plainville, KS	11/18/88	11/14/88	22,057	Do.
Ponderosa Co. (The) (Company)	Casper, WY	11/18/88	11/17/88	22,058	Do.
R.E. Puckett Energy Co. (Company)	Denver, CO	11/18/88	11/18/88	22,059	Do.
Rawhide Mud Co. (Company)	Casper, WY	11/18/88	11/17/88	22,060	Do.
Rich Bros. Servicing, Inc. (Workers)	Newcastle, WY	11/18/88	11/18/88	22,061	Do.
Rio Lucy Mfg. Co. (Workers)	Broadway, NY	11/18/88	9/7/88	22,062	Skirts.
Renn Drilling, Inc. (Workers)	McLeansboro, IL	11/18/88	11/11/88	22,063	Oil & Gas.
Selin Sportswear, Inc. (Workers)	Brooklyn, NY	11/18/88	9/7/88	22,064	Ladies' Skirts.
Shape Optimedia, Sub Div. (APMO)	Sanford, ME	11/18/88	11/14/88	22,065	Compact Discs.
Shape, Inc. (APMO)	Biddeford, ME	11/18/88	11/14/88	22,066	Do.
Sheehan Exploration (Workers)	Casper, WY	11/18/88	11/14/88	22,067	Oil & Gas.
Do.	Sidney, MT	11/18/88	11/14/88	22,068	Do.
Shelby Drilling, Co. (Company)	Englewood, CO	11/18/88	11/15/88	22,069	Do.
Shields Drilling (Workers)	Russell, KS	11/18/88	11/17/88	22,070	Do.
Southern Triangle Oil Co. (Workers)	Mt. Carmel, IL	11/18/88	11/15/88	22,071	Do.
Stellum Oil Field Supply, Inc.	Olney, IL	11/18/88	8/12/88	22,072	Do.
Straus Knitting Mills (Workers)	St. Paul, MN	11/18/88	11/14/88	22,073	Knit Trim for Outer Wear.
Summit Gas & Oil (Workers)	Bradford, PA	11/18/88	11/14/88	22,074	Oil & Gas.
Sundstrand Heat Transfer Inc. (UAW)	Dowagiac, MI	11/18/88	11/10/88	22,075	A/C Refrigeration & Heating
Taylor Drilling Co. (Workers)	Chehalis, WA	11/18/88	10/11/88	22,076	Oil & Gas.
Do.	Olney, IL	11/18/88	11/18/88	22,077	Do.



## APPENDIX—Continued

Petitioner (union/workers/firm)	Location	Date received	Date of petition	Petition No.	Articles produced
Teledyne Amco (USAW)	Mohnton, PA	11/18/88	11/10/88	22,078	Sewing Machine Equipment.
Terrell Drilling Inc. (Workers)	Grayville, IL	11/18/88	11/15/88	22,079	Oil & Gas.
Terrell Tractor & Well Service (Workers)	do	11/18/88	11/15/88	22,080	Do.
Thompson Oil & Gas Co. (Workers)	Pleasantville PA	11/18/88	11/14/88	22,081	Do.
Tioga Swabbing Service, Inc. (Workers)	Tioga, ND	11/18/88	11/8/88	22,082	Do.
Triangle Industries, Inc./American Natl Can Co. (USWA)	Chicago, IL	11/18/88	11/10/88	22,083	Can Containers.
Trico Industries, Inc. (USWA)	Huntington Park, CA	11/18/88	11/10/88	22,084	Oil & Gas.
Trico Industries, Inc. (Workers)	Bradford, PA	11/18/88	11/14/88	22,085	Do.
Trident Drilling Completion & Services, Inc. (Workers)	Olney, IL	11/18/88	11/9/88	22,086	Do.
Triple B Oil Producers, Inc.	do	11/18/88	11/9/88	22,087	Do.
Verlyn Berger Excavating (Workers)	Lambert, MT	11/18/88	11/11/88	22,088	Do.
Victory Energy Development Co. (Subdiv.) (VEDC)	Indiana, PA	11/18/88	11/14/88	22,089	Do.
Warrior Drilling Co. (Workers)	Wichita, KS	11/18/88	11/12/88	22,090	Do.
Western Geophysical Co. (Workers)	Englewood, CO	11/18/88	11/18/88	22,091	Do.
Wintershall Corp. (Workers)	do	11/18/88	11/18/88	22,092	Do.
Wamer & Becker (UJAPPI)	Sacramento, CA	11/18/88	11/14/88	22,093	Do.
Wurlitzer (Workers)	Corinth, MS	11/18/88	11/10/88	22,094	Electronic Keyboard Organs.
Wyoming Casing Service (Workers)	Gillette, WY	11/18/88	11/18/88	22,095	Oil & Gas.
Acaliana Reporting Service, Inc. (Company)	Lafayette, LA	11/18/88	11/18/88	22,096	Do.
Alliance Well Service, Inc. (Workers)	Liberty, TX	11/18/88	11/18/88	22,097	Do.
Do	Lovington, NM	11/18/88	11/18/88	22,098	Do.
Do	Farmington, NM	11/18/88	11/18/88	22,099	Do.
Do	El Campo, TX	11/18/88	11/18/88	22,100	Do.
Do	El Reno, LA	11/18/88	11/18/88	22,101	Do.
Andarkoo (Workers)	Houston, TX	11/18/88	11/2/88	22,102	Do.
ARCO Oil & Gas Co. Southeastern Dist. Ofc. (Company)	Lafayette, LA	11/18/88	11/18/88	22,103	Do.
ARCO Oil & Gas Co. Central Dist. Ofc. (Company)	Midland, TX	11/18/88	11/18/88	22,104	Do.
ARCO Oil & Gas Co. Western Dist. (Company)	Bakersfield, CA	11/18/88	11/18/88	22,105	Do.
ARK-LA Oil & Gas (Workers)	Smackover, LA	11/18/88	11/9/88	22,106	Do.
ARMCO, Inc. (USWA)	Gainesville, TX	11/18/88	11/17/88	22,107	Do.
ATSF Railroad/BN Railroad (TCU)	Amarillo, TX	11/18/88	10/25/88	22,108	Do.
Arkansas Oil & Gas Commission (Company)	El Dorado, AR	11/18/88	11/14/88	22,109	Do.
Atlas Wireline (Workers)	Ventura, CA	11/18/88	11/14/88	22,110	Do.
Baker Industries (Workers)	Pine River, MN	11/18/88	11/14/88	22,111	Wood Resins for Cables.
Bayou State Oil Corp. (Workers)	Shreveport, LA	11/18/88	11/10/88	22,112	Oil & Gas.
Brazos Production Co. (Company)	Stafford, TX	11/18/88	11/12/88	22,113	Do.
Burris Drilling Co. (Workers)	Denver, CO	11/18/88	11/18/88	22,114	Do.
CENEX (Workers)	Laurel, MT	11/18/88	11/18/88	22,115	Do.
CGG American Serv., Inc. (Workers)	Houston, TX	11/18/88	11/8/88	22,116	Do.
COFSCO, Inc. (Company)	Wooster, OH	11/18/88	11/16/88	22,117	Do.
Commonwealth Savings Assoc. (Workers)	Houston, TX	11/18/88	11/13/88	22,118	Do.
Consolidated Energy Corp. (Workers)	Seneca, PA	11/18/88	11/3/88	22,119	Do.
Council of Energy Resource Tribes (Workers)	Denver, CO	11/18/88	11/17/88	22,120	Do.
Daniel Geophysical, Inc. (Workers)	Denver, CO	11/18/88	11/14/88	22,121	Do.
Davis Mud & Chemical (Company)	Mills, WY	11/18/88	11/16/88	22,122	Do.
Dresser Atlas (Workers)	Mt Vernon, IL	11/18/88	11/9/88	22,123	Do.
Dwight's Hotline Energy Reports (Workers)	Oklahoma City, OK	11/18/88	11/17/88	22,124	Do.
EL Paso Natural Gas Co. (Workers)	Farmington, NM	11/18/88	11/17/88	22,125	Do.
Eastman Whipstock, Inc. (Company)	Brookhaven, MS	11/18/88	11/17/88	22,126	Do.
Eastman Whipstock, Inc. (Company)	Corpus Christi, TX	11/18/88	11/17/88	22,127	Do.
Do	Houston, TX	11/18/88	11/17/88	22,128	Do.
Energy Operating Corp. (Workers)	Dallas, TX	11/18/88	10/24/88	22,129	Do.
Do	Billings, MT	11/18/88	10/24/88	22,130	Do.
Do	Oklahoma City, OK	11/18/88	10/24/88	22,131	Do.
Ensearch Alaska Construction Inc.	Achorage, AK	11/18/88	11/1/88	22,132	Do.
Envirogas, Inc. (Workers)	Mayville, NY	11/18/88	11/18/88	22,133	Do.
Evers Electric (Company)	El Dorado, AR	11/18/88	11/15/88	22,134	Do.
Exxon Production Research Co. (Workers)	Houston, TX	11/18/88	11/18/88	22,135	Do.

[FR Doc. 88-30091 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-20, 909]

**APV Chemical Machinery, Inc.,  
Saginaw, MI; Negative Determination  
Regarding Application for  
Reconsideration**

By an application dated November 10, 1988, with Congressional support, the petitioners requested administrative reconsideration of the subject petition

for trade adjustment assistance. The denial notice was signed on October 28, 1988 and published in the *Federal Register* on November 17, 1988 (53 FR 46509).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

- (1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;
- (2) If it appears that the determination complained of was based on a mistake

in the determination of facts not previously considered; or

(3) If, in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The workers at the subject firm produced chemical machinery for the aerospace, chemical and pharmaceutical industries.

The petitioners claim that the subject firm had designed and manufactured batch mixers and extruded equipment like the ones currently being imported

from France and England, respectively. It is also claimed that nameplates were placed on the machinery once the imported equipment was received in Saginaw indicating that the machines were made in Saginaw. Some electric motors were also attached to the imported equipment.

The Department's denial was based on the fact that the "contributed importantly" test of the Group Eligibility Requirements of the Trade Act of 1974 was not met. The Department's survey of the subject firm's major customers which accounted for over 100 percent of the firm's 1987 sales decline shows that none of the respondent's reported import purchases of chemical machinery in 1986, 1987 or in the first nine months of 1988.

Section 223(b)(1) of the Trade Act states that the Department cannot certify workers for adjustment assistance who were laid off more than one year prior to the date of the petition. The date of the subject petition is August 24, 1988. Other findings in the investigation show that there were no batch makers or extruded equipment produced at the Saginaw plant in 1987 or in 1988.

The Saginaw plant closed in December 1987 and all production was transferred to another domestic corporate plant. A domestic transfer of production would not form a basis for certification.

The imported equipment (batch makers and extruded equipment) had a positive employment effect on the workforce at Saginaw since additional work was performed on the imported equipment, i.e., attaching nameplates and motors. Imported power panels were reworked at Saginaw in order to fit U.S. voltage requirements. Power plants were not manufactured at the subject plant in 1987 or in 1988.

**Conclusion**

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 12th Day of December 1988.

Stephen A. Wandner,  
Deputy Director, Office of Legislation and  
Actuarial Services, UIS.

[FR Doc. 88-29786 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-20,984]

**BethEnergy Mines, Inc., Wilson Shop,  
Ellsworth, PA; Negative Determination  
Regarding Application for  
Reconsideration**

By an application dated November 16, 1988, Local 1197 of the United Mine Workers of America requested administrative reconsideration of the subject petition for trade adjustment assistance. The denial notice was signed on November 3, 1988.

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(3) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(4) If, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The workers at the Wilson Shop provide maintenance services for affiliated bituminous coal mines.

The union claims that the Department's denial in the subject case is contrary to the decision granted earlier to workers at Mine 84 of BethEnergy Mines in TA-W-15,956 issued in August, 1984. It is also claimed that foreign steel imports deterred the reopening of the mine.

Investigation findings show that historically, the Wilson Shop serviced three mines. In 1988 one of the mines became depleted. In March, 1988 a catastrophic fire occurred at another mine and this, in effect, became the "dominant cause" for worker separations at the Wilson Shop. Accordingly, in August 1988 the company found that it could no longer economically justify keeping all the workers in the Wilson Shop. The company retained only enough maintenance workers to service the remaining mine.

In order for service workers like those at the Wilson Shop to become certified eligible for adjustment assistance their separations must be caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control. In any case, the reduction in demand for services must originate at a production facility

whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports. These conditions have not been met for workers at the Wilson Shop. Workers at the mines serviced by the Wilson Shop are not currently certified eligible to apply for adjustment assistance.

In the earlier certification (TA-W-15,956) referenced by the union, it should be noted that the investigation was for a different worker group in a different time period. Further, the predominant portion of the coal mined was being shipped to Bethlehem steelmaking facilities in Lackawanna, New York, (TA-W-13,644); Bethlehem, Pennsylvania, (TA-W-13,289) and Sparrows Point, Maryland, (TA-W-15,742) where workers were under certifications. These certifications have long since expired and no new ones have been issued. Therefore, decisions issued on those petitions are not relevant to the subject case.

Further, deterrents to reopening one of the mines (e.g., decreased orders for domestic coal production because of foreign steel imports) would not provide a basis for certification.

**Conclusion**

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed at Washington, DC, this 12th Day of December, 1988.

Barbara Ann Farmer,  
Director, Office of Program Management,  
UIS.

[FR Doc. 88-29787 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-30-M

[TA-W-21,055, et al.]

**Adjustment Assistance; B. J. Titan  
Service, et al.**

In the matter of: B.J. Titan Service, TA-W-21,055, B.J. Titan Service, Hays, Kansas, TA-W-21,056, B.J. Titan Service, Plainville, Kansas, TA-W-21,100, B.J. Titan Service Regional Areas Headquartered in Houston, Texas and Operating at the following locations:

TA-W-21,160A, Houston/Tomball/South & East Texas Region Headquartered in Houston, Texas with Operations at:

Alice, Texas	Bryan, Texas
Corpus Christi, Texas	Houston, Texas
Pleasanton, Texas	Tomball, Texas
Tyler, Texas	

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TA-W-21,160B, West Texas Region  
Headquartered in Midland, Texas with  
Operations at:

Abilene, Texas	Breckenridge, Texas
Brownsville, Texas	Jacksboro, Texas
Odessa, Texas	Snyder, Texas
Hobbs, New Mexico	Roswell, New Mexico

TA-W-21,160C, Oklahoma/Kansas Region  
Headquartered in Oklahoma City, Oklahoma  
with Operations at:

Medicine Lodge, Kansas	Enid, Oklahoma
Armore, Okla	Okla City,
Hominy, Okla	Okla
Yukon, Okla	Yukon, Texas
Oakley, Kansas	

TA-W-21,160D, West Coast/Alaska Region  
Headquartered in Signal Hill, California with  
Operations at:

Anchorage, Alaska	North Slope, Alaska
Kenai, Alaska	Arenal, California
Bakersfield, California	Shafter, California
Signal Hill, California	Ventura, California
Fernly, Nevada	

TA-W-21,160E, Rocky Mountain Region  
Headquartered in Denver, Colorado with  
Operations at:

Denver, Colorado	Farmington, New Mexico
Dickinson, North Dakota	Roosevelt, Utah
Casper, Wyoming	Powell, Wyoming
Riverton, Wyoming	

TA-W-21,160F, Offshore/Southeastern  
Region Headquartered in Lafayette,  
Louisiana with Operations at:

Crowley, Louisiana	Harvey, Louisiana
Lafayette, Louisiana	New Iberia, Louisiana
Port Allen, Louisiana	Alvin, Texas
Beaumont, Texas	Galveston, Texas
Sabine Pass, Texas	Victoria, Texas

#### Certifications Regarding Eligibility To Apply for Worker Adjustment Assistance

All workers of B.J. Titan Service, in the  
above cited locations who became totally or  
partially separated from employment on or  
after October 1, 1985 are eligible to apply for  
adjustment assistance under section 223 of  
the Trade Act of 1974.

Marvin M. Fooks,  
Director, Office of Trade Adjustment  
Assistance.

Dated December 21, 1988.  
[FR Doc. 88-30092 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-30-M

#### Mine Safety and Health Administration

[Docket No. M-88-216-C]

#### Mettiki Coal Corp.; Petition for Modification of Application of Mandatory Safety Standard

Mettiki Coal Corporation, Route 3,  
Box 124A, Deer Park, Maryland 21550  
has filed a petition to modify the  
application of 30 CFR 75.511 (low-,  
medium-, or high-voltage distribution  
circuits and equipment repair) to its  
Mettiki Mine (I.D. No. 18-00621) located  
in Garrett County, Maryland. The

petition is filed under section 101(c) of  
the Federal Mine Safety and Health Act  
of 1977.

A summary of the petitioner's  
statements follows:

1. The petition concerns the  
requirement that electrical work  
including locking out and tagging  
disconnecting devices be performed on  
low-, medium-, or high-voltage  
distribution circuits or equipment, by a  
qualified person or by a person trained to  
perform electrical work and to  
maintain electrical equipment under the  
direct supervision of a qualified person.
2. There is an insufficient number of  
high-voltage electricians available at the  
mine to supervise or perform power  
center moves in addition to other  
essential duties.

3. As an alternate method, petitioner  
proposes to train low- and medium-  
voltage electricians, in the skills  
necessary to safely deenergize and  
reenergize high-voltage branch lines to  
underground power centers, in  
accordance with the training program  
outlined in the petition.
4. Petitioner states that the proposed  
alternate method will provide the same  
degree of safety for the miners affected  
as that afforded by the standard.

#### Request for Comments

Persons interested in this petition may  
furnish written comments. These  
comments must be filed with the Office  
of Standards, Regulations and  
Variances, Mine Safety and Health  
Administration, Room 627, 4015 Wilson  
Boulevard, Arlington, Virginia 22203. All  
comments must be postmarked or  
received in that office on or before  
January 30, 1989. Copies of the petition  
are available for inspection at that  
address.

Patricia W. Silvey,  
Director, Office of Standards, Regulations  
and Variances.

Date: December 21, 1988.  
[FR Doc. 88-30093 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-43-M

[Docket No. M-88-224-C]

#### Old Ben Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Old Ben Coal Company, 500 North  
DuQuoin Street, Benton, Illinois 62812  
has filed a petition to modify the  
application of 30 CFR 77.216-3(a) (water,  
sediment, or slurry impoundments and  
impounding structures; inspection  
requirements; correction of hazards;  
program requirements) to its Mine No.  
21 (I.D. No. 11-00588), (Impoundment

No. 1211-IL08-00588) its Mine No. 24  
(I.D. No. 11-00589), (Impoundment No.  
1211-IL08-00589) its John Ross  
Preparation Plant (I.D. No. 11-02416),  
(Impoundment No. 1211-IL08-02416) and  
its Mine No. 26 (I.D. 11-00590),  
(Impoundment No. 1211-IL08-00590) all  
located in Franklin County, Illinois. The  
petition is filed under section 101(c) of  
the Federal Mine Safety and Health Act  
of 1977.

A summary of the petitioner's  
statements follows:

1. The petition concerns the  
requirement that all water, sediment or  
slurry impoundments be examined by a  
qualified person designated by the  
person owning, operating or controlling  
the impounding structure at intervals not  
exceeding seven days for appearances  
of structural weakness and other  
hazardous conditions.
2. An alternate method, petitioner  
proposes that for these impoundments  
and for future impoundments at these  
mines, examinations for signs of  
structural weakness or other hazards  
would be conducted monthly.
3. Petitioner states that the proposed  
alternate method will provide the same  
degree of safety for the miners affected  
as that afforded by the standard.

#### Request for Comments

Persons interested in this petition may  
furnish written comments. These  
comments must be filed with the Office  
of Standards, Regulations and  
Variances, Mine Safety and Health  
Administration, Room 627, 4015 Wilson  
Boulevard, Arlington, Virginia 22203. All  
comments must be postmarked or  
received in that office on or before  
January 30, 1989. Copies of the petition  
are available for inspection at that  
address.

Patricia W. Silvey,  
Director, Office of Standards, Regulations  
and Variances.

Date: December 21, 1988.  
[FR Doc. 88-30094 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-43-M

[Docket No. M-88-227-C]

#### Pyro Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

Pyro Mining Company, P.O. Box 287,  
Sturgis, Kentucky 42459 has filed a  
petition to modify the application of 30  
CFR 75.1700 (oil and gas wells) to its  
Pyro No. 9 Slope, William Station Mine  
(I.D. No. 15-13881) located in Union  
County, Kentucky. The petition is filed

under section 101(c) of the Federal Mine  
Safety and Health Act of 1967.

A summary of the petitioner's  
statements follows:

1. The petition concerns the  
requirement that barriers be established  
and maintained around oil wells  
penetrating coal beds.
2. The barrier around oil and gas wells  
interferes with maintenance of effective  
roof control, improvement of mining  
safety and conservation of mineral  
resources.
3. As an alternate method, petitioner  
proposed to clean out, plug and mine  
through the oil and gas wells on a mine  
wide basis using specific techniques and  
procedures as outlined in the petition.
4. Prior to mining through the plugged  
oil or gas well an approval of the  
specific mining procedures would be  
requested of the MSAH District  
Manager, and appropriate officials  
would be allowed to observe the  
process and all mining would be under  
the direct supervision of a certified  
official. In addition:

(a) Drivage sites would be  
established.

(b) Equipment would be checked for  
permissibility and serviced prior to  
mining through the well.

(c) Methane monitors would be  
calibrated prior to the shift and tests  
would be made during mining  
approximately every 10 minutes; and

(d) When the wellbore is intersected,  
all equipment would be deenergized and  
safety checks would be made before  
mining would continue in by the well a  
sufficient distance to permit adequate  
ventilation around the areas of the  
wellbore.

5. Petitioner states that the proposed  
alternate method will provide the same  
degree of safety for the miners affected  
as that afforded by the standard.

#### Request for Comments

Persons interested in this petition may  
furnish written comments. These  
comments must be filed with the Office  
of Standards, Regulations and Variance,  
Mine Safety and Health Administration,  
Room 627, 4015 Wilson Boulevard,  
Arlington, Virginia 22203. All comments  
must be postmarket or received in that  
office on or before January 30, 1989.  
Copies of the petition are available for  
inspection at that address.

Patricia W. Silvey,  
Director, Office of Standards, Regulations  
and Variances.

Date: December 21, 1988.  
[FR Doc. 88-30095 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-43-M

[Docket No. M-88-226-C]

#### Rough Diamond, Inc.; Petition for Modification of Application of Mandatory Safety Standard

Rough Diamond, Inc., P.O. Box 2239,  
Middlesboro, Kentucky 40965 has filed a  
petition to modify the application of 30  
CFR 75.305 (weekly examinations for  
hazardous conditions) to its Mine No. 2  
(I.D. No. 15-00237) located in Bell  
County, Kentucky. The petition is filed  
under section 101(c) of the Federal Mine  
Safety and Health Act of 1977.

A summary of the petitioner's  
statement follows:

1. The petition concerns the  
requirement that return aircourses be  
examined in their entirety on a weekly  
basis.

2. Petitioner states that due to a roof  
fall and poor roof conditions, the return  
entry of the mine cannot be safely  
traveled.

3. As an alternate method, petitioner  
proposes that a qualified person would  
take weekly methane and airflow  
readings along with an inspection of the  
area.

4. In support of this request, petitioner  
states that—

(a) The roof fall can be inspected on  
either end and the height is sufficient  
over the fall to be inspected from one  
end to the other;

(b) The height over the fall is  
sufficient for normal airflow to pass; and  
(c) due to poor roof conditions, no  
employees would be allowed in the area  
to cleanup the fall.

4. For these reasons, petitioner  
requests a modification of the standard.

#### Request for Comments

Persons interested in this petition may  
furnish written comments. These  
comments must be filed with the Office  
of Standards, Regulations and  
Variances, Mine Safety and Health  
Administration, Room 627, 4015 Wilson  
Boulevard, Arlington, Virginia 22203. All  
comments must be postmarket or  
received in that office on or before  
January 30, 1989. Copies of the petition  
are available for inspection at that  
address.

Patricia W. Silvey,  
Director, Office of Standards, Regulations  
and Variances.

Date: December 21, 1988.  
[FR Doc. 88-30096 Filed 12-29-88; 8:45 am]  
BILLING CODE 4510-43-M

#### NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-321 and 50-366]

#### Georgia Power Co. et al.; Issuance of Environmental Assessment and Finding of No Significant Impact

The United States Nuclear Regulatory  
Commission (the Commission) is  
considering issuance of amendments to  
Facility Operating License Nos. DPR-57  
and NPF-5, issued to Georgia Power  
Company, et al. (the licensee) for  
operation of the Edwin I. Hatch Nuclear  
Plant, Units 1 and 2, located in Appling  
County, Georgia.

#### Environmental Assessment

##### Identification of Proposed Action

The amendments would consist of  
changes to the operating licenses to  
extend the expiration dates of the  
operating licenses to August 6, 2014 for  
Hatch Unit 1, and to June 13, 2016 for  
Hatch Unit 2. The proposed license  
amendments are responsive to the  
licensee's application dated February 28,  
1986. The Commission's staff has  
prepared an Environmental Assessment  
of the proposed action, "Environmental  
Assessment by the Office of Nuclear  
Reactor Regulation Relating to the  
Change in Expiration Dates of Facility  
Operating Licenses DPR-57 and NPF-5,  
Georgia Power Company, Oglethorpe  
Power Corporation, Municipal Electric  
Authority of Georgia, City of Dalton,  
Georgia, Edwin I. Hatch Nuclear Plant,  
Units 1 and 2, Docket Numbers 50-321  
and 50-366, dated 12/23/88."

##### Summary of Environmental Assessment

The Commission's staff has reviewed  
the potential environmental impact of  
the proposed changes in expiration  
dates of the Operating Licenses for the  
Edwin I. Hatch Nuclear Plant, Units 1  
and 2. This evaluation considered the  
previous environmental studies,  
including the "Final Environmental  
Statement for the Edwin I. Hatch  
Nuclear Plant, Unit 1 and Unit 2,"  
October 1972, the "Final Environmental  
Statement Related to Operation of  
Edwin I. Hatch Nuclear Plant, Unit No.  
2," NUREG-0417, March 1978, and more  
recent NRC policy.

##### Radiological Impacts

The staff concludes that the Exclusion  
Area, the Low Population Zone and the  
nearest population center distances will  
likely be unchanged from those  
described in the October 1972 Final  
Environmental Statement. The  
population living within 10 miles of the



plant in 1988 is essentially double the number of people estimated to live within the 10-mile zone based upon the 1970 census, as reported in NUREG-0417. The total number of residents within the 10-mile zone is still less than 10,000. This slow, small increase in the number of people living within the 10-mile zone and the continuing rural nature of the area indicate that the numbers of people living around the plant should pose no problem to the proposed extension of the operating licenses.

The additional period of plant operation would not significantly affect the probability or consequences of any reactor accident. Station radiological effluents to unrestricted areas during normal operation have been well within Commission regulations regarding as-low-as-is-reasonably-achievable (ALARA) limits, and are indicative of future releases. The proposed additional years of reactor operation do not increase the annual public risk from reactor operation.

With regard to normal plant operation, the occupational exposures for the Hatch Nuclear Plant have been less than the national average for boiling water reactors. The licensee is striving for further dose reductions in accordance with ALARA principles and the staff expects further reductions to be achieved using advanced technologies and equipment that will likely be available.

Accordingly, annual radiological impacts on man, both offsite and onsite, are not more severe than previously estimated in the FES, and our previous cost-benefit conclusions remain valid.

The environmental impacts attributable to transportation of fuel to and waste from the Hatch Nuclear Plant, with respect to normal conditions of transport and possible accidents in transport, would be bounded as set forth in Summary Table S-4 of 10 CFR Part 51.52. The values in Table S-4 would continue to represent the contribution of transportation to the environmental costs associated with plant operation.

#### Non-Radiological Impacts

The Commission has concluded that the proposed extensions will not cause a significant increase in the impacts to the environment and will not change any conclusions reached by the Commission in the FESs.

#### Finding of No Significant Impact

The Commission has reviewed the proposed changes to the expiration dates of the Edwin I. Hatch Nuclear Plant, Units 1 and 2, facility operating licenses relative to the requirements set

forth in 10 CFR Part 51. Based upon the environmental assessment, the staff concluded that there are no significant radiological or non-radiological impacts associated with the proposed action and that the proposed license amendments will not have a significant effect on the quality of the human environment. Therefore, the Commission has determined, pursuant to 10 CFR 51.31, not to prepare an environmental impact statement for the proposed amendments.

For further details with respect to this action, see (1) the application for amendments dated February 28, 1986, as supplemented on September 25, 1986, December 23, 1986, and December 15, 1988, (2) the Final Environmental Statement for the Edwin I. Hatch Nuclear Plant, Unit 1 and Unit 2, issued October 1972, (3) the Final Environmental Statement Related to Operation of Edwin I. Hatch Nuclear Plant, Unit 2, issued March 1978, and (4) the Environmental Assessment dated December 23, 1988. These documents are available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC, and at the Appling County Public Library, 301 City Hall Drive, Baxley, Georgia 31513.

Dated at Rockville, Maryland, this 23rd day of December 1988.

For the Nuclear Regulatory Commission,  
Lawrence P. Crocker,  
Acting Director, Project Directorate II-3,  
Division of Reactor Projects I/II, Office of  
Nuclear Reactor Regulation.

[FR Doc 88-30102 Filed 12-29-88; 8:45 am]  
BILLING CODE 7590-01-M

#### Biweekly Notice Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations

##### I. Background

Pursuant to Public Law (P.L.) 97-415, the Nuclear Regulatory Commission (the Commission) is publishing this regular biweekly notice. P.L. 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from December 5, 1988 through December 16, 1988. The last biweekly notice was published on December 14, 1988 (53 FR 50320).

#### NOTICE OF CONSIDERATION OF ISSUANCE OF AMENDMENT TO FACILITY OPERATING LICENSE AND PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION AND OPPORTUNITY FOR HEARING

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration and Resources Management, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to Room P-216, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland from 7:30 a.m. to 4:15 p.m. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 30, 1989, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the

proceeding must file a written petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene must set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to

participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to (Project Director): petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this Federal

Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room for the particular facility involved.

**Commonwealth Edison Company,  
Docket No. 50-456 Braidwood Station,  
Unit No. 1 Will County, Illinois**

*Date of application for amendment:*  
October 26, 1988, supplemented  
November 22, 1988, November 29, 1988,  
and December 5, 1988.

*Description of amendment request:*  
The amendment would revise Technical Specification 4.8.1.1.2f to extend, on a one-time basis, the frequency for performing certain diesel generator surveillance tests for an additional 7 months from the previous extension of 31 months. This would allow such tests to be performed during the refueling outage of Braidwood Station Unit 1. The current Technical Specification includes the phrase "...18 months, during shutdown ...". This wording implies that the surveillance tests were intended to be performed during a refueling outage shutdown. The refueling outage for Braidwood Unit 1 is scheduled for September 1989. Commonwealth Edison Company has stated that Braidwood Station does not intend to use any of the 25% extension permitted by Technical Specification 4.0.2 if this amendment is approved, since this could result in scheduling concerns for subsequent fuel cycles.

*Basis for proposed no significant hazards consideration determination:*  
The staff has evaluated this proposed amendment and has determined that it involves no significant hazards considerations. According to 10 CFR 50.92(c), a proposed amendment to an operating license involves no significant hazards considerations if operation of



the facility in accordance with the proposed amendment would not:

- (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
- (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
- (3) Involve a significant reduction in a margin of safety.

This proposed amendment involves the frequency of surveillance tests to prove diesel generator availability. Previously evaluated accidents which involve a loss of offsite power are the only accidents which depend on diesel generator availability. The probability of other accidents concurrent with a loss of offsite power are not affected by this diesel generator surveillance frequency.

The consequences of previously evaluated accidents would not be significantly increased because the diesel generator availability would not be significantly decreased. The previously established preventive maintenance programs at each station are sufficient to detect up to 95% of the potential failure modes that would be detectable during the performance of the deferred surveillances. The remaining 5% of the potential failure modes are mostly related to a mechanical wear type of failure. Because the operation time of the diesel generators is small, these kinds of failures have a small probability of occurring. Additionally, the licensee has utilized the service group of the diesel generator manufacturer to perform a dynamic test of the diesel generator using the ENSPEC 3000 Engine Analyzer. The test concluded that engine performance exceeded that required by the 18 month inspection procedures. This information provides confidence that the diesels will be capable of performing their intended function, resulting in no significant increase in the consequences of an accident previously evaluated.

The change does not add or modify any existing equipment, nor introduce a new mode of plant operation. The operability of the diesel generators will continue to be verified by performing the other related Technical Specification required surveillances, which remain unchanged. As such, the possibility of a new or different kind of accident from any accident previously evaluated is not created.

Commonwealth Edison Company indicated that the proposed change has been discussed with the diesel generator manufacturer and that they found the change to be acceptable. Deferral of the surveillance will not significantly increase the possibility of undetected degradation of the diesel generators

because they are operated infrequently for short periods of time. Since the actual operation time of the diesel generator is small, the probability of a diesel generator failure due to mechanical wear is small. Commonwealth Edison Company reviewed the failure history for the diesel generator and did not find any trends identifying abnormal failures. The limiting conditions for operation and other surveillance requirements to verify operability are unchanged and will remain in effect. The monthly and quarterly diesel generator surveillances will continue to be performed during the surveillance interval extension, as well as the previously indicated preventive maintenance programs. As such, the margin of safety is not reduced.

Therefore, based upon the above analysis, the staff concludes that the proposed amendment to the Technical Specifications does not involve significant hazards consideration.

**Local Public Document Room**  
location: Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481.

**Attorney for licensee:** Michael Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket Nos. 50-237 and 249, Dresden Nuclear Power Station, Unit Nos. 2 and 3, Grundy County, Illinois

**Date of application for amendment request:** October 5, 1988 and November 7, 1988

**Description of amendment request:** This amendment would delete Figure 6.1-1, "Offsite Organization," and Figure 6.1-2, "Station Organization," from the Technical Specifications (TS) and would revise Section 6 to require inclusion of these organization charts in the QA Topical Report. However, the NRC will continue to be notified of licensee organization changes through other regulatory controls. In accordance with 10 CFR 50.34(b)(6)(i), the applicant's organizational structure is required to be included in the Final Safety Analysis Report (FSAR). Chapter 13 of the FSAR provides a description of the station organization and a detailed organization chart. Updates to the FSAR are required by 10 CFR 50.71(e) to be submitted annually to the NRC. Even through Figures 6.1-1 and 6.1-2 would be deleted from TS, Section 6 of the TS would be revised to require inclusion of these organization charts in the Commonwealth Edison Company (CECo) QA Topical. Whereupon, Appendix B to 10 CFR Part 50, and 10

CFR 50.4(b)(7), will govern any changes made to the organization as it is described in the Quality Assurance (QA) program. Finally, it is CECo's normal practice to inform the NRC of organizational changes affecting their nuclear facilities prior to implementation.

**Basis for proposed no significant hazards consideration determination:**

The Commission has provided standards in 10 CFR 50.92(c) for determining whether a significant hazards consideration exists. A proposed amendment to an Operating License for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) involve a significant increase in the probability of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. CECo evaluated the proposed TS changes and determined, and the NRC staff agrees that:

(1) The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated because deletion of the organization charts from the TS does not affect plant operation, nor does it involve any physical modification of the plant. Furthermore, the aforementioned administrative and regulatory controls remain in force to ensure that organizational changes are reviewed by the NRC.

(2) The proposed amendment does not create the possibility of a new or different kind of accident than previously evaluated because the proposed change is administrative in nature; and does not physically alter any systems or components, or the way they are operated.

(3) The proposed amendment does not involve a significant reduction in a margin of safety because CECo through its quality assurance program, and its commitment to maintain only qualified personnel in positions of responsibility, and other required controls, assures that safety-related operations will be performed at a high level of competence. Furthermore, this amendment does not change any setpoints or operating parameters. Consequently, removal of organization charts from the TS will not affect the margin of safety. The NRC staff has reviewed the licensee's evaluation related to the proposed changes and concurs with their conclusions.

In addition the associated editorial TS changes proposed by CECo are considered representative of example (i) in the Commission's guidance (51 FR 7751) for examples of no significant hazards, which is defined as "a purely administrative change to TS; for example a change to achieve consistency throughout the TS, correction of an error, or change in nomenclature."

Therefore, the NRC staff proposed to determine that this amendment request does not involve significant hazards consideration based upon a preliminary review of the application, the licensee's evaluation of no significant hazards, and NRC guidance.

**Local Public Document Room**  
location: Morris Public Library, 604 Liberty Street, Morris, Illinois 60450.

**Attorney for licensee:** Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

**Date of application for amendment:** November 26, 1988; January 14 and June 1, 1988.

**Description of amendment request:** In accordance with the requirements of 10 CFR 73.55, the licensee submitted an amendment to the LaSalle County Station Security Plan to reflect recent changes to that regulation. The proposed amendment would modify paragraph 2.C.(27) of Facility Operating License No. NPF-11 and paragraph 2.C.(18) of Facility Operating License No. NPF-18 to require compliance with the revised plan.

**Basis for proposed no significant hazards consideration determination:** On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of Plants and Materials," to clarify plant security requirements to afford an increased assurance of plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on November 26, 1988; January 14 and June 1, 1988 to satisfy the requirements of the amended regulations. The Commission proposes to amend the license to reference the revised plan.

In the Supplementary Materials accompanying the amended regulations,

the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and that the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii) "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

**Local Public Document Room**  
location: Public Library of Illinois, Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

**Attorney for licensee:** Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

**Date of application for amendments:** September 9, 1988

**Description of amendments request:** The proposed amendments to Operating License No. NPF-11 and Operating License No. NPF-18 would revise the LaSalle Units 1 and 2 Technical Specifications by providing flexibility to align snubber inspection intervals with refueling outages when no failures are encountered.

This change would modify the LaSalle County Station Technical Specification requirement 4.7.9.b "Subsequent Visual Inspection Period" for zero failures from 18 months (2725%) to 18 months (-50% +25). This would allow adequate flexibility to bring the snubber surveillance date back into conformance with the refueling outage sequence. This will also prevent a shutdown for the sole purpose of performing snubber

inspections which would have been required for Unit 1 this cycle.

In June of 1987, snubber visual inspections were performed on LaSalle Unit 1 and no failures were found. The next inspection interval was set at 18 months 2725% making the surveillance due in December of 1988 with an early start date (-25%) near the end of July and a critical date (+25%) of April 1989. The Unit 1 second refueling outage was started in March 1988 after an 11 month run and ended in the beginning of July 1988. This was short of the early start date for the visual inspection. The next scheduled outage is October 1989. This could have resulted in a need to shut down mid-cycle to perform the surveillance. Unit startup was delayed and the surveillance was performed in late July under the early window.

**Basis for proposed no significant hazards consideration determination:** The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because this change has been evaluated against those criteria for which the original limit of minus 25% was established. That limit was imposed to insure adequate service life occurred to be able to visually observe degradation. After nine months, sufficient service life will have occurred to allow a detection of snubber degradation, thus establishing the basis for the next cycle.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the proposed revisions do not add or remove plant equipment or affect how this equipment is operated.

3. Involve a significant reduction in the margin of safety because snubbers visually inspected after a nine month cycle have gone through sufficient service life to detect any degradation if it existed. This change does not extend the service time between inspections.



**Local Public Document Room**  
location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

**Attorney to licensee:** Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

**Date of application for amendments:**  
October 7, 1988

**Description of amendments request:**  
The proposed amendments to Operating License No. NPF-11 and Operating License No. NPF-18 would revise the LaSalle Units 1 and 2 Technical Specifications by allowing operation of both units with suppression pool temperatures of up to 105° F.

The suppression pool is cooled during normal, as well as abnormal, conditions by using the suppression pool cooling mode of the Residual Heat Removal (RHR) system. The cooling water for the RHR heat exchangers is the RHR Service Water system which uses the LaSalle cooling lake as a heat sink. This is located at the coolest part of the station cooling lake. When the cooling lake temperature rises, the lowest temperature that the suppression pool can be maintained at also increases. During previous summers, the suppression pool was able to be maintained below the limit of 100° F.

Illinois has experienced record hot weather in 1988 exceeding all expectations. The cooling lake temperature increased due to several consecutive days of very hot weather. During these periods, the suppression pool temperature increased to very near the limit of 100° F. However, the weather cooled sufficiently at that time to provide relief and the lake and suppression pool temperatures decreased. It is anticipated that these elevated temperatures will pose a recurring problem at LaSalle County Station in future years during the summer months.

**Basis for proposed no significant hazards consideration determination:**  
The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously

evaluated; or (2) create the possibility of a new or different kind of accident from an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because this change has been evaluated against those criteria for which the original limit of 100° F was established. It has been concluded that the original limit of 100° F includes conservatism which were not expected to cause operational impact. However, due to unforeseen external environmental conditions, some of the conservatism may be reduced without significant impact on plant safety.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the change does not add or remove plant equipment or affect how this equipment is operated. The plant has been evaluated for various conditions relating to the suppression pool temperature previously and this change will not provide conditions with the possibility for a new or different accident.

3. Involve a significant reduction in the margin of safety because the basis for Technical Specification 3/4.8.2 shows the margin between the analyzed temperature rise in the suppression pool during blowdown and the ultimate limit of 200° F is large even with a new initial suppression pool temperature of 105° F. Therefore any reduction in the margin of safety is not significant.

**Local Public Document Room**  
location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

**Attorney to licensee:** Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket Nos. 50-373 and 50-374, LaSalle County Station, Unit Nos. 1 and 2, LaSalle County, Illinois

**Date of application for amendments:**  
November 29, 1988

**Description of amendments request:**  
The proposed amendments to Operating License No. NPF-11 and Operating License No. NPF-18 would revise the LaSalle Units 1 and 2 Technical Specifications by removing specific load profiles for each specific DC Battery. This revision will eliminate the need to revise the Technical Specifications every time a DC system load profile

change is made. Listings of DC bus load profiles will continue to be maintained in the UFSAR Tables 8.3-12 through 8.3-14. These DC System Load Tables will be updated annually as changes are made in accordance with 10 CFR 50.71(e). The elimination of specific load profiles for each battery charger and battery will make Technical Specifications 4.8.2.3.2.c.4 and 4.8.2.3.2.d similar to the Byron Station Technical Specifications 4.8.2.1.2.c.4 and 4.8.2.1.2.d, covering the same area. No changes to the Technical Specification Bases are being proposed. No change to the Technical Specification Limiting Conditions for Operation or actual surveillance testing requirements are being proposed.

**Basis for proposed no significant hazards consideration determination:**

The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from an accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because the tables proposed to be removed from the Technical Specifications are an administrative listing of DC loads. These tables currently exist and will continue to be maintained in the UFSAR.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the basis design of the DC Power System and its interfaces with other systems will remain unchanged. There are no proposed changes to the Technical Specification Bases.

3. Involve a significant reduction in the margin of safety because current testing frequencies will remain unchanged. The change will facilitate testing because the values will better reflect installed loads in the plant.

**Local Public Document Room**  
location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

**Attorney to licensee:** Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket No. 50-374, LaSalle County Station, Unit No. 2, LaSalle County, Illinois

**Date of application for amendment:**  
September 7, 1988

**Description of amendment request:**  
The proposed amendment to Operating License No. NPF-18 would revise the LaSalle Unit 2 Technical Specifications by deleting the specifications added to allow installation and use of the Fine Motion Control Rod Drive (FMCRD) during the Unit 2 Cycle 2. That test has been completed and the FMCRD will be removed during the Unit 2 outage which began in October 1988.

The Fine Motion Control Rod Demonstration (FMCRD) Test, General Electric NEDO-31130, was approved by NRC prior to being installed at LaSalle Unit 2 for the second fuel cycle. This special control rod is at a peripheral location (02-43) limiting plant impact. At the end of this second fuel cycle, the FMCRD and all associated equipment are to be removed and the original locking piston design control rod drive is to be reinstalled, bringing the entire Control Rod Drive system back to its original design.

Technical Specification Special Test Exceptions (3/4.10.8, 3/4.10.9, 3/4.10.10) were added to the Technical Specifications to allow testing of the FMCRD at the control location 02-43. These Technical Specification Special Test Exceptions are to be deleted upon removal of FMCRD, along with the references to them, contained in Technical Specifications 3.1.3.1 through 3.1.3.7 for Operational Conditions. Technical Specification 3.9.1 will be modified to delete the requirement to fully insert FMCRD and disarm the motor electrically before core alterations.

**Basis for proposed no significant hazards consideration determination:**

The Commission has provided standards for determining whether no significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from an accident previously evaluated; or (3)

involve a significant reduction in a margin of safety.

The licensee has determined, and the NRC staff agrees, that the proposed amendment will not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because the Fine Motion Control Rod Drive (FMCRD) will be removed and a locking piston control rod drive (CRD) of the original design will be reinstalled. This will restore the CRD system to the configuration of its original design. The Technical Specifications will likewise be returned to their original state.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because this proposed amendment and actions that are scheduled for removing the FMCRD and reinstalling a locking piston CRD will restore the CRD system to the configuration of its original design. All the original accident evaluations will again be valid for the CRD system.

3. Involve a significant reduction in the margin of safety because the CRD system will be returned to its original design and therefore all of the original safety evaluation will apply. The margin of safety will likewise return to its original level.

**Local Public Document Room**  
location: Public Library of Illinois Valley Community College, Rural Route No. 1, Ogelsby, Illinois 61348.

**Attorney to licensee:** Michael I. Miller, Esquire; Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company,**  
Docket Nos. 50-254 and 50-265, Quad Cities Nuclear Power Station, Units 1 and 2, Rock Island County, Illinois

**Date of application for amendments:**  
November 15, 1988

**Description of amendments request:**  
Commonwealth Edison Company (CECo, the licensee) proposes to amend Operating Licenses DPR-29 and DPR-30 for Quad Cities Station to conform with the recommendations of Generic Letter (GL) 84-13 which allows for deleting Snubber Table 3.6-1 from Technical Specifications (TS). There are three types of TS changes associated with the proposed license amendment. The first is a result of GL 84-13; the second change removes references to hydraulic snubbers; while the last type of change corrects typographical errors and rennumbers the TS.

GL 84-13 concluded that detailed listings of snubbers in TS are not necessary, provided TS are modified to specify what snubbers are required to

be operable. CECo's amendment application followed this guidance by eliminating Table 3.6-1, and replacing all references to TS Table 3.6-1 with a statement that specifies "all snubbers on safety-related piping systems." The record of installed safety related snubbers will be maintained within the control of Quad Cities Administrative procedures in order to comply with the surveillance requirements of TS paragraph 4.6.1.1.

Test requirements for hydraulic snubbers are no longer needed by the Station since the total population of snubbers on safety-related piping systems consist of mechanical snubbers. Therefore, the proposed TS change will delete all references to hydraulic snubbers due to the inapplicability of this type of snubber to the station's current as-built condition of safety-related systems. Similarly, several typographical errors have been corrected and some specifications have been renumbered as a result of the deletion of the hydraulic snubbers from the Technical Specifications.

**Basis for proposed no significant hazards consideration determination:**  
The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; (2) create the possibility of a new or different kind of accident from an accident previously evaluated; or (3) involve a significant reduction in a margin of safety. In accordance with 10 CFR 50.92, CECo conducted an analysis of their proposed amendment and concluded that it does not involve significant hazards consideration. This conclusion was based upon the determination that the operation of Quad Cities Station in conformance with the proposed amendment:

(1) Would not involve a significant increase in the probability or consequences of an accident previously evaluated because required testing of safety-related snubbers has not changed. Current functional and visual testing of these snubbers will not be affected. The proposed change transfers the official record of installed safety-related snubbers from TS to the control of Quad Cities administrative procedures. All references to Table 3.6-1 in the TS text would be replaced with a blanket statement - "all snubbers on



safety-related piping system." The operability and surveillance requirements of safety-related snubbers remain unaffected.

The proposed change will also remove all references to hydraulic snubbers. The scope of required snubber testing will not be affected because the station does not have hydraulic snubbers installed on safety-related piping systems.

(2) Would not create the possibility of a new or different kind of accident from any accident previously evaluated because the testing methods and type of snubbers (i.e. safety-related) tested remain unchanged. Since, the snubber listing will be documented and controlled in a separate administrative procedure, snubber capability will still be adequately monitored. Also, since the station does not have hydraulic snubbers installed on safety-related systems, the removal of all references to this type of snubber will not impact the purpose of snubber testing. Operability and testing of required snubbers are not affected.

(3) Would not involve a significant reduction in the margin of safety because the intent, methods, and quantity of snubbers to be tested remain the same. Also, since the station does not have hydraulic snubbers installed on safety-related systems, the removal of all references to this type of snubber will not impact snubber testing. This TS change for the deletion of Snubber Table 3.6-1 and Hydraulic Snubber test requirements will not decrease the safety margin of the integrity of the piping systems because no decrease in snubber functional and visual testing requirements is proposed.

As for the proposed typographical and editorial changes, the NRC has provided guidance (51 FR 7751) on what changes are considered examples of no significant hazards. The proposed changes do conform with example (i) which reads "a purely administrative change to TS; for example a change to achieve consistency throughout the Technical Specifications, correction of an error, or change in nomenclature."

NRC staff reviewed the licensee's application and analysis of no significant hazards consideration. Based upon this review, and the above discussion, the NRC staff proposes to determine that this amendment request does not involve significant hazards considerations.

**Local Public Document Room location:** Dixon Public Library, 221 Hennepin Avenue, Dixon, Illinois 61021.

**Attorney for licensee:** Michael I. Miller, Esquire; Sidley and Austin, One

First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**Commonwealth Edison Company, Docket Nos. 50-295 and 50-304, Zion Nuclear Power Station, Unit Nos. 1 and 2, Lake County, Illinois**

**Date of application for amendments:** September 28, 1988

**Brief description of amendments:** This amendment request will modify Technical Specification Section 4.2.1.F.1 (Boric Acid System) in the existing Technical Specifications. The purpose of this change is to clarify the testing requirements for the heat trace which protects piping from the Boric Acid Tanks (BAT) to the Charging Pump suction lines. This change replaces the existing ambiguous surveillance requirement (i.e., functional test) with a clear and concise description of how this heat trace system shall be demonstrated Operable. This change will increase the surveillance frequency from weekly to daily and delineate the appropriate surveillance requirements.

**Basis for proposed no significant hazards consideration determination:** The Commission has provided standards for determining whether a significant hazards consideration exists as stated in (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee provided the following discussion regarding the above three criteria.

#### **Criterion 1**

This change adds the surveillance requirement of verifying daily that at least one channel is energized and the redundant channel is available. This is a significant increase over the current surveillance requirements of functionally testing heat tracing operation weekly. In addition, a requirement to Energize each heat trace channel weekly provides a more specific requirement rather than to functionally test the operation of the heat trace system and alarm circuits weekly. The control room annunciator has been deleted from the surveillance requirements since it is not required by Standard Technical Specification and is

not considered necessary to ensure operability of the heat trace system. The annunciator is neither safety-related nor reliability related.

Because the proposed change involves the expansion and clarification of the affected section, the example (ii) of 48 FR 14869 is applicable in this instance. Example (ii) reads as follows: "A change that constitutes an additional limitation, restriction, or control not presently in Technical Specification: for example a more stringent surveillance requirement."

#### **Criterion 2**

This proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated, since it increases the reliability of heat trace operations by requiring more frequent surveillance of system operations and removes ambiguous testing requirements.

Also, since the change does not create a change in system operation, a new or different kind of accident from those previously evaluated in the FSAR is not created.

#### **Criterion 3**

The proposed change will increase the margin of safety since the change is more conservative than is currently required by the Technical Specifications. Specifically, the heat trace for the Boric Acid Tanks to the Charging Pumps suction lines are verified operable daily versus weekly. Thus, this change does not involve a reduction in the margin of safety.

Since the application for amendment satisfies the criteria specified in 10 CFR 50.92 and is similar to examples for which no significant hazards consideration exists, Commonwealth Edison Company has made a determination that the application involves no significant hazards consideration.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis.

Accordingly, the Commission proposes to determine that the proposed changes to the Technical Specifications involve no significant hazards consideration.

**Local Public Document Room location:** Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

**Attorney to licensee:** Michael I. Miller, Esq., Sidley and Austin, One First National Plaza, Chicago, Illinois 60603.

**NRC Project Director:** Daniel R. Muller

**GPU Nuclear Corporation, et al., Docket No. 50-320, Three Mile Island Nuclear Station, Unit No. 2, Dauphin County, Pennsylvania**

**Date of amendment request:** April 4, 1988

**Description of amendment request:** The proposed amendment would revise TMI-2 Operating License No. DPR-73 by modifying Appendix B Technical Specifications Sections 1.0, "Definitions" and 2.0, "Limiting Conditions for Operation." The proposed changes would revise certain surveillance terms and definitions in the Appendix B Technical Specifications consistent with the meaning in the Appendix A Technical Specifications.

In Section 1 the licensee proposes a change in the definition of "Calibration". The term "functional test" in the definition would be changed to "channel functional test." Also in Section 1 the licensee proposes to delete the terms and associated definitions for "functional check" and "functional test". These two terms would be replaced by "channel functional test" and "channel check." The definitions for these two terms are identical to the Appendix A Technical Specification definitions.

Section 2.1.1, Liquid Effluents, defines the limits and conditions for the controlled release of liquid radioactive effluents to the environment. This section also specifies the surveillance requirements for the monitoring equipment. The liquid effluent radiation monitor currently receives an instrument channel test monthly and a source check prior to each liquid discharge. The licensee proposes to change the terminology such that the liquid radiation monitor receives a channel functional test monthly and a channel check prior to each liquid discharge.

Section 2.1.2, Gaseous Effluents, defines the limits and conditions for the controlled release of radioactive gaseous effluents to the environment. This section also specifies the surveillance requirements for the monitoring equipment. The unit vent monitors for TMI-2 currently receive an instrument channel check at least monthly and a sensor check at least daily. The licensee proposes to change the terminology such that the vent monitors receive a channel functional test at least monthly and a channel check at least daily.

Section 2.1.3, Radioactive Gaseous Effluent Monitoring Instrumentation, requires that each channel of each radioactive gaseous effluent monitor demonstrate operability by performance of a channel check, source check, channel calibration and channel

functional test operations at specific intervals of time. The licensee proposes to delete the requirement for a monthly source check. The licensee finds that the methodology used for performing the daily channel check on the current monitor verifies the same degree of operability as the monthly source check.

Table 2.1-36 specifies the time interval for the various instrument surveillance requirements. The current Technical Specifications require a source check for the Noble Gas activity monitor. The licensee proposes to delete this requirement from the table to be consistent with the proposed deletion of the requirement to conduct a source check.

**Basis for proposed no significant hazards consideration determination:** The Commission has provided standards for determining whether a significant hazards consideration exists in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety.

TMI-2 is currently in a post-accident, cold shutdown, long-term cleanup mode, with sufficient decay heat removal assured by direct heat loss from the reactor coolant system to the reactor building atmosphere. The licensee is presently engaged in defueling the damaged reactor, decontaminating the facility and readying the plant for long-term storage. As of the end of September 1988, approximately 68 percent of the fuel contained in the reactor vessel has been removed. Defueling the facility has progressed to the regions below the location of the original core volume. Defueling activities within the reactor building will be completed in the fall of 1989. The staff has determined in previous license amendments, that the potential accidents analyzed for TMI-2 in the current cleanup-mode are bounded in scope and severity by the range of accidents originally analyzed in the facility FSAR. The changes proposed by the licensee are changes to the Appendix B Technical Specifications. These changes have been proposed by the licensee to ensure consistent usage of terms throughout both the Appendix A and Appendix B specifications. Terms that are no longer referenced in the

Appendix B Technical Specifications would be deleted from Section 1.0.

The proposed changes do not significantly increase the probability or consequences of an accident previously evaluated because no changes are proposed to current safety systems or setpoints. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated because no new modes of operation or new equipment are being introduced. The proposed changes revise the definitions used to characterize the surveillance requirements for environmental monitoring equipment and as such does not affect the potential or severity of an accident at TMI-2. The proposed changes do not involve a significant reduction in a margin of safety, because, as mentioned previously, the changes are administrative in nature and result in consistency of definitions throughout the Technical Specifications. Furthermore no active components are required to maintain the current safe shutdown of TMI-2.

Based on the above considerations, the staff proposes to determine that the proposed changes do not involve a significant hazards consideration.

**Local Public Document Room location:** State Library of Pennsylvania Government Publications Section, Education Building, Walnut Street and Commonwealth Avenue, Harrisburg, Pennsylvania 17126.

**Attorney for licensee:** Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

**NRC Project Director:** John F. Stolz

**Indiana Michigan Power Company, Dockets Nos. 50-315 and 50-316, Donald C. Cook Nuclear Plant, Units Nos. 1 and 2, Berrien County, Michigan**

**Date of amendment request:** December 2, 1986, November 23, 1987, and July 21, 1988.

**Description of amendment request:** In accordance with the requirements of 10 CFR 73.55, the licensee submitted an amendment to the Physical Security Plan for the Donald C. Cook Nuclear Plant to reflect recent changes to that regulation. The proposed amendments would modify paragraphs 2.D of Facility Operating Licenses Nos. DPR-58 and DPR-74 to require compliance with the revised Plan.

**Basis for proposed no significant hazards consideration determination:** On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of



Plants and Materials," to clarify plant security requirements to afford an increased assurance of plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on December 2, 1988, November 23, 1987, and July 21, 1988, to satisfy the requirements of the amended regulations. The Commission proposes to amend the licenses to reference the revised plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and that the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving no significant hazards considerations and examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii) "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendments involve no significant hazards consideration.

**Local Public Document Room**  
location: Maude Preston Palenske Memorial Library, 500 Market Street, St. Joseph, Michigan 49085.

**Attorney for licensee:** Gerald Charnoff, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

**NRC Project Director:** Theodore R. Quay, Acting.

**Long Island Lighting Company, Docket No. 50-322, Shoreham Nuclear Power Station, Suffolk County, New York**

**Date of amendment request:** July 15, 1988

**Description of amendment request:** This amendment would revise Technical Specifications 3/4.8.1, A. C. Sources, to adopt staff recommended changes to

improve and maintain diesel generator reliability (Generic Letter 84-15).

**Basis for proposed no significant hazards consideration determination:** The Commission has provided standards for determining whether a significant hazards consideration exists as stated in 10 CFR 50.92(c). A proposed amendment to an operating license for a facility involves no significant hazards considerations if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

In accordance with 10 CFR 50.92 the licensee has reviewed the proposed changes and has concluded as follows:

The proposed license change does not involve a significant hazards consideration because operation of the Shoreham Nuclear Power Station, in accordance with this change, would not:

(1) involve a significant increase in the probability or consequences of an accident previously evaluated as it does not alter the onsite standby power supply system design or the system's operability and availability requirements. The diesel generators are required to supply the same emergency load service regardless of the proposed change. The reduction of test frequency, the independent testing and the loading to 1400 KW should reduce the potential for failures caused by excessive testing and running diesels at low or no load. Surveillance Testing of the diesel generators at a load of 3300 KW will continue to be performed every 31 days.

(2) create the possibility of a new or different kind of accident from any accident previously evaluated as onsite standby power supply system design and operability requirements are not affected by the proposed change.

(3) involve a significant reduction in a margin of safety as the diesel generators are required to supply the same emergency load service, regardless of the proposed change. Performance of diesel generator testing within 1 hour and every 8 hours thereafter, upon inoperability of one or more offsite circuits (3.8.1.1 a, e), provides little additional assurance of diesel generator operability than testing within 24 hours of a previous surveillance test or within 8 hours. Upon loss of offsite circuits, diesel generator reliability is not expected to be adversely affected, thus, surveillance testing within 24 or 8 hours provides adequate assurance of diesel generator operability. It also allows time for pre-test inspection, if required, and sequential testing of diesel generators. The proposed requirement (3.8.1.1.b.c) that upon unplanned inoperability of the diesel being tested, the remaining diesels are individually tested within 24 hours, is incorporated to determine if a common mode failure exists. Otherwise, testing of the remaining diesel

generators is not required. The addition of Surveillance Requirement 4.8.1.1.2.a.5 which includes running the diesel generators at 1400 KW, will demonstrate operability and availability without subjecting diesel generators to operating stresses which can occur by testing at the qualified load of 3300 KW. This requirement will also reduce the amount of wear associated with running diesel generators at no or low loads. Each diesel generator has a test schedule based on its individual performance in previous surveillance tests. Test schedules will now be determined by the number of failures per 20 consecutive tests in addition to the 100 consecutive tests originally identified (Table 4.8.1.1.2-1). The proposed tech spec changes are consistent with the guidelines of Generic Letter 84-15. They will serve to reduce the number of diesel starts and runs, thereby reducing wear and tear and ultimately degradation and failure. The proposed changes should improve overall safety.

Based upon the above considerations and analyses, LILCO has determined that this proposed change does not involve a significant hazards consideration.

The staff reviewed the licensee's determination that the proposed license amendment involves no significant hazards consideration and agrees with the licensee's analyses. Accordingly, the staff proposes to determine that the proposed license amendment does not involve a significant hazards consideration.

**Local Public Document Room**  
location: Shoreham-Wading River Public Library, Route 25A, Shoreham, New York 11786-9697

**Attorney for licensee:** W. Taylor Reveley, III, Esq., Hunton and Williams, P.O. Box 1535, Richmond, Virginia 23212

**NRC Project Director:** Walter R. Butler

**Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana**

**Date of amendment request:** September 20, 1988 and November 28, 1988

**Description of amendment request:** The proposed amendment would revise License Condition 2.C.9 of the license issued March 6, 1985, would remove fire protection Technical Specifications 3/4.3.3.8, 3/4.7.10.1 through 3/4.7.10.5, 3/4.7.11, and 6.2.2.e, and the corresponding Section 3/4 Bases, and revise Technical Specification 6.5.1.6 of Appendix A of that license. Generic Letters 86-10, dated April 24, 1986, and 88-12, dated August 2, 1988, from the NRC provided guidance to licensees to request removal of the fire protection Technical Specifications. The licensee's proposed amendment is in response to these Generic Letters.

**Basis for proposed no significant hazards consideration determination:**

The staff has evaluated this proposed amendment and determined that it involves no significant hazards considerations. According to 10 CFR 50.92(c), a proposed amendment to an operating license involves no significant hazards considerations if operation of the facility in accordance with the proposed amendment would not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated; or
2. Create the possibility of a new or different kind of accident from any accident previously evaluated; or
3. Involve a significant reduction in a margin of safety.

The proposed revision to the License Condition is in accordance with the guidance provided in Generic Letter 86-10 for licensees requesting removal of fire protection Technical Specifications (TS). The incorporation of the NRC-approved Fire Protection Program, and the former TS requirements by reference to the procedures implementing these requirements into the Final Safety Analysis Report (FSAR) and the use of the standard License Condition on fire protection will ensure that the Fire Protection Program, including the systems, the administrative and technical controls, the organization, and the other plant features associated with fire protection will be on a consistent status with other plant features described in the FSAR. Also, the provisions of 10 CFR 50.59 would then apply directly for changes the licensee desires to make in the Fire Protection Program. In this context, the determination of the involvement of an unreviewed safety question defined in 50.59(a)(2) would be made based on the "accident...previously evaluated" being the postulated fire in the fire hazards analysis for the fire area affected by the change. Hence, the proposed License Condition establishes an adequate basis for defining the scope of changes to the Fire Protection Program which can be made without prior Commission approval, i.e., without introduction of an unreviewed safety question. The revised License Condition or the removal of the existing TS requirements on fire protection does not create the possibility of a new or different kind of accident from those previously evaluated. They also do not involve a significant reduction in the margin of safety since the License Condition does not alter the requirement that an evaluation be performed for the identification of an unreviewed safety question for each proposed change to the Fire Protection Program. Consequently, the proposed License Condition or the removal of the fire protection requirements do not

involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed modification of the Administrative Control Section 8 of the Technical Specifications includes the review of the Fire Protection Program and implementing procedures and the submittal of recommended changes to the Safety Review Committee as one of the responsibilities of the Plant Operations Review Committee under TS 6.5.1.6. In this manner, the Fire Protection Program will be addressed by administrative control requirements that are consistent with other programs addressed by License Conditions. These changes are administrative in nature and do not impact the operation of the facility in a manner that involves significant hazards considerations.

The proposed amendment includes the removal of fire protection Technical Specifications in four areas: (1) fire detection systems, (2) fire suppression systems, (3) fire barriers, and (4) fire brigade staffing requirements. While it is recognized that a comprehensive Fire Protection Program is essential to plant safety, many details of this program that are currently addressed in Technical Specifications can be modified without affecting nuclear safety. With the removal of these requirements from the Technical Specifications, they have been incorporated into the Fire Protection Program implementing procedures. Hence, with the additions to the existing administrative control requirements that are applicable to the Fire Protection Program and the revised License Condition, there are suitable administrative controls to ensure that licensee initiated changes to these requirements, that have been removed from the Technical Specifications, will receive careful review by competent individuals. Again, these changes are administrative in nature and do not impact the operation of the facility in a manner that involves significant hazards considerations.

Based on the review and the above discussions, the staff proposes to determine that the proposed changes do not involve a significant hazards consideration.

**Local Public Document Room**  
location: University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122

**Attorney for licensee:** Bruce W. Churchill, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N St., NW., Washington, DC 20037

**NRC Project Director:** Jose A. Calvo

**Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania**

**Date of application for amendments:** August 26, 1988

**Description of amendment request:** The proposed changes to Technical Specification pages 240g and 240q reflect a modification to permit the removal of that portion of the carbon dioxide fire suppression system (CARDON) that serves the control room. The change is proposed to eliminate a safety hazard to personnel in the control room as would occur if inadvertently pressurized carbon dioxide hoses failed inside the control room. The licensee's concerns arise from observations of inadvertently pressurized hoses in the turbine building and the control room and observations of blistered hoses and a ruptured hose in the turbine building. The licensee proposes that the nine existing portable 14 pound Class 2A halon extinguishers in the control room and the two water hose reels located outside the entrance to the control room provide sufficient fire suppression capability. The proposed changes do not affect the CARDON system's use for other areas such as the Turbine Building, Cable Spreading Room, Computer Room, High Pressure Coolant Injection System Pump Rooms and the Diesel Generator Rooms. The effect of this proposed amendment is to delete the Control Room from the list, on pages 240g and 240q, of those areas of the plant that are served by the CARDON system.

**Basis for proposed no significant hazards consideration determination:** The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The licensee has provided a discussion of the proposed changes as they relate to these standards; the discussion is presented below.

Standard 1 - The proposed changes do not involve a significant increase in the



probability or consequences of an accident previously evaluated.

The proposed changes involve the removal of a redundant fire suppression system from the Control Room. The probability of a fire in the Control Room is not increased by removing the CO<sub>2</sub> hose reels of the CO<sub>2</sub> Fire Protection System. The consequences of a fire in the Control Room are not increased because the Control Room operators are adequately equipped to handle a fire in the Control Room by means of portable halon extinguishers and shutdown if the fire requires the Operators to leave the water hose stations adjacent to the Control Room. The Control Room is continuously manned, automatic fire detection is provided, and alternative shutdown panels outside the Control Room will allow the plant to be safely shutdown if damage results to safe shutdown equipment. Thus, the proposed changes do not involve a significant increase in the probability or consequences of an accident as previously evaluated in Chapter 14 of the PBAPS Updated Final Safety Analysis Report.

Standard 2 - The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The elimination of the redundant CO<sub>2</sub> Fire Protection System from the Control Room does not create the possibility of a new or different type of accident. Sufficient fire suppression capability is maintained even without the use of the CO<sub>2</sub> Fire Protection System by halon extinguishers and water hose reels located outside the entrance to the Control Room. Alternative shutdown panels outside the Control Room will allow the plant to be safely shutdown if the fire forces the operators to leave the Control Room or if damage results to safe shutdown equipment.

Standard 3 - The proposed revisions do not involve a significant reduction in a margin of safety.

Fire suppression capability is maintained by means of portable halon extinguishers and hose stations adjacent to the Control Room which would provide the Control Room personnel with adequate fire suppression capability. As determined by the Control Room habitability study, the continued presence of the CO<sub>2</sub> hose reels in the Control Room does not present a safety hazard to Control Room personnel and jeopardizes Control Room habitability. For these reasons, the change will enhance the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis.

Accordingly, the Commission has proposed to determine that the above changes do not involve a significant hazards consideration.

**Local Public Document Room**  
location: Government Publications Section, State Library of Pennsylvania, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania 17126

**Attorney for Licensee:** Troy B. Conner, Jr., 1747 Pennsylvania Avenue, NW., Washington, DC 20006

**NRC Project Director:** Walter R. Butler

Philadelphia Electric Company, Public Service Electric and Gas Company, Delmarva Power and Light Company, and Atlantic City Electric Company, Dockets Nos. 50-277 and 50-278, Peach Bottom Atomic Power Station, Units Nos. 2 and 3, York County, Pennsylvania

**Date of application for amendments:** October 21, 1988

**Description of amendment request:** The proposed change to Technical Specification pages iv, 103, 103a and 110 would revise the minimum count rate required on the source range monitors for the withdrawal of control rods for startup. This change affects startup only and does not extend to refueling activities. The current Technical Specification requiring a minimum count rate of three counts per second (cps) would be revised, for startup only, to specify the minimum count rate as a function of the signal-to-noise (S/N) ratio below a count rate of 3 cps. This relationship between count rate and the S/N ratio is defined by an added Figure 3.3.1. The specification is also revised such that when the reduced count rate is being utilized, at least three of the SRM channels must indicate on or above the curve provided in Figure 3.3.1. Several other administrative changes are also proposed to correct previous inadvertent omissions and misspellings.

The source range monitoring (SRM) system consists of four identical neutron detection channels that provide neutron flux information during reactor startup and low flux level operations until overlap with the intermediate range monitoring (IRM) system is achieved. The SRM system is not required to ensure that the safety design bases are maintained, and, accordingly, no credit is taken for action by the system in the Final Safety Analysis Report (FSAR) accident analyses. The only events related to the proposed change are those that potentially could occur during startup: a continuous rod withdrawal, which is an anticipated operational transient, and the control rod drop accident. As indicated in the FSAR, the worst case rod withdrawal event analysis does not take credit for the rod block that would be initiated by the rod block monitoring (RBM) system based on the input from the SRM. Therefore, the analysis progresses until scram signals are generated by the IRM and average power range monitoring system to prevent fuel damage. As also indicated in the FSAR, the control rod drop analysis (CRDA) does not take credit for information provided by the source range monitoring system as the

rod drive is withdrawn; the scram signal is assumed by the analysis to be generated by the IRM. An input assumption for several of the CRDA cases is that they are initiated from power levels of at least ten-to-the-minus-eight of rated power. As indicated in the licensee's application, the proposed change in the minimum SRM count rate (the SRM downscale setpoint) will continue to ensure that the applicable CRDA case would also be initiated from at least ten-to-the-minus-eight of the rated power level. Therefore, the input to the CRDA analysis remains valid.

The proposed change is needed because both units have been shut down since March 1987 and it appears likely that the SRM count rate may not be above the minimum value of three cps on at least two channels when the units are expected to be restarted. Therefore, the count rate specification is proposed to be revised to include values down to 0.7 cps with an associated S/N ratio. The augmentation of the count rate below three cps with an S/N specification ensures that the statistical neutron monitoring confidence level of 95% is maintained at the lower count rates.

**Basis for proposed no significant hazards consideration determination:** The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

Standard 1 - The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The events that would likely involve the SRM in their response would be the control rod drop accident (CRDA) and the continuous rod withdrawal error. The CRDA is more limiting and the design basis accident analysis for it does not give credit for SRM response. The analysis for this event utilizes the trip provided by the IRM. No hardware changes are proposed for the SRM or other systems.

Several of the CRDA analysis cases are assumed to start from ten-to-the-minus-eight of rated power. The

proposed lower limit of 0.7 cps, which corresponds to approximately ten-to-the-minus-eight of rated power and the specification of a S/N ratio to ensure the same statistical neutron monitoring confidence level supports the continuing validity of this analysis assumption.

Therefore, it is concluded that the proposed changes do not significantly affect the probability of initiating the CRDA or rod withdrawal event and since the SRMs are not given credit in the analyses for responding to these events the proposed SRM changes do not affect the design basis analysis consequences of these events.

Standard 2 - The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

No hardware modifications or other changes which would initiate new or different kinds of accidents are involved. The proposed changes have been shown to be within the bounds of previously existing design basis safety analyses.

Standard 3 - The proposed changes do not involve a significant reduction in a margin of safety.

The only effect of these changes is to permit withdrawal of control rods at a lower SRM count rate while maintaining the previously established statistical neutron monitoring confidence level of 95% and the assurance that any event would initiate from at least ten-to-the-minus-eight of rated power. The SRMs are not required to ensure the safety margins of mitigative actions in the design basis safety analyses.

On the bases discussed above, the Commission has proposed to determine that the above changes do not involve a significant hazards consideration.

The licensee has also proposed several administrative changes to correct Technical Specification (TS) 4.3.C.1 of the Unit 2 TS to state that scram time testing may be accomplished during operational hydrostatic testing or during startup. This would restore a phrase that was inadvertently omitted in an earlier amendment application and would make the Unit 2 TS identical to the current Unit 3 TS in this regard. The licensee also proposes to correct the abbreviation for the Rod Block Monitor in TS 3.3.B.5.a.

The Commission has provided guidance for the application of the criteria for no significant hazards consideration determination by providing examples of amendments that are considered not likely to involve significant hazards considerations (51 FR 7751). These examples include: Example (i) "A purely administrative change to technical specifications: for

example, a change to achieve consistency throughout the technical specification, corrections of an error, or a change in nomenclature." The proposed change, to restore previously inadvertently omitted information and to correct the spelling of an acronym, is an example of such an administrative change. Since this proposed change is encompassed by an example for which no significant hazard exists, the staff has made a proposed determination that it involves no significant hazards consideration.

**Local Public Document Room**  
location: Government Publications Section, State Library of Pennsylvania, Education Building, Commonwealth and Walnut Streets, Harrisburg, Pennsylvania 17126

**Attorney for Licensee:** Troy B. Conner, Jr., 1747 Pennsylvania Avenue, NW., Washington, DC 20006

**NRC Project Director:** Walter R. Butler

Power Authority of the State of New York, Docket No. 50-333, James A. FitzPatrick Nuclear Power Plant, Oswego, New York

**Dates of amendment request:** December 1, 1988, November 19, 1987, and March 7, 1988.

**Description of amendment request:** In accordance with the requirements of 10 CFR 73.55, the licensee submitted revisions to the James A. FitzPatrick Nuclear Power Plant Physical Security Plan to reflect recent changes to that regulation. The proposed amendment would modify paragraph 2.D of Facility Operating License No. DPR-59 to require compliance with the revised Plan.

**Basis for proposed no significant hazards consideration determination:** On August 4, 1988 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of Plants and Materials," to clarify plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on December 1, 1988, November 19, 1987, and March 7, 1988, to satisfy the requirements of the amended regulations. The Commission proposes to amend the license to reference the revised Plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and the

"Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving no significant hazards considerations and examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii), "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

**Local Public Document Room**  
location: State University of New York, Penfield Library, Reference and Documents Department, Oswego, New York 13126.

**Attorney for licensee:** Mr. Charles M. Pratt, 10 Columbus Circle, New York, New York 10019.

**NRC Project Director:** Robert A. Capra, Director

Public Service Electric & Gas Company, Docket No. 50-354, Hope Creek Generating Station, Salem County, New Jersey

**Date of amendment request:** November 28, 1988

**Description of amendment request:** The proposed amendment would revise the emergency diesel generator fuel oil sampling requirements presently stated in Technical Specifications Surveillance Requirement 4.8.1.1.2.f, Electric Power Systems, A. C. Sources to comply with the latest ASTM test standard for obtaining a test sample.

**Basis for proposed no significant hazards consideration determination:** The Commission has provided guidance concerning the application of criteria for determining whether a significant hazards consideration exists by providing certain examples of action involving no significant hazards considerations and examples of action involving significant hazards considerations (51 FR 7751). One of the examples of actions involving no significant hazards considerations is example (i) "a purely administrative



change to technical specifications: for example, a change to achieve consistency throughout the technical specifications, correction of an error, or a change in nomenclature." The proposed change conforms to this example since it merely updates a test standard.

Therefore, the Commission proposes to determine that the proposed amendment does not involve significant hazards considerations.

**Local Public Document Room**  
location: Pennsylvania Public library, 190 S. Broadway, Pennsville, New Jersey 08070

**Attorney for licensee:** Troy B. Conner, Jr., Esquire, Conner and Wetterhahn, 1747 Pennsylvania Avenue, NW., Washington, DC 20006

**NRC Project Director:** Walter R. Butler

**Southern California Edison Company, et al., Docket No. 50-206, San Onofre Nuclear Generating Station, Unit No. 1, San Diego County, California**

**Date of amendment request:** October 27, 1988

**Description of amendment request:** The proposed change would require the reactor coolant system overpressure protection system to be operable whenever the residual heat removal system is in operation.

**Basis for proposed no significant hazards consideration determination:** As required by 10 CFR 50.91(a), the licensee has provided its analysis about the issue of no significant hazards consideration which is quoted below:

As required by 10 CFR 50.91(a)(1), this analysis is provided to demonstrate that a proposed license amendment to revise the LCOs for the overpressure protection systems for SONGS 1 represents a no significant hazards consideration. In accordance with the three factor test of 10 CFR 50.92(c), implementation of the proposed amendment was analyzed and found not to: 1) involve a significant increase in the probability or consequences for an accident previously evaluated; or 2) create the possibility of a new or different kind of accident from any accident previously evaluated; or 3) involve a significant reduction in a margin of safety.

The RHR system has a design pressure of 500 psig. Requiring the overpressure protection systems to be operable during RHR system operation will assure that the design pressure of the RHR system is not exceeded. Maintenance of the RHR boundary is essential to assurance of continued, reliable RHR system operation and, consequently, safety of the reactor core which is cooled by the RHR system.

#### Analysis

Conformance of the proposed amendments to the standards for a determination of no significant hazard as defined in 10 CFR 50.92 (three factor test) is shown in the following:

1. Will operation of the facility in accordance with this proposed change

involve a significant increase in the probability or consequences of an accident previously evaluated?

#### Response: No

The use of the overpressure protection systems to protect the RHR system do not affect accident probabilities, as the overpressure event occurs by some mechanism external to either of these systems. However, the overpressure protection of the RHR system is important to provide assurance that, in the event of an overpressurization incident, the RHR system will not be damaged. The continued operation of the RHR system is necessary to maintain the reactor core in a cooled, shutdown configuration. Therefore, it is concluded that operation of the facility in accordance with this proposed change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Will operation of the facility in accordance with this proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

#### Response: No

The revisions proposed herein require that an existing system, the overpressure protection system, be operable when the RHR system is in operation. Both the RHR system and the overpressure protection system are designed to be operated in the configuration. Therefore, it is concluded that operation of the facility in accordance with this proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

#### Response: No

The revisions proposed herein assure continued compliance with a previously reviewed margin of safety. The NRC concluded, in their review of an SEP Topic associated with the RHR system, overpressure protection for the RHR system is necessary to assure the design margin of safety for the RHR system. Therefore, it is concluded that operation of the facility in accordance with this proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the analysis and, based on that review, it appears that the three criteria are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

**Local Public Document Room**  
location: General Library, University of California, P.O. Box 19557, Irvine, California 92713.

**Attorney for licensee:** Charles R. Kocher, Assistant General Counsel, and James Beoletto, Esquire, Southern California Edison Company, P.O. Box 800, Rosemead, California 91770.

**NRC Project Director:** George W. Knighton

**Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee**

**Date of amendment requests:** December 2, 1988 (TS 88-14)

**Description of amendment requests:** The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Units 1 and 2 Technical Specifications (TS). The changes are to revise Table 3.3-12, "Radioactive Liquid Effluent Monitoring Instrumentation." These changes will clearly state the minimum radiation monitor channels required to be operable for each header for the essential raw cooling water (ERCW) effluent.

**Basis for proposed no significant hazards consideration determination:** TVA provided the following in its submittal to support its proposed changes to the TS:

TVA is requesting this change to avoid future misinterpretation of limiting condition for operation (LCO) 3.3.3.9, table 3.3-12, the minimum radiation monitor channels required operable for the ERCW effluent headers. On June 5, 1988, noncompliance of technical specifications resulted from an incorrect interpretation of the minimum radiation monitor channels required for the ERCW effluent line as stated in licensee event report 327/88-002. Table 3.3-12 lists the instrument as ERCW effluent line and gives the minimum radiation monitor channels required operable as one. Because there are "A" and "B" trains of ERCW, each with two radiation monitors for each discharge header, one monitor for each train must be operable.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. This technical specification change involves only clarification to the original effluent release radiation monitoring configuration of the LCO [3.3.3.9] in accordance with GDC [General Design Criterion] 64 [of Appendix A to 10 CFR Part 50] and RG [Regulatory Guide] 1.21 for SQN.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. There has not been any change in plant hardware or configuration to the ERCW radiation monitoring system that could result in an accident because of this technical specification [change].

(3) Involve a significant reduction in a margin of safety. The present radiation monitoring limitations for the ERCW effluent remain the same. This technical specification change can only enhance SQN's margin of safety to the environment.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for the amendments involves no significant hazards considerations.

**Local Public Document Room**  
location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

**Attorney for licensee:** General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

**NRC Assistant Director:** Suzanne Black

**Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee**

**Date of amendment requests:** December 2, 1988 (TS 88-25)

**Description of amendment requests:** The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant Units 1 and 2 Technical Specifications (TS). The proposed change is to revise the action statements of limiting conditions for operation (LCO) 3.4.3.2 for the pressurizer power-operated relief valves (PORVs) and their associated block valves. The proposed change will require different actions based on the cause of valve inoperability. With one or more PORVs inoperable but capable of reactor coolant system (RCS) pressure control, power operation may continue, provided the associated block valve is closed (power does not have to be removed from the closed block valve). With one or more PORVs or block valves inoperable and incapable of RCS pressure control, reactor shutdown will be required.

**Basis for proposed no significant hazards consideration determination:** TVA provided the following information in its submittal to support the proposed change to the TS:

The Final Safety Analysis Report (FSAR) accident analysis for a steam generator tube rupture (SGTR), section 15.4.3, assumes that with a loss of offsite power, RCS pressure is reduced to 1,100 pounds per square inch absolute by using the pressurizer PORVs.

This pressure reduction is required to minimize the amount of reactor coolant transferred to the secondary side and eventually terminate RCS break flow.

The current action statement for an inoperable PORV requires the associated block valve be closed and its power removed. Once the block valve is closed and power removed, there is no time limit to return the PORV to operable status because the action was only intended to ensure that a leaking PORV could not be a source of uncontrolled RCS leakage. This action does not ensure availability of at least one PORV for RCS depressurization following a postulated SGTR accident coincident with a loss of offsite power and a single failure. For example, the normal pressurizer spray system is not available during a loss of offsite power, and a single failure of a battery board would render one PORV inoperable.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The pressurizer PORVs are designed to limit pressurizer pressure and prevent the undesirable opening of the safety valves. The PORVs are also used for automatic and manual pressure control. The FSAR analysis for overpressurization protection during modes 1, 2, and 3 assumes that the PORVs do not actuate. The pressurizer safety valves provide the required pressure relief. However, the FSAR accident analysis for an SGTR does take credit for pressure reduction using the PORVs. The proposed change ensures PORV operability for this purpose. If the PORV is incapable of RCS pressure control, then reactor shutdown is required. Thus, the proposed change ensures the assumptions made in the FSAR are valid and the resulting consequences of the SGTR accident remain within conservative limits.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The change to the action statements does not require any hardware changes nor any changes to the operating procedures. The change simply places more restrictive limitations on continued power operations when a PORV is inoperable and incapable of RCS pressure control. Thus, the possibility of a new or different kind of accident is not created.

(3) Involve a significant reduction in a margin of safety. The intended design and operation of the PORVs have not been changed. The valve function to provide overpressure protection is the same, while valve availability for pressure control has increased. The more stringent action statements prevent operation in an unanalyzed condition and therefore improve the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for the amendments involves no significant hazards considerations.

**Local Public Document Room**  
location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

**Attorney for licensee:** General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

**NRC Assistant Director:** Suzanne Black

**Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee**

**Date of amendment requests:** December 2, 1988 (TS 88-32)

**Description of amendment requests:** The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Units 1 and 2 Technical Specifications (TS). The changes are to revise surveillance requirement (SR) 4.6.1.2 and Bases 3/4.6.1.2 to permit the use of an alternative method for calculating containment leakage rates known as the mass point method.

**Basis for proposed no significant hazards consideration determination:** TVA stated the following in its submittal to support its proposed change to the TS:

This [mass point] test methodology was incorporated into American National Standards Institute (ANSI)/American Nuclear Society (ANS) 56.8-1981 (revised 1987) and is accepted by NRC staff as an improved method. The current 10 CFR 50, Appendix J, paragraph III.A.3, references type A test methods from ANSI N45.4-1972, "Leakage Rate Testing of Containment Structures for Nuclear Reactors." This standard accepts two techniques for evaluating [containment leakage rate] test results: the total-time method and the point-to-point method. The proposed change to the SQN TS provides for the use of the newer, more accurate mass point method as referenced in ANSI/ANS 56.8-1987. No changes to the other provisions in ANSI N45.4-1972 are requested.

The Commission has provided Standards for determining whether a



significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has performed and provided the following analysis:

TVA has evaluated the proposed TS change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The mass point technique for calculation of the containment leakage rate is a newer, more accurate and NRC staff-endorsed method. It, or any other calculational method used to determine containment leakage rates during testing, is not considered to be an initiator of any accident previously evaluated. The mass point technique is judged to be a superior method for calculating containment leakage rates and thereby a better method of verifying that leakage from the containment is maintained within allowable limits. By employing a more reliable calculational technique, the assessment of containment integrity, through integrated leak rate testing, is enhanced. As such, the consequences of previously evaluated accidents are not impacted.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed amendment provides for the use of a newer, more accurate technique for calculation of the leakage rate during a containment integrated leak rate test. No possibility of a new or different kind of accident is created because the technique used to calculate leak rates in itself is not considered to be an initiator of any accident, transient, incident, or event.

(3) Involve a significant reduction in a margin of safety. The proposed amendment allows the use of the mass point method to calculate the leakage rate from the containment when performing a containment integrated leak rate test. The mass point method is a newer, more accurate method, which has been endorsed by the NRC staff. By adopting this technique, TVA will be able to make more reliable determinations of containment leakage during an integrated leak rate test. As such, the degree of confidence in containment integrity would be enhanced. Therefore, this proposed revision does not impact the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for amendments involves no significant hazards considerations.

*Local Public Document Room*  
location: Chattanooga-Hamilton County

Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

*Attorney for licensee:* General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

*NRC Assistant Director:* Suzanne Black

**Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee**

*Date of amendment requests:*  
December 2, 1988 (TS 88-42)

*Description of amendment requests:* The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Units 1 and 2 Technical Specifications (TS). The changes are to revise the trip setpoint and allowable value units for the intermediate-range (IR) nuclear flux detector and to revise the applicability requirements for the source range (SR) nuclear flux detector.

*Basis for proposed no significant hazards consideration determination:* TVA stated the following in its submittal to support its proposed changes to the TS:

TVA is replacing the SR and IR neutron (flux) monitors as part of the equipment upgrade to comply with Regulatory Guide 1.97 as required by SQN license conditions 2.C.24 (unit 1) and 2.C.14 (unit 2). The new SR/IR monitor is a fission chamber design manufactured by Gamma Metrics. This design does not require high-voltage deenergization as part of the normal SR detector operation. Consequently, the applicability table 3.3-1 is being revised to delete an unnecessary note involving high-voltage deenergization. The new IR monitor uses a signal that is in units of relative power. Consequently, the trip setpoint and allowable value are being changed in table 2.2-1. The bases to section 2.2 are also being revised to delete references to IR detector current signals that are proportional to power levels. The changes to unit 1 also have appropriate footnotes added to indicate that the changes become effective for unit 1 after installation of the new detectors during the unit 1 cycle 4 refueling outage. The unit 2 detectors will be installed during the unit 2 cycle 3 refueling outage, and the change will be effective at the time of startup following the outage.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequence(s) of an accident previously evaluated. The three administrative changes are proposed to support the installation of the Gamma Metrics source range (SR) and intermediate range (IR) detector assemblies. The first involves the deletion of a table note that is not applicable to the design of the new SR detectors. The second involves a change in engineering units for the P-6 setpoint that results from the difference in output signals from the IR detectors. The third involves the addition of a certain footnote to enable the review and approval of the unit 1 change to proceed independently of the unit 1 installation schedule. The new SR/IR detectors are class-1E equipment that is seismically and environmentally qualified and compatible with the present design requirements. Because the new hardware is compatible with the present design requirements and the proposed technical specification changes are administrative in nature, the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The three administrative changes are proposed to support the installation of the Gamma Metrics SR and IR detector assemblies. The first involves the deletion of a table note that is not applicable to the design of the new SR detectors. The second involves a change in engineering units for the P-6 setpoint that results from the difference in output signals from the IR detectors. The third involves the addition of a certain footnote to enable the review and approval of the unit 1 change to proceed independently of the unit 1 installation schedule. The new SR/IR detectors are class-1E equipment that is seismically and environmentally qualified and compatible with the present design requirements. Because the new hardware is compatible with the present design requirements and the proposed technical specification changes are administrative in nature, the proposed amendment will not create the possibility of a new or different kind of accident from any previously analyzed.

(3) Involve a significant reduction in a margin of safety. The three administrative changes are proposed to support the installation of the Gamma Metrics SR and IR detector assemblies. The first involves the deletion of a table note that is not applicable to the design of the new SR detectors. The second involves a change in engineering units for the P-6 setpoint that results from the difference in output signals from the IR detectors. The third involves the addition of a certain footnote to enable the review and approval of the unit 1 change to proceed

independently of the unit 1 installation schedule. The new SR/IR detectors are class-1E equipment that is seismically and environmentally qualified and compatible with the present design requirements. Because the new hardware is compatible with the present design requirements and the proposed technical specification changes are administrative in nature, the proposed amendment will not involve a significant reduction in a margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for the amendments involves no significant hazards considerations.

*Local Public Document Room*  
location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

*Attorney for licensee:* General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

*NRC Assistant Director:* Suzanne Black

**Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee**

*Date of amendment requests:*  
December 5, 1988 (TS 88-06)

*Description of amendment requests:* The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant, Units 1 and 2 Technical Specifications (TS). The proposed changes are to provide relaxation in the test frequency for the containment purge supply and exhaust isolation valves. Surveillance Requirement (SR) 4.6.3.4 currently states that each containment purge isolation valve be demonstrated operable within 24 hours after each closing of the valve except when the valve is being used for multiple cyclings. Any purge valve that has undergone multiple cyclings is required to be tested at least once every 72 hours. Operability is demonstrated by performance of a Type C leak test of Appendix J to 10 CFR Part 50. This test is to verify that the measured leakage rate from each purge valve, when added to the leakage rates for all other Type B and Type C penetrations, does not exceed 60 percent of the maximum containment leakage rate (La).

In lieu of SR 4.6.3.4, TVA proposes to add a new surveillance requirement under Containment Ventilation System Specification 3.6.1.9. The new SR 4.6.1.9.3 would relax the 24/72-hour test interval and would establish a specific maximum leakage rate of 0.05 La for each purge valve. An action statement

from Revision 5 of the NRC Standard Technical Specifications (STS) is included to address operability requirements for leakage in excess of 0.05 La to be consistent with the revised surveillance requirement. These changes are patterned after Revision 5 of the NRC STS.

*Basis for proposed no significant hazards consideration determination:* TVA provided the following information in its submittal to support the proposed changes:

The proposed change requests a relaxation from the current 24/72-hour test interval for SQN's purge system containment isolation valves. Relaxation of the test interval to once per three months would provide significant benefits and savings to TVA in the areas of ALARA (as low as reasonably achievable), cost, and plant safety.

Under SQN's current surveillance requirement, test personnel are required to enter the annulus at least three times each week for a minimum test duration of one hour. This places test personnel in areas of low to intermediate radiation for prolonged periods of time, resulting in additional exposure. By reducing the number of times test personnel enter the annulus (252 entries versus 8 entries) over 1-year time period, the annual saving in net exposure is estimated to be 3 man-rem.

Under the current 24/72-hour test frequency, at least 252 tests are performed each year for both units. Considering that each complete test requires three technicians for a minimum of three hours at an average cost of \$40 per technician, the annual cost to TVA in testing alone equals \$181,000 for both units. Additional overhead costs needed to support each test, such as planning, scheduling, issuing, and reviewing test packages, are approximately \$300,000 annually. The proposed 3-month test interval would reduce the total number of tests to eight times per year, resulting in an annual saving to TVA of \$290,000. The net saving projected over SQN's remaining operational life would therefore be very significant.

During the Type C leak test of SQN's purge system containment isolation valves, a test connection valve is opened between the inboard and outboard purge isolation valves creating a containment leak path. While the test valve is open, the plant must enter a 1-hour limiting condition for operation (LCO 3.6.1.1). The frequent entering and exiting of an LCO to performance surveillances place an undesirable burden on the Operations staff to record and status each entry. Relaxing the test interval to once every three months would alleviate placing the plant into frequent LCOs and would provide more freedom to the operators for monitoring plant conditions.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the

issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has performed and provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed change conforms to the current NRC STSs for establishing a specific maximum leakage limit (0.05 La) and associated action statements for each containment purge supply and exhaust isolation valve. This leakage limit is a conservative limit with regard to the overall leakage limit of 0.60 La. TVA has evaluated the leakage characteristics of the subject purge valves under normal operation and under worst-case postaccident operation to ensure that the proposed relaxation in leak-test frequency from the current 24/72 hours to 90 days would not reduce valve reliability for containment isolation between tests. No new hardware or operating practices are introduced by these changes. Consequently, the probability or consequences of accidents previously evaluated are unchanged.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed change establishes a specific maximum leakage rate of 0.05 La and associated action statements for SQN's containment purge supply and exhaust isolation valves, which is consistent with the NRC STSs and NRC requirements for maintaining specific leakage paths. TVA conducted an environmental material degradation analysis of the soft-seat material within these valves to ensure the seating material would not degrade under normal operation or worst-case accident conditions. Based on TVA's analysis, the valve seats would continue to function properly (remain resilient); and, therefore, the proposed relaxation in test frequency from 24/72 hours to 90 days would not reduce the valve's ability to seal for containment isolation. The proposed changes does not physically affect these valves or their design; consequently, the possibility of a new or different kind of accident from any previously analyzed is not created.

(3) Involve a significant reduction in a margin of safety. The proposed change deletes the existing SR (SR 4.6.3.4) and functionally groups it under the containment ventilation system specification as a new SR (SR 4.6.1.9.3). An action statement from revision 5 of the NRC STS was included to address operability requirements for leakage in excess of 0.05 La to be consistent with the revised surveillance requirement. Because the new SR conforms to the current NRC STSs and establishes a specific maximum leakage rate for the SQN containment purge supply and exhaust isolation valves, the proposed change is considered to be a technical specification improvement. TVA's evaluation



indicates that the soft-seat material within SQN's purge valves would remain resilient under normal or postaccident operating conditions and that the service life of this seat material is well above the 40-year design life of SQN. Based on TVA's analysis, the proposed change to relax the leak-test frequency from 24/72 hours to the proposed 90-day frequency would not reduce the valve's ability to seal for containment isolation nor would the valve undergo catastrophic failure between tests. Consequently, the proposed change will not significantly reduce the margin of safety.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the application for amendments involves no significant hazards considerations.

**Local Public Document Room**  
location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

**Attorney for licensee:** General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

**NRC Assistant Director:** Suzanne Black

**Tennessee Valley Authority, Docket No. 50-328, Sequoyah Nuclear Plant, Unit 2, Hamilton County, Tennessee**

**Date of amendment request:**  
December 2, 1988 (TS 88-33)

**Description of amendment request:**  
The Tennessee Valley Authority (TVA) proposes to modify the Sequoyah Nuclear Plant (SQN) Unit 2 Technical Specifications (TS). The changes are to revise (1) the upper head injection (UHI) accumulator level switch setpoint and tolerances of surveillance requirement (SR) 4.5.1.2.c.1 and (2) the heat flux hot channel factor ( $F_Q(z)$ ) of limiting condition for operation (LCO) 3.2.2 and SR 4.2.2.2.

**Basis for proposed no significant hazards consideration determination:**  
TVA stated the following in its submittal to support its proposed changes in the TS:

This proposed revision to the SQN Unit 2 UHI technical specifications is consistent with the SQN Unit 1 technical specification proposed change 88-20 (submitted August 15, 1988; and supplemented by letter dated September 21, 1988; which NRC approved by letter dated October 14, 1988) and [proposed change] 88-28 (submitted September 21, 1988).

Condition adverse to quality report (CAQR) SQP871844 documents that the level switches and setpoints that were used previously could allow more than the analytical limit of 1,130.5 cubic feet of UHI water to be injected during a postulated accident. Two changes in the design and configuration of the UHI system were pursued to correct this potential problem. First, the minimum delivered UHI water

volume was reduced from 900 cubic feet to 850 cubic feet. This change is supported by Westinghouse Electric Corporation (W) evaluations described in a September 14, 1988 letter to TVA (included as attachment 1 [to TVA's submittal]). Second, a new model of level switch is being installed in the UHI system. These new switches are essentially the same as those presently used, except for their span. Because of the span differences, the switches also have different accuracy characteristics. Demonstrated Accuracy Calculation 1-LS-87-21 determined a new setpoint and tolerances based on the new instrument characteristics. These new values are being incorporated into SR 4.5.1.2.c.1 to ensure that the delivered UHI water volumes are bounded by the volumes assumed in the large-break, loss of coolant accident (LOCA) analyses. This in turn ensures that the offsite doses from a postulated LOCA are bounded by the analyses of the [SQN] Final Safety Analysis Report (FSAR), section 15.5.

The Commission has provided Standards for determining whether a significant hazards determination exists as stated in 10 CFR 50.92(c). 10 CFR 50.91 requires that at the time a licensee requests an amendment, it must provide to the Commission its analyses, using the standards in Section 50.92, on the issue of no significant hazards consideration. Therefore, in accordance with 10 CFR 50.91 and 10 CFR 50.92, the licensee has provided the following analysis:

TVA has evaluated the proposed technical specification change and has determined that it does not represent a significant hazards consideration based on criteria established in 10 CFR 50.92(c). Operation of SQN in accordance with the proposed amendment will not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated. The UHI system is designed to supply additional [water] inventory to the reactor core during the blowdown phase of a LOCA. UHI flow to the core is terminated by automatic hydraulic isolation valves. These valves are actuated by level switches on the UHI water accumulator. The proposed change reflects a new actuation setpoint and the associated instrument tolerances for the level switches. As such, the change does not increase the probability of a previously evaluated accident. The new setpoint and tolerances were calculated based on a new level switch accuracy characteristic and a broadened UHI-delivered water volume band. Broadening the delivered water volume band did result in increased PCTs [peak cladding temperatures] for the limiting cases. In all cases, however, the PCT remained below the 10 CFR 50.46 limit of 2,200 degrees F. This in turn ensures that offsite doses remain bounded by the analyses of [the] FSAR, section 15.5. Because the proposed setpoint ensures that the delivered water volume remains bounded by the new analytical limits, the proposed change does not increase the consequences of any previously evaluated accident.

$F_Q(z)$  is defined as the maximum local heat flux on the surface of a fuel rod divided by the core average heat flux.  $F_Q(z)$  is used to limit the magnitude of hot spots and is used as a bounding input for accident analyses.  $F_Q(z)$  is not postulated as being the initiating event for any accident scenario. Therefore, the proposed change does not affect the probability of any accident previously evaluated. The proposed reduction in  $F_Q(z)$  from 2.237 to 2.15 is conservative in nature in that it results in reduced PCTs during a postulated accident. (The  $F_Q(z)$  reduction serves as an operational restriction to ensure that PCTs remain below the 10 CFR 50.46 limit of 2,200 degrees F.) Because of the reduction in calculated PCT, the proposed change will not increase the consequences of a previously evaluated accident.

(2) Create the possibility of a new or different kind of accident from any previously analyzed. The proposed change to the actuation setpoint and tolerances represents no modification to the UHI design or operation, which could create a new accident.

The change only affects the performance of UHI for accident scenarios in which it is already assumed to function.

As stated ...[above]  $F_Q(z)$  is not assumed to be the initiating event for any accident scenario. The proposed change to  $F_Q(z)$  provides additional PCT margin to ensure that the 2,200-degree-F limit is not exceeded. The presence of additional margin will not create the possibility of a new or different kind of accident.

(3) Involve a significant reduction in a margin of safety. The proposed change to SR 4.5.1.2.c.1 represents a new setpoint and accuracies for the combination of new level switches and a broadened, delivered water volume band. The setpoint ensures that the delivered water volume remains between 850 and 1,130.5 cubic feet. W analyses have indicated that delivered water volumes between these limits ensure that PCT remains below 2,200 degrees F. Therefore, the margin of safety is not reduced by this proposed change.

The proposed reduction in  $F_Q(z)$  is conservative in nature because it lowers the calculated PCT for the limiting LOCA analysis case. As calculated by W, the proposed reduction in  $F_Q(z)$  from 2.237 to 2.15 lowers the calculated PCT by 87 degrees F for the limiting imperfect mixing case and by 96 degrees F for the limiting perfect mixing case. These reductions, combined with PCT margin obtained by administratively limiting [steam generator tubes plugged] SGTP to 5 percent, result in calculated PCTs of 2,089 degrees F for the limiting imperfect mixing case and 2,067 degrees F for the limiting perfect mixing case. Because the calculated PCT remains below the 2,200-degree-F limit of 10 CFR 50.46, there is no reduction in the margin of safety to cladding failure; and additional margin is being added.

The staff has reviewed the licensee's no significant hazards consideration determination and agrees with the licensee's analysis. Therefore, the staff proposes to determine that the

application for the amendment involves no significant hazards considerations.

**Local Public Document Room**  
location: Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

**Attorney for licensee:** General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, E11 B33, Knoxville, Tennessee 37902.

**NRC Assistant Director:** Suzanne Black

**Toledo Edison Company and The Cleveland Electric Illuminating Company, Docket No. 50-346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio**

**Date of amendment request:**

December 1, 1988 as supplemented January 29, 1988; and January 12, 1988.

**Description of amendment request:** In accordance with the requirements of 10 CFR 73.55, the licensee submitted an amendment to the Physical Security Plan for the Davis-Besse Nuclear Power Station, Unit No. 1, to reflect recent changes to that regulation. The proposed amendment would modify paragraph 2.D of Facility Operating License No. NPF-3 to require compliance with the revised Plan.

The licensee's January 12, 1988 submittal requested deletion of the Type 1 Vital Area designation for the Davis-Besse Containment Vessel and, with that, the deletion of the Two-Man Rule.

**Basis for proposed no significant hazards consideration determination:**  
On August 4, 1986 (51 FR 27817 and 27822), the Nuclear Regulatory Commission amended Part 73 of its regulations, "Physical Protection of Plants and Materials," to clarify plant security requirements to afford an increased assurance of plant safety. The amended regulations required that each nuclear power reactor licensee submit proposed amendments to its security plan to implement the revised provisions of 10 CFR 73.55. The licensee submitted its revised plan on December 1, 1986 and January 29, 1988, to satisfy the requirements of the amended regulations. The Commission proposes to amend the license to reference the revised plan.

In the Supplementary Materials accompanying the amended regulations, the Commission indicated that it was amending its regulations "to provide a more safety conscious safeguards system while maintaining the current levels of protection" and that the "Commission believes that the clarification and refinement of requirements as reflected in these amendments is appropriate because

they afford an increased assurance of plant safety."

The Commission has provided guidance concerning the application of the criteria for determining whether a significant hazards consideration exists by providing certain examples of actions involving no significant hazards considerations and examples of actions involving significant hazards considerations (51 FR 7750). One of these examples of actions involving no significant hazards considerations is example (vii), "a change to conform a license to changes in the regulations, where the license change results in very minor changes to facility operations clearly in keeping with the regulations." The changes in this case fall within the scope of the example. For the foregoing reasons, the Commission proposes to determine that the proposed amendment involves no significant hazards consideration.

The Commission has evaluated the January 12, 1988 request and proposes to determine that these changes would not:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated because the consequences of any accident produced by the acts of a single person would not exceed those produced by two persons and the probability of such acts is not increased because compensating requirements more stringent than those when the Two Man Rule was instituted now are in place;

2. Create the possibility of a new or different kind of accident from any accident previously evaluated because the Vital Area designation does not create an accident initiation scenario which has not been previously evaluated. The redesignation is justified based on accident initiation evaluations and access into these areas will be properly controlled based on existing security requirements for similarly designated areas.

3. Involve a significant reduction in a margin of safety because all Vital Areas have the same security requirements, thereby maintaining the margin of safety assumed in the analysis.

Based on the above evaluation, the Commission proposes to determine that the deletion of the Type 1 Vital Area designation for the Containment Vessel and the deletion of the Two-Man Rule would not involve significant hazards considerations.

**Local Public Document Room**  
location: University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43608.

**Attorney for licensee:** Gerald Charnoff, Esquire, Shaw, Pittman, Potts

and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

**NRC Project Director:** John N. Hannon

**Union Electric Company, Docket No. 50-483, Callaway Plant, Unit 1, Callaway County, Missouri**

**Date of amendment request:** October 25, 1988

**Description of amendment request:**  
The proposed amendment involves a core reload and would revise the Technical Specifications (TS) to include increased peaking factors (nuclear enthalpy rise hot channel factor and heat flux hot channel factor), a positive moderator temperature coefficient (PMTTC), increased refueling water storage tank (RWST)/accumulator boron concentrations, and increased spray additive tank (SAT) sodium hydroxide concentration. The reload core is projected to have 88 new Vantage 5 (V-5) fuel assemblies, with 9 Optimized Fuel Assemblies (OFA's) and 96 V-5 assemblies carried over from Cycle 3.

**Basis for proposed no significant hazards consideration determination:**  
The Commission has provided guidance concerning the application of the standards in 10 CFR 50.92 by providing certain examples (51 FR 7751) of actions not likely to involve a significant hazards consideration. Example (iii) of this guidance states: "For a nuclear power reactor, a change resulting from a nuclear reactor core reloading, if no fuel assemblies significantly different from those found previously acceptable to the NRC for a previous core at the facility in question are involved. This assumes that no significant changes are made to the acceptance criteria for the technical specifications, that the analytical methods used to demonstrate conformance with the technical specifications and regulations are not significantly changed, and that NRC has previously found such methods acceptable."

The proposed license amendment is directly related to the above example in that the core reload uses V-5 fuel which is not significantly different from previous cores at Callaway, the changes to the technical specifications are needed to allow more flexibility in fuel management schemes and not because of any significant change made to the acceptance criteria for technical specifications, and the analytical methods used by the licensee in the required reload analyses have been previously found acceptable by the NRC.

Therefore, based on the above, the staff proposes to determine that the



proposed technical specification changes do not involve a significant hazards consideration.

**Local Public Document Room**  
Location: Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251 and the John M. Olin Library, Washington University, Skinker and Lindell Boulevards, St. Louis, Missouri 63130.

**Attorney for licensee:** Gerald Charnoff, Esq., Shaw, Pittman, Potts & Trowbridge, 2300 N Street, NW., Washington, DC 20037.

**NRC Project Director:** John N. Hannon.

Virginia Electric and Power Company, Docket No. 50-338, North Anna Power Station, Unit No. 1, Louisa County, Virginia

**Date of amendment request:**  
November 30, 1988

**Description of amendment request:**  
The proposed change would revise heatup and cooldown curves valid to 10 effective full power years (EFPY). The revised curves are less restrictive than the curves currently specified in the NA-1 TS for low temperatures. To support the proposed change, the licensee performed a 10 CFR Part 50 Appendix G analysis using the results from Capsule U which was removed at the end of Cycle 6. The data obtained from Capsule U indicates that the heatup and the cooldown curves for NA-1 can be shifted to allow higher operating pressures relative to the current curves specified in TS Figures 3.4.2 and 3.4.3. The reason for this curve shift is that the Capsule U analysis shows the reactor vessel has been exposed to a lower fast neutron fluence than previously assumed. The current TS curves are based on an assumed design basis neutron fluence through 10 EFPY.

The measured fast neutron (E greater than 1.0 Mev) fluence data shows that Capsule U was exposed to  $8.28 \times 10^{18}$  n/cm<sup>2</sup> at 5.90 EFPY. The measured fluences are significantly lower than the design values due to the implementation of low leakage fuel management at the North Anna Power Station. Using the measured fluence at 5.90 EFPY to estimate the fluence at 10.0 EFPY results in a lower fluence than used to generate the current NA-1 TS curves. NRC Regulatory Guide 1.99, Revision 2 allows the use of surveillance data to adjust original design values after two or more credible surveillance data sets become available. Capsule U is the second capsule removed from NA-1. Capsule V was removed after 1.13 EFPY.

Heatup and cooldown curves provide an upper pressure and temperature limit and Reactor Coolant Pump (RCP)

operation limits the lower operation pressure. The PORV low temperature overpressurization protection (LTOP) setpoints prevent inadvertent operation at pressures which would exceed the allowable Appendix G curve. The licensee's evaluation in support of the proposed change summarizes the analyses performed to determine revised heatup and cooldown curves, and LTOP setpoints.

The heatup and cooldown curves required by Appendix G of 10 CFR Part 50 were extrapolated to 10 EFPY by including the effects of the incremental radiation exposure on the reactor vessel beltline region. These results were referenced to the analysis of Capsule U from NA-1. The revised curves allow higher PORV setpoints than the current setpoints for the LTOP. The revised Appendix G curves were prepared using standard Westinghouse methodology, including Regulatory Guide 1.99, Rev. 2. The new heatup and cooldown curves are valid until 10 EFPY of operation. The next reactor vessel surveillance capsule, Capsule X, is scheduled to be removed from NA-1 after the ninth fuel cycle which allows sufficient time for analysis prior to exceeding 10 EFPY.

The heatup and cooldown curves prepared by Westinghouse were determined in a conventional manner according to Section III of the ASME Code as required by 10 CFR Part 50 Appendix G. Both steady-state and transient thermal conditions were considered in order to bound the possible combinations of pressure (i.e., membrane) and thermal stresses, and Westinghouse curves were revised to include plant specific instrument loop uncertainties.

The revised NA-1 pressurizer PORV low temperature overpressurization lift settings should be less than or equal to 450 psig, whenever any RCS cold leg temperature is less than or equal to 247° F, and less than or equal to 390 psig whenever any RCS cold leg temperature is less than 150° F.

The PTS evaluations were made for the limiting beltline locations. The current value of the limiting RT<sub>PTS</sub> parameter was updated using the calculated fluences contained in the capsule report, and no significant change was observed.

**Basis for proposed no significant hazards consideration determination:**  
The Commission has provided standards for determining whether a significant hazards consideration exists (10 CFR 50.92(c)). A proposed amendment to an operating license for a facility involves no significant hazards considerations if operation of the facility in accordance with the proposed

amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The licensee has evaluated the change request against the standards provided above and has determined that the proposed change does not involve a significant hazards consideration for the following reasons:

1. The proposed amendment does not involve an increase in the probability or consequence of an accident previously evaluated. The proposed change revises the operating restrictions presently in place to prevent non-ductile pressurization or overstressing the reactor vessel based on the most recent surveillance capsule and specific instrument uncertainties. The probability of non-ductile vessel failure has not been increased by virtue of the refined analysis techniques that were implemented based on specific unit information. The consequences of violating an Appendix G curve or actuating the LTOP system are not increased.

2. The proposed amendment does not create the possibility of a new or different kind of accident [from any accident previously evaluated] and was evaluated in light of the unit specific information that has been derived from the recent evaluations and analyses.

3. The proposed amendment does not involve a significant reduction in the margin of safety. The safety factors defined in the ASME Code and the requirements of 10 CFR [Part] 50 Appendix G provide the basis for the safety margins utilized. The plant-specific information utilized to evaluate the proposed change provides more explicit information and confirms that the safety margins are not reduced.

The NRC staff has made a preliminary review of the licensee's analyses of the proposed change and agrees with the licensee's conclusion that the three standards in 10 CFR 50.92(c) are met. Therefore, the staff proposes to determine that the proposed amendments do not involve a significant hazards consideration.

**Local Public Document Room**  
Location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

**Attorney for licensee:** Michael W. Maupin, Esq., Hunton and Williams, P.O. Box 1535, Richmond, Virginia 23212.

**NRC Project Director:** Herbert N. Berkow

Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

**Date of amendment request:**  
November 21, 1988

**Description of amendment request:**  
This amendment would revise Wolf Creek Generating Station (WCGS), Unit No. 1, Technical Specification Section 6.5.1.2, Plant Safety Review Committee Composition, to add the Manager Nuclear Plant Engineering Wolf Creek as a committee member. The proposed change provides additional design engineering expertise on the Plant Safety Review Committee (PSRC).

**Basis for proposed no significant hazards consideration determination:**  
The Commission has provided standards in 10 CFR 50.92(c) for determining whether a significant hazards consideration exists. A proposed amendment to an Operating License for a facility involves no significant hazards consideration if operation of the facility in accordance with the proposed amendment would not: (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) create the possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. The Wolf Creek Nuclear Operating Corporation reviewed the proposed change and determined that:

(1) This license amendment request adds the Manager Nuclear Plant Engineering Wolf Creek as a Plant Safety Review Committee (PSRC) member. This change will provide additional design engineering expertise available to the PSRC. This change does not involve any modifications to plant equipment or procedures. Therefore, this license amendment request does not involve a significant increase in the probability or consequences of an accident previously evaluated.

(2) This license amendment request does not introduce any new methods of plant operation or involve the physical alteration of the plant or any plant equipment. Therefore, this license amendment request does not create the possibility of a new or different kind of accident from any accident previously evaluated.

(3) The addition of the Manager Nuclear Plant Engineering Wolf Creek to the PSRC membership constitutes an administrative change which enhances the PSRC. This change will not effect any existing design limits or safety criteria. Therefore, this change does not reduce the margin of safety.

Based on the previous discussion, the licensee concluded that the proposed amendment request does not involve a

significant increase in the probability of a new or different kind of accident from any accident previously evaluated; nor involve a significant reduction in the required margin of safety. The NRC staff has reviewed the licensee's no significant hazards considerations determination and agrees with the licensee's analysis. The staff has, therefore, made a proposed determination that the licensee's request does not involve a significant hazards consideration.

**Local Public Document Room**  
Location: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

**Attorney for licensee:** Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037

**NRC Project Director:** Jose A. Calvo

#### PREVIOUSLY PUBLISHED NOTICES OF CONSIDERATION OF ISSUANCE OF AMENDMENTS TO OPERATING LICENSES AND PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION AND OPPORTUNITY FOR HEARING

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the Federal Register on the day and page cited. This notice does not extend the notice period of the original notice.

**Houston Lighting & Power Company, City Public Service Board of San Antonio, Central Power and Light Company, City of Austin, Texas, Docket No. 50-498 South Texas Project, Unit 1, Matagorda County, Texas**

**Date of amendment request:**  
November 7, 1988

**Brief description of amendment request:**  
The proposed amendment would revise the Unit 1 Technical Specifications to the Combined Technical Specifications for Units 1 and 2, add placing the positive displacement pump in a lock-out condition during cold overpressurization, add a reactor coolant pump seal isolation charging header pressure interlock and modify

the administrative section of the Technical Specification.

**Date of publication of individual notice in Federal Register:** November 22, 1988 (53 FR 47283).

**Expiration date of individual notice:**  
December 22, 1988.

**Local Public Document Room**  
Location: Wharton County Junior College, J.M. Hodges Learning Center, 911 Boling Highway, Wharton, Texas 77488 and Austin Public Library, 810 Guadalupe Street, Austin, Texas 78701.

**Pacific Gas and Electric Company, Docket Nos. 50-275 Diablo Canyon Nuclear Power Plant, Unit 1 San Luis Obispo County, California**

**Date of amendment request:**  
November 10, 1988

**Description of amendment request:**  
The proposed amendment would be an exemption from the required frequency interval identified in the Technical Specification 4.3.1.1, Table 4.3-1, for performance of the operational test for the Unit 1 seismic trip actuation device. The present surveillance requirement requires the seismic trip actuating device operational test to be conducted semiannually. The proposed change would allow the test to be performed no later than the next refueling outage (currently targeted for October 1989).

**Date of publication of individual notice in Federal Register:** November 28, 1988 (53 FR 47886)

**Expiration date of individual notice:**  
December 28, 1988.

**Local Public Document Room**  
Location: California Polytechnic State University Library, Government Documents and Maps Department, San Luis Obispo, California 93407.

#### NOTICE OF ISSUANCE OF AMENDMENT TO FACILITY OPERATING LICENSE

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing in



connection with these actions was published in the *Federal Register* as indicated. No request for a hearing or petition for leave to intervene was filed following this notice.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendments, (2) the amendments, and (3) the Commission's related letters, Safety Evaluations and/or Environmental Assessments as indicated. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document rooms for the particular facilities involved. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects.

**Arkansas Power & Light Company**, Docket Nos. 50-313 and 50-368, Arkansas Nuclear One, Units 1 and 2, Pope County, Arkansas

*Date of application for amendment:* December 2, 1988, as supplemented on February 24, 1988.

*Brief description of amendment:* The amendments modify paragraphs 2.C.(4) and 2.D. of the Facility Operating License Nos. DPR-51 and NPF-6, respectively, to require compliance with the licensee's Physical Security Plan. The Plan was amended to conform to the requirements of 10 CFR 73.55. Consistent with the provisions of 10 CFR 73.55, search requirement must be implemented within 60 days and miscellaneous amendments within 180 days from the effective date of the amendments.

*Date of issuance:* December 6, 1988  
*Effective date:* December 6, 1988  
*Amendment Nos.:* 114 and 88  
*Facility Operating License Nos. DPR-51 and NPF-6:* Amendments revised the licenses.

*Date of initial notice in Federal Register:* April 20, 1988 (53 FR 13011). The Commission's related evaluation of the amendments is contained in a

Safeguards Evaluation Report dated December 6, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Tomlinson Library, Arkansas Tech University, Russellville, Arkansas 72801

**The Cleveland Electric Illuminating Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, Toledo Edison Company**, Docket No. 50-440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

*Date of application for amendment:* February 10, 1988 as supplemented March 3, 1988.

*Brief description of amendment:* The amendment provided a one-time extension for the disassembly and inspection of the turbine control, turbine stop, low pressure turbine intercept and low pressure turbine intermediate stop valves until the first refueling outage.

*Date of issuance:* December 8, 1988  
*Effective date:* December 8, 1988  
*Amendment No.:* 16

*Facility Operating License No. NPF-58:* This amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* May 4, 1988 (53 FR 15905 and 15917). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 8, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Perry Public Library, 3753 Main Street, Perry, Ohio 44081

**Connecticut Yankee Atomic Power Company**, Docket No. 50-213, Haddam Neck Plant, Middlesex County, Connecticut

*Date of application for amendment:* September 13, 1988

*Brief description of amendment:* The amendment revises Table 3.22-2, "Fire Detection Instruments," by reducing the number of smoke detectors available in the containment from 23 to 22 and incorporates a new section of sprinkler protection in the turbine building into Technical Specification Section 3.22C, "Spray and/or Sprinkler Systems."

*Date of Issuance:* December 6, 1988  
*Effective date:* December 6, 1988  
*Amendment No.:* 100  
*Facility Operating License No. DPR-61:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 19, 1988 (53 FR 40983). The Commission's related evaluation of

this amendment is contained in a Safety Evaluation dated December 6, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Russell Library, 123 Broad Street, Middletown, Connecticut 06457.

**Consumers Power Company**, Docket No. 50-255, Palisades Plant, Van Buren County, Michigan

*Date of application for amendment:* October 7, 1988.

*Brief description of amendment:* This amendment deletes the steam generator differential pressure limit from the Technical Specifications.

*Date of issuance:* December 12, 1988  
*Effective date:* December 12, 1988  
*Amendment No.:* 119

*Provisional Operating License No. DPR-20:* The amendment revises the Technical Specifications.

*Date of initial notice in Federal Register:* November 2, 1988 (53 FR 44250). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 12, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Van Zoeren Library, Hope College, Holland, Michigan 49423.

**Detroit Edison Company**, Docket No. 50-341, Fermi-2, Monroe County, Michigan

*Date of application for amendment:* January 26, 1988 (NRC-87-0202)

*Brief description of amendment:* This amendment revises the Fermi-2 Technical Specifications to clarify the limiting condition for operation of the 480v MCC 72CF swing bus.

*Date of issuance:* December 25, 1988  
*Effective date:* December 15, 1988  
*Amendment No.:* 29

*Facility Operating License No. NPF-43:* The amendment revises the Technical Specifications.

*Date of initial notice in Federal Register:* May 18, 1988 (53 FR 17787). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 15, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Monroe County Library System, 3700 South Custer Road, Monroe, Michigan 48161.

**Florida Power and Light Company**, et al., Docket No. 50-389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

*Date of application for amendment:* September 7, 1988

*Brief description of amendment:* The amendment changed the value of Pa in Technical Specification Section 3/4.6.1 entitled "Containment Systems." Pa is defined in Appendix J (Primary Reactor Containment Leakage Testing For Water-Cooled Power Reactors) to 10 CFR Part 50 as the calculated peak containment pressure related to the design basis accident. The value of Pa was changed from 43.4 psig to 41.8 psig. The value of 41.8 psig represents the postulated Loss of Coolant Accident peak containment internal pressure.

*Date of Issuance:* December 16, 1988  
*Effective Date:* December 16, 1988

*Amendment No.:* 36

*Facility Operating License No. NPF-16:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 19, 1988 (53 FR 40986). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 16, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Indian River Junior College Library, 3209 Virginia Avenue, Ft. Pierce, Florida.

**GPU Nuclear Corporation**, et al., Docket No. 50-289, Three Mile Island Nuclear Station, Unit No. 1, Dauphin County, Pennsylvania

*Date of application for amendment:* December 10, 1988

*Brief description of amendment:* Incorporates operability and surveillance requirements for the Reactor Coolant Inventory Trending System.

*Date of Issuance:* December 13, 1988  
*Effective date:* December 13, 1988

*Amendment No.:* 147

*Facility Operating License No. DPR-50:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* January 4, 1987 (52 FR 1555). The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated December 13, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Government Publications Section, State Library of Pennsylvania, Walnut Street and Commonwealth Avenue, Box 1601, Harrisburg, Pennsylvania 17105.

**Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia**, Docket No. 50-424, Vogtle Electric Generating Plant, Unit 1, Burke County, Georgia

*Date of application for amendment:* August 12, 1988

*Brief description of amendment:* The amendment modified the Technical Specifications to clarify that residual heat removal cold leg injection valves may be closed in Mode 3 during check valve leak testing.

*Date of issuance:* December 5, 1988  
*Effective date:* December 5, 1988

*Amendment No.:* 14

*Facility Operating License No. NPF-68:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 19, 1988 (53 FR 40989). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Burke County Library, 412 Fourth Street, Waynesboro, Georgia 30830

**Iowa Electric Light and Power Company**, Docket No. 50-331, Duane Arnold Energy, Center, Linn County, Iowa

*Date of application for amendment:* August 29, 1988

*Brief description of amendment:* The amendment revised the Technical Specifications by changing the setpoints for the Uninterruptible AC and Instrument AC systems undervoltage relays. These changes reflect modifications to the systems' power supplies that will be made to conform to the guidance of Regulatory Guide 1.97. Related administrative changes were also made for improved clarity and consistency.

*Date of issuance:* December 7, 1988  
*Effective date:* December 7, 1988  
*Amendment No.:* 156

*Facility Operating License No. DPR-49:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 19, 1988 (53 FR 40991). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 7, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Cedar Rapids Public Library, 500 First Street, S. E., Cedar Rapids, Iowa 52401.

**Long Island Lighting Company**, Docket No. 50-322, Shoreham Nuclear Power Station, Suffolk County, New York

*Date of application for amendment:* September 4, 1987 as supplemented November 19, 1987.

*Brief description of amendment:* This amendment changed the definition of core alteration in the Technical Specifications (TSs) to include certain exceptions and changed footnotes in the TSs to be consistent with the new definitions.

*Date of issuance:* November 30, 1988  
*Effective date:* November 30, 1988

*Amendment No.:* 10

*Facility Operating License No. NPF-36:* This amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* December 18, 1987 (52 FR 47785). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 30, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Shoreham-Wading River Public Library, Route 25A, Shoreham, New York 11786-9697.

**Louisiana Power and Light Company**, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

*Date of amendment request:* June 7, 1988 as supplemented on August 8, 1988.

*Brief description of amendment:* The amendment revised the Technical Specifications for the Reactor Coolant Flow-Low trip to allow the operator to bypass the trip below 10% of Rated Thermal Power.

*Date of issuance:* December 2, 1988  
*Effective date:* December 2, 1988

*Amendment No.:* 46

*Facility Operating License No. NPF-38:* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* July 13, 1988 (53 FR 26526). The August 8, 1988 submittal provided additional clarifying information and did not change the finding of the initial notice. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 2, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.



Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

*Date of amendment request:* May 4, 1988

*Brief description of amendment:* The amendment changed the Technical Specifications on Engineered Safety Features Actuation System Instrumentation as it relates to actions required for loss of one and loss of more than one channel that protects against loss of voltage and/or degraded voltage on the 4.16kV Emergency Bus and 480V Emergency Bus undervoltage circuits.

*Date of issuance:* December 14, 1988

*Effective date:* December 14, 1988

*Amendment No.:* 47

*Facility Operating License No. NPF-38.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* July 13, 1988 (53 FR 26525). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 14, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.

Louisiana Power and Light Company, Docket No. 50-382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

*Date of amendment request:* March 25, 1988 as supplemented August 3, 1988.

*Brief description of amendment:* The amendment revised the Technical Specifications on boron dilution by adding mode 4 requirements, clarifying the surveillance to verify systems isolation only when the system is to be isolated, make surveillances consistent with the mode 4 and 5 limited conditions for operation, and revise the frequencies for backup boron dilution detection.

*Date of issuance:* December 14, 1988

*Effective date:* December 14, 1988

*Amendment No.:* 48

*Facility Operating License No. NPF-38.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* September 7, 1988 (53 FR 34607). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 14, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* University of New Orleans Library, Louisiana Collection, Lakefront, New Orleans, Louisiana 70122.

Northeast Nuclear Energy Company, Docket No. 50-245, Millstone Nuclear Power Station, Unit No. 1, New London County, Connecticut

*Date of application for amendment:* April 22, 1988

*Brief description of amendment:* The technical specification change would remove the requirement to monitor temperature at the reactor vessel bottom head drain during heatup/cooldown and during operation with the core critical. Also, a provision has been added to the technical specification to allow for up to 48 hours without recording of the reactor vessel shell or fluid temperature to conduct maintenance in the recording equipment, provided that no heatup/cooldown evolution is in progress.

*Date of issuance:* December 15, 1988

*Effective date:* December 15, 1988

*Amendment No.:* 26

*Facility Operating License No. DPR-21.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* July 13, 1988 (53 FR 26527). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 15, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Waterford Public Library, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Northeast Nuclear Energy Company, et al., Docket No. 50-336, Millstone Nuclear Power Station, Unit No. 2, New London County, Connecticut

*Date of application for amendment:* August 2, 1988

*Brief description of amendment:* The amendment revises Technical Specification (TS) 4.7.8.c "Snubbers," for Millstone Unit 2. The change to the TS decreases the sample size, for subsequent tests of snubbers, from 10% to 5% of the snubber test population.

*Date of issuance:* December 6, 1988

*Effective date:* December 6, 1988

*Amendment No.:* 135

*Facility Operating License No. DPR-65.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* September 21, 1988 (53 FR 36671). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 6, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Waterford Public Library, 49 Rope Ferry Road, Waterford, Connecticut 06385.

Northern States Power Company, Docket No. 50-263, Monticello Nuclear Generating Plant, Wright County, Minnesota

*Date of application for amendment:* November 24, 1988, September 8, 1987, and November 30, 1987

*Brief description of amendment:* The amendment modified paragraph 2.C.3 of the license to require compliance with the amended Physical Security Plan. This Plan was amended to conform to the requirements of 10 CFR 73.55. Consistent with the provisions of 10 CFR 73.55, search requirements must be implemented within 60 days and miscellaneous amendments within 180 days from the effective date of this amendment.

*Date of issuance:* December 13, 1988

*Effective date:* December 13, 1988

*Amendment No.:* 58

*Facility Operating License No. DPR-22.* This amendment revised the license.

*Date of initial notice in Federal Register:* April 6, 1988 (53 FR 11374). The Commission's related evaluation of the amendment is contained in a letter to Northern States Power Company dated December 13, 1988, and a Safeguards Evaluation Report dated December 13, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Technology and Science Department, Minneapolis Public Library, 300 Nicollet Mall, Minneapolis, Minnesota 55401.

Omaha Public Power District, Docket No. 50-285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

*Date of amendment request:* September 2, 1988.

*Brief description of amendment:* This amendment modifies the Technical Specifications to reflect changes necessary to support Cycle 12 operation.

*Date of issuance:* December 14, 1988

*Effective date:* December 14, 1988

*Amendment No.:* 117

*Facility Operating License No. DPR-40.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 5, 1988 (53 FR 39175). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 14, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* W. Dale Clark Library, 215 South 15th Street, Omaha, Nebraska 68102

Philadelphia Electric Company, Docket No. 50-352, Limerick Generating Station, Unit 1, Montgomery County, Pennsylvania

*Date of application for amendment:* July 7, 1988

*Brief description of amendment:* The amendment revised the Technical Specifications to delete reference to the cooldown mode of operation for the Reactor Enclosure Recirculation System and the common plant Standby Gas Treatment System.

*Date of issuance:* December 7, 1988

*Effective date:* December 7, 1988

*Amendment No.:* 12

*Facility Operating License No. NPF-39.* This amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* November 2, 1988 (53 FR 44254). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 7, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Pottstown Public Library, 500 High Street, Pottstown, Pennsylvania 19464.

Tennessee Valley Authority, Dockets Nos. 50-259, 50-260 and 50-296, Browns Ferry Nuclear Plant, Units 1, 2 and 3, Limestone County, Alabama

*Date of application for amendments:* October 14, 1988 (TS 260/261-T)

*Brief description of amendments:* The amendments modify the Limiting Condition for Operation (LCO) in order to specify conditions needing to be met when work involving the reactor vessel is being performed.

*Date of issuance:* December 15, 1988

*Effective date:* December 15, 1988, and shall be implemented within 60 days

*Amendments Nos.:* 161, 158, 132

*Facility Operating Licenses Nos. DPR-33, DPR-52 and DPR-68.*

Amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* October 27, 1988 (53 FR 43495). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 15, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Athens Public Library, South Street, Athens, Alabama 35611.

Tennessee Valley Authority, Docket Nos. 50-327 and 50-328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

*Date of application for amendments:* September 16, 1987 (TS 87-41)

*Brief description of amendments:* These amendments revise Section 3/4.9.7, Crane Travel - Spent Fuel Pit Area, of the Sequoyah, Units 1 and 2 Technical Specifications (TS). The revisions are to (1) revise the maximum load that may be transported over the fuel assemblies in the spent fuel storage pool from 2,000 pounds to 2,100 pounds and (2) allow for the fuel pool divider gate and the fuel transfer canal gate, which are each about 4,800 pounds, to be transported over fuel assemblies in the storage pool when following safe paths.

*Date of issuance:* December 5, 1988

*Effective date:* December 5, 1988

*Amendment Nos.:* 91, 61

*Facility Operating Licenses Nos. DPR-77 and DPR-79.*

Amendments revised the Technical Specifications.

*Date of initial notice in Federal Register:* April 20, 1988 (53 FR 13022).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Chattanooga-Hamilton County Library, 1001 Broad Street, Chattanooga, Tennessee 37402.

Toledo Edison Company and The Cleveland Electric Illuminating Company, Docket No. 50-346, Davis-Besse Nuclear Power Station, Unit No. 1, Ottawa County, Ohio

*Date of application for amendment:* December 7, 1988

*Brief description of amendment:* This amendment revised the TS's relating to Steam and Feedwater Rupture Control System (SFRCS), Turbine Stop Valve (TSV) response times and the associated Bases Sections.

*Date of issuance:* December 7, 1988

*Effective date:* December 7, 1988

*Amendment No.:* 125

*Facility Operating License No. NPF-3.* Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* June 17, 1987 (52 FR 23108). The Commission's related evaluation of the amendment is contained in a letter dated December 7, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* University of Toledo Library, Documents Department, 2801 Bancroft Avenue, Toledo, Ohio 43606.

Union Electric Company, Docket No. 50-483, Callaway Plant, Unit 1, Callaway County, Missouri

*Date of application for amendment:* July 12, 1988

*Brief description of amendment:* The amendment revised Technical Specification 3.5.1, Accumulators, to allow the plant to remain in Hot Standby with reactor coolant system pressure less than or equal to 1,000 psig with one accumulator inoperable, and allows closing one accumulator isolation valve for up to 2 hours to perform leakage testing of system check valves.

*Date of issuance:* December 5, 1988

*Effective date:* December 5, 1988

*Amendment No.:* 40

*Facility Operating License No. NPF-30.*

Amendment revised the Technical Specifications.

*Date of initial notice in Federal Register:* August 24, 1988 (53 FR 32299). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* Callaway County Public Library, 710 Court Street, Fulton, Missouri 65251 and the John M. Olin Library, Washington University, Skinker and Lindell Boulevards, St. Louis, Missouri 63130.

Virginia Electric and Power Company, et al., Docket Nos. 50-336 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

*Date of application for amendments:* November 6, 1986, as supplemented February 24 and March 12, 1987, and March 8 and June 10, 1988.

*Brief description of amendments:* The amendments permit the redesign of the NA-1&2 reactor coolant pump and steam generator supports since the dynamic effects of postulated primary loop pipe ruptures would be eliminated from the design basis using fracture mechanics "leak-before-break" technology as permitted by the revised General Design Criterion 4 of Appendix A, 10 CFR Part 50.

*Date of issuance:* December 5, 1988

*Effective date:* December 5, 1988

*Amendment Nos.:* 107 and 93

*Facility Operating License Nos. NPF-4 and NPF-7.* Amendments revised the License.

*Date of initial notice in Federal Register:* September 7, 1988 (53 FR 34615). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 5, 1988.

*No significant hazards consideration comments received:* No.

*Local Public Document Room location:* The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.



Virginia Electric and Power Company, et al., Docket Nos. 50-338 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: May 28, 1988

Brief description of amendments: The amendments modified the NA-1&2 Section 3/4.6, "Containment Systems" to reflect the use of the Mass Point method for calculating containment leakage rates, which is described in ANSI/ANS 56.8-1987, "Containment System Leakage Testing Requirements." Also, the Bases section reflects the use of the ANSI/ANS 56.8-1987 standard.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment Nos.: 108 and 94

Facility Operating License Nos. NPF-4 and NPF-7. Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: September 7, 1988 (53 FR 34615). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 7, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Virginia Electric and Power Company, et al., Docket Nos. 50-338 and 50-339, North Anna Power Station, Units No. 1 and No. 2, Louisa County, Virginia

Date of application for amendments: December 4, 1987

Brief description of amendments: The amendments implement more stringent primary-to-secondary coolant systems leakage limits and establish surveillance requirements to assure operability of the existing and new N-16 instrumentation necessary to assure compliance with the revised leakage limits.

Date of issuance: December 12, 1988

Effective date: December 12, 1988

Amendment Nos.: 109 and 95

Facility Operating License Nos. NPF-4 and NPF-7. Amendments revised the Technical Specifications.

Date of initial notice in Federal Register: December 30, 1987 (52 FR 49234). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 12, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: The Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Wolf Creek Nuclear Operating Corporation, Kansas Gas and Electric Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Docket No. 50-482, Wolf Creek Generating Station, Coffey County, Kansas

Date of amendment request: June 24, 1988

Brief description of amendment: The amendment revised the Technical Specifications and corresponding Bases necessary for Cycle 4 operation. These changes included increased boron concentration in the refueling water storage tank and accumulators, a revised part power multiplier and changes resulting from revised reactor coolant temperature measurement uncertainties.

Date of Issuance: December 5, 1988

Effective date: December 5, 1988

Amendment No.: 23

Facility Operating License No. NPF-42. Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: August 24, 1988 (53 FR 32302). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 5, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801 and Washburn University School of Law Library, Topeka, Kansas 66621

Yankee Atomic Electric Company, Docket No. 50-829, Yankee Nuclear Power Station, Franklin County, Massachusetts

Date of application for amendment: March 25, 1988

Brief description of amendment: The Amendment revises the Technical Specifications related to the containment isolation barriers including blank flanges, expansion joints and valves.

Date of issuance: December 7, 1988

Effective date: December 7, 1988

Amendment No.: 121

Facility Operating License No. DPR-36. Amendment revised the Technical Specifications.

Date of initial notice in Federal Register: May 4, 1988 (53 FR 5922). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated December 7, 1988.

No significant hazards consideration comments received: No.

Local Public Document Room location: Greenfield Community College, 1 College Drive, Greenfield, Massachusetts 01301.

Dated at Rockville, Maryland, this 20th day of December, 1988.

For the Nuclear Regulatory Commission

Steven A. Varga,

Director, Division of Reactor Projects-I/II,

Office of Nuclear Reactor Regulation

[Doc. 88-29806 Filed 12-29-88; 8:45 am]

BILLING CODE 7990-01-D

## PENSION BENEFIT GUARANTY CORPORATION

### Request for OMB Extension of Approval for Information Collection; Employer Liability for Withdrawals from and Terminations of Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for OMB approval of extension.

SUMMARY: The Pension Benefit Guaranty Corporation has requested an extension by the Office of Management and Budget of the expiration date of a currently approved information collection requirement (1212-0017) without any change in substance or in the method of collection. The information collection, which is scheduled to expire on March 31, 1989, is contained in the PBGC's regulation on Employer Liability for Withdrawals from and Terminations of Single-Employer Plans, 29 CFR Part 2622. This notice advises the public of the PBGC's request for an extension of OMB approval for this collection of information.

ADDRESSES: Written comments (at least three copies) should be addressed to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Pension Benefit Guaranty Corporation, 3206 New Executive Office Building, Washington, DC 20503. Requests for information and copies of the proposed collection of information and supporting documentation, should be addressed to the Communications and Public Affairs Department (Code 38000), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington, DC 20006. The request for extension will be available for public inspection, and copying, at the PBGC Communications and Public Affairs Department in Suite 7100, at the above address, between the hours of 9:00 a.m. and 4:00 p.m.

FOR FURTHER INFORMATION CONTACT: Renae R. Hubbard, Special Counsel, Office of the General Counsel (Code 22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW.,

Washington, DC 20006; telephone 202-778-8851 (202-778-8859 for TTY and TDD). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Pension Benefit Guaranty Corporation ("PBGC") is requesting that the Office of Management and Budget extend for three years the approval of the collection of information contained in the PBGC's regulation on Employer Liability for Withdrawals from and Terminations of Single-Employer Plans, 29 CFR Part 2622. Section 4062 of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1362 ("ERISA"), provides that the contributing sponsor of a single-employer pension plan and members of the sponsor's controlled group ("the employer") incur employer liability if the plan terminates with assets insufficient to pay benefit liabilities (or, with respect to terminations initiated before December 18, 1987, benefit commitments) under the plan. However, the amount of employer liability for pre-December 18, 1987 cases, the payment terms for employer liability, and the PBGC's statutory lien for employer liability are all affected by whether and to what extent the unadjusted liability exceeds 30 percent of the employer's net worth. Section 2622.3 of the employer liability regulation requires that an employer submit information that will enable the PBGC to determine the employer's net worth. If this information is not provided to the PBGC, it would be significantly hindered in the performance of its statutory duty to calculate and collect employer liability.

The PBGC has approximately 100 pension plan terminations per year that percent a net worth issue. Based on its recent experience concerning the number of plans maintained and terminated by each employer (ranging from one per employer to ten per employer), the PBGC estimates that only 60 employers per year will be affected by this information collection. Normally, only one submission of net worth information for an employer is required, regardless of the number of plans being terminated.

The PBGC estimates that the time required to comply with this information collection ranges from one hour to several weeks, with the mean being three days. In has been PBGC's experience that there is great diversity in the character of the employers involved and the effort required to submit the data. In most instances, only copying and transmission of existing data is needed. In some, new net worth data may have to be compiled. Based on the mean time of three days (24 hours)

and the estimated number of responses (60), the annual burden is estimated at 1440 hours.

Issued at Washington, DC, this 23rd day of December 1988.

Kathleen P. Utgoff,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 88-30106 Filed 12-29-88; 8:45 am]

BILLING CODE 7700-01-M

## RAILROAD RETIREMENT BOARD

### Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

#### Summary of Proposal(s)

- (1) Collection title: Repayment of Debt.
- (2) Form(s) submitted: ID-22, ID-22f, ID-22g, ID-22i, ID-22s, ID-22t, and ID-22u.
- (3) OMB Number: N/A.
- (4) Expiration date of current OMB clearance: N/A.
- (5) Type of request: New collection.
- (6) Frequency of response: On occasion.
- (7) Respondents: Individuals or households.
- (8) Estimated annual number of respondents: 550.
- (9) Total annual responses: 2,285.
- (10) Average time per response: .0503 minutes.
- (11) Total annual reporting hours: 115.
- (12) Collection description: Section 2 of the Railroad Unemployment Insurance Act provides unemployment and sickness benefits for qualified railroad workers. When the RRB determines that an overpayment of RUIA benefits has occurred, it initiates prompt action to notify the claimant of the overpayment and to recover the amount owed the RRB. The collection obtains information needed by the RRB to allow for the repayment of amount owed by the claimant by means of a credit card, and in addition to the customary form of payment by check or money order.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (313-751-4692).

Comments regarding the information collection should be addressed to Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OBM reviewer, Justin Kopca (202-395-7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,

Director of Information Resources Management.

[FR Doc. 88-30045 Filed 12-29-88; 8:45 am]

BILLING CODE 7905-01-M

### Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

#### Summary of Proposal(s)

- (1) Collection title: Certification Regarding Rights to Unemployment.
- (2) Form(s) submitted: UI-45, UI-32.
- (3) OMB Number: 3220-0079.
- (4) Expiration date of current OMB clearance: 3-31-89.
- (5) Type of request: Revision of a currently approved collection.
- (6) Frequency of response: On occasion.
- (7) Respondents: Individuals or households, Businesses or other for-profit.
- (8) Estimated annual number of respondents: 3,350.
- (9) Total annual responses: 8,050.
- (10) Average time per response: .1564 minutes.
- (11) Total annual reporting hours: 1,259.
- (12) Collection description: In administering the disqualification for the voluntary leaving work provision of Section 4, of the Railroad Retirement Insurance Act, the Railroad Retirement Board investigates an unemployment claim indicating the claimant left work voluntarily. The certification obtains information needed to determine whether the leaving was with good cause.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (312-751-4692). Comments regarding the information collection should be addressed to



Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin Kopca (202-395-7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,  
Director of Information Resources  
Management.

[FR Doc. 88-30046 Filed 12-29-88; 8:45 am]  
BILLING CODE 7905-01-M

#### Agency Forms Submitted for OMB Review

**AGENCY:** Railroad Retirement Board.

**ACTION:** In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

#### Summary of Proposal(s):

(1) *Collection title:* Investigation of Claim for Possible Days of Employment or State Benefits Received.

(2) *Form(s) submitted:* ID-5i, ID-5R(SUP), ID-49R, ID-49S, UI-48 and UI-54.

(3) *OMB Number:* 3220-0049.

(4) *Expiration date of current OMB clearance:* 7-31-89.

(5) *Type of request:* Revision of a currently approved collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households, State or local governments, Businesses or other for-profit, Small businesses or organizations.

(8) *Estimated annual number of respondents:* 11,250.

(9) *Total annual responses:* 19,100.

(10) *Average time per response:* .16194 minutes.

(11) *Total annual reporting hours:* 3,475.

(12) *Collection description:* Under the RUIA, unemployment or sickness benefits are not payable for any day in which remuneration is payable or accrues to the claimant. The collection obtains information from the claimant, claim agent, railroad and non-railroad employers and state agencies about work performed and/or benefits received during the same period as unemployment benefits are claimed.

#### Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (312-751-4692).

Comments regarding the information collection should be addressed to Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin Kopca (202-395-7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,  
Director of Information Resources  
Management.

[FR Doc. 88-30047 Filed 12-29-88; 8:45 am]  
BILLING CODE 7905-01-M

#### Agency Forms Submitted for OMB Review

**AGENCY:** Railroad Retirement Board.

**ACTION:** In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

#### Summary of Proposal(s)

(1) *Collection title:* Availability for work.

(2) *Form(s) submitted:* UI-38, UI-38S and ID-8K.

(3) *OMB Number:* N.A.

(4) *Expiration date of current OMB clearance:* N.A.

(5) *Type of request:* New collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households, Non-profit institutions.

(8) *Estimated annual number of respondents:* 15,000.

(9) *Total annual responses:* 24,000.

(10) *Average time per response:* .13025 minutes.

(11) *Total annual reporting hours:* 3,126.

(12) *Collection description:* Under Section I(k) of the Railroad Unemployment Insurance Act, unemployment benefits are not payable for any day for which the claimant is not available for work. The collection obtains information needed by the RRB to determine whether a claimant is willing and ready to work.

#### Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Pauline Lohens, the agency clearance officer (312-751-4692). Comments regarding the information collection should be addressed to Pauline Lohens, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin

Kopca (202-395-7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Pauline Lohens,  
Director of Information Resources  
Management.

[FR Doc. 88-30048 Filed 12-29-88; 8:45 am]  
BILLING CODE 7905-01-M

#### OFFICE OF SCIENCE AND TECHNOLOGY POLICY

##### White House Science Council (WHSC); Meetings

The White House Science Council, the purpose of which is to advise the Director, Office of Science and Technology Policy (OSTP), will meet on January 12 and 13, 1989 in Room 5104, New Executive Office Building, Washington, DC. The meeting will begin at 6:00 p.m. on January 12, recess and reconvene at 8:00 a.m. on January 13, 1989. Following is the proposed agenda for the meeting:

(1) Briefing of the council, by the Assistant Directors of OSTP, on the current activities of OSTP.

(2) Briefing of the Council by OSTP personnel and personnel of other agencies on proposed, ongoing, and completed panel studies.

(3) Discussion of composition of panels to conduct studies.

The January 12 and 13 meetings will be closed to the public.

The briefings on the current activities of OSTP necessarily will involve discussion of material that is formally and properly classified in accordance with the provisions of Executive Order 12356 in the interest of national defense or for foreign policy reasons. This is also true for the briefing on panel studies. As well, a portion of both of these briefings will require discussion of internal personnel procedures of the Executive Office of the President and information which, if prematurely disclosed, would significantly frustrate the implementation of decisions made requiring agency action. These portions of the meeting will be closed to the public pursuant to 5 U.S.C. 552 b.(c)(1), (2), and (9)(B).

A portion of the discussion of panel composition will necessitate the disclosure of information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Accordingly, this portion of the meeting

will also be closed to the public, pursuant to 5 U.S.C. 552b.(c)(6).

Barbara J. Diering,  
Special Assistant, Office of Science and  
Technology Policy.

December 27, 1988.  
[FR Doc. 30134 Filed 12-27-88; 4:35 pm]  
BILLING CODE 3170-01-M

#### SECURITIES AND EXCHANGE COMMISSION

##### Forms Under Review by Office of Management and Budget

*Agency Clearance Officer:* Kenneth A. Fogash (202) 272-2142.

*Upon Written Request, Copy Available From:* Securities and Exchange Commission, Office of Consumer Affairs, 450 Fifth Street, NW., Washington, DC 20549.

#### Extension

Rule 23c-1

File No. 270-253

Form N-5

File No. 270-172

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission has submitted for extension of OMB approval Rule 23c-1 and Form N-5 under the Investment Company Act of 1940.

Rule 23c-1 sets forth conditions for the repurchase, by a registered closed-end investment company, of its own securities. There are 345 active registered closed-end investment companies, all of which could use the rule. Estimated annual compliance time per registrant is 2.5 hours.

Form N-5 is the registration statement for small business investment companies under the Securities Act of 1933 and the Investment Company Act of 1940. Approximately 2 registration statements on Form N-5 are filed annually, with an estimated compliance time of 350.

The estimated average burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

Direct general comments to Gary Waxman at the address below. Direct any comments concerning the accuracy of the estimated average burden hours for compliance with SEC rules and forms to Kenneth A. Fogash, Deputy Executive Director, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-6004, and Gary Waxman, Clearance Officer,

Office of Information and Regulatory Affairs, Office of Management and Budget (Paperwork Reduction Projects 3235-0280 and 3235-0189), Room 3228 NEOB, Washington, DC 20503.

Jonathan G. Katz,  
Secretary.

December 21, 1988.  
[FR Doc. 88-30099 Filed 12-29-88; 8:45 am]  
BILLING CODE 8010-01-M

[Release No. 34-26390; File No. SR-NYSE-88-40]

#### Self-Regulatory Organization; Proposed Rule Change by New York Stock Exchange, Inc., Relating to the Meaning, Administration or Enforcement of Rule 19c-4

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on December 19, 1988, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

This proposed rule change consists of a stated policy or interpretation of Rule 19c-4<sup>1</sup> (the "Rule") under the Securities Exchange Act of 1934 (the "Act") that would propose an exception from paragraph (c)(3) of the Rule. This proposed rule change reads as follows:

Notwithstanding the provisions of Rule 19c-4(c)(3), the Exchange may determine that it will not proceed to delist the equity securities of a company because that company has issued or proposes to issue, in an exchange offer for outstanding shares of its common stock, units and their constituent securities which have no vote or a lesser vote than its outstanding common stock where the Exchange, after considering all the surrounding circumstances, including other action that may have been taken or is proposed to be taken by the company, determines that the exchange offer does not (or did not) give rise to the collective action problems discussed in the Release of the SEC that accompanied the adoption of Rule 19c-4, is not (or was not) coercive in nature and does not (or did not) have the effect of disenfranchising outstanding common stock holders. For example, if the Exchange determines that the exchange offer,

<sup>1</sup> See, Securities Exchange Act Release No. 34-25891 (July 7, 1968), 53 FR 26376 (July 12, 1988) ("Adopting Release").

• does not depend on a shareholder vote but is available for the individual choice of all outstanding common stock holders in a fair and non-discriminatory manner,

• is accompanied by a prospectus under the Securities Act of 1933 (or a comparable disclosure document) that describes the exchange offer and the securities being offered,

• is not considered to give rise to the creation of an insider group, or a control group, of common stock holders or to enhance the standing of any such group, and is not an exchange offer, either alone or in the aggregate with prior similar exchange offers, for more than 25% of the outstanding common stock of the company as of the date of the first such offer, and

• does not adversely affect the voting rights of the holders of outstanding common stock that do not accept the exchange.

• then the Exchange may conclude that the exchange offer is not inconsistent with Rule 19c-4.

The term 'units' as used herein shall mean unbundled stock units<sup>2</sup> or securities with substantially similar characteristics<sup>3</sup> issued by a corporation which consist of, and are separable into, two or more constituent securities, which, in the aggregate, are designed to replicate the economic characteristics typically associated with ownership of the corporation's common stock<sup>4</sup> and have a term in excess of three years. The term 'constituent securities' as used herein shall mean the two or more constituent securities which together make up the unit.<sup>4</sup>

#### II. Self-Regulatory Organization's Statement of the Statutory Basis for the Proposed Rule Change

##### A. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(5) that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to,

<sup>2</sup> The Commission notes that four companies have filed form S-4 registration statements with the Commission under the Securities Act of 1933, each with respect to the issuance of unbundled stock units ("USUS") in exchange for common stock of the issuer.

<sup>3</sup> With regard to the four S-4 registration statements for unbundled stock units filed thus far with the Commission, each registration statement provides that in a third party tender offer for the company's common stock each holder of a constituent security may convert such unit into common stock. Similarly, in an issuer tender offer for at least 20% of the outstanding shares of each class of the company's common stock, the company is required to make an offer to acquire or invite tenders of at least the same percentage of the outstanding Incremental Dividend Preferred Stock and the Equity Appreciation Certificates.

<sup>4</sup> See also SR-NYSE-88-39 which proposes listing standards for constituent securities of common stock.



and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purpose of the Act or the administration of the Exchange.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. By providing a basis upon which the presumption stated in paragraph (c)(3) of the Rule may be overcome, this proposed rule change will result in the elimination of a burden on competition that would otherwise prevail.

**C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others**

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve the proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the proposal. In particular, the Commission solicits comments on whether it is appropriate for the NYSE, based on the factors cited in the proposal, to except from Rule 19(c)(4)'s presumption against exchange offers certain exchange offers of common stock for units. In addition, the Commission specifically solicits

comments on whether the tender offer protection afforded shareholders in the proposals to issue unbundled stock units make the exchange of these units for common stock sufficiently neutral in regard to potential contests for corporate control so as to address the Rule's concerns that exchange offers of disparate voting rights stock are used to disenfranchise shareholders of their voting rights.<sup>5</sup> Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by January 23, 1989.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,  
Secretary.

Date: December 22, 1988.

[FR Doc. 88-30098 Filed 12-29-88; 8:45 am]  
BILLING CODE 8010-01-M

**SMALL BUSINESS ADMINISTRATION**

**Reporting and Recordkeeping Requirements Under OMB Review**

**ACTION:** Notice of reporting requirements submitted for review.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the Federal Register notifying the public that the agency has made such a submission.

**DATE:** Comments should be submitted on or before January 30, 1989. If you intend to comment but cannot prepare comments promptly, please advise the

<sup>5</sup> See *supra* note 3.

OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (S.F. 83), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer. Submit comments to the Agency Clearance Officer and the OMB Reviewer.

**FOR FURTHER INFORMATION CONTACT:**

**Agency Clearance Officer:** William Cline, Small Business Administration, 1441 L Street, NW., Room 200, Washington, DC 20416, Telephone: (202) 653-8538.

**OMB Reviewer:** Gary Waxman, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Telephone: (202) 395-7340.

**Title:** Application for Certificate of Competency

**Form No.:** 74, 74A, 74B, 183

**Frequency:** On occasion

**Description of respondents:** Applicants are presenting their financial and other capabilities in order for SBA to determine their ability to perform a specific government contract.

**Annual responses:** 18,000  
**Annual burden hours:** 5700

**William A. Cline,**  
Chief, Administrative Information Branch.  
[FR Doc. 88-30128 Filed 12-29-88; 8:45 am]  
BILLING CODE 8025-01-M

**TENNESSEE VALLEY AUTHORITY**

**Information Collection Under Review by the Office of Management and Budget (OMB)**

**AGENCY:** Tennessee Valley Authority.  
**ACTION:** Information Collection Under Review by the Office of Management and Budget (OMB).

**SUMMARY:** The Tennessee Valley Authority (TVA) has sent to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), as amended by Pub. L. 99-591.

Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be directed to the Agency Clearance Officer and also to the Desk Officer for the Tennessee Valley Authority, Office of Information and Regulatory Affairs, Office of

Management and Budget, Washington, DC 20503; Telephone: (202) 395-3084.

**Agency Clearance Officer:** Mark R. Winter, Tennessee Valley Authority, 100 Lupton Building, Chattanooga, TN 37401; (615) 751-2523.

**Type of Request:** Regular submission.

**Title of Information Collection:**

Residential Energy Services Home

Insulation Program (Energy Package).

**Frequency of Use:** On occasion.

**Type of Affected Public:** Individuals or households.

**Small Businesses or Organizations**

**Affected:** No.

**Federal Budget Functional Category Code:** 271.

**Estimated Number of Annual Responses:** 10,000.

**Estimated Total Annual Burden Hours:** 3,000.

**Estimated Average Burden Hours Per Response:** 3.

**Need For and Use of Information:** This information is needed to determine applicable energy improvements in the TVA region. Data will be used to establish standards for various residential programs and to provide information to consumers about methods and actions for the wise and efficient use of electrical energy.

**John W. Thompson,**  
Vice President, Services Senior Agency Official.

[FR Doc. 88-30050 Filed 12-29-88; 8:45 am]  
BILLING CODE 8120-01-M

**Information Collection Under Review by the Office of Management and Budget (OMB)**

**AGENCY:** Tennessee Valley Authority.  
**ACTION:** Information Collection Under Review by the Office of Management and Budget (OMB).

**SUMMARY:** The Tennessee Valley Authority (TVA) has sent to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), as amended by Pub. L. 99-591.

Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer whose name, address, and telephone number appear below. Questions or comments should be directed to the Agency Clearance Officer and also to the Desk Officer for the Tennessee Valley Authority, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; Telephone: (202) 3084.

**Agency Clearance Officer:** Mark R. Winter, Tennessee Valley Authority, 100 Lupton Building, Chattanooga, TN 37401; (615) 751-2523.

**Type of Request:** Regular submission.

**Title of Information Collection:** Land Between The Lakes Turkey Hunter Survey.

**Frequency of Use:** Annually.

**Type of Affected Public:** Individuals.

**Small Businesses or Organizations**

**Affected:** No.

**Federal Budget Functional Category Code:** 452.

**Estimated Number of Annual Responses:** 4000.

**Estimated Total Annual Burden Hours:** 200.

**Estimated Average Burden Hours Per Response:** .05.

**Need For and Use of Information:** In order to manage the turkey population and help ensure hunter safety at Land Between The Lakes, quantitative information on the number of hunters, the number of days they hunt, and their impact on the turkey population is needed.

**John W. Thompson,**  
Vice President, Services Senior Agency Official.

[FR Doc. 88-30066 Filed 12-29-88; 8:45 am]  
BILLING CODE 8120-01-M

**OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE**

[Docket No. 301-62]

**Determination To Impose Increased Duties on Certain Products of the European Community**

**SUMMARY:** Pursuant to authority delegated by the President to the United States Trade Representative in Proclamation No. 5759 of December 24, 1987, the United States Trade Representative hereby partially terminates the suspension of the application of increased duties on imports of certain products of the European Community proclaimed in Proclamation No. 5759, and hereby modifies the list of affected products as set forth herein.

**EFFECTIVE DATE:** 12:01 a.m. January 1, 1989.

**FOR FURTHER INFORMATION CONTACT:** Laura Anderson, (202) 395-3074, or Les Glad, (202) 395-3077 (for technical and policy information), or Richard Parker, (202) 395-6800 (for legal issues).

**SUPPLEMENTARY INFORMATION:** On December 24, 1987, the President determined, pursuant to section 301(a) of the Trade Act of 1974, as amended (19 U.S.C. 2411), that the "Council Directive

Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action" (the Directive) adopted in December 1985 by the European Community (EC) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, a trade agreement; or is unjustifiable or unreasonable and constitutes a burden or restriction on United States commerce (52 FR 49131).

The Directive, which has not yet been applied to EC meat imports, will prohibit imports into the European Community of any meat produced from animals treated with growth hormones, effective January 1, 1989, thereby severely disrupting exports of United States meat to the EC. The need for the EC prohibition is not supported by valid scientific evidence. Accordingly, the United States considers that the EC Directive constitutes a disguised restriction on international trade. In response, the President proclaimed increases in United States customs duties on certain articles the product of the European Community, as described in both the Tariff Schedules of the United States and the Harmonized Tariff Schedule of the United States, and set forth in Annexes A and B to Proclamation No. 5759. At the same time the President suspended the application of the increased duties for so long as the European Community member states continued the import practices then in effect with respect to United States exports of relevant meat products. At the time, the member states of the European Community were not yet applying the Directive to meat imports. The President also proclaimed in part that "the United States Trade Representative is authorized to suspend, modify, terminate, or terminate the suspension of the increased duties imposed by this Proclamation, upon publication in the Federal Register of his determination that such action is in the interest of the United States."

The member states of the European Community are now planning to apply the Directive to meat imports effective January 1, 1989. Therefore, on December 22, 1988, I determined that it is in the interest of the United States to partially terminate the suspension of the increased duties imposed by Proclamation No. 5759, and to modify it as set forth in this determination, to take effect at 12:01 a.m. on January 1, 1989.

Since the Harmonized Tariff of the United States (HTS) is effective January 1, 1989, the modifications effected by this determination are expressed only in terms of the HTS.



Partial Termination of Suspension

Pursuant to the authority granted to me in Proclamation No. 5759, I am hereby terminating the suspension of the increased duties imposed by that Proclamation on all enumerated products except those of subheading 9903.23.10, "Intestines, weasands, bladders, tendons and integuments, not specially provided for (except sheep, lamb and goat), prepared for use as sausage casings (provided for in subheading 0504.00.00)". I have determined that it is in the interest of the United States to exclude that subheading from the termination of the suspension, in order to make this action substantially equivalent in value to the effect of the application of the Directive to EC meat imports. Specifically, I am reducing the level of responsive action in response to the derogation from the Directive that the European Community will continue to apply to imports of meat

products used in the manufacture of pet foods. Accordingly, U.S. note 6 to subchapter III of chapter 99 of the HTS is modified by striking out "subheadings 9903.23.00 through 9903.23.35, inclusive," and by inserting in lieu thereof "subheading 9903.23.10."

Modifications

Annex B to Proclamation 5759 contained typographical errors, which are corrected herein. For subheading 9903.23.15, the description in that Annex referred to "Tomatoes, prepared or preserved otherwise than by the processes specified in chapters 7 or 11 or in heading 2201 (provided for in subheadings 2002.10.00, 2002.29.00, nad [sic] 2103.20.40)". The correct heading is "2001", and the correct subheadings are "2002.10.00, 2002.90.00, or 2103.20.40". For subheading 9903.23.30, the description referred to "Fruit juices not specially provided for, concentrated or not concentrated, whether or not

sweetened, not mixed and not containing over 0.5 percent of ethyl alcohol by volume (provided for in subheading 2209.80.60.)". The correct subheading is "2009.80.60". Subheading 9903.23.15 is modified by inserting "(except paste)" in the article description after "preserved". The Harmonized Tariff Schedule of the United States is hereby modified accordingly. The modifications to the HTS made by this determination are effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. January 1, 1989. This determination shall be published in the Federal Register. Clayton Yeutter, United States Trade Representative. The following list illustrates the effect of the above action taken by the United States Trade Representative, imposing increased duties on certain products of the European Community.

HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, CHAPTER 99, SUBCHAPTER III

Heading/ subheading	Article description	Rates of duty 1 general	Rates of duty 2
9903.23.00	Articles the product of the European Community (Belgium, Denmark, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom):	100% ad val.	No change.
9903.23.05	Beef, without bone (except offal), fresh, chilled, or frozen (provided for in subheading 0201.30.60 or 0202.30.60); Pork hams and shoulders (except those that have been boned and cooked and packed in airtight containers), processed or otherwise prepared or preserved (provided for in subheadings 0210.11, 1602.41.90 or 1602.42.40).	100% ad val.	No change.
9903.23.15	Tomatoes, prepared or preserved (except paste) otherwise than by the processes specified in chapter 7 or 11 or in heading 2001 (provided for in subheading 2002.10, 2002.90 or 2103.20.40).	100% ad val.	No change.
9903.23.20	Soluble or instant coffee extracts, essences and concentrates (containing no admixture of sugar, cereal, or other additive) (provided for in subheading 2101.10.20).	100% ad val.	No change.
9903.23.25	Other fermented alcoholic beverages, containing less than 7 percent alcohol by volume (provided for in subheading 2206.00.90).	100% ad val.	No change.
9903.23.30	Fruit juices not specially provided for, concentrated or not concentrated, whether or not sweetened, not mixed and not containing over 0.5 percent of ethyl alcohol by volume (provided for in subheading 2009.80.60).	100% ad val.	No change.
9903.23.35	Pet food packaged for retail sale, of byproducts obtained from the milling of grains, mixed feeds, and mixed-feed ingredients (provided for in subheading 2309.10).	100% ad val.	No change.

[FR Doc. 88-30143 Filed 12-29-88; 8:45 am]  
BILLING CODE 3190-01-M

DEPARTMENT OF TRANSPORTATION  
Federal Highway Administration

Environmental Impact Statement; Ellis County, TX

AGENCY: Federal Highway Administration (FEWA), DOT.  
ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed highway project in Ellis County, Texas.  
FOR FURTHER INFORMATION CONTACT: W.L. Hall, Jr., P.E., District Engineer,

Federal Highway Administration, 826 Federal Building, Austin, Texas 78701, (512) 482-5988.  
SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Texas State Department of Highways and Public Transportation DHT, intends to prepare an Environmental Impact Statement (EIS) on a proposal to upgrade a portion of U.S. 287 in Ellis County, Texas, to a four-lane divided, non-controlled access facility. Because of difficulty in predicting availability of funds, the DHT has not yet decided whether to use State or Federal funds to finance construction of this project. The highway section under study passes through the City of Midlothian (1982 Population 9,447). The corridor study begins approximately 5.0 miles west of Midlothian and ends at a point near the town of Sardis, approximately

6.1 miles east of Midlothian. This portion of U.S. 287 is the only portion of the facility whose preliminary plans are yet to be completed. Planning for improvements of this facility around Ennis and Waxahachie has been completed. The existing facility is, for the most part, a two-lane roadway with a four-lane roadway existing through the central business district of Midlothian. U.S. 287 has become a major link for truck traffic from the Dallas/Ft. Worth area to the Houston/Galveston area. Truck traffic ranges in the neighborhood of 26 to 28 percent of the average daily traffic on the facility. The existing facility through the central business district (CBD) of Midlothian is unable to handle the present traffic. Higher volumes of traffic are expected in the

future with the present growth predicted to continue. Truck traffic is expected to increase along with the continued rate of increase in traffic. Truck traffic creates a problem in the central business district with its narrow streets and minimum building setbacks. This proposed project in conjunction with the construction around Ennis and Waxahachie will provide fast, direct, safe and efficient transportation service from the Dallas/Fort Worth metropolitan area to a direct connection with I.H. 45 to the Houston/Galveston area. Separation of the intra-city traffic from through traffic will reduce congestion in the city and better serve local traffic. By separation of short local trips from thru trips, access to local housing, businesses, schools and churches will be improved. The proposed improvement will benefit through traffic by eliminating the usual delays and interruptions associated with city travel. Six alternatives will be considered for this proposed action, five of which are possible bypass routes. One alternative will be along the existing facility with signalization improvements and other traffic flow improvements in the CBD considered. The "no-build" alternative will also be considered. There are currently no plans to hold formal scoping meetings for this proposal. A public meeting was held on June 6, 1985 for the proposed action. A public hearing will be held at a later date. Adequate notice will be given through the news media concerning the time and location of the hearing. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified. Comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above. Issued on December 23, 1988. W.L. Hall, Jr., District Engineer, Austin, Texas. [FR Doc. 88-30044 Filed 12-29-88; 8:45 am] BILLING CODE 4910-22-M  
Environmental Impact Statement: San Diego County, CA  
AGENCY: Federal Highway Administration (FHWA), DOT.  
ACTION: Notice of intent.  
SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement will be prepared for a proposed highway project in San Diego County, California.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Klekar, District Engineer, Federal Highway Administration, P.O. Box 1915, Sacramento, California 95812-1915. Telephone: (916) 551-1307.  
SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the California Department of Transportation, will prepare an Environmental Impact Statement (EIS) on a proposal to construct approximately 11.2 miles of State Route 125 on new location between proposed Interstate Route 905 (formerly Route 117) near the United States/Mexico Border Crossing and adopted Route 54. Route 125 is expected to be a multi-lane freeway with the ultimate design being eight lanes. Alternatives for this project consist of "no build" and several potential alignment alternatives. A public meeting in San Diego County is scheduled to solicit citizen input. Scoping meetings will also be arranged with responsible/cooperating agencies and special interest groups upon request. In addition, a public hearing will be held. Public notice will be given as to the time and place of the hearing. To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address previously provided. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The Regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal Programs and activities apply to this program.) Issued on: December 23, 1988. Susan E. Klekar, District Engineer, Sacramento, California. [FR Doc. 88-30053 Filed 12-29-88; 8:45 am] BILLING CODE 4910-22-M  
DEPARTMENT OF THE TREASURY  
Fiscal Service  
Renegotiation Board Interest Rate; Prompt Payment Interest Rate; Contracts Disputes Act  
Although the Renegotiation Board is no longer in existence, other Federal Agencies are required to use interest rates computed under the criteria established by the Renegotiation Act of 1971 (Pub. L. 92-41). For example, the Contracts Disputes Act of 1978 (Pub. L. 95-563) and the Prompt Payment Act (Pub. L. 97-177) are required to calculate

interest due on claims " \* \* \* at a rate established by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97) for the Renegotiation Board." Therefore, notice is hereby given that, pursuant to the above mentioned sections, the Secretary of the Treasury has determined that the rate of interest applicable for the purpose of said sections, for the period beginning January 1, 1989 and ending on June 30, 1989, is 9 3/4 percent per annum. Dated: December 20, 1988. Gerald Murphy, Fiscal Assistant Secretary. [FR Doc. 88-30068 Filed 12-29-88; 8:45 am] BILLING CODE 4810-35-M  
VETERANS ADMINISTRATION  
Agency Information Collection Under OMB Review  
AGENCY: Veterans Administration.  
ACTION: Notice.  
The Veterans Administration has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The responsible department or staff office; (2) the title of the collection(s); (3) the agency form number(s), if applicable; (4) a description of the need and its use; (5) how often the information collection must be completed, if applicable; (6) who will be required or asked to report; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to respond; and (9) an indication of whether section 3504(h) of Pub. L. 96-511 applies. ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from John Turner, Department of Veterans Benefits (203C), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-2744. Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 728 Jackson Place, NW., Washington, DC 20503, (202) 395-7316. DATES: Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice. Dated: December 20, 1988.



By direction of the Administrator.  
Amar J. Singh,  
Acting Director, Office of Information  
Management and Statistics.

**Extension**

1. Department of Veterans Benefits.
2. Veterans Application for Assistance in Acquiring Special Housing Adaptations.
3. VA Form 26-4555d.
4. The form is completed by certain disabled veterans in applying for benefits as authorized by law for the acquisition of adaptations to veterans' homes.
5. On occasion.
6. Individuals or households.
7. 75 responses.
8. 25 hours.
9. Not applicable.

**Extension**

1. Department of Veterans Benefits.
2. Request for Confidential Verification of Birth.
3. VA Form 21-4504.
4. The form is used to secure verification of birth from the registrar of Vital Statistics in order to establish age or relationship.
5. On occasion.
6. State or local governments.
7. 1575 responses.
8. 788 hours.

9. Not applicable.  
[FR Doc. 88-30035 Filed 12-29-88; 8:45 am]  
BILLING CODE 8320-01-M

**Agency Information Collection Under OMB Review**

**AGENCY:** Veterans Administration.  
**ACTION:** Notice.

The Veterans Administration has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This document lists the following information: (1) The responsible department or staff office; (2) the title of the collection(s); (3) the agency form number(s), if applicable; (4) a description of the need and its use; (5) how often the form(s) must be filled out, if applicable; (6) who will be required or asked to report; (7) an estimate of the number of responses; (8) an estimate of the total number of hours needed to fill out the form, if applicable; and (9) an indication of whether section 3504(h) of Pub. L. 96-511 applies.

**ADDRESSES:** Copies of the forms and supporting documents may be obtained from Patti Viers, VA Clearance Officer (732), Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3172.

Comments and questions about the items on the list should be directed to the VA's OMB Desk Officer, Joseph Lackey, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, (202) 395-7316.

**DATES:** Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice.

Dated: December 19, 1988.  
By direction of the Administrator.

Frank E. Lalley,  
Director, Office of Information Management and Statistics.

**Extension**

1. Office of Information Management and Statistics.
2. Certification of Inability to Pay Transportation Costs.
3. VA Form 70-2323.
4. This form will be used by veteran claimants to provide income information which will form the basis for a determination as to the claimant's eligibility for reimbursement of travel costs incurred to obtain VA benefits.
5. Annually.
6. Individuals or households.
7. 450,000 responses.
8. 60,000 hours.
9. Not applicable.

[FR Doc. 88-30036 Filed 12-29-88; 8:45 am]  
BILLING CODE 8320-01-M

**Sunshine Act Meetings**

Federal Register

Vol. 53, No. 251

Friday, December 30, 1988

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

**CONSUMER PRODUCT SAFETY COMMISSION**

**TIME AND DATE:** 10:00 a.m., Thursday, December 29, 1988.

**LOCATION:** Room 556, Westwood Towers, 5401 Westbard Avenue, Bethesda, Maryland.

**STATUS:****MATTERS TO BE CONSIDERED:****Part Open/Part Closed to the Public****1. Delegations of Authority**

The Commission will consider issues related to Commission Delegations of Authority.

**Open to the Public****2. Voluntary Standards Policy: Final Amendments**

The Commission will consider amendments to the Commission's regulations (16 CFR 1031 and 1032) concerning staff participation in voluntary standard activities.

**Closed to the Public****3. Compliance Status Report**

The staff will brief the Commission on the status of various compliance matters.

**FOR A RECORDED MESSAGE CONTAINING THE LATEST AGENDA INFORMATION, CALL:** 301-492-5709.

**CONTACT PERSON FOR ADDITIONAL INFORMATION:** Sheldon D. Butts, Office of the Secretary, 5401 Westbard Ave., Bethesda, Md. 20207 301-492-6800.

Sheldon D. Butts,  
Deputy Secretary.  
December 23, 1988.

[FR Doc. 88-30139 Filed 12-27-88; 4:39 pm]  
BILLING CODE 6355-01-M

**NATIONAL TRANSPORTATION SAFETY BOARD**

**TIME AND DATE:** 9:30 a.m. Friday, January 6, 1989.

**PLACE:** The Board Room, Eighth Floor, 800 Independence Avenue, SW., Washington, DC 20594.

**STATUS:** The first two items are open to the public. The last item is closed under Exemption 10 of the Government in Sunshine Act.

**MATTERS TO BE CONSIDERED:****4809A**

Railroad Accident Report: Collision of Amtrak Train 66 with Maintenance-of-Way Equipment, Chester, Pennsylvania, January 29, 1988.

NTSB Response to FAA re Safety Recommendation A-88-59 and A-88-60 related to the issuance of medical certificates (Mail Control 88-0736).

**5003**

Opinion and Order: Administrator v. McCament and Carmen, Dockets SE-7726 and 7723; disposition of the appeals of Carmen and Administrator.

**FOR MORE INFORMATION CONTACT:** Bea Hardesty, (202) 382-8525.

December 28, 1988.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 88-30187 Filed 12-28-88; 8:45 am]

BILLING CODE 7533-01-M

**SECURITIES AND EXCHANGE COMMISSION Agency Meetings**

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of January 3, 1989.

A closed meeting will be held on Wednesday, January 4, 1989, at 2:30 p.m. An open meeting will be held on Thursday, January 5, 1989, at 10:00 a.m.

The Commissioners, Counsel to the Commission, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Cox, as duty officer, voted to consider the items listed for the closed meeting in closed session. The subject matter of the closed meeting scheduled for Wednesday, January 4, 1989, at 2:30 p.m., will be:

Formal order of investigation.  
Institution of injunctive actions.  
Settlement of injunctive action.  
Settlement of administrative proceedings of an enforcement nature.  
Institution of administrative proceedings of an enforcement nature.  
Opinions.

The subject matter of the open meeting scheduled for Thursday, January 5, 1989, at 10:00 a.m., will be:

1. Consideration of an application of Delta Government Options Corp. for registration as a clearing agency under section 17a of the Securities Exchange Act of 1934. For further information, please contact Richard Konrath at (202) 272-2775.

2. Consideration of whether to issue a release proposing a rule (Rule 15c2-10) to govern the operation of proprietary trading systems that are not operated as facilities of national securities exchanges or associations and a conforming amendment to Rule 3a12-7 under the Securities Exchange Act of 1934. For further information, please contact Gordon K. Fuller at (202) 272-2414, or Eugene Lopez at (202) 272-2828.

3. Consideration of the recommendation with respect to the request of RMJ Securities Corporation ("RMJ Securities") and its subsidiary, RMJ Options Trading Corporation, that the staff issue a no-action letter with respect to the non-registration of RMJ Securities' options trading system as a national securities exchange under sections 3(a)(1) and 6 of the Securities Exchange Act of 1934. For further information, please contact Gordon K. Fuller at (202) 272-2414, or Eugene Lopez at (202) 272-2828.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Patrick Daugherty at (202) 272-2200.

Jonathan G. Katz,  
Secretary.

December 27, 1988.

[FR Doc. 88-30230 Filed 12-28-88; 4:00 pm]

BILLING CODE 8010-01-M



**Corrections**

Federal Register

Vol. 53, No. 251

Friday, December 30, 1988

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Part 520****Oral Dosage Form New Animal Drugs Not Subject to Certification; Diethylcarbamazine Plus Oxibendazole Chewable Tablets***Correction*

In rule document 88-26209 appearing on page 45759 in the issue of Monday, November 14, 1988, make the following correction:

In the second column, in the heading for Part 520, in the first line, "From" should read "Form".

BILLING CODE 1505-01-D

**LEGAL SERVICES CORPORATION****45 CFR Part 1609****Fee-Generating Cases***Correction*

In proposed rule document 88-29142 beginning on page 50982 in the issue of Monday, December 19, 1988, make the following correction:

On page 50983, in the 2nd column, in the 2nd complete paragraph, in the 18th line, "order the" should read "order to".

BILLING CODE 1505-01-D

**federal register**

Friday  
December 30, 1988

**Part II****Department of the Treasury****Internal Revenue Service****26 CFR Part 1 and 602**

**Treatment of Partnership Liabilities; Allocations Attributable to Nonrecourse Liabilities; Final and Temporary Regulations and Notice of Proposed Rulemaking**



## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Parts 1 and 602

[T.D. 8237]

## Treatment of Partnership Liabilities; Allocations Attributable to Nonrecourse Liabilities

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final and temporary regulations.

**SUMMARY:** This document contains final and temporary regulations concerning the treatment of partnership liabilities and the allocation of deductions attributable to nonrecourse debt. The temporary regulations reflect changes to the applicable tax law made by section 79 of the Tax Reform Act of 1984. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the Proposed Rules section of this issue of the Federal Register.

**DATES:** Sections 1.752-0T through 1.752-4T, section 1.704-1T, and the amendments to sections 1.704-1 and 602.101 are effective as of December 29, 1988.

The temporary regulations under section 752 are generally applicable to any partnership liability incurred on or after January 30, 1989, although the temporary regulations apply as of March 1, 1984 to certain liabilities for which a partner bears the economic risk of loss. Section 1.704-1T is generally applicable for partnership taxable years beginning after December 29, 1988, unless the partnership elects to apply the provisions of that section to the first taxable year of such partnership ending after December 29, 1988. Additional guidance on the applicability of the temporary regulations under sections 752 and 704 is contained in §§ 1.752-4T and 1.704-1T(b)(4)(iv)(m).

**FOR FURTHER INFORMATION CONTACT:** Robert E. Shaw, 202-343-8459, or Mary Munday, 202-377-9470 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

## Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in §§ 1.752-4T(c) and 1.704-1T(b)(4)(iv)(m)(2) have been reviewed and, pending receipt and

evaluation of public comments, approved by the Office of Management and Budget (OMB) under control number 1545-1090. The estimated annual burden per respondent varies from 3 minutes to 8 minutes, depending on individual circumstances, with an estimated average of 5 minutes.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

For further information concerning these collections of information, and where to submit comments on these collections of information, the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section of this issue of the Federal Register.

**BACKGROUND**

This document adds new temporary regulations §§ 1.752-0T, -1T, -2T, -3T, and -4T. The temporary regulations under section 752 reflect changes to the applicable tax law made by section 79 of the Tax Reform Act of 1984 (Pub. L. 98-369), which overruled the decision in *Raphan v. United States*, 3 Cl. Ct. 457 (1983), and directed the Treasury Department to prescribe regulations under section 752 relating to the treatment of guarantees, assumptions, indemnity agreements, and similar arrangements.

This document also adds new temporary regulation § 1.704-1T and amends § 1.704-1 to make conforming changes. The temporary regulation under section 704(b) reflects amendments to the rules governing the allocation of deductions attributable to nonrecourse debt that coordinate those rules with the temporary regulations under section 752, modify the treatment of minimum gain, and take account of comments that have been submitted to the Service.

**Explanation of Provisions of Temporary Regulations Under Section 752****Overview**

Under section 752, a partner's share of the liabilities of the partnership is reflected in the adjusted basis of the partner's interest in the partnership by treating any increase in the partner's share of those liabilities as a contribution of money to the partnership by the partner and any decrease in the

partner's share of those liabilities as a distribution of money to the partner by the partnership. Section 752 also treats the assumption of a partnership liability by a partner as a contribution of cash by the partner, and the assumption of a partner's liability by the partnership as a distribution of cash to the partner. Under the regulations in effect under section 752 prior to the amendments made by this document (the "existing regulations"), the partners generally share recourse liabilities of the partnership in accordance with the ratios in which the partners share partnership losses, while the partners share nonrecourse liabilities of the partnership in accordance with the ratios in which they share partnership profits. The existing regulations define a nonrecourse liability as any liability with respect to which "none of the partners have any personal liability."

In *Raphan v. United States*, 3 Cl. Ct. 457 (1983), *rev'd*, 759 F. 2d 879 (Fed. Cir. 1985), the United States Claims Court held that a guarantee by a general partner of an otherwise nonrecourse debt of the partnership did not require the partner to be treated as personally liable for that debt. The Tax Reform Act of 1984 (the "1984 Act") specifically provided that the decision in *Raphan* is not to be followed in applying section 752 and the regulations thereunder. In addition, Congress directed Treasury to revise and update its regulations under section 752 to take account of current commercial practices and arrangements, such as assumptions, guarantees, and indemnities. See section 79(b) of the 1984 Act; see also H.R. Rep. No. 861, 98th Cong., 2d Sess. 869 (1984). The legislative history indicated that the revisions to the section 752 regulations should be based on the manner in which the partners, and persons related to the partners, share the economic risk of loss for a partnership liability (other than a bona fide nonrecourse liability). H.R. Rep. No. 861, 98th Cong., 2d Sess. 869 (1984).

In accordance with the legislative history of the 1984 Act, the temporary regulations under section 752 employ an economic risk of loss analysis (1) to determine whether a partnership liability is a recourse or nonrecourse liability, and (2) to determine the partners' shares of any recourse liability of the partnership. In recognition of the diversity of current lending practices and financing techniques, the temporary regulations have been designed to take account of the wide variety of commercial practices by which the partners may share the economic risk of loss for a partnership liability, including

guarantees, assumptions and indemnities.

**Sharing Recourse Liabilities—Economic Risk of Loss**

Under the temporary regulation, a partnership liability is a recourse liability to the extent that any partner bears the economic risk of loss for that liability, and a partner's share of any recourse liability of the partnership equals the portion, if any, of the economic risk of loss for such liability that is borne by such partner. Generally, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or a person related to the partner) would be obligated to make a payment to the creditor or a contribution to the partnership with respect to a partnership liability (and would not be entitled to be reimbursed for such payment or contribution by another partner, a person related to another partner, or the partnership) if (1) all of the partnership's assets (including money) were worthless, (2) all of the partnership's liabilities were due and payable in full, (3) the partnership disposed of all of its assets in a fully taxable transaction for no consideration (other than relief from certain liabilities), and (4) the partnership allocated its items of income, gain, loss, deduction, and credit for the year among the partners and liquidated the partners' interests in the partnership. The temporary regulations provide that a person is related to a partner if such person and the partner bear a relationship to each other that is specified in section 267(b) or 707(b)(1), with the following modifications: (1) "80 percent or more" is substituted for "more than 50 percent" each place it appears in those sections; (2) brothers and sisters are excluded from the members of a person's family; and (3) section 267(f)(1)(A) is disregarded.

Under the approach taken by the temporary regulations, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or a person related to the partner) would bear the economic burden of discharging the obligation represented by that liability if the partnership were unable to do so. For example, equal partners in a general partnership will share the economic risk of loss for any partnership recourse debt equally because they will share any economic burden corresponding to that debt equally. Similarly, in the case of a limited partnership, a limited partner generally will not bear the economic risk of loss for any partnership liability because a limited partner generally has no obligation to contribute additional

capital to the partnership. However, if a partner (or a person related to the partner)—whether such partner is a limited partner or a general partner—could be required to make a payment to a creditor or a contribution to the partnership in order to discharge a partnership liability, the partner may be considered to bear the economic risk of loss for such liability.

Thus, the determination of whether a partner bears the economic risk of loss for a partnership liability takes into account the manner in which the partners have agreed to share economic losses relating to the liabilities of the partnership under all the arrangements among the partners, persons related to the partners, and the partnership. For example, even though a partnership creditor may be entitled to seek repayment only from the general partner of a limited partnership, the limited partners, and not the general partner, may bear the economic risk of loss for the liability to the extent that the limited partners are obligated under the partnership agreement or otherwise to discharge the partnership's obligation to the creditor. Also, if the partnership maintains capital accounts for its partners in accordance with § 1.704-1(b)(2)(iv) and the partners are obligated to restore any deficit balances in their capital accounts (as set forth in § 1.704-1(b)(2)(ii)(3)), the manner in which the partners will share the economic risk of loss for any partnership liability will be affected by their capital account balances.

In determining the amount of any obligation of a partner to make a payment to a creditor or a contribution to the partnership with respect to a partnership liability, the temporary regulations reduce the partner's obligation by the amount of any reimbursement that the partner would be entitled to receive from another partner, a person related to another partner, or the partnership. The Service is continuing to study whether a right to be reimbursed for a payment or contribution by an unrelated person (e.g., pursuant to an indemnification agreement from a third party) should be taken into account in the same manner and solicits comment on this issue.

The temporary regulations also include the following special rules regarding the determination of whether a partner bears the economic risk of loss for a partnership liability:

(1) A partner who contributes (or otherwise provides) property to the partnership that is used solely as security for a partnership liability will bear the economic risk of loss for the

partnership liability (to the extent of the value of such property).

(2) A partner who does not have a direct obligation to make a payment to a creditor or a contribution to the partnership with respect to a partnership liability may be considered to bear the economic risk of loss for the liability if the partner undertakes other obligations that are tantamount to guaranteeing the obligation.

(3) A partner who (directly or indirectly) guarantees the payment of interest on an otherwise nonrecourse liability will, in certain circumstances, be considered to bear the economic risk of loss for the liability.

In addition, the temporary regulations provide that if a partner (or a person related to the partner) makes a nonrecourse loan to the partnership, such partner shall be considered to bear the economic risk of loss for that liability unless (1) the partner's interest (including the interest of any person related to such partner) in each item of partnership income, gain, loss, deduction, or credit is 10 percent or less, and (2) the loan constitutes qualified nonrecourse financing within the meaning of section 465(b)(6).

The economic risk of loss analysis employed in the temporary regulations generally corresponds to, and further develops, the economic risk of loss analysis employed in the regulations under section 704(b). The coordination of these two sections reflects the fact that one of the principal purposes for including partnership liabilities in the bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities.

The allocation of partnership liabilities among the partners serves to equalize the partnership's basis in its assets ("inside basis") with the partners' bases in their partnership interests ("outside basis"). The provision of additional basis to a partner for the partner's partnership interest will permit the partner to receive distributions of the proceeds of partnership liabilities without recognizing gain under section 731, and to take deductions attributable to partnership liabilities without limitation under section 704(d) (which limits the losses that a partner may claim to the basis of the partner's interest in the partnership). By equalizing inside and outside basis, section 752 simulates the tax consequences that the partners would realize if they owned undivided interests in the partnership's assets, thereby treating the partnership as an aggregate of its partners. Of course, this

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goal can only be achieved if the partners that are allocated the deductions attributable to a partnership liability are allocated the basis for that liability.

Accordingly, the coordination of the economic risk of loss analysis employed in sections 704(b) and 752 generally requires that the basis for a partnership liability be allocated to the partner that will be allocated the deductions attributable of that liability. Since the economic risk of loss analysis employed under section 752 applies without regard to whether the partnership satisfies the substantial economic effect safe harbor set forth in § 1.704-1(b)(2), the temporary regulations provide additional guidance on the determination of the partners' interests in the partnership under section 704(b). See § 1.704-1(b)(3).

Taxpayers should draw no inferences from the economic risk of loss analysis employed by the temporary regulations under section 752 regarding the application of section 465.

#### Sharing Nonrecourse Liabilities

If no partner bears the economic risk of loss for a partnership liability, the liability is a nonrecourse liability of the partnership. The legislative history of the 1984 Act indicates that Congress did not expect the revisions to the regulations under section 752 to make major changes in the manner in which the partners share nonrecourse liabilities, although the regulations could attempt to provide more certainty than presently exists. H.R. Rep. No. 861, 98th Cong., 2d Sess. 869 (1984).

Under the temporary regulations, as in the existing regulations, the partners generally share nonrecourse liabilities in accordance with their interests in partnership profits. The temporary regulations do, however, require that the nonrecourse liabilities of a partnership be allocated among the partners first to reflect the partners' shares of (1) any partnership minimum gain (within the meaning of § 1.704-1T(b)(4)(i)(f), and (2) any tax gain that would be allocated to the partners under section 704(c) (or in the same manner as under section 704(c) to reflect a revaluation of partnership property under § 1.704-1(b)(2)(iv) (f) or (r)) if the partnership disposed of (in a taxable transaction) all partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities and for no other consideration ("section 704(c) minimum gain"). To the extent that partnership nonrecourse liabilities exceed the portion of such liabilities allocated to the partners in the manner described in the preceding sentence, such excess nonrecourse

liabilities are allocated among the partners in accordance with the general rule, that is, in proportion to the partners' interest in partnership profits. For this purpose, the partnership agreement may specify the partners' interests in partnership profits as long as the interests so specified are reasonably consistent with allocations (which have substantial economic effect) of some significant item of partnership income or gain among the partners. In any case in which all items of partnership income, gain, loss, and deduction are allocated equally between the partners, they will share the nonrecourse liabilities of the partnership equally (unless there is section 704(c) minimum gain) because they will share partnership profits and partnership minimum gain equally.

The allocation of nonrecourse liabilities among the partners in accordance with their shares of partnership minimum gain and section 704(c) minimum gain coordinates the treatment of nonrecourse liabilities under section 752 with the treatment of nonrecourse liabilities under the section 704(b) regulations. As in the case of recourse liabilities, this reflects the fact that one of the principal purposes for including partnership liabilities in the bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities. The modifications made by the temporary regulations to the rules governing the allocation of nonrecourse liabilities have also been designed (1) to reflect more accurately the manner in which the partners will share the partnership income that is used to discharge nonrecourse liabilities, and (2) to provide more certainty regarding the application of section 752 to nonrecourse debt.

#### Amendments to Rules Governing the Allocation of Deductions Attributable to Nonrecourse Debt Under Section 704(b)

This document amends and restates as new temporary regulation § 1.704-1T the rules governing the allocation of deductions attributable to nonrecourse debt (the "nonrecourse debt regulations"), and makes certain conforming changes to the existing regulations under section 704(b). The temporary regulation adopts the same definition of nonrecourse liability for purposes of section 704(b) as is included in the temporary regulations under section 752. In so doing, the regulation determines whether a partner bears the economic risk of loss for an otherwise nonrecourse liability in accordance with the temporary regulations under section

752. Among other consequences, the temporary regulation thereby extends the special rules under section 704(b) applicable to nonrecourse loans for which a partner bears the economic risk of loss to nonrecourse loans for which a person related to a partner bears the economic risk of loss.

The temporary regulation also modifies the treatment of partnership minimum gain by requiring that items of income and gain be allocated to the partners at any time there is a net decrease in partnership minimum gain allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership. In contrast to the rule in the existing regulations, the minimum gain chargeback set forth in the temporary regulation is mandatory—that is, the rule applies whether or not the partnership agreement includes a minimum gain chargeback provision or a deficit restoration obligation. The modifications to the minimum gain chargeback rules are considered necessary to take account of the fact that an allocation of minimum gain (like an allocation of nonrecourse deductions) cannot have economic effect because no partner can receive an economic benefit corresponding to such gain.

In addition, the Service has received comments recommending, among other things, that (1) the partners' shares of partnership minimum gain take into account distributions of proceeds of nonrecourse loans to the extent that such nonrecourse loans have caused an increase in partnership minimum gain, (2) the Service provide additional guidance on the application of the nonrecourse debt regulations to tiered partnerships, and (3) the Service provide additional guidance regarding the rules applicable to nonrecourse loans for which a partner bears the economic risk of loss. The amendments made by this document to the nonrecourse debt regulations adopt provisions responding to these comments.

Thus, under the temporary regulation, minimum gain attributable to proceeds of a nonrecourse borrowing that are distributed to the partners is allocated to the partners who received those distributions. With respect to tiered partnerships, the temporary regulation contains rules describing how increases and decreases in the partnership minimum gain of the lower-tier (or subsidiary) partnership will be taken into account in determining the increases and decreases in the partnership minimum gain of the upper-tier (or parent) partnership. These rules

generally are designed to produce the same consequences for the upper-tier partnership as would have resulted if it had held a direct interest in the lower-tier partnership's assets and liabilities.

In the case of nonrecourse loans for which a partner bears the economic risk of loss ("partner nonrecourse debts"), the temporary regulation includes a series of rules clarifying the treatment of such loans. In general, any item of loss, deduction, or section 705(a)(2)(B) expenditure that is attributable to a partner nonrecourse debt (as determined under rules similar to those governing nonrecourse deductions) must be allocated to the partner who bears the economic risk of loss for that debt. Correspondingly, any decrease in the minimum gain attributable to a partner nonrecourse debt may require items of income and gain to be allocated to the lending partner in accordance with rules similar to the general nonrecourse liability minimum gain chargeback rules.

The Service is continuing to consider other comments submitted on the nonrecourse debt regulations and solicits comment on the appropriateness of the amendments to those regulations made by this document and the need for additional changes.

#### Special Analyses

These rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for interpretative regulations. Therefore, these rules do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6) and a Regulatory Flexibility Analysis is not required.

#### List of Subjects

26 CFR 1.701-1 through 1.771-1

Income taxes, Partnerships.

26 CFR Part 602

Reporting and recordkeeping requirements.

#### Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1 and 602 are amended as follows:

#### PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1986

Paragraph 1. The authority for Part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805. . . .

#### § 1.752-1 [Removed]

Par. 2. Section 1.752-1 is removed.

Par. 3. Sections 1.752-0T, 1.752-1T, 1.752-2T, 1.752-3T, and 1.752-4T are added in the appropriate place to read as follows:

#### § 1.752-0T Table of contents (temporary).

This section lists the captions that appear in the temporary regulations under section 752.

#### § 1.752-1T Treatment of partnership liabilities—General rules (temporary).

(a) General principles.  
(1) Recourse liabilities.  
(2) Nonrecourse liabilities.  
(b) Increase in partner's share of liabilities.  
(c) Decrease in partner's share of liabilities.  
(d) Partner's share of recourse liabilities.  
(1) In general.  
(2) Recourse liability defined.  
(3) Economic risk of loss.  
(i) In general.  
(ii) Obligation to make payment or contribution in connection with constructive liquidation.  
(A) Obligation to make net payment to creditor or other person with respect to partnership liability.  
(1) In general.  
(2) Obligation to make payment.  
(i) In general.  
(ii) Providing money or other property for use as security for partnership liability.  
(B) Obligation to make net contribution with respect to partnership liability.  
(1) In general.  
(2) Obligation to contribute.  
(3) Net contribution defined.  
(4) Outstanding partnership indebtedness with respect to partnership liability.  
(i) In general.  
(ii) Liability for which creditor's right to repayment is limited.  
(C) Reimbursement.  
(D) Obligations recognized for purposes of this paragraph (d)(3).  
(1) In general.  
(2) Deemed satisfaction.  
(3) Exception where plan to circumvent or avoid obligation exists.  
(E) Time of satisfaction.  
(1) In general.  
(2) Obligations that are not required to be satisfied within prescribed time period.  
(i) In general.  
(ii) Value of obligation.  
(3) Liquidation of partner's interest.  
(i) In general.  
(ii) Delayed liquidations.  
(iii) Partnership liquidation defined.  
(4) Satisfaction of obligation with promissory note.  
(5) Obligations imposed by law.  
(F) Obligations limited to value of property.  
(1) In general.  
(2) Partnership interests.  
(3) Promissory notes.  
(G) Meaning of certain terms.  
(iii) Constructive liquidation.  
(A) In general.  
(B) Partnership assets.  
(iv) Arrangements tantamount to a guarantee.  
(v) Nonrecourse debt with respect to which a partner has assumed an obligation to pay interest.  
(A) In general.

(B) Present value.  
(vi) Tiered partnerships.  
(vii) De minimis rule.  
(e) Partner's share of nonrecourse liabilities.  
(1) In general.  
(2) Nonrecourse liability defined.  
(3) Meaning of certain terms.  
(i) Partner's share of partnership minimum gain.  
(ii) Partner's proportionate share of excess nonrecourse liabilities.  
(A) In general.  
(B) Excess nonrecourse liabilities.  
(C) Interest in partnership profits.  
(f) Assumption of liability.  
(1) In general.  
(2) Effect of assumption.  
(i) Assumption by partnership.  
(ii) Assumption by partner.  
(g) Liability defined.  
(h) Related person.  
(1) In general.  
(2) Modifications to sections 267(b) and 707(b)(1).  
(3) Person related to more than one partner.  
(i) In general.  
(ii) Percentage of related ownership.  
(4) Related partners.  
(i) [Reserved.]  
(j) Special rules.  
(1) Tiered partnerships.  
(2) Liabilities which are part recourse and part nonrecourse.  
(3) Increase and decrease in share of liabilities resulting from same transaction.  
(4) Time of determination.  
(5) Limitation.  
(k) Examples.

#### § 1.752-2T Liabilities to which contributed or distributed property is subject (temporary).

(a) In general.  
(b) Examples.

#### § 1.752-3T Sale or exchange of partnership interest (temporary).

#### § 1.752-4T Effective dates and transition rules (temporary).

(a) In general.  
(b) Partner loans and guarantees.  
(c) Election.  
(d) Coordination with amendments to section 704(b) regulations.  
(e) Cross reference.

#### § 1.752-1T Treatment of partnership liabilities—General rules (temporary).

(a) General principles. Under section 752, a partner's share of the liabilities of the partnership is reflected in the adjusted basis of the partner's interest in the partnership by treating any increase in the partner's share of those liabilities as a contribution of money to the partnership by the partner and any decrease in the partner's share of those liabilities as a distribution of money to the partner by the partnership. Section 752 also treats the assumption of a partnership liability by a partner as a contribution of cash by the partner, and



the assumption of a partner's liability by the partnership as a distribution of cash to the partner. This section provides general rules governing the application of section 752, including rules for determining a partner's share of the liabilities of the partnership. See paragraph (g) of this section for the definition of liability. The determination of a partner's share of a partnership liability under the rules of this section depends on whether that liability is a recourse or nonrecourse liability.

(1) *Recourse liabilities.* (i) Under this section, a partnership liability is a recourse liability to the extent that any partner bears the economic risk of loss for that liability, and a partner's share of any recourse liability of the partnership equals the portion, if any, of the economic risk of loss for such liability that is borne by such partner. See paragraph (d) (1) and (2) of this section for rules relating to recourse liabilities of a partnership and paragraph (d)(3) of this section for the meaning of economic risk of loss.

(ii) Generally, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or person related to the partner) would be obligated to make a payment to the creditor or a contribution to the partnership with respect to a partnership liability (and would not be entitled to be reimbursed for such contribution or payment by another partner, a person related to another partner, or the partnership) if all of the partnership's liabilities were due and payable in full, all of the partnership's assets (including money) were worthless, the partnership disposed of all of its assets in a fully taxable transaction for no consideration (other than relief from certain liabilities), and the partnership allocated its items of income, gain, loss, deduction, and credit for the year among the partners and liquidated the partners' interests in the partnership. See paragraph (d)(3)(iii) of this section (relating to the meaning of the term "constructive liquidation") for the events that are deemed to occur for purposes of determining whether a partner bears the economic risk of loss for a partnership liability, paragraph (d)(3) (iv), (v), (vi), and (vii) for special rules relating to the definition of economic risk of loss, and paragraph (h) of this section for the definition of related person.

(iii) Under this approach, a partner bears the economic risk of loss for a partnership liability to the extent that the partner (or a person related to the partner) would bear the economic burden of discharging the obligation

represented by that liability if the partnership were unable to do so. For example, equal partners in a general partnership will share the economic risk of loss for any partnership recourse debt equally because they will share any economic burden corresponding to that debt equally. Similarly, in the case of a limited partnership, a limited partner generally will not bear the economic risk of loss for any partnership liability because a limited partner generally has no obligation to contribute additional capital to the partnership. However, if a partner (or a person related to the partner)—whether such partner is a limited partner or a general partner—could be required to make a contribution to the partnership or a payment to the creditor in order to discharge a partnership liability (or to reimburse another partner (or a person related to another partner) for any such contribution or payment), the partner may be considered to bear the economic risk of loss for such liability under paragraph (d)(3) of this section. Thus, the determination of whether a partner bears the economic risk of loss for a partnership liability takes into account the manner in which the partners have agreed to share economic losses relating to the liabilities of the partnership under all the arrangements among the partners, persons related to the partners, and the partnership. For example, even though a partnership creditor may be entitled to seek repayment only from the general partner of a limited partnership, the limited partners, and not the general partner, may bear the economic risk of loss for the liability to the extent that the limited partners are obligated under the partnership agreement or otherwise to discharge the partnership's obligation to the creditor. Also, if the partnership maintains capital accounts for its partners in accordance with § 1.704-1(b)(2)(iv) and the partners are obligated to restore any deficit balances in their capital accounts (as set forth in § 1.704-1(b)(2)(ii)(3)), the manner in which the partners will share the economic risk of loss for any partnership liability will be affected by their capital account balances.

(iv) The economic risk of loss analysis employed in this section generally corresponds to, and further develops the economic risk of loss analysis employed in the regulations under section 704(b). The coordination of these two sections reflects the fact that one of the principal purposes for including partnership liabilities in the bases of the partners' interests in the partnership is to support the deductions that will be claimed by

the partners for the items attributable to those liabilities.

(2) *Nonrecourse liabilities.* (i) If no partner bears the economic risk of loss for a partnership liability, the liability is a nonrecourse liability of the partnership. See paragraph (e) of this section for rules relating to nonrecourse liabilities of a partnership. Under this section, the partners generally share nonrecourse liabilities in accordance with their interests in partnership profits. This section does, however, require that the nonrecourse liabilities of a partnership be allocated among the partners first to reflect the partners' shares of any partnership minimum gain (within the meaning of § 1.704-1T(b)(4)(iv)(f)) and any tax gain that would be allocated to the partners under section 704(c) (or in the same manner as under section 704(c) to reflect a revaluation of partnership property under § 1.704-1(b)(2)(iv) (f) or (r)) if the partnership disposed of (in a taxable transaction) all partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities and for no other consideration ("section 704(c) minimum gain"). To the extent that partnership nonrecourse liabilities exceed the portion of such liabilities allocated to the partners in the manner described in the preceding sentence, such excess nonrecourse liabilities are allocated among the partners in accordance with the general rule, that is, in proportion to the partners' interests in partnership profits. For this purpose, the partnership agreement may specify the partners' interests in partnership profits as long as the interests so specified are reasonably consistent with allocations (which have substantial economic effect) of some significant item of partnership income or gain among the partners. In any case in which all items of partnership income, gain, loss, and deduction are allocated equally among the partners, they will share the nonrecourse liabilities of the partnership equally (unless there is section 704(c) minimum gain) because they will share partnership profits and partnership minimum gain equally.

(ii) The allocation of nonrecourse liabilities among the partners in accordance with their shares of partnership minimum gain and section 704(c) minimum gain coordinates the treatment of nonrecourse liabilities under this section with the treatment of nonrecourse liabilities under the section 704(b) regulations. As in the case of recourse liabilities, this reflects the fact that one of the principal purposes for including partnership liabilities in the

bases of the partners' interests in the partnership is to support the deductions that will be claimed by the partners for the items attributable to those liabilities.

(iii) The following example illustrates the application of the rules of this section to nonrecourse liabilities:

*Example.* The AB partnership purchases depreciable property for a \$1,000 nonrecourse purchase money note that is a nonrecourse liability under the rules of this section. Assume that this is the only nonrecourse liability of the partnership, and that no principal payments are due on the purchase money note for a year. The partnership agreement allocates all depreciation deductions for such property to A. In addition, the partnership agreement provides that, for purposes of allocating the nonrecourse liability between the partners under the rules of this section, the partners' interests in partnership profits shall equal 50 percent each, which is reasonably consistent with allocations (which have substantial economic effect) of some significant item of partnership income and gain. Immediately after purchasing the depreciable property, the partners share the nonrecourse liability equally because they are treated as though they have equal interests in partnership profits. Under paragraph (b) of this section, A and B are each treated as if they contributed \$500 to the partnership to reflect each partner's increase in his or her share of partnership liabilities (from \$0 to \$500). The minimum gain with respect to an item of partnership property subject to a nonrecourse liability equals the amount of gain that would be recognized if the partnership disposed of the property in full satisfaction of the nonrecourse liability and for no other consideration. Therefore, if the partnership claims a depreciation deduction of \$200 for the depreciable property in the year it acquires that property, partnership minimum gain for the year will increase by \$200 (the excess of the \$1,000 nonrecourse liability over the \$800 adjusted tax basis of the property). See § 1.704-1T(b)(4)(iv)(c). Assuming that the allocation of all of the \$200 depreciation deduction to A is valid under section 704 (b), A will have a \$200 share of partnership minimum gain at the end of that year because the depreciation deduction is treated as a nonrecourse deduction. See § 1.704-1T(b)(4)(iv) (b) and (f). Accordingly, at the end of that year, A will be allocated \$200 of the nonrecourse liability to match A's share of partnership minimum gain and the remaining \$800 of the nonrecourse liability will be allocated equally between A and B (\$400 each). As a result, A's share of partnership liabilities increases by \$100 (from \$500 to \$600) and B's share of partnership liabilities decreases by \$100 (from \$500 to \$400). Consequently, A is treated under paragraph (b) of this section as if A contributed an additional \$100 to the partnership, and B is treated under paragraph (c) of this section as if B received a distribution of \$100 from the partnership.

(b) *Increase in partner's share of liabilities.* Any increase in a partner's share of the liabilities of the partnership,

or any increase in a partner's individual liabilities by reason of the partner's assumption of liabilities of the partnership, shall be treated as a contribution of money by that partner to the partnership. See example (1) of paragraph (k) of this section.

(c) *Decrease in partner's share of liabilities.* Any decrease in a partner's share of the liabilities of the partnership, or any decrease in a partner's individual liabilities by reason of the assumption by the partnership of the individual liabilities of such partner, shall be treated as a distribution of money by the partnership to that partner. See example (1) of paragraph (k) of this section.

(d) *Partner's share of recourse liabilities.* (1) *In general.* A partner's share of the recourse liabilities of the partnership equals that portion of the recourse liabilities of the partnership for which such partner bears the economic risk of loss (within the meaning of paragraph (d)(3) of this section).

(2) *Recourse liability defined.* For purposes of this section, a partnership liability is a recourse liability of the partnership to the extent, but only to the extent, that one or more partners bear the economic risk of loss (within the meaning of paragraph (d)(3) of this section) for such liability.

(3) *Economic risk of loss.* (i) *In general.* Except as otherwise provided in this paragraph (d)(3), a partner bears the economic risk of loss for a liability of the partnership at any time to the extent, but only to the extent, that either—

(A) The partner would be obligated to make—

(1) A net payment to a creditor or other person with respect to such liability; or

(2) A net contribution to the partnership with respect to such liability; if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) at that time; or

(B) The partner (or a person related to such partner) is the creditor with respect to such liability (i.e., the liability represents a debt owed to such partner or related person) and, but for this paragraph (d)(3)(i)(B), such liability would be a nonrecourse liability of the partnership (within the meaning of paragraph (e)(2) of this section).

See examples (3) through (18) of paragraph (k) of this section. See paragraph (d)(3)(ii) of this section for rules regarding the determination of a partner's obligation to make a net payment to a creditor or other person or a net contribution to the partnership with respect to a partnership liability. For purposes of subdivision (B) of this

paragraph (d)(3)(i), if a liability of the partnership that is owed to a partner or a person related to a partner includes or reflects an obligation owed to another person to which property owned by the partnership is subject (generally known as a "wrapped indebtedness"), then such other person, and not such partner or related person, shall be treated as the person to whom the portion of the partnership liability corresponding to the wrapped indebtedness is owed. See example (19) of paragraph (k) of this section. If the aggregate amount of the economic risk of loss that all partners are determined to bear with respect to a partnership liability (or portion thereof) under the first sentence of this paragraph (d)(3)(i) exceeds the amount of such liability (or portion thereof), then the economic risk of loss borne by each partner with respect to such liability shall equal the amount determined by multiplying the amount of such liability (or portion thereof) by the fraction obtained by dividing the amount of the economic risk of loss that such partner is determined to bear with respect to that liability (or portion thereof) under the first sentence of this paragraph (d)(3)(i) by the sum of such amounts for all partners. See example (9)(iv) of paragraph (k) of this section.

(ii) *Obligation to make payment or contribution in connection with constructive liquidation.* (A) *Obligation to make net payment to creditor or other person with respect to partnership liability.* (1) *In general.* Except as otherwise provided in this paragraph (d)(3)(ii), the net payment that a partner would be obligated to make to a creditor or other person with respect to a partnership liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) equals the excess (if any) of—

(i) The sum of the payments that such partner and any persons related to such partner would be obligated to make to a creditor or other person with respect to such liability at the time of such liquidation; over

(ii) The amount of any reimbursements (within the meaning of paragraph (d)(3)(ii)(C) of this section) that such partner and any persons related to such partner would be entitled to receive with respect to any such payments.

See examples (4), (9)(iii), (11), (12) (ii) and (iii), (14), (17), and (18)(ii) of paragraph (k) of this section.

(2) *Obligation to make payment.* (i) *In general.* For purposes of this paragraph (d)(3), a partner, a person related to a partner, or the partnership has an obligation to make a payment to



a creditor or other person with respect to a partnership liability at any time to the extent, but only to the extent, that the partnership, such partner, or such related person is obligated (whether by agreement or operation of law) at such time to make—

(A) A payment to the creditor in full or partial satisfaction of such liability; or  
(B) A payment to another partner, a person related to another partner, or the partnership with respect to any payment made by any such other person pursuant to an obligation of such other person to make a payment described in subdivision (A) or (B) of this paragraph (d)(3)(ii)(A)(2)(i).

Any obligation of a partner that constitutes an obligation to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(2) of this section) shall not be treated as an obligation to make a payment to a creditor or other person with respect to a partnership liability. See paragraph (d)(3)(ii)(E) of this section for rules regarding the time in which an obligation to make a payment to a creditor or other person must be satisfied.

(ii) *Providing money or other property for use as security for partnership liability.* For purposes of this paragraph (d)(3), if—

(A) A partner contributes or otherwise provides money or other property (other than a promissory note of which such partner is the maker that is not readily tradeable on an established securities market) to the partnership; and

(B) Such money or other property is used in the partnership's activities solely to secure the payment of a partnership liability; then the partnership's obligation to use such money or other property to discharge such liability shall be treated as an obligation of such partner to make a payment to a creditor or other person with respect to that liability. For purposes of the preceding sentence, money or other property contributed to the partnership that is described in subdivision (A) of this paragraph (d)(3)(ii)(A)(2)(i) and that is used to secure the payment of a partnership liability is presumed to be used in the partnership's activities solely to secure the payment of a partnership liability if substantially all of the items of income, gain, loss, and deduction attributable to such money or other property are allocated to the contributing partner and the portion of such items allocated to the contributing partner is greater than such partner's share of any other significant item of partnership income, gain, loss, or deduction. In addition, if a partner contributes or otherwise

provides money or other property to the partnership and the partnership uses such money or other property to acquire other property that is used solely in the partnership's activities to secure the payment of a partnership liability, such other property shall be treated as property contributed or otherwise provided to the partnership by such partner for purposes of this paragraph (d)(3)(ii)(A)(2)(i). For example, if a partner with a 50 percent interest in partnership income, gain, loss, and deduction contributes money to the partnership, such money is used to purchase government securities that are pledged to secure the payment of a partnership liability, and such partner is allocated 99 percent of the income from such securities, then the partnership's obligation to use the securities to discharge a partnership liability is treated as an obligation of such partner to make a payment to a creditor or other person with respect to that liability. See example (12)(ii) of paragraph (k) of this section.

(B) *Obligation to make net contribution with respect to partnership liability.*—(1) *In general.* Except as otherwise provided in this paragraph (d)(3)(ii), the net contribution that a partner would be obligated to make to the partnership with respect to a partnership liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) equals the amount determined by multiplying the net contribution that such partner would be obligated to make to the partnership at the time of such liquidation (within the meaning of paragraph (d)(3)(ii)(B)(3) of this section) by the fraction obtained by dividing—

(i) The outstanding partnership indebtedness (within the meaning of paragraph (d)(3)(ii)(B)(4) of this section) with respect to that liability at the time of such liquidation; by  
(ii) The sum of the net contributions that all partners would be obligated to make to the partnership at the time of such liquidation.

See examples (6), (7), (8), (9) (ii) and (iii), (10)(ii), (12)(iv), (13) (ii) and (iii), and (15)(iv) of paragraph (k) of this section.

(2) *Obligation to contribute.* Except as otherwise provided in this paragraph (d)(3), a partner has an obligation to make a contribution to the partnership at any time to the extent, but only to the extent, of the sum of—

(i) The outstanding principal balance of any promissory note of which such partner is the maker that is owned by the partnership and was contributed to the partnership by such partner (other than a promissory note that is readily

tradeable on an established securities market at the time of contribution);

(ii) The amount of any obligation of such partner that arises under the partnership agreement or by operation of law to make subsequent contributions of money or other property to the partnership (other than pursuant to a promissory note of which such partner is the maker); and

(iii) The amount of any obligation of such partner or a person related to such partner to reimburse any partner for a contribution to the partnership that is described in this paragraph (d)(3)(ii)(B)(2).

For purposes of this paragraph (d)(3)(ii), if a partner contributes a promissory note to the partnership during a partnership taxable year beginning after December 29, 1988 and the maker of such note is a person related to such partner (within the meaning of paragraph (h) of this section, but without regard to subdivision (4) of that paragraph), then such promissory note shall be treated as a promissory note of which such partner is the maker. See paragraph (d)(3)(ii)(E) of this section for rules regarding the time in which an obligation to make a contribution to the partnership must be satisfied.

(3) *Net contribution defined.* For purposes of paragraph (d)(3)(ii)(B)(1) of this section, the net contribution that a partner would be obligated to make to the partnership at the time of a constructive liquidation of the partnership equals the aggregate amount of the contributions that such partner would be obligated to make to the partnership if the partnership constructively liquidated at that time, reduced by the aggregate amount of the reimbursements (within the meaning of paragraph (d)(3)(ii)(C) of this section) that such partner or a person related to such partner would be entitled to receive with respect to such contributions. See examples (3)(iii), (5), (6)(iii), (7), and (9)(iii) of paragraph (k) of this section.

(4) *Outstanding partnership indebtedness with respect to partnership liability.*—(i) *In general.* For purposes of paragraph (d)(3)(ii)(B)(1) of this section, the outstanding partnership indebtedness with respect to a partnership liability equals the amount of such liability reduced by the sum of—

(A) The portion, if any, of such liability that constitutes a liability for which the creditor's right to repayment from the partnership is limited to one or more assets of the partnership (within the meaning of subdivision (ii) of this paragraph (d)(3)(ii)(B)(4)); and

(B) The excess of the sum of the amounts, if any, that are treated under paragraph (d)(3)(ii)(A)(2)(ii) of this section as obligations of the partners to make payments to a creditor or other person with respect to such liability, over any reimbursements that such partners would be entitled to receive (directly or indirectly) from the partnership with respect to payments made pursuant to those obligations.

The amount described in subdivision (B) of this paragraph (d)(3)(ii)(B)(4)(i) shall not include any amount attributable to any portion of a liability that is described in subdivision (A) of this paragraph (d)(3)(ii)(B)(4)(i). See examples (9)(iii), (12)(iv), and (13)(iii) of paragraph (k) of this section.

(ii) *Liability for which creditor's right to repayment is limited.* A partnership liability is a liability with respect to which the creditor's right to repayment is limited to one or more assets of the partnership to the extent, but only to the extent, that the outstanding balance of such liability exceeds the aggregate amount that the partners would be obligated to contribute to the partnership to discharge that liability if—

(A) The partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section, except that subdivision (A) of that paragraph shall be applied as if all of the partnership's assets (including any money or other property that is described in paragraph (d)(3)(ii)(A)(2)(ii) of this section) were worthless); and

(B) The partners did not discharge their obligations, if any, to make payments to a creditor or other person with respect to such liability (within the meaning of paragraph (d)(3)(ii)(A)(2) of this section).

See example (13)(ii) of paragraph (k) of this section. For example, if an entity that is treated as a partnership for federal income tax purposes is organized and operated under a local law which provides that none of the members of that entity is liable for its debts and other obligations, then all the liabilities of that entity will generally constitute liabilities for which the creditor's right to repayment is limited to one or more assets of the partnership because the members of that entity are not required to make contributions to the entity to discharge its liabilities.

(C) *Reimbursement.* Except as otherwise provided in this paragraph (d)(3)(ii), if a partner or a person related to a partner is obligated to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership, such partner or related person is entitled to

be reimbursed for any payment or contribution made pursuant to such obligation to the extent, but only to the extent, that—

(i) Another partner, a person related to another partner, or the partnership would be obligated to make a payment to such partner or related person in the event that such partner or related person makes a payment or contribution pursuant to such obligation; and

(2) The reimbursing payment that such other person would be obligated to make is recognized under this paragraph (d)(3)(ii) as an obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership (or in the case of an obligation of the partnership to reimburse a partner for a contribution to the partnership, such obligation would be recognized as an obligation to make a contribution to the partnership if the partnership were a partner). See examples (4), (7), (11), and (15)(iv) of paragraph (k) of this section.

(D) *Obligations recognized for purposes of this paragraph (d)(3).*—(1) *In general.* For purposes of this paragraph (d)(3)(ii)—

(i) A partner, person related to a partner, or the partnership has an obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership to the extent that any person has a legally enforceable right to require such partner, related person, or partnership to make such payment or contribution;

(ii) The determination of whether a partner, person related to a partner, or the partnership would have an obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership if the partnership constructively liquidated shall be based on all the facts and circumstances at the time of such determination; and

(iii) Any obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership that would arise if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) shall be recognized only to the extent that the existence and amount of such obligation would be determinable with reasonable certainty and such obligation would not otherwise be subject to contingencies that would make it unlikely that the obligation would ever be discharged.

(2) *Deemed satisfaction.* Except to the extent that an obligation is not recognized under this paragraph

(d)(3)(ii), the rules of this paragraph (d)(3)(ii) shall be applied by assuming that any partner, person related to a partner, or partnership that would be obligated to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership if the partnership constructively liquidated actually discharges such obligation at the time of the constructive liquidation. See examples (6)(iii), (10)(iii), (11), and (15)(iii) of paragraph (k) of this section. Thus, for example, a partner is generally assumed to discharge an obligation to make a contribution to the partnership even if such partner's net worth is less than the amount of the obligation. To the extent that the obligation of a partner to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership is not recognized under this paragraph (d)(3)(ii), this paragraph (d)(3)(ii) shall be applied as if such obligation did not exist. See example (11)(ii) and (15)(iv) of paragraph (k) of this section.

(3) *Exception where plan to circumvent or avoid obligation exists.* An obligation of a partner to make a net payment to a creditor or other person or a net contribution to the partnership with respect to a partnership liability shall not be recognized for purposes of this section to the extent that the facts and circumstances indicate a plan to circumvent or avoid such obligation. See examples (7), (9) (iv) and (v), and (11) of paragraph (k) of this section.

(E) *Time of satisfaction.*—(1) *In general.* Except as otherwise provided in paragraph (d)(3)(ii)(E)(2) of this section—

(i) An obligation to make a payment to a creditor or other person with respect to a partnership liability shall be recognized for purposes of applying this paragraph (d)(3)(ii) only to the extent that such obligation is required to be satisfied within a reasonable period of time after such partnership liability becomes due and payable; and

(ii) An obligation to make a contribution to the partnership shall be recognized for purposes of this paragraph (d)(3)(ii) only to the extent that such obligation must be satisfied by the later of—

(A) The end of the partnership taxable year in which the partner's interest in the partnership is liquidated; or

(B) 90 days after the date of such liquidation.  
(2) *Obligations that are not required to be satisfied within prescribed time period.*—(i) *In general.* Any obligation of a partner, a person related to a partner,



or the partnership to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership that does not meet the requirements of paragraph (d)(3)(ii)(E)(2) of this section shall be recognized under this paragraph (d)(3)(ii)(E)(2) for purposes of determining the consequences of a constructive liquidation of the partnership (within the meaning of paragraph (d)(3)(iii) of this section) only to the extent of the value that such obligation would have if the partnership constructively liquidated at the time of such determination.

(ii) *Value of obligation.* For purposes of subdivision (7) of this paragraph (d)(3)(ii)(E)(2), the value of an obligation equals—

(A) The outstanding principal balance of such obligation if such obligation bears interest for the period commencing on the date that the partnership liability to which such obligation relates is due and payable (in the case of an obligation that does not meet the requirements of paragraph (d)(3)(ii)(E)(2) of this section) or the date of the liquidation of the partner's interest in the partnership (in the case of an obligation that does not meet the requirements of paragraph (d)(3)(ii)(E)(2) of this section) and ending on the date that the obligation is satisfied, and the rate of interest that such obligation bears (appropriately adjusted for the period of compounding) is equal to or greater than the applicable Federal rate (within the meaning of section 1274(d)) at the time of valuation; or

(B) If subdivision (A) of this paragraph (d)(3)(ii)(E)(2) does not apply to such obligation, the imputed principal amount that such obligation would have under section 1274(b) if the partnership constructively liquidated at the time of valuation.

For purposes of the preceding sentence, the imputed principal amount of an obligation is determined by treating such obligation as a debt instrument to which section 1274 applies (without regard to section 1274(b)(3) and section 1274A) and by assuming for purposes of applying section 1274 that the sale or exchange of property in which such debt instrument was given as consideration occurred at the time of valuation. See examples (13) (ii) and (iii) and (15)(iii) of paragraph (k) of this section.

(3) *Liquidation of partner's interest—*  
(i) *In general.* For purposes of this paragraph (d)(3)(ii)(E), the liquidation of a partner's interest in the partnership occurs on the earlier of—

(A) The date on which the partnership is liquidated; or

(B) The date on which the partner's interest in the partnership is liquidated under § 1.761-1(c).

(ii) *Delayed liquidations.* If—

(A) A partner's interest in the partnership is not liquidated after the partnership's primary business activities have been discontinued; and

(B) The principal purpose for delaying the liquidation of such partner's interest in the partnership is to delay the time at which the partner will be required to satisfy an obligation to make a contribution to the partnership; any obligation of such partner to make a contribution to the partnership shall be considered to fail the requirements of subdivision (7) of this paragraph (d)(3)(ii)(E) and shall be recognized under this paragraph (d)(3)(ii) only to the extent of its value as determined in accordance with subdivision (2) of this paragraph (d)(3)(ii)(E).

(iii) *Partnership liquidation defined.* For purposes of this paragraph (d)(3)(ii)(E), the liquidation of a partnership occurs on the earlier of (A) the date on which the partnership terminates under section 708(b)(1) (A) or (B) the date on which the partnership ceases to be a going concern even though the partnership may continue in existence for the purpose of winding up its affairs, paying its debts, and distributing any remaining assets to its partners.

(4) *Satisfaction of obligation with promissory note.* For purposes of this paragraph (d)(3)(ii)(E), an obligation is not satisfied by the transfer to the obligee of a promissory note (other than a note that is readily tradeable on an established securities market) of which the obligor (or a person related to the obligor) is the maker.

(5) *Obligations imposed by law.* Any obligation imposed on a partner or a person related to a partner by state or local law is deemed to satisfy the requirements of subdivision (7) of this paragraph (d)(3)(ii)(E). For example, if a partner would be obligated under state law to make a net contribution to the partnership with respect to a partnership liability if the partnership constructively liquidated, such partner is deemed to be obligated to satisfy such obligation within the time period set forth in subdivision (7) of this paragraph (d)(3)(ii)(E).

(F) *Obligations limited to value of property—*  
(1) *In general.* If the obligation of a partner or a person related to a partner to make a payment to a creditor or other person with respect to a partnership liability or the obligation of a partner to make a contribution to the partnership is limited to the fair market value of any property,

then the amount of such obligation is determined, for purposes of this paragraph (d)(3)(ii), on the basis of the fair market value of such property as of—

(i) The time that the amount of such obligation is determined for purposes of this paragraph (d)(3)(ii) if the fair market value of such property is readily ascertainable (e.g., marketable securities) or such property is property of a type that by its terms increases or decreases in value (e.g., a debt instrument on which principal payments are made during its term); or

(ii) If the property is not described in subdivision (7) of this paragraph (d)(3)(ii)(F)(1), the latest of the time that the liability is incurred, the time that the liability is assumed, or the time of the most recent valuation of such property that is made in connection with such liability.

For example, if a partner pledges marketable securities to a partnership creditor to guarantee the payment of a partnership liability and the partner does not assume any personal liability under the guarantee, then the amount that the partner is considered obligated to pay the creditor for purposes of determining the manner in which the partners share the economic risk of loss for the liability equals the fair market value of the marketable securities at the time of any such determination. Alternatively, if the partner had given the creditor a lien on real property, the amount of the obligation would equal the fair market value of such property as of the latest of the time the liability is incurred, the guarantee is made, or the most recent valuation of such property made in connection with the guarantee (e.g., to assure the creditor that the property continues to represent adequate security for the partnership liability).

(2) *Partnership interests.* For purposes of this paragraph (d)(3)(ii), in the case of any obligation to make a payment to a creditor or other person with respect to a partnership liability or a contribution to the partnership, any interest in such partnership shall be deemed to have a fair market value of zero. For example, if a partner pledges such partner's interest in the partnership to a partnership creditor to guarantee the payment of a partnership liability and the partner does not assume any personal liability under the guarantee, the partner is not considered to have any obligation to make a payment to the creditor under the guarantee for purposes of this paragraph (d)(3)(ii) because the partnership interest is deemed to have a fair market value of zero.

(3) *Promissory notes.* For purposes of applying this paragraph (d)(3)(ii)(F) to a partner or a person related to a partner, the term "property" does not include a promissory note (other than a note that is readily tradeable on an established securities market) of which such partner or such related person is the maker.

(G) *Meaning of certain terms.* For purposes of this section, the term "creditor" means the person to whom any liability is owed, and the term "partnership agreement" has the meaning set forth in § 1.761-1 (c).

(iii) *Constructive liquidation—*  
(A) *In general.* For purposes of this section, if a partnership is deemed to constructively liquidate, the following events are deemed to occur—

(1) All of the assets of the partnership (other than property that is described in paragraph (d)(3)(ii)(A)(2)(ii) of this section) become worthless;

(2) All of the liabilities of the partnership (including any wrapped indebtedness described in paragraph (d)(3)(i) of this section) become due and payable in full because of the partnership's failure to make the payments required with respect to such liabilities;

(3) The partnership (i) transfers in a fully taxable exchange any property described in paragraph (d)(3)(ii)(A)(2)(ii) of this section to the owner of any liability to which such property is subject in full or partial satisfaction of such liability and (ii) disposes of all of its remaining assets in a fully taxable exchange (involving the transfer of any partnership asset subject to a liability to the owner of that liability) for no consideration (other than relief from any liability for which the creditor's right to repayment is limited to one or more assets of the partnership (within the meaning of paragraph (d)(3)(ii)(B)(4)(ii) of this section), after taking into account the reduction in any such liability that would result from any transfer described in subdivision (1) of this paragraph (d)(3)(iii)(A)(3)); and

(4) The partnership allocates its items of income, gain, loss, deduction, and credit for the partnership taxable year ending on the date of the liquidation among the partners in accordance with the partnership agreement and liquidates the partners' interests in the partnership.

See examples (3)(iii), (5)(ii), (12)(ii), (13)(ii), (16)(ii), (17)(ii), and (18)(ii) of paragraph (k) of this section. For purposes of determining the amount of any liability that is deemed satisfied in connection with any constructive liquidation as a result of a transfer of property that is described in paragraph

(d)(3)(iii)(A)(3)(i) of this section, such property shall be considered to have a value equal to the amount of the obligation to make a payment to a creditor or other person that arises under paragraph (d)(3)(ii)(A)(2)(ii) of this section with respect to such property, provided that such obligation shall be taken into account only to the extent that it is recognized for purposes of applying paragraph (d)(3)(ii) of this section to such constructive liquidation.

(B) *Partnership assets.* For purposes of this paragraph (d)(3)(iii), the assets of the partnership include all of the money and other property (including contractual rights such as insurance policies) owned by the partnership other than (1) the obligation of any partner or person related to any partner to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(2) of this section), and (2) the obligation of any partner or person related to any partner to make a payment described in paragraph (d)(3)(ii)(A)(2)(i) of this section to the partnership.

(iv) *Arrangements tantamount to a guarantee.* If one or more partners or persons related to such partners—

(A) Undertake one or more contractual obligations in order to acquire a loan;

(B) Such obligations eliminate substantially all of the risk to the creditor that the partnership will not satisfy its obligations under that loan (assuming that such partners or related persons satisfy their obligations); and

(C) One of the principal purposes of the arrangement is to permit partners other than such partners to include a portion of such liability in the basis of their partnership interests; then such partners shall be considered to bear the economic risk of loss with respect to such liability in a manner that reflects their relative economic burdens with respect to that liability pursuant to such contractual obligations and no other partner shall be considered to bear the economic risk of loss with respect to such liability. See example (20) of paragraph (k) of this section.

(v) *Nonrecourse debt with respect to which a partner has assumed an obligation to pay interest—*  
(A) *In general.* For purposes of this section, if one or more partners (or persons related to such partners) would be obligated (whether pursuant to the partnership agreement, by operation of law, or otherwise) to pay more than 20 percent of the total interest that will accrue on any nonrecourse liability of the partnership during the term of such liability (or if the liability has an indefinite term, the expected term of

such liability) if the partnership fails to pay such interest, then each such partner's economic risk of loss for such liability shall be increased by an amount equal to the sum of the present values of the remaining interest payments that such partner (or any person related to such partner) would be obligated to make if the partnership fails to make those payments (taking into account any payment that such partner or related person may be required to make pursuant to that obligation only to the extent that such partner or related person would not be entitled to be reimbursed (within the meaning of paragraph (d)(3)(ii)(C) of this section) for such payment). See example (21) of paragraph (k) of this section. An obligation of a partner to pay any portion of the interest that will accrue on a nonrecourse liability of the partnership shall not be treated as an obligation to pay such interest for purposes of this paragraph (d)(3)(v) unless it is reasonable to expect, based on all the facts and circumstances, that the partner would be required to pay substantially all of the interest subject to that obligation if the partnership failed to pay such interest. For example, if a partner guarantees the payment of all of the interest due on an otherwise nonrecourse liability but the lender can only enforce that guarantee by first foreclosing on the property subject to such liability, it generally will not be reasonable to expect that the partner would be required to pay substantially all of the interest subject to that guarantee if the partnership failed to pay such interest unless substantially all of the interest due on such liability is payable at the end of the term of the liability (e.g., a liability on which no payments of principal or interest are due until maturity). A partnership liability is a nonrecourse liability of the partnership for purposes of this paragraph (d)(3)(v) only to the extent that such liability would, but for this paragraph (d)(3)(v), be a nonrecourse liability (within the meaning of paragraph (e) of this section) of the partnership.

(B) *Present value.* For purposes of this paragraph (d)(3)(v), the present value of any interest payment with respect to a partnership liability is determined by assuming that such payment will be made when due and by using a discount rate equal to—

(1) The rate at which such interest payment accrues on the liability; or

(2) The applicable Federal rate, compounded semiannually, if the liability is (A) a debt instrument to which section 483 applies and there is



total unstated interest on such debt instrument, or (B) a debt instrument to which section 1274 applies and the issue price of such debt instrument is equal to the imputed principal amount of such debt instrument.

(vi) *Tiered partnerships.* For purposes of this section, if a partnership (the "upper-tier partnership") owns (directly or indirectly through one or more partnerships) an interest in another partnership (the "subsidiary partnership"), the upper-tier partnership bears the economic risk of loss for any liability of the subsidiary partnership to the extent of the sum of—

(A) The economic risk of loss (within the meaning of this paragraph (d)(3), but without regard to this subdivision (vi) of that paragraph) that the upper-tier partnership bears with respect to such liability; and

(B) The amount of the economic risk of loss (within the meaning of this paragraph (d)(3)) that the upper-tier partnership's partners would bear for any portion of such liability with respect to which the upper-tier partnership does not otherwise bear the economic risk of loss if the subsidiary partnership's liabilities constituted liabilities of the upper-tier partnership.

(vii) *De minimis rule.* If a partner would, but for this paragraph (d)(3)(vii), bear the economic risk of loss under paragraph (d)(3)(i)(B) of this section for a partnership liability for a loan from such partner or a person related to such partner, then such partner shall not be considered to bear the economic risk of loss for that liability if—

(A) The partner's interest (including the interest of any person related to such partner) in each item of partnership income, gain, loss deduction, or credit is 10 percent or less; and

(B) Such loan constitutes qualified nonrecourse financing within the meaning of section 465(b)(6).

(e) *Partner's share of nonrecourse liabilities.*—(1) *In general.* A partner's share of the nonrecourse liabilities of a partnership shall equal the sum of—

(i) The partner's share of partnership minimum gain (within the meaning of paragraph (e)(3)(i) of this section);

(ii) The amount of any taxable gain that would be allocated to the partner under section 704(c), or in the same manner as under section 704(c) in connection with a revaluation of partnership property pursuant to § 1.704-1(b)(2)(iv) (f) or (r) (see §§ 1.704-1(b)(2)(iv)(f)(4), 1.704-1(b)(4)(i)), if the partnership disposed of (in a taxable transaction) all partnership property subject to one or more nonrecourse liabilities of the partnership in full

satisfaction of such liabilities and for no other consideration; and

(iii) The partner's proportionate share of the excess nonrecourse liabilities of the partnership (within the meaning of paragraph (e)(3)(ii) of this section).

See examples (13)(iv), (16)(ii), (17)(iii), (19)(ii), (22) and (23) of paragraph (k) of this section. For purposes of subdivision (ii) of this paragraph (e)(1), the amount of taxable gain that would be recognized by the partnership if it disposed of an item of partnership property subject to one or more nonrecourse liabilities of the partnership in full satisfaction of such liabilities shall be computed by taking into account only the portion of the adjusted tax basis of such property that is allocated to nonrecourse liabilities of the partnership under the principles of § 1.704-1T(b)(4)(iv)(c) (1) and (2).

(2) *Nonrecourse liability defined.* For purposes of this section, a liability of a partnership is a nonrecourse liability of the partnership to the extent, but only to the extent, that no partner bears the economic risk of loss (within the meaning of paragraph (d)(3) of this section) for such liability.

(3) *Meaning of certain terms.*—(i) *Partner's share of partnership minimum gain.* A partner's share of partnership minimum gain shall be determined in accordance with the rules of § 1.704-1T(b)(4)(iv)(f), except that at any time it is necessary to determine a partner's share of partnership liabilities, such partner's share of partnership minimum gain shall be computed as if the partnership taxable year had ended immediately prior to such determination. For purposes of section 752 and the regulations thereunder, any increase in a partner's share of partnership minimum gain shall be deemed to occur immediately before the event that caused such increase.

(ii) *Partner's proportionate share of excess nonrecourse liabilities.*—(A) *In general.* A partner's proportionate share of the excess nonrecourse liabilities of the partnership equals the amount determined by multiplying the partner's percentage interest in partnership profits by the excess nonrecourse liabilities of the partnership.

(B) *Excess nonrecourse liabilities.* The excess nonrecourse liabilities of the partnership equal the excess of—

(1) The aggregate amount of the nonrecourse liabilities of the partnership; over

(2) The aggregate amount of the nonrecourse liabilities of the partnership that are allocable to the partners under paragraph (e)(1) (i) and (ii) of this section.

(C) *Interest in partnership profits.* For purposes of this paragraph (e), the partners' interests in partnership profits shall be determined by taking into account all facts and circumstances relating to the economic arrangement of the partners. However, if—

(1) The partnership agreement specifies the partners' interests in partnership profits for purposes of determining such partners' shares of the nonrecourse liabilities of the partnership; and

(2) The partners' interests in partnership profits (as specified in the partnership agreement) are reasonably consistent with allocations (which have substantial economic effect under § 1.704-1(b)) of some significant item of partnership income or gain among such partners;

then the partners' interests in partnership profits shall, for the purposes of this paragraph (e), be deemed to be as specified in the partnership agreement. See example (22) (iii) of paragraph (k) of this section.

(f) *Assumption of liability.*—(1) *In general.* Except as otherwise provided in § 1.752-2T, for purposes of section 752 and the regulations thereunder, a person is considered to assume a liability to the extent, but only to the extent, that as a result of the assumption—

(i) The assuming person is subjected to personal liability with respect to such liability; and

(ii) In the case of any assumption of a partnership liability by a partner, the person to whom such liability is owed is aware of the assumption and can directly enforce the partner's obligation with respect to such liability, and no other partner or person related to another partner would bear the economic risk of loss for such liability (within the meaning of paragraph (d)(3) of this section) immediately after the assumption if such liability were treated as a partnership liability.

(2) *Effect of assumption.*—(i) *Assumption by partnership.* If a partnership assumes a liability of a partner, such liability shall thereafter be treated as a liability of the partnership, and not the partner, for purposes of section 752 and the regulations thereunder.

(ii) *Assumption by partner.* If a partner assumes a liability of the partnership, such liability shall thereafter be treated as a liability of the partner, and not the partnership, for purposes of section 752 and the regulations thereunder.

(g) *Liability defined.* Except as otherwise provided in the regulations under section 752, an obligation is a

liability of the obligor for purposes of section 752 and the regulations thereunder to the extent, but only to the extent, that incurring or holding such obligation gives rise to—

(1) The creation of, or an increase in, the basis of any property owned by the obligor (including cash attributable to borrowings);

(2) A deduction that is taken into account in computing the taxable income of the obligor; or

(3) An expenditure that is not deductible in computing the obligor's taxable income and is not properly chargeable to capital.

See examples (2) and (3)(ii) of paragraph (k) of this section.

(h) *Related person.*—(1) *In general.* Except as otherwise provided in this paragraph (h), a person is related to a partner for purposes of this section if and only if such person and the partner bear a relationship to each other that is specified in section 267(b) (without modification by section 267(e)(1)) or section 707(b)(1), taking into account the modifications made by paragraph (h)(2) of this section.

(2) *Modifications to sections 267(b) and 707(b)(1).* For purposes of this section, sections 267(b) and 707(b)(1) shall be applied by—

(i) Substituting "80 percent or more" for "more than 50 percent" each place it appears in such sections;

(ii) Excluding brothers and sisters from the members of a person's family; and

(iii) Disregarding section 267(f)(1)(A).

(3) *Person related to more than one partner.*—(i) *In general.* For purposes of this section, if a person is related to more than one partner—

(A) Any obligation of such person to make a payment to a creditor or other person with respect to a partnership liability (within the meaning of paragraph (d)(3)(ii)(A)(2) of this section), any obligation of such person to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(2) of this section), and any reimbursement that such person is entitled to receive with respect to such payment or contribution (within the meaning of paragraph (d)(3)(ii)(C) of this section) shall be allocated to the related partner with the greatest percentage of related ownership with respect to such person; and

(B) Any partnership liability owed to such related person that, but for paragraph (d)(3)(i)(B) of this section, would be a nonrecourse liability of the partnership shall be treated as a liability that is owed to a person related to the partner with the greatest percentage of

related ownership with respect to such related person.

If more than one partner holds the same percentage of related ownership with respect to such person and no partner holds a greater percentage, any such obligation, right to reimbursement, or liability shall be allocated equally among such partners unless the facts and circumstances establish that the partners would share any economic burden or benefit corresponding to any such obligation, right to reimbursement, or liability in a different manner.

(ii) *Percentage of related ownership.* The percentage of related ownership of a partner with respect to a related person equals the greater of—

(A) The percentage ownership of the related person by the partner; or

(B) The percentage ownership of the partner by the related person.

In determining the percentage of related ownership of a partner with respect to a related person, the constructive ownership or attribution rules applicable under sections 267(b) and 707(b)(1) (as modified by paragraph (h)(2) of this section) must be taken into account, and if a partner is related to a person under more than one of the relationships set forth under sections 267(b) and 707(b)(1) (as so modified), then the relationship establishing the highest percentage of related ownership must be used. For purposes of this section, natural persons shall be deemed to have a zero percentage of related ownership with respect to each other. For example, if a person that is related to more than one partner is obligated to make a payment to a creditor with respect to a partnership liability, and such person and such partners are related because they are members of the same family, then that obligation must, for purposes of determining the economic risk of loss borne by each partner with respect to such liability, be divided equally among such partners (unless the facts and circumstances establish that the partners would share any economic burden corresponding to such obligation in a different manner) under this paragraph (h)(3) because they have the same percentage of related ownership (zero).

(4) *Related partners.* Except as otherwise provided in this section, if related persons (within the meaning of this paragraph (h)) own (directly or indirectly) interests in the same partnership, then such persons shall not be treated as related persons for purposes of determining the economic risk of loss borne by each of them for the liabilities of such partnership.

(i) [Reserved.]

(j) *Special rules.*—(1) *Tiered partnerships.* If a partnership (the "upper-tier partnership") is a partner in another partnership (the "subsidiary partnership"), the upper-tier partnership's share of the liabilities of the subsidiary partnership (other than any liability of the subsidiary partnership that is owed to the upper-tier partnership) shall be treated as liabilities of the upper-tier partnership for purposes of applying section 752 and the regulations thereunder to the partners of the upper-tier partnership.

(2) *Liabilities which are part recourse and part nonrecourse.* If one or more partners bears the economic risk of loss (within the meaning of paragraph (d)(3) of this section) for only a portion of a partnership liability, such liability shall be treated as a recourse liability of the partnership to the extent that the partners bear the economic risk of loss for such liability and as a nonrecourse liability of the partnership in an amount equal to the excess. See examples (13)(iv) and (19)(ii) of paragraph (k) of this section.

(3) *Increase and decrease in share of liabilities resulting from same transaction.* For purposes of section 752 and the regulations thereunder, if as a result of a single transaction (for example, a contribution by a partner to the partnership of property subject to a liability or the termination of the partnership under section 706(b)) a partner incurs both an increase (or decrease) in the partner's share of the liabilities of the partnership and a decrease (or increase) in the partner's individual liabilities—

(i) Such increase and decrease must be offset against each other prior to the application of paragraph (b) or (c) of this section; and

(ii) Only the amount of the net increase or decrease, if any, in the sum of the partner's share of the liabilities of the partnership and the partner's individual liabilities resulting from such transaction shall be treated as a contribution of money by the partner to the partnership or a distribution of money by the partnership to the partner, respectively, under paragraph (b) or (c) of this section.

See § 1.752-2T (b) (examples (1) and (2)).

(4) *Time of determination.* A partner's share of the liabilities of the partnership must be determined whenever such determination is necessary in order to determine the tax liability of the partner or any other person. See § 1.705-1 (a) for rules regarding when the adjusted basis of a partner's interest in the partnership must be determined.



(5) *Limitation.* For purposes of section 752 and the regulations thereunder, the amount of an indebtedness shall be taken into account only once, even though a partner (in addition to his liability for such indebtedness as a partner) may be separately liable therefor in a capacity other than as a partner.

(k) *Examples.* The following examples illustrate the application of the rules of this section. Except as otherwise provided, these examples assume that (1) the partnerships discussed therein are formed under state laws corresponding to the Uniform Partnership Act or the Revised Uniform Limited Partnership Act, whichever is appropriate, (2) partnership indebtedness constitutes debt for federal income tax purposes, and (3) any debt instrument given in consideration for the sales or exchange of property bears adequate stated interest (within the meaning of section 1274 (c)).

*Example (1).* A and B are equal partners in a general partnership. The partnership borrows \$1,000. A and B, as equal partners, share the partnership liability for that obligation equally under the rules of this section. The resulting \$500 increase in each partner's share of the liabilities of the partnership is treated as a contribution of \$500 by that partner to the partnership. See paragraph (b) of this section. Each time the partnership pays a portion of the outstanding balance of the \$1,000 loan, each partner's share of the liabilities of the partnership is decreased by one-half of the payment, and the decrease in each partner's share of partnership liabilities is treated as a distribution of that amount by the partnership to that partner. See paragraph (c) of this section.

*Example (2).* (i) C and D are partners in a general partnership that uses the cash method of accounting. At the close of its taxable year, the partnership has accrued interest expense of \$1,000 and accounts payable of \$500 for services performed on behalf of the partnership.

(ii) Under its method of accounting, the partnership's accrued interest expense and accounts payable are not deductible until paid. Also, the partnership obligations represented by those items have not created or increased the basis of any partnership property or given rise to a nondeductible expenditure of the partnership that is not properly chargeable to capital account. As provided by paragraph (g) of this section, an obligation that constitutes a debt for federal income tax purposes is a liability of the obligor only to the extent that incurring or holding such obligation gives rise to (1) the creation of, or an increase in, the basis of any property owned by the obligor, (2) a deduction that is taken into account in computing the taxable income of the obligor, or (3) an expenditure that is not deductible in computing the obligor's taxable income and is not properly chargeable to capital. Therefore, the partnership obligations for accrued but

unpaid interest expense and accounts payable are not partnership liabilities for purposes of section 752.

*Example (3).* (i) E and F form a general partnership with cash contributions of \$20,000 each. The partnership agreement provides that E and F will share all partnership profits and losses equally. The partnership purchases depreciable personal property for \$40,000 in cash and a recourse purchase money note for \$60,000.

(ii) The indebtedness represented by the purchase money note is a partnership liability because incurring that obligation creates an additional \$60,000 of basis in the partnership's depreciable personal property. See paragraph (g) of this section. Under paragraph (d) of this section, the partnership liability for the purchase money note constitutes a recourse liability of the partnership to the extent, but only to the extent, that one or more partners bears the economic risk of loss for such liability, and each partner's share of the recourse liabilities of the partnership equals the portion of those liabilities for which such partner bears the economic risk of loss. To the extent that no partner bears the economic risk of loss for the liability represented by the purchase money note, that liability constitutes a nonrecourse liability of the partnership. See paragraph (e)(2) of this section. Under paragraph (d)(3)(i) of this section, a partner bears the economic risk of loss for a partnership liability to the extent that such partner would be obligated to make a net payment to a creditor or other person or a net contribution to the partnership with respect to such liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section).

(iii) In a constructive liquidation of the partnership, all partnership assets are assumed to become worthless and all partnership liabilities are assumed to become due and payable in full. See paragraph (d)(3)(iii)(A) (1) and (2) of this section. Thus, if the partnership constructively liquidated, the purchase money note would be due and payable, but the partnership would lack the assets needed to discharge the note. As a result, E and F, as equal general partners, would each be obligated by operation of law to make a net contribution of \$30,000 to the partnership with respect to the partnership liability for the purchase money note. See paragraph (d)(3)(ii)(B) of this section. Therefore, under paragraph (d)(3)(i) of this section, E and F each bear the economic risk of loss for \$30,000 of that liability. Accordingly, the \$60,000 partnership liability for the purchase money note is a recourse liability, and E and F share that liability equally.

*Example (4).* (i) The facts are the same as in example (3), except that F is a limited partner, who guarantees the purchase money note and has no obligation to make additional capital contributions to the partnership. Under the guarantee, if the partnership defaults on the purchase money note, F is obligated to pay the outstanding balance of the note. In addition, F is subrogated to the seller's rights against the partnership under the purchase money note for any payments made by F pursuant to the guarantee.

(ii) Under F's guarantee, if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), F would be obligated to make a \$60,000 payment to the seller with respect to the partnership liability for the purchase money note. F would, however, be entitled to be reimbursed (within the meaning of paragraph (d)(3)(ii)(C) of this section) by the partnership for any payment made under the guarantee pursuant to F's right to subrogation. As a result, F would not be obligated to make a net payment to a creditor or other person with respect to the liability for the purchase money note. See paragraph (d)(3)(ii)(A) of this section. E, as the sole general partner, however, would be obligated to make a net contribution of \$60,000 to the partnership with respect to the partnership liability for the purchase money note in order to provide the partnership with the funds needed to pay the outstanding balance of the note that is owed to F, as subrogee. See paragraph (d)(3)(ii)(B) of the section. Thus, E bears the economic risk of loss for the entire \$60,000 partnership liability. Accordingly, under paragraph (d) of this section, the liability is a recourse liability, and E's share of that liability is \$60,000.

*Example (5).* (i) The facts are the same as in example (3), except that the partnership agreement provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704-1(b)(2)(ii)(b)(3)). At the time it incurs the liability for the purchase money note, the partnership has no income, gain, loss, deduction, or credit for the taxable year.

(ii) To determine the economic risk of loss that each partner bears with respect to the partnership liability for the purchase money note, the partnership must be deemed to constructively liquidate (within the meaning of paragraph (d)(3)(iii) of this section). This requires, among other things, that the partnership be treated as if it disposed of all its assets in a fully taxable exchange for no consideration, allocated partnership items of income, gain, loss, deduction, and credit to the partners for the partnership taxable year ending on the date of the liquidation, and liquidated the partner's interests in the partnership. See paragraph (d)(3)(iii)(A) (3) and (4) of this section. If the partnership constructively liquidated immediately after incurring the purchase money note, the partnership would recognize a taxable loss of \$100,000 (which equals the adjusted tax basis of the property) on the disposition of its depreciable personal property for no consideration. Thus, the partnership would have a taxable loss of \$100,000 for the hypothetical partnership taxable year ending on the date of the constructive liquidation. The partnership agreement would allocate this loss between E and F as follows:

	E	F
Capital account on formation.....	\$20,000	\$20,000
Less: loss.....	(50,000)	(50,000)
Capital account after constructive liquidation.....	(\$30,000)	(\$30,000)

Thus, in order to restore the deficit balances in their capital accounts, E and F would each be obligated to make a net contribution of \$30,000 to the partnership with respect to the partnership liability for the purchase money note if the partnership constructively liquidated immediately after it incurred that liability. See paragraph (d)(3)(ii)(B) of this section. Therefore, as in example (3) E and F each bears \$30,000 of the economic risk of loss for the partnership liability under paragraph (d)(3)(i) of this section.

*Example (6).* (i) The facts are the same as in example (5), except that the partnership agreement provides that 90 percent of partnership net taxable loss will be allocated to E and 10 percent to F.

(ii) As in example (5), if the partnership constructively liquidated immediately after incurring the purchase money note, the partnership would recognize a taxable loss of \$100,000 on the disposition of its depreciable personal property for no consideration, and the partnership would have a net taxable loss of \$100,000 for the hypothetical partnership taxable year ending on the date of the constructive liquidation. The partnership agreement would allocate 90 percent of this net taxable loss to E and 10 percent to F.

	E	F
Capital account on formation.....	\$20,000	\$20,000
Less: loss.....	(90,000)	(10,000)
Capital account after constructive liquidation.....	\$70,000	\$10,000

Thus, E would be obligated to make a net contribution of \$70,000 to the partnership at the time of the constructive liquidation (within the meaning of paragraph (d)(3)(ii)(B)(3) of this section) in order to restore the deficit balance in E's capital account. F, on the other hand, would not be obligated to make a contribution to the partnership, but would be entitled to receive a \$10,000 distribution from the partnership.

(iii) Under paragraph (d)(3)(ii)(B)(1) of this section, \$60,000 of the \$70,000 net contribution that E would be obligated to make to the partnership constitutes an obligation to make a net contribution with respect to the partnership liability for the purchase money note (E's net contribution (\$70,000) multiplied by the fraction obtained by dividing the outstanding partnership indebtedness with respect to that liability (\$60,000) by the sum of the partners' net contributions (\$70,000)). The other \$10,000 of E's net contribution would fund the distribution to F. While the holder of the purchase money note could attempt to recover the balance due on the note from F as a general partner, E and F have agreed under the partnership agreement that, as between them, E will bear the risk of loss for that

liability, and the rules of this section assume that E actually discharges E's obligation to make a net contribution to the partnership at the time of the constructive liquidation. See paragraph (d)(3)(ii)(D)(2) of this section. Under paragraph (d)(3)(i) of this section, E bears the economic risk loss for the full amount of the partnership liability for the purchase money note. Therefore, the partnership liability for the note is a recourse liability that is allocated entirely to E. See paragraph (d) (1) and (2) of this section.

*Example (7).* (i) The facts are the same as in example (6), except that F contributes a promissory note (of which F is the maker) with a principal balance of \$60,000 to the partnership. The promissory note is not readily tradeable on an established securities market. F's promissory note is payable in five years; however, F's obligation to discharge the note will be accelerated if, prior to that time, the partnership is liquidated.

(ii) F's promissory note constitutes an obligation to make a contribution to the partnership (within the meaning of paragraph (d)(3)(ii)(B)(2) of this section). If F contributed the \$60,000 principal balance of the promissory note to the partnership immediately after the constructive liquidation, F's capital account would increase by \$60,000, giving F a positive capital account balance of \$70,000 and the right to the distribution of an additional \$60,000 from the partnership.

F's capital account after constructive liquidation.....	\$10,000
Plus: contribution pursuant to promissory note.....	60,000
Total.....	\$70,000

Because F would be entitled to be reimbursed for a contribution made pursuant to the promissory note, F would not be obligated to make a net contribution to the partnership upon a constructive liquidation. See paragraph (d)(3)(ii)(B)(3) and (C) of this section. After F's payment of the \$60,000 balance due on the promissory note, the partnership would have only \$60,000 in cash to satisfy the \$60,000 partnership liability and F's \$70,000 positive capital account balance. E would, however, be obligated to make a net contribution of \$70,000 to the partnership to restore the deficit balance in E's capital account. As in example (6), \$60,000 of this net contribution constitutes a net contribution with respect to the partnership liability and \$10,000 is attributable to the partnership's obligation to satisfy F's positive capital account balance. Therefore, as in example (6), E bears the economic risk of loss for the full amount of the partnership liability for the purchase money note unless F's contribution of the promissory note to the partnership constitutes part of a plan to circumvent or avoid E's deficit restoration obligation. See paragraph (d)(3)(ii)(D)(3) of this section regarding the existence of a plan to circumvent or avoid an obligation.

*Example (8).* (i) G and H form a general partnership to invest in stocks, securities, and other income producing liquid assets. G, the managing partner, contributes \$5,000 in cash

to the partnership, and H, an investor, contributes \$15,000 in cash to the partnership. Immediately after its formation, the partnership obtains a \$10,000 recourse loan from a commercial bank and purchases \$15,000 of corporate stock, \$10,000 of government securities, and a \$3,000 certificate of deposit. At the end of its first day of business, the partnership owns the following assets:

	Adjusted basis
Cash.....	\$2,000
Corporate stock.....	15,000
Government securities.....	10,000
Certificate of deposit.....	3,000
Total.....	\$30,000

The partnership agreement provides that the partners will share partnership taxable income and loss equally. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partner's positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704-1(b)(2)(ii)(b)(3)).

(ii) The indebtedness represented by the loan is a partnership liability. See paragraph (g) of this section. The partners will share that liability according to the economic risk of loss borne by each partner with respect to such liability. See paragraph (d)(3)(i) of this section. The determination of the economic risk of loss that each partner bears with respect to the liability for the loan is, in turn, governed by the impact that a constructive liquidation of the partnership would have on the partners' obligation with respect to that liability. If a partnership is deemed to constructively liquidate, all partnership assets, including cash and other financial assets, are deemed to be worthless, and the partnership is treated as if it disposed of those assets in a fully taxable exchange for no consideration. On the deemed disposition of its cash, corporate stock, government securities, and certificate of deposit for no consideration at the end of its first day of business, the partnership would recognize a \$30,000 taxable loss. This loss would be allocated equally between the partners.

	G	H
Capital accounts on formation.....	\$5,000	\$15,000
Less: loss.....	(15,000)	(15,000)
Capital accounts after constructive liquidation.....	(\$10,000)	\$0

Consequently, if the partnership constructively liquidated at the end of its first



day of business, G would be obligated to make a net contribution of \$10,000 to the partnership to restore the deficit balance in G's capital account. See paragraph (d)(3)(ii)(B)(3) of this section. Under paragraph (d)(3)(ii)(B)(7) of this section, G's deficit restoration obligation would be treated as an obligation to make a net contribution of \$10,000 to the partnership with respect to the partnership liability for the loan. Therefore, under paragraph (d)(3)(i) of this section, G bears the economic risk of loss for the full amount of the partnership liability for the loan. As a result, the liability is a recourse liability that is allocated entirely to G. See paragraph (d)(1) and (2) of this section.

**Example (9).** (i) I and J form a limited partnership. I, the general partner, contributes \$10,000 to the partnership, and J, the limited partner, contributes \$90,000 to the partnership. The partnership purchases depreciable personal property 1 for \$110,000, paid by the delivery of \$40,000 in cash and a recourse purchase money note in the principal amount of \$70,000 ("note 1"). The partnership also purchases depreciable property 2 for \$270,000, paid by the delivery of \$80,000 in cash and a recourse purchase money note in the principal amount of \$210,000 ("note 2"). J and the seller of property 2 enter into an indemnification agreement whereby J agrees to pay the seller the outstanding balance of note 2 if the partnership fails to make the payments required pursuant to that note. Under the indemnification agreement, if the partnership defaults, the seller may collect the balance due on note 2 directly from J without pursuing its legal remedies against the partnership. The seller may also attempt to collect the balance due on note 2 from the partnership before it proceeds against J under the indemnification agreement. The partnership agreement does not give J any right to seek repayment from the partnership or I for any amount that J pays to the seller pursuant to the indemnification agreement. Similarly, neither the partnership nor I are beneficiaries of the indemnification agreement. The partnership agreement provides that partnership taxable income and loss will be allocated 10 percent to I and 90 percent to J, except that all partnership taxable loss will be allocated to I after the partners' capital accounts are reduced to zero and partnership taxable income must first be allocated to eliminate any deficit balances in the partners' capital accounts. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv) and distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partner's positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)). The partners are not obligated to restore any deficit balances in their capital accounts following the liquidation of their interests in the partnership. The partnership has no income, gain, loss, deduction, or credit for the period prior to the acquisition of properties 1 and 2.

(ii) The partnership obligations represented by notes 1 and 2 constitute partnership liabilities ("liabilities 1 and 2", respectively).

See paragraph (g) of this section. If the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) immediately after incurring liabilities 1 and 2, the partnership would recognize a taxable loss of \$380,000 from the disposition of properties 1 and 2 for no consideration. See paragraph (d)(3)(ii)(A)(3) of this section. Thus, for the hypothetical taxable year ending on the date of the constructive liquidation, the partnership would have a taxable loss of \$380,000. This loss would be allocated between the partners as follows:

Capital accounts on formation.....	\$10,000	\$90,000
Less: loss.....	(290,000)	(90,000)
Capital accounts after constructive liquidation.....	(\$280,000)	\$0

After the constructive liquidation, I, as the sole general partner, would be obligated by operation of law to contribute \$280,000 to the partnership to discharge the partnership's obligations under notes 1 and 2. J, on the other hand, would be obligated pursuant to the indemnification agreement to pay the outstanding balance of note 2 (\$210,000) to the seller of property 2 because of the partnership's failure to make the payments due on that note. See paragraph (d)(3)(iii)(A)(2) of this section.

(iii) I's obligation to contribute \$280,000 to the partnership constitutes an obligation to make a net contribution to the partnership. See paragraph (d)(3)(ii)(B)(3) of this section. Under paragraph (d)(3)(ii)(B)(2) of this section, the net contribution that I would be obligated to make to the partnership at the time of the constructive liquidation is allocated among the partnership liabilities to determine the net contribution that I would be obligated to make with respect to each liability. The amount of I's obligation to make a net contribution to the partnership that will be allocated to each partnership liability is determined by multiplying the amount of that obligation by the fraction obtained by dividing the outstanding partnership indebtedness with respect to that liability at the time of the constructive liquidation by the sum of the net contributions that all partners would be obligated to make to the partnership as a result of the liquidation. Under paragraph (d)(3)(ii)(B)(4) of this section, the outstanding partnership indebtedness with respect to liabilities 1 and 2 at the time of the constructive liquidation equals the outstanding balances of those liabilities—\$70,000 and \$210,000, respectively. The sum of the net contributions that the partners would be obligated to make to the partnership at the time of the constructive liquidation equals \$280,000 because I is the only partner that would be obligated to make a net contribution to the partnership. Therefore, if the partnership constructively liquidated immediately after incurring liabilities 1 and 2, I would be obligated to make net contributions with respect to liabilities 1 and 2 of 70,000 (\$280,000 multiplied by 70,000/\$280,000) and \$210,000

(\$280,000 multiplied by 210,000/\$280,000), respectively. In addition, assuming that J has no right under applicable state law to be reimbursed for any payment made pursuant to the indemnification agreement, J would be obligated to make a net payment of \$210,000 to a creditor or other person with respect to liability 2. See paragraph (d)(3)(ii)(A) of this section.

(iv) Under paragraph (d)(3)(i)(A) of this section, the economic risk of loss borne by a partner with respect to any partnership liability generally equals the sum of (a) the net payment that such partner would be obligated to make to a creditor or other person and (2) the net contribution that such partner would be obligated to make to the partnership with respect to such liability if the partnership constructively liquidated. If the aggregate amount of the economic risk of loss that all partners would otherwise be determined to bear with respect to a partnership liability exceeds the amount of such liability, however, then the economic risk of loss borne by each partner with respect to such liability shall equal the amount determined by multiplying such liability by the fraction obtained by dividing the economic risk of loss that the partner would otherwise be considered to bear with respect to such liability by the sum of such amounts for all partners. See the next to the last sentence of paragraph (d)(3)(i) of this section. Under the general rule of paragraph (d)(3)(i)(A) of this section, I and J would each bear the economic risk of loss for the full amount of liability 2. I and J each bear the economic risk of loss for the full amount of liability 2 under the general rule because the arrangements between the partners fail to satisfactorily address the manner in which they will share the risk of loss attributable to that liability. In such a case, the facts must be closely scrutinized to determine whether the failure to resolve the manner in which the partners will share the risk of loss attributable to a partnership liability is part of a plan to circumvent or avoid the obligation of any partner to make a net payment to a creditor or other person or a net contribution to the partnership with respect to such liability. See paragraph (2)(3)(ii)(D)(3) of this section regarding the existence of a plan to circumvent or avoid an obligation. Assuming that there is not a plan to circumvent or avoid either partner's obligation with respect to liability 2, I and J each bear the economic risk of loss of \$105,000 of liability 2 under the next to the last sentence of paragraph (d)(3)(i) of this section. Also, I bears the economic risk of loss for the full amount of liability 1 because I would be obligated to make a net contribution to the partnership of \$70,000 with respect to liability 1 if the partnership constructively liquidated immediately after incurring that liability. Accordingly, liabilities 1 and 2 are recourse liabilities of the partnership. I and J share liability 2 equally, and I is allocated the entire amount of liability 1. See paragraph (d)(1) and (2) of this section.

**Example (10).** (i) K and L form a limited partnership. K, the general partner, and L, the limited partner, contribute \$30,000 and

\$80,000, respectively, in cash to the partnership. The partnership purchases depreciable personal property for \$250,000 using the \$100,000 in cash contributed by the partners and a \$150,000 recourse loan from a commercial bank. To provide additional security for the loan, the bank obtains an indemnification from L. Under the indemnification agreement, if the partnership defaults on the loan, L has agreed to pay the bank the portion, if any, of the outstanding balance of the loan that it is unable to recover from the partnership. L has no obligation, however, to make any payment pursuant to the indemnification agreement until the bank has exhausted its legal remedies against the partnership. The partnership agreement provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), and K is obligated to restore to the partnership any deficit balance in K's capital account following the liquidation of K's interest (as set forth in § 1.704-1(b)(2)(ii)(b)(3)). L has no obligation to contribute additional capital to the partnership. The partnership agreement also provides that partnership taxable income and loss will be allocated 20 percent to K and 80 percent to L, except that partnership taxable loss will be allocated solely to K after the partners' capital accounts are reduced to zero and partnership taxable income must be allocated first to eliminate any deficit balances in the partner's capital accounts.

(ii) The indebtedness represented by the loan obtained by the partnership to purchase the depreciable personal property is a partnership liability. See paragraph (g) of this section. If the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), K, as the only partner that has any obligation to contribute additional capital to the partnership, would be obligated to make a contribution to the partnership of the funds needed to pay the outstanding balance of the loan, and K would not be entitled to seek reimbursement for this contribution from L (K is not a beneficiary of the indemnification agreement). Consequently, K would be obligated to make a net contribution of \$150,000 with respect to the partnership liability for the loan if the partnership constructively liquidated. See paragraph (d)(3)(ii)(B) of this section. Therefore, under paragraph (c) of this section, K bears the economic risk of loss for the full amount of the partnership liability for the loan, and that liability is a recourse liability that is allocated entirely to K.

(iii) Under the indemnification agreement, L's obligation to make a payment to the bank arises only if the bank cannot recover its loan from the partnership. Consequently, if the partnership constructively liquidated, L would not be obligated to make a payment to the bank under the indemnification agreement unless K failed to discharge K's obligation to contribute additional capital to the partnership. Under paragraph (d)(3)(ii)(D)(2) of this section, however, the partners are generally treated as if they

actually discharge their obligations to make contributions to the partnership or payments to a creditor or other person for purposes of applying paragraph (d)(3)(ii) of this section. Therefore, since K is assumed to satisfy K's obligation to contribute additional capital to the partnership, L is not considered to have an obligation to make a payment to the bank under the indemnification agreement.

**Example (11).** (i) The facts are the same as in example (10), except that K is a corporation that is a member of an affiliated group of corporations filing a consolidated return. K was formed by the parent of the consolidated group, P corporation, solely to acquire and hold its general partner interest. P corporation formed K to acquire an interest in the partnership both for investment purposes and for the tax losses it expected the partnership's property to generate. To limit its monetary exposure, however, P capitalized K only with the funds K needed to acquire its general partner interest.

(ii) These facts and circumstances, when considered together with L's indemnification agreement, indicate a plan to circumvent or avoid K's obligation to make a net contribution to the partnership. Therefore, under paragraph (d)(3)(ii)(D)(3) of this section, K's obligation to make a net contribution to the partnership is not recognized for purposes of applying the rules of paragraph (d)(3) of this section, and the rules of this section must be applied as if that obligation did not exist. See paragraph (d)(3)(ii)(D)(2) of this section. Accordingly, if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), the bank would not be able to recover any part of its loan from the partnership, and L would be obligated pursuant to the indemnification agreement to pay the bank the outstanding balance of the loan. Under paragraph (d)(3)(i) of this section, L bears the economic risk of loss for the full amount of the partnership liability for the loan. Therefore, the partnership liability for the loan is a recourse liability that is allocated entirely to L. See paragraph (d)(1) and (2) of this section.

**Example (12).** (i) M and N form a general partnership to purchase an office building, each contributing \$15,000 to the partnership. The partnership purchases an office building for \$100,000 with the cash contributed by the partners and a \$70,000 recourse loan from a commercial bank. In connection with the purchase of the building, M contributes an additional \$45,000 to the partnership. These funds are deposited in a special escrow account of the partnership that is to be used solely for purposes of making payments on the loan. The partnership pledges the escrow account to the bank as security for the loan. The partnership agreement provides that the partners will share partnership taxable income and loss equally, except that interest income from the escrow account is to be allocated 95 percent to M and 5 percent to N. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital

account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704-1(b)(2)(ii)(b)(3)). The partnership has no income, gain, loss, deduction, or credit for the period prior to the acquisition of the building.

(ii) The indebtedness represented by the loan obtained by the partnership to purchase the office building is a partnership liability. See paragraph (g) of this section. If the partnership is deemed to constructively liquidate (within the meaning of paragraph (d)(3)(iii) of this section) immediately after purchasing the building, the partnership is treated as if the building became worthless, the loan became due and payable in full, and the partnership disposed of the building in a fully taxable exchange for no consideration. In addition, the partnership is deemed to transfer the funds held in escrow to the bank in partial satisfaction of the loan. The escrowed funds are not deemed to be worthless because those funds, which were contributed to the partnership by M, are used in the partnership's activities solely to secure the payment of the loan from the bank. See paragraph (d)(3)(iii)(A)(2) and (d)(3)(iii)(A)(2)(ii) of this section. Under paragraph (d)(3)(ii)(A)(2)(i) of this section, the partnership's obligation to use the escrowed funds that M contributed to the partnership to discharge the loan is treated as an obligation of M to make a payment to a creditor or other person with respect to the partnership liability for the loan.

(iii) On the disposition of its office building for no consideration, the partnership would incur a taxable loss of \$100,000, which would be allocated equally between the partners. Thus, if the partnership constructively liquidated immediately after purchasing the building, the partners' capital accounts would appear as follows:

	M	N
Capital accounts on formation.....	\$60,000	\$15,000
Less: loss.....	(50,000)	(50,000)
Capital accounts after constructive liquidation.....	\$10,000	(\$35,000)

M's positive capital account balance would entitle M to a \$10,000 distribution from the partnership. Because M would not have been entitled to any distribution from the partnership if M had not provided the escrowed funds to the partnership, M's right to this distribution constitutes a right to be reimbursed by the partnership for the escrowed funds that M is considered obligated to pay to the bank under paragraph (d)(3)(ii)(A)(2)(i) of this section. Thus, under paragraph (d)(3)(ii)(A) of this section, M would be obligated to make a net payment of \$35,000 (\$45,000 less \$10,000) to a creditor or other person with respect to the partnership liability for the loan if the partnership constructively liquidated.



(iv) N's \$35,000 deficit capital account balance constitutes an obligation to make a net contribution to the partnership. Under paragraph (d)(3)(ii)(B)(7) of this section, this obligation will be allocated to the partnership liability for the loan only to the extent that it does not exceed the outstanding partnership indebtedness with respect to that liability. Under paragraph (d)(3)(ii)(B)(4) of this section, the outstanding partnership indebtedness with respect to that liability equals \$35,000 (the amount of such liability (\$70,000), reduced by the excess of (1) the amount M's obligation to make a payment to a creditor or other person with respect to such liability (\$45,000) over (2) the reimbursement that M is entitled to receive from the partnership with respect to that liability (\$10,000)). Therefore, if the partnership constructively liquidated, N would be obligated to make a net contribution of \$35,000 to the partnership with respect to the partnership liability for the loan.

(v) Under paragraph (d)(3)(i) of this section, M and N each bear the economic risk of loss for \$35,000 of the partnership liability for the loan. Accordingly, the liability is a recourse liability that M and N share equally.

**Example (13).** (i) O and P contribute \$125,000 and \$25,000 in cash, respectively, to form a calendar year general partnership on December 31, 1988. P also contributes a promissory note for \$100,000 to the partnership. The promissory note is payable on the fifth anniversary of the partnership's formation and bears interest at a rate of 12 percent, compounded annually. On the date of its formation, the partnership purchases improved real property for its \$150,000 of capital and a \$850,000 nonrecourse loan from a commercial bank. The nonrecourse loan is secured by a mortgage on the real property and a pledge of P's promissory note. The partnership agreement provides that the partners will share partnership taxable income and loss equally. The partnership agreement also provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) are to be made in accordance with the partners' positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704-1(b)(2)(ii)(b)(3)), except that P is not obligated to restore the first \$100,000 of any deficit balance in P's capital account prior to the maturity of P's promissory note. For 1988, the partnership has no income, gain, loss, deduction, or credit. Assume that the Federal mid-term rate for December 1988 is 10 percent, compounded semiannually.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the improved real property is a partnership liability. See paragraph (g) of this section. To determine whether any partner bears the economic risk of loss for that liability at the end of 1988, the partnership must be treated as if it constructively liquidated (within the meaning of paragraph

(d)(3)(iii) of this section) at that time. If the partnership is deemed to constructively liquidate at the end of 1988, the following events are deemed to occur: (1) the partnership's improved real property becomes worthless, (2) the nonrecourse loan becomes due and payable, (3) the partnership disposes of its improved real property in a fully taxable exchange (involving the transfer of that property to the bank), and (4) the partnership allocates its taxable income or loss to the partners for the partnership taxable year ending on the date of the constructive liquidation and liquidates the partners' interests. In the constructive liquidation, the partnership is treated as if it received consideration in the form of relief from liability upon the hypothetical disposition of its improved real property to the extent that the nonrecourse loan is a liability for which the creditor's right to repayment is limited to one or more assets of the partnership. See paragraph (d)(3)(iii)(A)(3) of this section. Under paragraph (d)(3)(ii)(B)(4)(i) of this section, the nonrecourse loan constitutes a liability for which the creditor's right to repayment is limited to one or more assets of the partnership to the extent, but only to the extent, that the outstanding balance of the loan exceeds the aggregate amount of the contributions that the partners would be obligated to make to the partnership to discharge that loan if the partnership constructively liquidated. P's promissory note (as a result of the pledge of that note to the bank to secure the nonrecourse loan) constitutes the only obligation that the partners have to make a contribution to the partnership in order to discharge the nonrecourse loan. Under paragraph (d)(3)(ii)(E) of this section, P's obligation to make a contribution to the partnership pursuant to the promissory note is recognized only to the extent of the value of that note because the note is not required to be paid by the later of (1) the end of the partnership taxable year in which N's interest is liquidated or (2) within 90 days after the date of such liquidation. At the time of the constructive liquidation (i.e., at end of 1988), however, P's promissory note is deemed to have a value equal to the outstanding balance of the note at that time (\$100,000) because the promissory note bears interest at a rate that equals or exceeds the applicable Federal rate at that time (i.e., the Federal mid-term rate for December 1988). See paragraph (d)(3)(ii)(E)(2) of this section. Accordingly, \$750,000 of the nonrecourse loan (\$850,000 less \$100,000) constitutes a liability for which the creditor's right to repayment is limited to one or more assets of the partnership, and the partnership is deemed to receive consideration of \$750,000 in relief from such liability upon the hypothetical disposition of its improved real property. Because the adjusted basis of the partnership's real property equals \$1,000,000 at the end of 1988, the partnership would recognize a taxable loss of \$250,000 on this disposition (\$1,000,000 less \$750,000 of consideration). This loss would be allocated equally between the partners for the partnership taxable year ending on the date of the constructive liquidation.

	O	P
Capital accounts on formation	\$125,000	\$25,000
Less: loss	(125,000)	(125,000)

	O	P
Capital accounts after constructive liquidation	\$0	(\$100,000)

(iii) P's obligation to restore the \$100,000 deficit balance in P's capital account is governed by the terms of P's promissory note. As stated above, P's obligation to make a contribution to the partnership pursuant to the promissory note is recognized to the extent of the outstanding balance of that note at the time of the constructive liquidation because the note bears interest at a rate that equals or exceeds the applicable Federal rate at that time. Thus, P would be obligated to make a net contribution to the partnership of \$100,000 as a result of the constructive liquidation. Under paragraph (d)(3)(ii)(B)(7) of this section, the net contributions that the partners would be obligated to make to the partnership if the partnership constructively liquidated can be allocated to a partnership liability only to the extent of the outstanding partnership indebtedness with respect to that liability. The outstanding partnership indebtedness with respect to the liability for the nonrecourse loan equals \$100,000 (the amount of such liability (\$850,000) reduced by the portion of such liability for which the creditor's right to repayment from the partnership is limited to one or more assets of the partnership (\$750,000)). See paragraph (d)(3)(ii)(B)(4) of this section. Thus, under paragraph (d)(3)(ii)(B)(7) of this section, the full amount of the \$100,000 net contribution that P would be obligated to make to the partnership if it constructively liquidated at the end of 1988 will be allocated to the partnership liability for the nonrecourse loan.

(iv) At the end of 1988, P bears the economic risk of loss for \$100,000 of the partnership liability for the nonrecourse loan, and no partner bears the economic risk of loss for the other \$750,000 of that liability. See paragraph (d)(3)(i) of this section. Accordingly, the liability is treated as a recourse liability to the extent that P bears the economic risk of loss for such liability and as a nonrecourse liability to the extent of the excess. See paragraph (j)(2) of this section. Under paragraph (d)(1) of this section, all \$100,000 of the recourse liability is allocated to P. Under paragraph (e)(1)(iii) of this section, the nonrecourse liability is allocated between the partners in proportion to their equal interests in partnership profits. At the end of 1988, O and P are thus each allocated \$375,000 of the nonrecourse liability of the partnership.

**Example (14).** (i) Q, the general partner, and R, the limited partner, form a limited partnership with cash contributions of \$10,000 each. Q and R share partnership profits and losses equally. The partnership purchases residential rental property for its \$20,000 of capital and an \$80,000 nonrecourse loan from a commercial bank. The nonrecourse loan is secured by a mortgage on the rental property. Q also provides the bank

with a guarantee that the loan will be repaid. If the partnership defaults on the loan, Q is liable to the bank for the difference between the value of the property and the outstanding balance of the loan. In connection with Q's guarantee, Q and R enter into an indemnification agreement whereby R agrees to reimburse Q for 50 percent of any payment that Q is required to make pursuant to the guarantee.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the residential rental property is a partnership liability. See paragraph (g) of this section. Upon a constructive liquidation (within the meaning of paragraph (d)(3)(iii) of this section), the partnership is treated as if its residential rental property becomes worthless and the nonrecourse loan becomes due and payable because of the partnership's failure to make the required payments on the loan. If these events occurred, Q would be obligated to pay the outstanding balance of the nonrecourse loan to the bank under the guarantee. Under the indemnification agreement, however, Q would be entitled to be reimbursed by R for 50 percent of any payment made to the bank pursuant to the guarantee. Thus, Q and R would each be obligated to make a net payment to a creditor or other person of 50 percent of the liability for the nonrecourse loan if the partnership constructively liquidated. See paragraph (d)(3)(ii)(A) of this section. Under paragraph (d)(3)(i) of this section, Q and R each bear the economic risk of loss for 50 percent of the partnership liability for the nonrecourse loan. Accordingly, the liability is a recourse liability that the partners share equally. See paragraph (d)(1) and (2) of this section.

**Example (15).** (i) S and T form a limited partnership at the beginning of 1989 solely to acquire and lease depreciable personal property. S, the general partner, and T, the limited partner, each contribute \$10,000 in cash to the partnership. In 1989, the partnership purchases depreciable personal property for \$20,000 in cash and a recourse purchase money note for \$80,000. For 1989, the partnership has a taxable loss of \$10,000, consisting of \$17,000 gross rental income, \$7,000 of interest expense, and a depreciation deduction of \$20,000. The partnership agreement provides that the partners will share the taxable income and loss of the partnership equally. In addition, the partnership agreement provides that capital accounts will be determined and maintained for the partners in accordance with § 1.704-1(b)(2)(iv) and distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partners' positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)). The partnership agreement also provides that any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership. While S is required to restore any deficit balance in S's capital account following the liquidation of S's interest within 90 days of such liquidation, T is not required to restore any deficit balance in T's capital account following the liquidation of T's interest for 2 years following the date of such liquidation (and any deficit balance in T's

capital account at the time of any such liquidation will not bear interest during that two-year period). The partnership makes \$10,000 of principal payments on the promissory note during 1989, and the outstanding balance of the promissory note at the end of 1989 is \$70,000. Assume that the Federal short-term rate for December 1989 is 10 percent, compounded semiannually.

(ii) The indebtedness represented by the purchase money note is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, the partners bear the economic risk of loss for that liability at the end of 1989 to the extent that they would be obligated to make a net payment to a creditor or other person or a net contribution to the partnership with respect to such liability if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section) at that time. If the partnership constructively liquidated at the end of 1989, the partnership would recognize a taxable loss of \$80,000 on the disposition of its depreciable property for no consideration. This would result in a partnership net taxable loss of \$80,000 for the partnership taxable year ending on the date of the constructive liquidation (\$80,000 loss on the deemed disposition plus a \$10,000 operating loss). This loss would be allocated to the partners as follows:

	S	T
Capital accounts on formation	\$10,000	\$10,000
Less: loss	(\$45,000)	(\$45,000)
Capital accounts after constructive liquidation	(\$35,000)	(\$35,000)

Accordingly, if the partnership constructively liquidated at the end of 1989, S and T would each be obligated to make a net contribution of \$35,000 to the partnership to restore the deficit balances in their capital accounts following the liquidation of their partnership interests. Under paragraph (d)(3)(ii)(E) of this section, however, T's obligation to make a contribution to the partnership pursuant to T's deficit restoration obligation is recognized only to the extent of the fair market value of that obligation at the time of the constructive liquidation because T is not required to satisfy that obligation by the later of (1) the end of the partnership taxable year in which T's interest is liquidated or (2) within 90 days after the date of such liquidation.

(iii) Because T's obligation to restore the deficit balance in T's capital account does not bear interest, the fair market value of the deficit restoration obligation that T would have if the partnership constructively liquidated is deemed to equal the imputed principal amount of that obligation under section 1274(b). See paragraph (d)(3)(ii)(E)(2)(ii)(B) of this section. The imputed principal amount of T's deficit restoration obligation is computed by treating that obligation as a debt instrument to which section 1274 applies and by assuming that the sale or exchange in which such debt instrument was given as consideration

occurred at the time of the constructive liquidation. Under section 1274(b), the imputed principal amount of a debt instrument equals the present values of all payments due under the debt instrument. The present value of a payment is determined as of the date of the sale or exchange by using a discount rate equal to the applicable Federal rate (within the meaning of section 1274(d)), compounded semiannually. The applicable Federal rate with respect to T's deficit restoration obligation is 10 percent, compounded semiannually (i.e., the Federal short-term rate for December 1989). Using this discount rate, the present value of the \$35,000 payment that T would be required to make two years after the constructive liquidation to restore the deficit balance in T's capital account equals \$28,795. Thus, under paragraph (d)(3)(ii)(B)(7) of this section, T would be obligated to make a net contribution of \$28,795 to the partnership with respect to the partnership liability for the purchase money note if the partnership constructively liquidated at the end of 1989. Under paragraph (d)(3)(ii)(D)(2) of this section, T is treated as if T actually discharges that obligation at the time of the constructive liquidation.

(iv) To the extent that T's deficit restoration obligation is not recognized, paragraph (d)(3)(ii) of this section is applied by assuming that T's obligation to make a contribution to the partnership did not exist. See paragraph (d)(3)(ii)(D)(2) of this section. In that case, S, as the sole general partner, would be obligated by operation of law to contribute an additional \$6,205 of capital to the partnership to make up the shortfall. Accordingly, if the partnership constructively liquidated at the end of 1989, S would be obligated to make a net contribution of \$41,205 (\$35,000 plus \$6,205) to the partnership with respect to the partnership liability for the purchase money note. See paragraph (d)(3)(ii)(B) of this section.

(v) At the end of 1989, S and T bear the economic risk of loss for \$41,205 and \$28,795, respectively, of the partnership liability for the purchase money note. See paragraph (d)(3)(i) of this section. Therefore, that liability is a recourse liability that the partners share according to the economic risk of loss borne by each of them. See paragraph (d)(1) and (2) of this section.

**Example (16).** (i) U and V form a general partnership with cash contributions of \$25,000 each. U and V share partnership profits and losses equally. The partnership purchases an apartment building for its \$50,000 of capital and a \$200,000 nonrecourse loan from a commercial bank. The nonrecourse loan is secured by a mortgage on the building. The loan documents provide that the partnership will be liable for the outstanding balance of the loan on a recourse basis to the extent of any decrease in the value of the apartment building resulting from the partnership's failure to properly maintain the property.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the apartment building is a partnership liability. See paragraph (g) of this section. If the partnership constructively



liquidated (within the meaning of paragraph (d)(3)(iii) of this section), the apartment building would become worthless, the nonrecourse loan would become due and payable because of the partnership's failure to make the required payments on the loan, and the partnership would dispose of the apartment building in a fully taxable exchange involving the transfer of the building to the bank. Since under this example there are no facts that establish with reasonable certainty the existence of any liability on the part of the partnership (and its partners) for damages resulting from the partnership's failure to properly maintain the building, the obligations of the partnership with respect to the nonrecourse loan would be extinguished on the transfer of the apartment building to the bank, and the partners would not have any obligation to contribute additional funds to the partnership to discharge the liability for the nonrecourse loan. See paragraph (d)(3)(ii)(D)(1) of this section. In addition, neither U nor V would be obligated to make a payment to a creditor or other person with respect to that liability if the partnership constructively liquidated. Therefore, under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for the partnership liability for the nonrecourse loan, and the liability constitutes a nonrecourse liability within the meaning of paragraph (e)(2) of this section. Under paragraph (e)(1) of this section, the partners share this nonrecourse liability equally because they share all partnership profits and losses equally.

**Example (17).** (i) W and X form a general partnership with cash contributions of \$50,000 each. The partners share all partnership profits and losses equally. On January 1, 1990, the partnership purchases raw land for \$100,000 on which it plans to construct an office building. The partnership obtains a nonrecourse construction loan commitment of \$900,000 from a commercial bank to finance the construction of the office building. The construction loan is secured by a mortgage on the property and a completion guarantee from W. Under the completion guarantee, W agrees to provide the funds necessary to complete the construction of building to the extent construction costs exceed \$900,000. At the end of 1990, the partnership has borrowed \$500,000 under the construction loan commitment.

(ii) The indebtedness represented by the outstanding balance of the construction loan is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability because no partner would be obligated to make a contribution to the partnership or a payment to a creditor or other person with respect to the partnership liability for the construction loan if the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section). See paragraph (d)(3)(ii)(A) and (B) of this section. Upon a constructive liquidation of the partnership, the construction loan is deemed to be due and payable in full because of the partnership's failure to make the required payments on the loan. See paragraph (d)(3)(iii)(A)(2) of this section. Under the completion guarantee, W

would not be obligated to make any payments in satisfaction of the construction loan as a result of the partnership's default because W's liability under the completion guarantee is limited to bearing cost overruns.

(iii) Under paragraph (e)(2) of this section, the construction loan is a nonrecourse liability of the partnership because no partner bears the economic risk of loss for that plan. Under paragraph (e)(1) of this section, the partners share this nonrecourse liability equally because they share all partnership profits and losses equally.

**Example (18).** (i) Y and Z, a corporation, each contribute \$100,000 to form a general partnership to acquire a hotel. The partners agree to share partnership profits and losses equally. The partnership purchases a hotel for its \$200,000 of capital and a nonrecourse loan of \$1,800,000 from VW, a commercial bank that is a wholly-owned subsidiary of Z. To secure its loan, VW takes a mortgage on the hotel and obtains a guarantee from Y. Under the guarantee, Y agrees to pay VW an amount equal to 50 percent of any loss that VW incurs on the loan. Y has no right to seek reimbursement from the partnership or Z for any amount that it pays to VW under the guarantee.

(ii) The indebtedness represented by the loan obtained by the partnership to purchase the hotel is a partnership liability. See paragraph (g) of this section. If the partnership constructively liquidated (within the meaning of paragraph (d)(3)(iii) of this section), VW would incur a loss equal to the outstanding balance of its loan to the partnership, and Y would be liable for 50 percent of that loss pursuant to the guarantee. Thus, Y bears the economic risk of loss for 50 percent of the partnership liability for the loan from VW. See paragraph (d)(3)(i) of this section.

(iii) Z and VW are related persons (within the meaning of paragraph (h) of this section). Under paragraph (d)(3)(i)(B) of this section, a partner bears the economic risk of loss with respect to a partnership liability to the extent that the partner (or a person related to such partner) is the owner of the liability, and but for that paragraph, the liability would be treated as a nonrecourse liability under paragraph (e)(2) of this section. If this section were applied without regard to paragraph (d)(3)(i)(B) of this section, 50 percent of the partnership liability for the loan from VW would be a nonrecourse liability because no partner would bear the economic risk of loss for that portion of the liability. Accordingly, since Z and VW are related persons, Z bears the economic risk of loss for 50 percent of the liability for the loan from VW under paragraph (d)(3)(i)(B) of this section. Because Z owns a one-half interest in the partnership, the de minimis rule set forth in paragraph (d)(3)(vii) of this section is inapplicable.

(iv) Under paragraph (d) of this section, the partnership liability for the loan from VW is a recourse liability, and the partners share that liability equally.

**Example (19).** (i) AB and CD form a general partnership with cash contributions of \$30,000 each. AB and CD share all partnership profits and losses equally. The partnership purchases an apartment building from AB for its \$60,000 in cash and a

nonrecourse purchase money note for \$240,000 that is secured by the building. The purchase money note given to AB by the partnership "wraps around" a \$200,000 underlying nonrecourse note issued by AB to an unrelated person in connection with AB's acquisition of the building. The underlying nonrecourse note is also secured by the building.

(ii) The indebtedness represented by the purchase money note is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i)(B) of this section, AB bears the economic risk of loss for only \$40,000 of the liability for the purchase money note because AB is not considered to be the creditor with respect to that liability to the extent it reflects the debt on the underlying nonrecourse note. See the fourth sentence of paragraph (d)(3)(i) of this section. Therefore, under paragraph (d) of this section, \$40,000 of the partnership liability for the purchase money note is a recourse liability that is allocated to AB. The remaining portion of the partnership liability is a nonrecourse liability because no partner bears the economic risk of loss for that liability. See paragraphs (e)(2) and (j)(2) of this section. Under paragraph (e)(1) of this section, AB's and CD's shares of the nonrecourse liability are \$100,000 each because they share all partnership profits and losses equally.

**Example (20).** (i) EF and GH, a widely held corporation, form a limited partnership to purchase and lease computer equipment. EF, the general partner, contributes \$200,000 to the partnership and GH, the limited partner, contributes \$800,000 to the partnership. The partnership agreement provides that partnership profits and losses will be allocated 20 percent to EF and 80 percent to GH. GH invests in the partnership, in part, to obtain significant tax losses that EF has indicated would be available from an investment in the partnership. The partnership purchases computer equipment subject to a two-year lease for \$10,000,000. To purchase the equipment, the partnership obtained a \$9,000,000 nonrecourse loan, with a five-year term, from a commercial bank. Upon making the loan, the bank acquired a security interest in the computer equipment. Furthermore, in order to induce the bank to make a nonrecourse loan to the partnership, EF agreed to lease the computer equipment from the partnership under a master lease. The master lease is pledged to the bank as additional security. The rental payments due under the master lease will provide the partnership with sufficient cash flow to make the principal and interest payments due on the loan. EF's obligation to make the rental payments required under the master lease is unconditional. EF must make those payments even if it is unable to sublease the equipment (after the existing two-year lease expires) or the equipment is damaged or destroyed. EF is also responsible for all costs associated with maintaining the equipment. Unless the loan that the partnership used to purchase the computer equipment is treated as a nonrecourse liability for purposes of section 752 and the regulations thereunder, GH will not be able to claim the tax losses that EF

indicated would be available from an investment in the partnership.

(ii) The indebtedness represented by the nonrecourse loan the partnership obtained to purchase the computer equipment is a partnership liability. See paragraph (g) of this section. Under the general rule of paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability. If no partner bears the economic risk of loss for the partnership liability, the liability will be treated as nonrecourse liability that EF and GH will share in accordance with their general profit sharing ratios. See paragraph (e) of this section. Paragraph (d)(3)(iv) of this section, however, provides that if one or more partners (or persons related to such partners) (1) undertake contractual obligations in order to acquire a loan, (2) those obligations eliminate substantially all the risk that the partnership will not satisfy its obligations under the loan (assuming that such partners (or related persons) satisfy their obligations), and (3) one of the principal purposes of the arrangement is to permit other partners to include a portion of such liability in the basis of their partnership interests, the partners that undertake such contractual obligations are considered to bear the economic risk of loss for that liability. Under the facts of this example, it must be concluded that one of the principal purposes for the master lease was to permit GH to include a portion of the nonrecourse loan in the basis of GH's partnership interest. Therefore, under paragraph (d)(3)(iv) of this section, EF bears the economic risk of loss for the partnership liability for the nonrecourse loan. Accordingly, for purposes of this section, the liability is a recourse liability that is allocated entirely to EF. See paragraph (d) (1) and (2) of this section.

**Example (21).** (i) KL and MN form a general partnership to purchase a shopping center. The partners each contribute \$500,000 to the partnership and agree to share partnership profits and losses equally. On January 1, 1991, the partnership obtains a \$4,000,000 nonrecourse loan, and purchases the shopping center for \$5,000,000. The nonrecourse loan is secured by a mortgage on the shopping center. The interest on the nonrecourse loan accrues at a 15 percent annual rate and is payable on December 31 of each year. The principal amount of the nonrecourse loan is payable in a lump sum on December 31, 2005. MN guarantees the payment of all interest due on the nonrecourse loan. Under the guarantee, MN is unconditionally obligated to pay the nonrecourse lender any interest payment that the partnership fails to make in a timely manner. MN is not entitled to be reimbursed for any payments made to the lender pursuant to the guarantee.

(ii) The indebtedness represented by the nonrecourse loan obtained by the partnership to acquire the shopping center is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability because the constructive liquidation of the partnership would not obligate any partner to make a payment to a creditor or other person or a net contribution to the partnership with respect to the liability

for the nonrecourse loan. Under paragraph (d)(3)(v) of this section, however, MN's economic risk of loss for that liability must be increased by an amount equal to the sum of the present values of the remaining interest payments on the nonrecourse loan that MN would be obligated to make pursuant to the guarantee if the partnership does not make those payments. The present value of each interest payment due on the nonrecourse loan is computed by using a discount rate equal to the rate at which interest accrues on the loan (15 percent, compounded annually). At the time the partnership obtains the nonrecourse loan, the sum of the present values of all interest payments due on the loan equals \$3,508,422, and MN therefore bears the economic risk of loss for \$3,508,422 of the partnership liability for the \$4,000,000 loan. Accordingly, at the time the partnership obtains the nonrecourse loan, \$3,508,422 of the partnership liability for that loan constitutes a recourse liability that must be allocated entirely to MN. See paragraph (d) (1) and (2) of this section. Only \$491,578 of the \$4,000,000 loan constitutes a nonrecourse liability that will be allocated equally between the partners under paragraph (e) of this section.

**Example (22).** (i) OP and QR form a limited partnership to acquire and operate a commercial office building. OP, the general partner, contributes \$20,000, and QR, the limited partner, contributes \$180,000 to the partnership. The partnership obtains an \$800,000 nonrecourse loan and purchases the building on leased land for \$1,000,000. The nonrecourse loan is secured only by the building, and no principal payments are due for five years. The partnership agreement provides that the partners' capital accounts will be determined and maintained in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or only partner's interest) will be made in accordance with partners' positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704-1(b)(2)(ii)(b)(3)). The partnership agreement also contains a minimum gain chargeback (in accordance with § 1.704-1(b)(4)(iv)(e)). The partnership agreement provides that, except as otherwise required by its minimum gain chargeback provision, (1) all partnership items will be allocated 10 percent to OP and 90 percent to QR until the partnership has recognized items of income and gain that exceed the items of loss and deduction it has recognized over its life, and (2) all further partnership items will be allocated equally between OP and QR. Finally, the partnership agreement specifies that OP and QR have equal interests in partnership profits for purposes of determining the partners' shares of the nonrecourse liabilities of the partnership (which is consistent with the equal division of all partnership income and gain that is required after the partnership has recognized items of income and gain that exceed the items of loss and deduction that it has recognized over its life). At the time the partnership agreement is entered into, there

is a reasonable likelihood that over the partnership's life it will recognize amounts of income and gain (the allocation of which will have substantial economic effect) significantly in excess of the amounts of loss and deduction allowed to the partnership.

(ii) In each of the partnership's first 2 taxable years, it generates rental income of \$95,000, operating expenses (including land lease payments) of \$10,000, interest expense of \$80,000, and a depreciation deduction of \$90,000, resulting in a taxable loss of \$85,000 in each of those years. The partnership agreement allocates 10 percent of these losses to OP and 90 percent to QR, and this allocation has substantial economic effect. If the partnership were to dispose of the building in full satisfaction of the nonrecourse loan at the end of year 1 or 2, the partnership would not realize any gain because the adjusted basis of the building exceeds the outstanding balance of the nonrecourse loan at the end of each of those years. Thus, at the end of years 1 and 2, there is no partnership minimum gain. See § 1.704-1T(b)(4)(iv)(c). In its third taxable year, the partnership again generates rental income of \$95,000, operating expenses of \$10,000, interest expense of \$80,000, and a depreciation deduction of \$90,000, resulting in a taxable loss of \$85,000. If the partnership were to dispose of the building in full satisfaction of the nonrecourse loan at the end of that year, it would realize \$70,000 of gain (\$800,000 amount realized less \$730,000 adjusted tax basis). Because the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during the year) is \$70,000, the amount of partnership nonrecourse deductions for the year is \$70,000, consisting of depreciation deductions allowable with respect to the building of \$70,000. See § 1.704-1T(b)(4)(iv)(b) and (c). Pursuant to the partnership agreement, all partnership items comprising the taxable loss of \$85,000, including the \$70,000 of nonrecourse deductions, are allocated 10 percent to OP and 90 percent to QR. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect.

	OP	QR
Capital account on formation	\$20,000	\$180,000
Less: Loss in years 1 and 2	(17,000)	(153,000)
Less: Loss in year 3 (without nonrecourse deductions)	(1,500)	(13,500)
Less: Nonrecourse deductions in year 3	(7,000)	(63,000)
Capital account at end of year 3	(\$5,500)	(\$49,500)

This allocation of the \$70,000 of nonrecourse deductions 10 percent to OP and 90 percent to QR is deemed to be made in accordance with the partners' interest in the partnership under § 1.704-1T(b)(4)(iv)(d). See § 1.704-1T(b)(5) (example 20(i)). At the end of the partnership's third taxable year, OP's and QR's shares of partnership minimum gain are



\$7,000 and \$63,000, respectively. See § 1.704-1T(b)(4)(iv)(f).

(iii) The indebtedness represented by the nonrecourse loan obtained by the partnership to purchase the office building is a partnership liability. See paragraph (g) of this section. Under paragraph (d)(3)(i) of this section, no partner bears the economic risk of loss for that liability. Therefore, under paragraph (e)(2) of this section, the liability is a nonrecourse liability that the partners will share in the manner prescribed under paragraph (e)(1) of this section. At the end of years 1 and 2, the nonrecourse liability is allocated equally between the partners under paragraph (e)(1)(iii) of this section. The partners share the nonrecourse liability equally because the partnership agreement specifies that, for purposes of determining the partners' shares of the nonrecourse liabilities of the partnership, each partner has a 50 percent interest in partnership profits, which is consistent with allocations (which have substantial economic effect) of some significant item of partnership income or gain. See paragraph (e)(3)(ii)(C) of this section. Thus, at the end of years 1 and 2, each partner's share of the nonrecourse liability is \$400,000.

(iv) At the end of year 3, there is partnership minimum gain, and OP's and QR's shares of partnership minimum gain are \$7,000 and \$63,000, respectively. Under paragraph (e)(1)(i) of this section, the nonrecourse liability is allocated to the partners first according to their shares of partnership minimum gain, and any excess is allocated equally between the partners under paragraph (e)(1)(iii) of this section. See paragraph (e)(3)(ii) (A) and (B) of this section. Therefore, at the end of year 3, OP's and QR's shares of the nonrecourse liability are \$372,000 (\$7,000 share of partnership minimum gain plus \$365,000 share of the excess) and \$428,000 (\$63,000 share of partnership minimum gain plus \$365,000 share of the excess), respectively.

**Example (23).** (i) ST and UV form a general partnership to own and operate residential rental property. UV contributes \$500,000 to the partnership that it uses to purchase residential rental property. ST contributes an apartment building with a \$1,200,000 fair market value and \$520,000 adjusted tax basis. The apartment building contributed by ST is subject to a \$700,000 nonrecourse loan. ST and UV share all partnership profits and losses equally.

(ii) The indebtedness represented by the nonrecourse loan is a partnership liability. See § 1.752-2T regarding the treatment of liabilities to which contributed or distributed property is subject. Under paragraph (e)(2) of this section, this liability is a nonrecourse liability because no partner bears the economic risk of loss for such liability. See paragraph (d)(3)(i) of this section. Under paragraph (e)(1)(ii) of this section, ST is allocated \$180,000 of the partnership liability for the nonrecourse loan because ST would be allocated taxable gain of \$180,000 under section 704(c) if the partnership disposed of (in a taxable transaction) the apartment building in full satisfaction of the nonrecourse liability. The remainder of the nonrecourse liability is allocated between the

partners in proportion to their equal interests in partnership profits. See paragraph (e)(1)(iii) of this section. Accordingly, ST's and UV's shares of the nonrecourse liability are \$440,000 (\$180,000 share of section 704(c) minimum gain and \$260,000 share of the excess of the nonrecourse liability over the section 704(c) minimum gain) and \$260,000 (which equals UV's \$260,000 share of the excess of the nonrecourse liability over the section 704(c) minimum gain), respectively.

#### § 1.752-2T Liabilities to which contributed or distributed property is subject (temporary).

(a) *In general.* For purposes of section 752 and the regulations thereunder, if property is contributed by a partner to the partnership or distributed by the partnership to a partner and such property is subject to a liability of the transferor (within the meaning of § 1.752-1T(f)(2), (g), and (j)(1)), the transferee shall be considered to have assumed such liability to the extent of the amount of such liability that does not exceed the fair market value of the property at the time of the contribution or distribution. See section 752(c).

(b) *Examples.* The following examples illustrate the application of the rules of this section:

**Example (1).** A contributes property with an adjusted basis of \$1,000 to a general partnership in exchange for a one-third interest in partnership. At the time of contribution, the property is subject to recourse debt of \$150 and has a fair market value in excess of \$150. The recourse debt to which the property is subject is a liability of A within the meaning of § 1.752-1T(g). Under this section, the partnership is considered to have assumed the liability to which the property is subject upon A's contribution of the property to the partnership (without regard to whether the partnership assumes such liability within the meaning of § 1.752-1T(f)). As a result of this assumption, A's individual liabilities decrease by \$150. At the same time, however, A's share of the liabilities of the partnership increases by \$150, assuming that, after the contribution, A bears the economic risk of loss (within the meaning of § 1.752-1T(d)(3)) for the entire amount of such liability because A remains personally liable to the creditor. Only the net increase or decrease in the sum of A's share of the liabilities of the partnership and A's individual liabilities is taken into account in applying section 752. See § 1.752-1T(j)(3) (relating to increase and decrease in share of liabilities resulting from same transaction). Accordingly, since there is no net change in the sum of A's share of the liabilities of the partnership and A's individual liabilities, A will not be considered to have made a contribution of money to the partnership or to have received a distribution of money from the partnership under § 1.752-1T(b) or (c). Therefore, A's basis for A's partnership interest is \$1,000 (A's basis for the contributed property of \$1,000).

**Example (2).** B contributes property with an adjusted basis of \$1,000 to partnership AB in

exchange for a one-half interest in the partnership. At the time of contribution, the property is subject to nonrecourse debt of \$2,500 and has a fair market value in excess of \$2,500. The nonrecourse debt to which the property is subject is a liability of B within the meaning of § 1.752-1T(g). In addition, to the extent that the liability is assumed by the partnership, the liability will be treated as a nonrecourse liability of the partnership under § 1.752-1T(e)(2) because no partner will bear the economic risk of loss for such liability. Under this section, the partnership is considered to have assumed the liability to which the property is subject upon B's contribution of the property to the partnership. As a result of this assumption, B's individual liabilities decrease by \$2,500. At the same time, however, B's share of the liabilities of the partnership increases by \$2,000 (the \$1,500 of gain that would be allocated to B under section 704(c) if the partnership disposed of the property (in a taxable transaction) in full satisfaction of the nonrecourse debt encumbering such property, and B's \$500 (one-half) share of the amount by which the nonrecourse liability exceeds that gain). See § 1.752-1T(e)(1) (relating to a partner's share of nonrecourse liabilities). Only the net decrease of \$500 in the sum of B's share of the liabilities of the partnership and B's individual liabilities is taken into account in applying section 752. See § 1.752-1T(j)(3) (relating to increase and decrease in share of liabilities resulting from same transaction). Therefore, under § 1.752-1T(c), B will be treated as receiving a distribution of money in the amount of \$500. Because the basis of B's partnership interest is \$1,000 (the basis of the property contributed by him), the distribution to B of \$500 does not result in the realization of any gain under section 731(a). B's basis for B's partnership interest is \$500 (B's basis for the contributed property of \$1,000 reduced by \$500, the amount of the distribution under § 1.752-1T(c)).

#### § 1.752-3T Sale or exchange of partnership interest (temporary).

For purposes of determining the amount of any gain or loss realized on a sale, exchange, or other disposition of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection with the sale, exchange, or other disposition of property not associated with partnerships. For example, if a partner whose share of partnership liabilities is \$250 sells the partner's interest in the partnership for \$750 cash and at the same time transfers to the purchaser the partner's \$250 share of partnership liabilities, the amount realized by the selling partner on the sale is \$1,000.

#### § 1.752-4T Effective dates and transition rules (temporary).

(a) *In general.* Except as otherwise provided in this section, §§ 1.752-1T, -2T, and -3T shall apply to any liability incurred or assumed by a partnership on or after January 30, 1989, unless such

liability is incurred or assumed by the partnership pursuant to a written binding contract in effect prior to December 29, 1988 and at all times thereafter.

(b) *Partner loans and guarantees.* If at any time on or after March 1, 1984, a partner bears the economic risk of loss (within the meaning of § 1.752-1T(d)(3)) for a partnership liability that is nonrecourse for purposes of § 1.1001-2 as a result of guaranteeing the payment of all or part of such liability or holding an interest in such liability as a creditor, the rules of §§ 1.752-1T, -2T, and -3T shall apply to such liability beginning on the later of—

(1) March 1, 1984; or

(2) The first date on which such partner bears the economic risk of loss with respect to the liability as a result of such guarantee or as a result of holding an interest in such liability as a creditor.

A guarantee made, or an interest in a liability as a creditor acquired, pursuant to a written binding contract in effect prior to March 1, 1984, and at all times thereafter, shall be disregarded for purposes of the preceding sentence. For purposes of this paragraph (b), the determination of whether a partner bears the economic risk of loss with respect to a partnership liability shall be made in accordance with the rules of § 1.752-1T(d)(3).

(c) *Election—(1) In general.* Notwithstanding anything to the contrary in this section, a partnership may elect to apply the provisions of §§ 1.752-1T, -2T, and -3T to all of its liabilities as of the beginning of the first taxable year of such partnership ending after December 29, 1988.

(2) *Time and manner of election.* An election under this paragraph (c) is made by attaching a written statement to the partnership return for the first taxable year of such partnership ending after December 29, 1988. A written statement required pursuant to this paragraph (c)(2) must include the name, address, and taxpayer identification number of the partnership making such statement and contain a declaration that an election is being made under this paragraph (c).

(d) *Coordination with amendments to section 704(b) regulations.* If all or part of a partnership liability is treated as one or more partner nonrecourse debts under § 1.704-1T(b)(4)(iv)(h) and, but for this paragraph (d), §§ 1.752-1T, -2T, and -3T would not apply to such liability, then the partnership may treat such liability as a liability to which §§ 1.752-1T, -2T, and -3T apply to the extent of the partners' shares (if any) of the minimum gain attributable to any such

partner nonrecourse debts (within the meaning of § 1.704-1T(b)(4)(iv)(h)(5)). If both § 1.704-1T(b)(4)(iv) and §§ 1.752-1T, -2T, and -3T apply to a taxable year of a partnership, any reference included in §§ 1.752-1T, -2T, and -3T to § 1.704-1T(b)(4)(iv) shall be treated as a reference to the appropriate provision of § 1.704-1T(b)(4)(iv) for purposes of applying §§ 1.752-1T, -2T, and -3T to such partnership for such taxable year. See §§ 1.704-1T(b)(4)(iv)(h) and 1.704-1T(b)(4)(iv)(m) for rules regarding the effective dates of §§ 1.704-1T(b)(4)(iv) and 1.704-1T(b)(4)(iv).

(e) *Cross reference.* For the rules applicable to liabilities of a partnership that are not subject to §§ 1.752-1T, -2T, and -3T, see 26 CFR 1.752-1.

Par. 4. A new § 1.704-1T is added to read as follows:

#### § 1.704-1T Partner's distributive share.

(a) [Reserved.]

(b) *Determination of a partner's distributive share—(0) Cross-references.*

Heading	Section
Cross-references .....	1.704-1T(b)(0).
[Reserved.] .....	1.704-1T(b)(1).
[Reserved.] .....	1.704-1T(b)(2).
[Reserved.] .....	1.704-1T(b)(3).
Special rules .....	1.704-1T(b)(4).
[Reserved.] .....	1.704-1T(b)(4)(i).
[Reserved.] .....	1.704-1T(b)(4)(ii).
[Reserved.] .....	1.704-1T(b)(4)(iii).
Allocations attributable to nonrecourse liabilities.	1.704-1T(b)(4)(iv).
In general .....	1.704-1T(b)(4)(iv)(a).
Allocation of nonrecourse deductions.	1.704-1T(b)(4)(iv)(a)(1).
Allocation of minimum gain.	1.704-1T(b)(4)(iv)(a)(2).
Determination of nonrecourse deductions.	1.704-1T(b)(4)(iv)(b).
Partnership minimum gain.	1.704-1T(b)(4)(iv)(c).
Requirements to be satisfied.	1.704-1T(b)(4)(iv)(d).
Minimum gain chargeback.	1.704-1T(b)(4)(iv)(e).
In general .....	1.704-1T(b)(4)(iv)(e)(1).
Allocations required pursuant to minimum gain chargeback.	1.704-1T(b)(4)(iv)(e)(2).
Coordination with paragraph (b)(2)(ii) of this section.	1.704-1T(b)(4)(iv)(e)(3).
Partner's share of partnership minimum gain.	1.704-1T(b)(4)(iv)(f).
Distribution of nonrecourse liability proceeds allocable to an increase in minimum gain.	1.704-1T(b)(4)(iv)(g).
In general .....	1.704-1T(b)(4)(iv)(g)(1).
Allocation of net increase in partnership minimum gain.	1.704-1T(b)(4)(iv)(g)(2).
Carryover to immediately succeeding taxable year.	1.704-1T(b)(4)(iv)(g)(3).
Distribution allocable to proceeds of nonrecourse liability.	1.704-1T(b)(4)(iv)(g)(4).
Nonrecourse debt of the partnership where a partner bears the economic risk of loss.	1.704-1T(b)(4)(iv)(h).

Heading	Section
In general .....	1.704-1T(b)(4)(iv)(h)(1).
Allocation of losses, deductions, and expenditures attributable to partner nonrecourse debt.	1.704-1T(b)(4)(iv)(h)(2).
Determination of partner nonrecourse deductions.	1.704-1T(b)(4)(iv)(h)(3).
Chargeback of items of income and gain.	1.704-1T(b)(4)(iv)(h)(4).
Partner's share of minimum gain attributable to partner nonrecourse debt.	1.704-1T(b)(4)(iv)(h)(5).
Net increase (or decrease) in minimum gain attributable to partner nonrecourse debt.	1.704-1T(b)(4)(iv)(h)(6).
Distribution of proceeds of partner nonrecourse debt allocable to increase in minimum gain attributable to such debt.	1.704-1T(b)(4)(iv)(h)(7).
Debt for which more than one partner bears the economic risk of loss.	1.704-1T(b)(4)(iv)(h)(8).
[Reserved.] .....	1.704-1T(b)(4)(iv)(i).
Tiered partnerships .....	1.704-1T(b)(4)(iv)(j).
Meaning of certain terms .....	1.704-1T(b)(4)(iv)(k).
Economic risk of loss.	1.704-1T(b)(4)(iv)(l).
Nonrecourse debt.	1.704-1T(b)(4)(iv)(m)(1).
Nonrecourse liability.	1.704-1T(b)(4)(iv)(m)(2).
Partner nonrecourse debt.	1.704-1T(b)(4)(iv)(m)(3).
[Reserved.] .....	1.704-1T(b)(4)(iv)(m)(4).
Effective dates.	1.704-1T(b)(4)(iv)(m)(5).
In general .....	1.704-1T(b)(4)(iv)(m)(6).
Election .....	1.704-1T(b)(4)(iv)(m)(7).
Examples .....	1.704-1T(b)(4)(iv)(m)(8).

(1) [Reserved.]  
 (2) [Reserved.]  
 (3) [Reserved.]  
 (4) *Special rules—(i)* [Reserved.]  
 (ii) [Reserved.]  
 (iii) [Reserved.]  
 (iv) *Allocations attributable to nonrecourse liabilities—(a) In general—(1) Allocation of nonrecourse deductions.* An allocation of an item of loss, deduction, or section 705(a)(2)(B) expenditure attributable to nonrecourse liabilities of the partnership ("nonrecourse deduction") cannot have economic effect because, in the event there is an economic burden that corresponds to such an allocation, the creditor alone bears that burden. Thus, nonrecourse deductions must be allocated in accordance with the partners' interests in the partnership. Paragraph (b)(4)(iv)(d) of this section, however, provides a test under which certain allocations of nonrecourse deductions will be deemed to be in accordance with the partners' interests in the partnership. If that test is not satisfied, the partners' distributive shares of nonrecourse deductions will



be determined, under § 1.704-1(b)(3), according to the partners' overall economic interests in the partnership. See also paragraph (b)(4)(iv)(h) of this section for special rules regarding the allocation of deductions attributable to nonrecourse debt with respect to which a partner bears the economic risk of loss.

(2) *Allocation of minimum gain.* To the extent that the amount of a nonrecourse liability encumbering an item of partnership property exceeds the adjusted tax basis of such property (or book value of such property if the property is properly reflected on the books of the partnership at a value that differs from its adjusted tax basis), a disposition of such property will generate gain in an amount that is at least equal to such excess ("partnership minimum gain"). See paragraph (b)(4)(iv)(c) of this section for rules regarding the computation of partnership minimum gain. An increase in partnership minimum gain may be attributable to items of partnership loss, deduction, or section 705(a)(2)(B) expenditure that decrease the adjusted tax basis (or book value) of property subject to a nonrecourse liability of the partnership or a nonrecourse borrowing by the partnership that exceeds the adjusted tax basis (or book value) of the partnership property encumbered by such liability. To the extent that an increase in partnership minimum gain is attributable to items of partnership loss, deduction, or section 705(a)(2)(B) expenditure, such items are treated as nonrecourse deductions under paragraph (b)(4)(iv)(b) of this section. Although an allocation of nonrecourse deductions cannot have economic effect, the amount of nonrecourse deductions allocated to any partner decreases such partner's capital account. Similarly, although the allocation to a partner of partnership minimum gain that is attributable to nonrecourse deductions claimed by the partnership increases the partner's capital account, the allocation cannot have economic effect because the minimum gain merely offsets nonrecourse deductions previously claimed by the partnership and does not necessarily bear any relationship to the value of partnership property. Thus, minimum gain that is attributable to nonrecourse deductions claimed by the partnership must be allocated to the partners that were allocated such nonrecourse deductions to prevent such gain from impairing the economic effect of other partnership allocations. In addition, if an increase in partnership minimum gain is attributable to a nonrecourse borrowing that is used to

make a distribution to the partners, then such minimum gain represents the unrecognized gain of which the distributee-partners have effectively reaped the economic benefits through the use of nonrecourse debt. An allocation of such minimum gain can have economic effect only if the allocation is made to the partners that received the economic benefit of that gain. Accordingly, under paragraph (b)(4)(iv)(e) of this section, minimum gain attributable to nonrecourse deductions claimed by the partnership or the proceeds of a nonrecourse liability distributed to the partners by the partnership must be allocated to the partners that were allocated such deductions or received such distributions.

(b) *Determination of nonrecourse deductions.* The amount of nonrecourse deductions for a partnership taxable year equals the excess, if any, of the net increase in the amount of partnership minimum gain during such year, over the aggregate amount of any distributions during such year of proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain. See examples (20) (i) and (vi), (21), and (22) of paragraph (b)(5) of this section. The nonrecourse deductions for a partnership taxable year shall consist first of depreciation or cost recovery deductions with respect to items of partnership property subject to one or more nonrecourse liabilities of the partnership to the extent of the increase in minimum gain attributable to the nonrecourse liabilities to which each such item of property is subject (or if such depreciation or cost recovery deductions exceed the amount of nonrecourse deductions for the year, then a proportionate share of each such deduction shall constitute a nonrecourse deduction), and the remainder of such nonrecourse deductions, if any, shall consist of a pro rata portion of other items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for that year. See example (23) of paragraph (b)(5) of this section. In addition, if the amount of nonrecourse deductions for a partnership taxable year exceeds the total amount of the items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for such year, then an amount of the net increase in partnership minimum gain for such year equal to that excess shall, for purposes of this paragraph (b)(4)(iv), be treated as an increase in partnership minimum gain for the immediately succeeding partnership taxable year for purposes of determining whether there is a net increase or a net decrease in partnership

minimum gain during such taxable year. For example, if a partnership encumbers partnership property with a nonrecourse liability that results in a net increase in partnership minimum gain for the taxable year, but the partnership does not distribute any proceeds of the liability during the year and the amount of such net increase in minimum gain exceeds the partnership's losses, deductions, and section 705(a)(2)(B) expenditures for such a year, then the partnership will have a net increase in partnership minimum gain for the taxable year that cannot be allocated either to distributions or to losses, deductions, or section 705(a)(2)(B) expenditures, thereby leaving the partnership with excess nonrecourse deductions for the year. See example (20)(vi) of paragraph (b)(5) of this section. For purposes of this paragraph (b)(4)(iv)(b), the items of partnership loss, deduction, and section 705(a)(2)(B) expenditure for a partnership taxable year are determined without regard to any item that is treated as a partner nonrecourse deduction under paragraph (b)(4)(iv)(h)(3) of this section.

(c) *Partnership minimum gain.* The amount of partnership minimum gain is determined by computing, with respect to each nonrecourse liability of the partnership, the amount of gain (of whatever character), if any, that would be realized by the partnership if it disposed of (in a taxable transaction) the partnership property subject to such liability in full satisfaction thereof (and for no other consideration), and by then aggregating the amounts so computed. See examples (20) (i) and (iv), (21), and (22) of paragraph (b)(5) of this section. For purposes of determining the amount of such gain, (1) the adjusted tax basis of partnership property subject to two or more liabilities of equal priority shall be allocated among such liabilities in proportion to the respective outstanding balances of such liabilities, and (2) the adjusted tax basis of partnership property subject to two or more liabilities of unequal priority shall be allocated to the liabilities of an inferior priority (in accordance with subdivision (1) of this paragraph (b)(4)(iv)(c)) only to the extent of the excess, if any, of the adjusted tax basis of such property over the aggregate outstanding balance of the liabilities of superior priority. Only the portion of the property's adjusted tax basis that is allocated to nonrecourse liabilities of the partnership shall be used in computing minimum gain. See example (20) (v) and (vii) of paragraph (b)(5) of this section. If partnership property subject to one or more nonrecourse liabilities of the partnership

is, under § 1.704-1(b)(2)(iv)(d), (f), or (r), properly reflected on the books of the partnership at a book value that differs from the adjusted tax basis of such property, then the determinations under this paragraph (b)(4)(iv) shall be made with reference to such book value. See example (22) of paragraph (b)(5) of this section. For purposes of this paragraph (b)(4)(iv), in determining the net increase or decrease in partnership minimum gain during any partnership taxable year in which the capital accounts of the partners are increased pursuant to § 1.704-1(b)(2)(iv) (f) or (r) to reflect a revaluation of partnership property subject to one or more nonrecourse liabilities of the partnership, any decrease in partnership minimum gain attributable to each such revaluation shall be added back to the net decrease or increase otherwise determined. See example (22)(iii) of paragraph (b)(5) of this section.

(d) *Requirements to be satisfied.*

Allocations of nonrecourse deductions are deemed to be made in accordance with the partners' interests in the partnership if and only if—

(1) Throughout the full term of the partnership, requirements (1) and (2) of § 1.704-1(b)(2)(ii)(b) are satisfied;

(2) Beginning in the first taxable year in which there are nonrecourse deductions and thereafter throughout the full term of the partnership, the partnership agreement provides for allocations of nonrecourse deductions among the partners in a manner that is reasonably consistent with allocations, which have substantial economic effect, of some other significant partnership item attributable to the property securing nonrecourse liabilities of the partnership;

(3) Beginning in the first taxable year of the partnership in which the partnership has nonrecourse deductions or makes a distribution of proceeds of a nonrecourse liability that are allocable to an increase in minimum gain and thereafter throughout the full term of the partnership, the partnership agreement contains a provision that complies with the requirements of paragraph (b)(4)(iv)(e) of this section ("minimum gain chargeback"); and

(4) All other material allocations and capital account adjustments under the partnership agreement are recognized under § 1.704-1(b) (without regard to whether allocations of adjusted tax basis and amount realized under section 613A(c)(7)(D) are recognized under § 1.704-1(b)(4)(v)).

(e) *Minimum gain chargeback.*—(1) *In general.* If there is a net decrease in partnership minimum gain for a partnership taxable year, the partners

must be allocated items of partnership income and gain in accordance with this paragraph (b)(4)(iv)(e) ("minimum gain chargeback").

(2) *Allocations required pursuant to minimum gain chargeback.* If a minimum gain chargeback is required for a partnership taxable year, then each partner must be allocated items of income and gain for such year (and, if necessary, for subsequent years) in proportion to, and to the extent of, an amount equal to the greater of—

(i) The portion of such partner's share of the net decrease in partnership minimum gain during such year that is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership; or

(ii) The deficit balance in such partner's capital account at the end of such year (determined before any allocation of partnership income, gain, loss, deduction, or section 705(a)(2)(B) expenditure for such year and excluding from such deficit capital account balance any amount that such partner is obligated to restore under § 1.704-1(b)(2)(ii)(c), as well as any addition thereto pursuant to the next to last sentences of paragraph (b)(4)(iv) (f) and (h)(5) of this section after taking into account thereunder, any changes during such year in partnership minimum gain and in the minimum gain attributable to any partner nonrecourse debt), provided that if requirements (1) and (2) of § 1.704-1(b)(2)(ii)(b) have not been satisfied throughout the full term of the partnership, the amount determined under this paragraph (b)(4)(iv)(e)(2)(ii) shall equal zero and the amount of any allocation in addition to that required under paragraph (b)(4)(iv)(e)(2)(i) of this section that must be made to such partner in connection with the net decrease in partnership minimum gain during such year shall be determined in accordance with the partner's interest in the partnership under § 1.704-1(b)(3).

See examples (20)(i) and (22)(v) of paragraph (b)(5) of this section. For purposes of this paragraph (b)(4)(iv)(e)(2), the partners' capital accounts shall be reduced by the items described in § 1.704-1(b)(2)(ii)(d) (4), (5), and (6). See paragraph (b)(4)(iv)(f) of this section for rules regarding the determination of a partner's share of a net decrease in partnership minimum gain. The portion of a partner's share of any net decrease in partnership minimum gain for a partnership taxable year that is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership equals the amount determined by multiplying the partner's

share of the net decrease in partnership minimum gain for the year by a fraction, the numerator of which is the portion of the net decrease in partnership minimum gain for the year that is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership and the denominator of which is the net decrease in partnership minimum gain for the year. For purposes of the preceding sentence, a net decrease in partnership minimum gain for a partnership taxable year is allocable to the disposition of partnership property subject to one or more nonrecourse liabilities of the partnership to the extent of any decrease in partnership minimum gain during such year that resulted from the disposition of any such property. Any minimum gain chargeback required for a partnership taxable year shall consist first of gains recognized from the disposition of items of partnership property subject to one or more nonrecourse liabilities of the partnership to the extent of the decrease in minimum gain attributable to the disposition of such items of property (or if such gains exceed the amount of the minimum gain chargeback required for such taxable year, the minimum gain chargeback shall consist of a proportionate share of each such gain), and the remainder of such minimum gain chargeback shall consist of a pro rata portion of the other items of partnership income and gain for that year. An allocation of items of income or gain required for a partnership taxable year pursuant to a minimum gain chargeback shall be deemed to be in accordance with the partners' interests in the partnership and shall be made before any other allocation of partnership items is made under section 704(b) for such year.

(3) *Coordination with § 1.704-1(b)(2)(ii).* For purposes of § 1.704-1(b)(2)(ii)(d)(6), offsetting increases to a partner's capital account taken into account under that paragraph do not include items of partnership income and gain that are expected to be allocated to that partner pursuant to this paragraph (b)(4)(iv)(e), provided that any subsequent distributions that are expected to be made to such partner of proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain shall be deemed to be offset by increases to the partner's capital account for purposes of that section.

(f) *Partner's share of partnership minimum gain.* A partner's share of partnership minimum gain at the end of



any partnership taxable year equals the excess (if any) of—

(1) The sum of the nonrecourse deductions allocated to such partner (and such partner's predecessors in interest) up to that time and the aggregate distributions to such partner (and such partner's predecessors in interest) up to that time of proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain; over

(2) The sum of such partner's (and such partner's predecessors in interest) aggregate share of the net decreases in partnership minimum gain up to that time and such partner's (and such partner's predecessors in interest) aggregate share of the decreases up to that time in partnership minimum gain resulting from revaluations of partnership property subject to one or more nonrecourse liabilities of the partnership.

A partner's share of the net decrease in partnership minimum gain during a partnership taxable year equals an amount that bears the same relation to the net decrease in partnership minimum gain during such year as such partner's share of partnership minimum gain at the end of the immediately preceding taxable year of the partnership (or, if later, the time immediately following the last time that the capital accounts of the partners are increased pursuant to § 1.704-1(b)(2)(iv)(f) or (r) to reflect a revaluation of partnership property subject to one or more nonrecourse liabilities of the partnership) bears to the amount of partnership minimum gain at the end of such preceding taxable year (or such later date). See examples (20) (i) and (iv) and (21) of paragraph (b)(5) of this section. A partner's share of any decrease in partnership minimum gain resulting from a revaluation of partnership property equals the amount of the increase in such partner's capital account attributable to such revaluation to the extent of the reduction in minimum gain caused by such revaluation. See example (22)(ii) of paragraph (b)(5) of this section. For purposes of § 1.704-1(b)(2)(ii)(d), the amount of a partner's share of partnership minimum gain shall be added to the limited dollar amount, if any, of the deficit balance in such partner's capital account that such partner is obligated to restore. See examples (20)(i) and (22)(i) of paragraph (b)(5) of this section.

(g) *Distribution of nonrecourse liability proceeds allocable to an increase in minimum gain*—(1) *In general.* If during a partnership taxable

year a partnership makes a distribution to the partners that is allocable to the proceeds of any nonrecourse liability of the partnership, such distribution is allocable to an increase in partnership minimum gain to the extent of the amount of the net increase, if any, in partnership minimum gain for such taxable year that is allocated to such nonrecourse liability under paragraph (b)(4)(iv)(g)(2) of this section.

(2) *Allocation of net increase in partnership minimum gain.* A net increase in partnership minimum gain for a taxable year is allocated to a nonrecourse liability of the partnership under this paragraph (b)(4)(iv)(g)(2) to the extent of the amount of any increase in partnership minimum gain for such year that arose as a result of incurring such nonrecourse liability (that is, the amount of any increase in partnership minimum gain for such year that arose as a result of encumbering partnership property with a nonrecourse liability that exceeds its adjusted tax basis or book value, as the case may be). See example (20)(vi) of paragraph (b)(5) of this section. If an amount of the net increase in partnership minimum gain for a partnership taxable year is allocated to more than one nonrecourse liability of the partnership pursuant to the first sentence of this paragraph (b)(4)(iv)(g)(2) and the sum of the amounts so allocated exceeds the total amount of such net increase, then the amount of such net increase that shall be allocated to each such liability equals the amount determined by multiplying the total amount of such net increase by the fraction obtained by dividing—

(i) The amount of such net increase that would be allocated to such liability under the first sentence of this paragraph (b)(4)(iv)(g)(2); by

(ii) The sum of the amounts of such net increase that would be allocated to all such liabilities under the first sentence of this paragraph (b)(4)(iv)(g)(2).

(3) *Carryover to immediately succeeding taxable year.* If the amount of the net increase in partnership minimum gain for a taxable year of the partnership that is allocated to a nonrecourse liability of the partnership under paragraph (b)(4)(iv)(g)(2) of this section exceeds the aggregate amount of the distributions to the partners during such year that are allocable to the proceeds of such liability ("excess allocable amount") and all or part of the net increase in partnership minimum gain for such year is treated as an increase in partnership minimum gain during the immediately succeeding taxable year under paragraph

(b)(4)(iv)(b) of this section, then an amount of such deemed increase in partnership minimum gain equal to such excess allocable amount (or, if less, the amount of such deemed increase) shall be treated as an increase in partnership minimum gain that arose as a result of incurring the nonrecourse liability to which such excess allocable amount is attributable for purposes of applying paragraph (b)(4)(iv)(g)(2) of this section in such succeeding taxable year. See example (20)(vi) of paragraph (b)(5) of this section. If for a partnership taxable year there is an excess allocable amount with respect to more than one nonrecourse liability of the partnership and the sum of such excess allocable amounts exceeds the amount of the net increase in partnership minimum gain for such year that is treated as an increase in partnership minimum gain during the immediately succeeding taxable year, then the amount of such deemed increase in partnership minimum gain which is treated as an increase in partnership minimum gain that arose as a result of incurring any such nonrecourse liability shall equal the amount determined by multiplying the amount of such deemed increase by the fraction obtained by dividing—

(i) The excess allocable amount for such year with respect to such nonrecourse liability; by

(ii) The sum of the excess allocable amounts for such year with respect to all nonrecourse liabilities.

(4) *Distribution allocable to proceeds of nonrecourse liability.* The determination of whether a distribution by the partnership to one or more partners is allocable to proceeds of a nonrecourse liability may be made under any reasonable method. For purposes of the preceding sentence, the rules prescribed under § 1.163-6T for allocating debt proceeds among expenditures (applying those rules to the partnership as if it were an individual) constitutes a reasonable method for determining (i) whether the proceeds of a nonrecourse liability have been distributed to the partners and (ii) the partners to whom such proceeds have been distributed.

(h) *Nonrecourse debt of the partnership where a partner bears economic risk of loss*—(1) *In general.* The rationale for the special rule contained in this paragraph (b)(4)(iv) is that, in the event there is an economic burden that corresponds to the nonrecourse deductions, none of the partners will bear that burden. Accordingly, for purposes of this paragraph (b)(4)(iv)—

(i) A nonrecourse liability of the partnership is a liability of the partnership (or portion thereof) for which no partner bears the economic risk of loss (within the meaning of paragraph (b)(4)(iv)(k)(1) of this section); and

(ii) The rules of this paragraph (h) govern the allocation of items of partnership income, gain, loss, deduction, or section 705(a)(2)(B) expenditure that must be made (and are considered in accordance with the partners' interests in the partnership) in connection with any nonrecourse debt (within the meaning of paragraph (b)(4)(iv)(k)(2) of this section) of the partnership for which any partner bears the economic risk of loss ("partner nonrecourse debt").

(2) *Allocation of losses, deductions, and expenditures attributable to partner nonrecourse debt.* Any item of partnership loss, deduction, or section 705(a)(2)(B) expenditure that is attributable to a partner nonrecourse debt ("partner nonrecourse deduction") must be allocated to the partner that bears the economic risk of loss for such debt. If more than one partner bears the economic risk of loss for a partner nonrecourse debt, any partner nonrecourse deduction attributable to such debt must be allocated among such partners in accordance with the ratios in which the partners share the economic risk of loss for such partner nonrecourse debt.

(3) *Determination of partner nonrecourse deductions.* For any partnership taxable year, the amount of partner nonrecourse deductions with respect to a partner nonrecourse debt equals the excess, if any, of the amount of the net increase during such year in the amount of minimum gain attributable to such partner nonrecourse debt, over the aggregate amount of any distributions during such year to the partner that bears the economic risk of loss for such debt of proceeds of such debt that are allocable to an increase in the minimum gain attributable to such debt. See example (20)(viii) and (ix) of paragraph (b)(5) of this section. The determination of which items of partnership loss, deduction, and section 705(a)(2)(B) expenditure constitute the partner nonrecourse deductions with respect to a partner nonrecourse debt for a partnership taxable year must be made in a manner that is consistent with the principles of paragraph (b)(4)(iv)(b) of this section. If the amount of partner nonrecourse deductions with respect to a partner nonrecourse debt for a partnership taxable year exceeds the total amount of items of partnership

loss, deduction, and section 705(a)(2)(B) expenditure for such year that are treated as partner nonrecourse deductions with respect to such debt, then an amount of the net increase during such year in the minimum gain attributable to such partner nonrecourse debt equal to that excess shall be treated as an increase during the immediately succeeding partnership taxable year in the minimum gain attributable to such debt for purposes of determining the net increase or decrease during such succeeding taxable year in the minimum gain attributable to such debt. The determination of which items of partnership loss, deduction, and section 705(a)(2)(B) expenditure constitute partner nonrecourse deductions for a partnership taxable year must be made before the determination of which items constitute nonrecourse deductions for the taxable year under paragraph (b)(4)(iv)(b) of this section.

(4) *Chargeback of items of income and gain.* If there is a net decrease during a partnership taxable year in the minimum gain attributable to a partner nonrecourse debt, then any partner with a share of the minimum gain attributable to such debt at the beginning of such year must be allocated items of partnership income and gain for such year (and, if necessary, for subsequent years) in proportion to, and to the extent of, an amount equal to the greater of—

(i) The portion of such partner's share of the net decrease in the minimum gain attributable to such partner nonrecourse debt that is allocable to the disposition of partnership property subject to such debt; or

(ii) The deficit balance in such partner's capital account at the end of such year (determined before any allocation of partnership income, gain, loss, deduction, or section 705(a)(2)(B) expenditure for such year and excluding from such deficit capital account balance any amount that such partner is obligated to restore under § 1.704-1(b)(2)(ii)(c), as well as any addition thereto pursuant to the next to last sentences of paragraph (b)(4)(iv)(f) and (h)(5) of this section after taking into account thereunder any changes during such year in partnership minimum gain and in the minimum gain attributable to any partner nonrecourse debt), provided that if requirements (1) and (2) of § 1.704-1(b)(2)(ii)(b) have not been satisfied throughout the full term of the partnership, the amount determined under this paragraph (b)(4)(iv)(h)(4)(ii) shall equal zero and the amount of any allocation in addition to that required under paragraph (b)(4)(iv)(h)(4)(i) of this

section that must be made to such partner in connection with the net decrease during such year in the minimum gain attributable to such partner nonrecourse debt shall be determined in accordance with the partner's interest in the partnership under § 1.704-1(b)(3).

See paragraph (b)(4)(iv)(h)(5) of this section for rules regarding the determination of a partner's share of a net decrease in the minimum gain attributable to a partner nonrecourse debt. For purposes of this paragraph (b)(4)(iv)(h)(4), the determination of whether the partners have deficit balances in their capital accounts shall be made by reducing the partner's capital accounts by the items described in § 1.704-1(b)(2)(ii)(d) (4), (5), and (6). The portion of a partner's share of any net decrease during a partnership taxable year in the minimum gain attributable to a partner nonrecourse debt that is allocable to the disposition of partnership property subject to such debt equals the amount determined by multiplying the partner's share of the net decrease in the minimum gain attributable to such debt for the year by a fraction, the numerator of which is the portion of the net decrease in the minimum gain attributable to such debt for the year that is allocable to the disposition of partnership property subject to such debt and the denominator of which is the net decrease in the minimum gain attributable to such debt for the year. For purposes of the preceding sentence, a net decrease during a partnership taxable year in the minimum gain attributable to a partner nonrecourse debt is allocable to the disposition of partnership property subject to such debt to the extent of any decrease during such year in the minimum gain attributable to such debt that resulted from the disposition of any such property. The determination of which items of partnership income and gain must be allocated pursuant to this paragraph (b)(4)(iv)(h)(4) for any partnership taxable year shall be made in a manner that is consistent with the principles of paragraph (b)(4)(iv)(e)(2) of this section. For purposes of this paragraph (b)(4)(iv)(h)(4), the items of partnership income and gain for a partnership taxable year do not include any item of income or gain that is allocated pursuant to a minimum gain chargeback for such year under paragraph (b)(4)(iv)(e) of this section. Any allocation of items of partnership income and gain required to be made pursuant to this paragraph (b)(4)(iv)(h)(4) for a partnership taxable



year must be made before any other allocation (other than a minimum gain chargeback pursuant to paragraph (b)(4)(iv)(e) of this section) of partnership items is made under section 704(b) for such year. For purposes of § 1.704-1(b)(2)(ii)(d)(6), offsetting increases in a partner's capital account taken into account under that paragraph do not include items of partnership income and gain that are expected to be allocated to that partner under this paragraph (b)(4)(iv)(h)(4), provided that any subsequent distributions that are expected to be made to such partner of proceeds of any partner nonrecourse debt (with respect to which such partner will bear the economic risk of loss at the time of distribution) that are allocable to an increase in the minimum gain attributable to such debt shall be deemed to be offset by increases to the partner's capital account for purposes of that section.

(5) *Partner's share of minimum gain attributable to partner nonrecourse debt.* For purposes of this paragraph (b)(4)(iv)(h), a partner's share of the minimum gain attributable to a partner nonrecourse debt at the end of any partnership taxable year equals the excess (if any) of—

(i) The sum of the partner nonrecourse deductions attributable to such debt that have been allocated to such partner (and such partner's predecessors in interest) up to that time and the aggregate amount of distributions made to such partner (and such partner's predecessors in interest) up to that time of proceeds of such debt that are allocable to an increase in the minimum gain attributable to such debt (but only if such partner (or such partner's predecessor in interest) bears the economic risk of loss for that debt at the time of any such distribution); over

(ii) The sum of such partner's (and such partner's predecessors in interest) aggregate share of the net decreases in the minimum gain attributable to such partner nonrecourse debt up to that time and such partner's (and such partner's predecessors in interest) aggregate share of the decreases up to that time in the minimum gain attributable to such partner nonrecourse debt resulting from revaluations of partnership property subject to such debt.

A partner's share of the net decrease in the minimum gain attributable to a partner nonrecourse debt for a partnership taxable year equals an amount that bears the same relation to the net decrease in the minimum gain attributable to such debt for such year as such partner's share of the minimum gain attributable to such debt at the end

of the immediately preceding taxable year of the partnership (or, if later, the time immediately following the last time that the capital accounts of the partners are increased pursuant to § 1.704-1(b)(2)(iv) (f) or (r) to reflect a revaluation of partnership property subject to such partner nonrecourse debt) bears to the amount of minimum gain attributable to such debt at the end of such preceding taxable year (or such later date). A partner's share of a decrease in the minimum gain attributable to a partner nonrecourse debt resulting from a revaluation of partnership property subject to such debt equals the amount of the increase in such partner's capital account that is attributable to such revaluation to the extent of the reduction in the minimum gain attributable to such debt caused by such revaluation. See paragraph (b)(4)(iv)(f) of this section for similar rules relating to partnership minimum gain. For purposes of § 1.704-1(b)(2)(ii)(d), the amount of a partner's share of the minimum gain attributable to any partner nonrecourse debt shall be added to the limited dollar amount, if any, of the deficit balance in such partner's capital account that such partner is obligated to restore, and a partner shall not otherwise be considered to have an obligation to restore a deficit balance in such partner's capital account as a result of bearing the economic risk of loss for any partner nonrecourse debt. See example (20)(viii) of paragraph (b)(5) of this section.

(6) *Net increase (or decrease) in minimum gain attributable to partner nonrecourse debt.* For purposes of this paragraph (b)(4)(iv)(h), the net increase (or decrease) in the minimum gain for a partnership taxable year that is attributable to a partner nonrecourse debt equals the sum of—

(i) Any increase (or decrease) in the net increase in partnership minimum gain during such year that would result if such partner nonrecourse debt were treated as a nonrecourse liability of the partnership; and

(ii) Any decrease (or increase) in the net decrease in partnership minimum gain during such year that would result if such partner nonrecourse debt were treated as a nonrecourse liability of the partnership.

In addition, for purposes of this paragraph (b)(4)(iv)(h), the amount of a decrease in the minimum gain attributable to a partner nonrecourse debt resulting from a revaluation of partnership property subject to such debt equals the excess of the aggregate amount of gain that would be realized

by the partnership immediately prior to such revaluation, over the aggregate amount of gain that would be realized by the partnership immediately after such revaluation if the partnership had, at each such time, disposed of (in a taxable transaction) the partnership property subject to such debt in full satisfaction thereof (and for no other consideration). Only the portion of the adjusted tax basis or book value, as the case may be, of the partnership property subject to such debt that is allocable to such debt under the principles of paragraph (b)(4)(iv)(c) (1) and (2) of this section shall be used in computing such gain.

(7) *Distribution of proceeds of partner nonrecourse debt allocable to an increase in the minimum gain attributable to such debt.* If a partnership makes a distribution to the partners during a partnership taxable year that is allocable to the proceeds of a partner nonrecourse debt, the amount of such distribution that is allocable to an increase in the minimum gain attributable to such debt equals the amount of the net increase during such year in the minimum gain attributable to such debt that arose as a result of incurring such debt or distributing proceeds of such debt. The rules of this paragraph (b)(4)(iv)(h)(7) shall be applied in a manner that is consistent with the principles of paragraph (b)(4)(iv)(g) of this section.

(8) *Debt with respect to which more than one partner bears the economic risk of loss.* If more than one partner bears the economic risk of a loss for different portions of a nonrecourse debt of the partnership, then each such portion shall be treated as a separate partner nonrecourse debt for purposes of this paragraph (b)(4)(iv).

(i) [Reserved.]

(j) *Tiered partnerships.* If a partnership (the "upper-tier partnership") is a partner in another partnership (the "subsidiary partnership"), then for purposes of applying this paragraph (b)(4)(iv) to the upper-tier partnership for any taxable year of the upper-tier partnership—

(1) The sum of—

(i) Any nonrecourse deductions of the subsidiary partnership allocated to the upper-tier partnership for such taxable year; and

(ii) Any distributions made during such taxable year to the upper-tier partnership by the subsidiary partnership of proceeds of a nonrecourse liability that are allocable to an increase to the partnership minimum gain of the subsidiary partnership;

shall be treated as an increase in the minimum gain of the upper-tier partnership that shall be taken into account in computing the net increase or decrease, as the case may be, in the partnership minimum gain of the upper-tier partnership for such taxable year;

(2) The upper-tier partnership's share for such taxable year of any net decrease in the partnership minimum gain of the subsidiary partnership shall be treated as a decrease in the minimum gain of the upper-tier partnership that shall be taken into account in computing the net increase or decrease, as the case may be, in the partnership minimum gain of the upper-tier partnership for such taxable year;

(3) The portion of the upper-tier partnership's share for such taxable year of any net decrease in the partnership minimum gain of the subsidiary partnership that is allocable to the disposition of property of the subsidiary partnership subject to one or more nonrecourse liabilities of the subsidiary partnership shall, for purposes of paragraph (b)(4)(iv)(e) of this section, be treated as a decrease during such year in the partnership minimum gain of the upper-tier partnership that resulted from the disposition of property of the upper-tier partnership that is subject to one or more nonrecourse liabilities of the upper-tier partnership;

(4) Any distributions made during such taxable year to the upper-tier partnership by the subsidiary partnership of proceeds of a nonrecourse liability that are allocable to an increase in the partnership minimum gain of the subsidiary partnership shall be treated as proceeds of a nonrecourse liability of the upper-tier partnership, and the increase in the minimum gain of the upper-tier partnership under paragraph (b)(4)(iv)(j)(1) of this section that is attributable to the receipt of such distributions shall, for purposes of paragraph (b)(4)(iv)(g) of this section, be treated as an increase in the minimum gain of the upper-tier partnership that arose as a result of encumbering property of the upper-tier partnership with such nonrecourse liability of the upper-tier partnership;

(5) Any nonrecourse deductions allocated to the upper-tier partnership by the subsidiary partnership for such taxable year shall, for purposes of paragraph (b)(4)(iv)(b) of this section, be treated as depreciation or cost recovery deductions with respect to an item of property of the upper-tier partnership subject to a nonrecourse liability of such partnership with respect to which the minimum gain increased during such

year by the amount of such nonrecourse deductions; and

(6) Any liability of the subsidiary partnership (within the meaning of the regulations under section 752) that is treated as a liability of the upper-tier partnership under § 1.752-1T(j)(1) shall be treated as a liability of the upper-tier partnership for purposes of applying paragraph (b)(4)(iv)(h) of this section, and rules incorporating the principles of subdivisions (1) through (5) of this paragraph (b)(4)(iv)(j) shall, to the extent appropriate, be applied to determine the allocations that the upper-tier partnership must make under paragraph (b)(4)(iv)(h) of this section with respect to any such liability that constitutes a nonrecourse debt for which one or more partners of the upper-tier partnership bear the economic risk of loss.

(k) *Meaning of certain terms.* For purposes of this paragraph (b)(4)(iv), the following terms have the meanings set forth below:

(1) *Economic risk of loss.* The determination of whether a partner bears the economic risk of loss with respect to any partnership liability shall be made in accordance with § 1.752-1T(d)(3) (without regard to whether that section applies to such liability).

(2) *Nonrecourse debt.* The term "nonrecourse debt" means any partnership liability that is considered nonrecourse for purposes of § 1.1001-2 (without regard to whether such liability is a recourse liability under § 1.752-1T(d)(2)) and any partnership liability for which the creditor's right to repayment is limited to one or more assets of the partnership (within the meaning of § 1.752-1T(d)(3)(ii)(B)(4)(ii)).

(3) *Nonrecourse liability.* The term "nonrecourse liability" means any partnership liability (or portion thereof) for which no partner bears the economic risk of loss.

(4) *Partner nonrecourse debt.* The term "partner nonrecourse debt" means any nonrecourse debt of the partnership for which any partner bears the economic risk of loss.

(i) [Reserved.]

(m) *Effective dates—(1) In general.* Except as otherwise provided in this paragraph (b)(4)(iv)(m), this paragraph (b)(4)(iv) shall apply for partnership taxable years beginning after December 29, 1988. For the rules applicable to taxable years beginning on or before December 29, 1988, see § 1.704-1(b)(4)(iv). If a partnership agreement entered into on or before December 29, 1988, complied with the provisions of § 1.704-1(b)(4)(iv)(d) on or before that date, the provisions of § 1.704-1(b)(4)(iv)(a) through (f) shall continue to apply to such partnership for any taxable year

beginning after that date (unless the partnership makes an election under paragraph (b)(4)(iv)(m)(2) of this section) and ending before any subsequent material modification to the partnership agreement.

(2) *Election.* A partnership may elect to apply the provisions of this paragraph (b)(4)(iv) to the first taxable year of such partnership ending after December 29, 1988. An election under this paragraph (b)(4)(iv)(m) is made by attaching a written statement to the partnership return for the first taxable year of such partnership ending after December 29, 1988. A written statement required pursuant to this paragraph (b)(4)(iv)(m)(2) must include the name, address, and taxpayer identification number of the partnership making such statement and contain a declaration that an election is being made under this paragraph (b)(4)(iv)(m).

(5) *Examples.* The operation of the rules of this paragraph is illustrated by the following examples:

*Examples (1) through (19).* [Reserved.]  
*Example (20).* (i) RM and HB form a limited partnership to acquire and operate a commercial office building. RM, the limited partner, contributes \$180,000, and HB, the general partner, contributes \$20,000 to the partnership, which obtains an \$800,000 nonrecourse loan and purchases the building (on leased land) for \$1,000,000. The nonrecourse loan is secured only by the building, and no principal payments are due for 5 years. The partnership agreement provides that the partners' capital accounts will be determined and maintained in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with partners' positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), HB will be required to restore any deficit balance in HB's capital account following the liquidation of HB's interest (as set forth in § 1.704-1(b)(2)(ii)(b)(3)), and RM will not be required to restore any deficit balance in RM's capital account following the liquidation of RM's interest. The partnership agreement contains a qualified income offset (as defined in § 1.704-1(b)(2)(ii)(d)), and, as of the end of each partnership taxable year discussed herein, the items described in § 1.704-1(b)(2)(ii)(d) (4), (5), and (6) are not reasonably expected to cause or increase a deficit balance in RM's capital account. In addition, the agreement contains a minimum gain chargeback (in accordance with paragraph (b)(4)(iv)(e) of this section). The partnership agreement provides that, except as otherwise required by its qualified income offset and minimum gain chargeback provisions, (a) all partnership items will be allocated 90 percent to RM and 10 percent to HB until the first time when the partnership has recognized items of income and gain that exceed the items of loss and deduction it has recognized over its life, and (b) all further



partnership items will be allocated equally between RM and HB. Finally, the partnership agreement provides that all distributions, other than distributions in liquidation of the partnership or of a partner's interest in the partnership, will be made 90 percent to RM and 10 percent to HB until a total of \$200,000 has been distributed, and thereafter all such distributions will be made equally to RM and HB. In each of the partnership's first 2 taxable years, it generates rental income of \$95,000, operating expenses (including land lease payments) of \$10,000, interest expense of \$80,000, and a cost recovery deduction of \$90,000, resulting in a net taxable loss of \$85,000 in each of those years. The allocations of these losses 90 percent to RM and 10 percent to HB have a substantial economic effect.

	RM	HB
Capital account on formation	\$180,000	\$20,000
Less: Net loss in years 1 and 2	(153,000)	(17,000)
Capital account at end of year 2	27,000	3,000

In the partnership's third taxable year, it again generates rental income of \$95,000, operating expense of \$10,000, interest expenses of \$80,000, and a cost recovery deduction of \$90,000, resulting in a net taxable loss of \$85,000. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liability at the end of that year, it would realize \$70,000 of gain (\$800,000 amount realized less \$730,000 adjusted tax basis). Since the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during the year) is \$70,000 and the partnership did not distribute any proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain, the amount of partnership nonrecourse deductions for that year is \$70,000, consisting of cost recovery deductions allowable with respect to the building of \$70,000. Pursuant to the partnership agreement all partnership items comprising the net taxable loss of \$85,000, including the \$70,000 nonrecourse deduction, are allocated 90 percent to RM and 10 percent to HB. The allocation of these items, other than the nonrecourse deductions, has a substantial economic effect.

	RM	HB
Capital account at end of year 2	\$27,000	\$3,000
Less: Net loss in year 3 (without nonrecourse deduction)	(13,500)	(1,500)
Less: Nonrecourse deduction in year 3	(63,000)	(7,000)
Capital account at end of year 3	(\$49,500)	(\$5,500)

This allocation of the \$70,000 nonrecourse deduction, 90 percent to RM and 10 percent to HB, satisfies requirement (2) of paragraph (b)(4)(iv)(d) of this section because the allocation is consistent with allocations,

which have a substantial economic effect, of other significant partnership items attributable to the building. Since the remaining requirements of paragraph (b)(4)(iv)(d) of this section are satisfied, the allocation of nonrecourse deductions is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's third taxable year, RM's and HB's shares of partnership minimum gain are \$63,000 and \$7,000, respectively. Therefore, pursuant to the next to last sentence in paragraph (b)(4)(iv)(f) of this section, RM is treated as obligated to restore a deficit balance in RM's capital account of \$63,000, so that in the succeeding year RM could be allocated up to an additional \$13,500 of partnership deductions, losses, and section 705(a)(2)(B) expenditures that are not nonrecourse deductions, and that allocation would be considered to have economic effect under the alternate economic effect test contained in § 1.704-1(b)(2)(ii)(d) even though such an allocation would increase a deficit capital account balance. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liability at the beginning of the partnership's fourth taxable year (and had no other economic activity in that year), the partnership minimum gain would be decreased from \$70,000 to zero. RM's and HB's shares of that net decrease would be \$63,000 and \$7,000, respectively. Upon such a disposition, the minimum gain chargeback would require (before any other allocation is made under section 704(b) with respect to partnership items for the partnership's fourth taxable year) that RM and HB be allocated \$63,000 and \$7,000 respectively, of the gain from that disposition.

(ii) Assume the same facts as originally stated in (i) except that the partnership agreement provides that all nonrecourse deductions of the partnership will be allocated equally between RM and HB. Furthermore, at the time the partnership agreement is entered into, there is a reasonable likelihood that over the partnership's life it will recognize amounts of income and gain significantly in excess of amounts of loss and deduction (other than nonrecourse deductions). The allocation of such excess equally between the partners pursuant to the partnership agreement will have a substantial economic effect. The allocation of all items, other than the nonrecourse deductions, 90 percent to RM and 10 percent to HB, has a substantial economic effect.

	RM	HB
Capital account on formation	\$180,000	\$20,000
Less: Net loss in years 1 and 2	(153,000)	(17,000)
Capital account at end of year 2	27,000	3,000
Less: Net loss in year 3 (without nonrecourse deduction)	(13,500)	(1,500)
Less: nonrecourse deduction in year 3	(35,000)	(35,000)

	RM	HB
Capital account at end of year 3	(\$21,500)	(\$33,000)

The allocation of the \$70,000 nonrecourse deduction equally between RM and HB satisfies requirement (2) of paragraph (b)(4)(iv)(d) of this section because the allocation is consistent with allocations, which will have a substantial economic effect, of other significant partnership items attributable to the building. Since the remaining requirements of paragraph (b)(4)(iv)(d) of this section are satisfied, the allocation of nonrecourse deductions is deemed to be made in accordance with the partners' interests in the partnership. The allocation of the nonrecourse deductions 75 percent to RM and 25 percent to HB (or in any other ratio between 90 percent to RM/10 percent to HB and 50 percent to RM/50 percent to HB) also would satisfy requirement (2) of paragraph (b)(4)(iv)(d) of this section.

(iii) Assume the same facts as originally stated in (i) except that the partnership agreement provides that RM will be allocated 99 percent, and HB 1 percent, of all nonrecourse deductions of the partnership. This allocation of the \$70,000 nonrecourse deduction does not satisfy requirement (2) of paragraph (b)(4)(iv)(d) because it is not reasonably consistent with allocations, which have a substantial economic effect, of any other significant partnership item attributable to the building. Therefore, the allocation of nonrecourse deductions will be disregarded, and the nonrecourse deductions of the partnership will be reallocated according to the partners' overall economic interests in the partnership, determined with reference to the factors set forth in § 1.704-1(b)(3)(ii).

(iv) Assume the same facts as originally stated in (i) except that, at the beginning of the partnership's fourth taxable year, RM contributes \$144,000 and HB contributes \$16,000 of additional capital to the partnership, which the partnership uses to reduce the amount of its nonrecourse liability from \$800,000 to \$640,000. In addition, in the partnership's fourth taxable year, it again generates rental income of \$95,000, operating expenses of \$10,000, interest expense of \$80,000, and a cost recovery deduction of \$90,000, resulting in net taxable loss of \$85,000. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liability at the end of that year, it would realize no gain (\$640,000 amount realized less \$640,000 adjusted tax basis). Therefore, the amount of partnership minimum gain at the end of the year is zero, which represents a net decrease in partnership minimum gain of \$70,000 during the year. RM's and HB's shares of this net decrease are \$63,000 and \$7,000 respectively, so that at the end of the partnership's fourth taxable year, RM's and HB's shares of partnership minimum gain are zero. Therefore, pursuant to the next to last sentence in paragraph (b)(4)(iv)(f) of this section, RM is no longer treated as being obligated to restore any deficit balance in

RM's capital account. Assuming the sum of the reductions to RM's capital account described in § 1.704-1(b)(2)(ii)(d) (4), (5), and (6) does not exceed \$94,500, the minimum gain chargeback does not require that either RM or HB be allocated items of income and gain in the partnership's fourth taxable year even though there is a net decrease in partnership minimum gain during that year. This is true because (1) none of the net decrease in partnership minimum gain for the partnership's fourth taxable year is allocable to the disposition of partnership property subject to nonrecourse liabilities of the partnership, (2) RM's capital account balance at the end of that year (before any allocation is made under section 704(b) to RM for such year) is \$94,500 (RM's capital account balance at the end of the partnership's third taxable year increased by RM's \$144,000 capital contribution), and (3) HB has a full deficit makeup obligation.

	RM	HB
Capital account at end of year 3	(\$49,500)	(\$5,500)
Plus: Contribution	144,000	16,000
Less: Net loss in year 4	(76,500)	(8,500)
Capital account at end of year 4	18,000	2,000

(v) Assume the same facts as originally stated in (i) except that the partnership incurred only a \$700,000 nonrecourse loan and, in addition, incurred a \$100,000 recourse loan, subordinate in priority to the nonrecourse loan, to which the partnership's building is also subject. Under paragraph (b)(4)(iv)(c) of this section, \$700,000 of the adjusted basis of the building at the end of the partnership's third taxable year is allocated to the nonrecourse liability (with the remaining \$30,000 allocated to the recourse liability) so that if the partnership disposed of the building in full satisfaction of the nonrecourse liability at the end of that year, it would realize no gain (\$700,000 amount realized less \$700,000 adjusted tax basis). Therefore, there is no minimum gain at the end of the partnership's third taxable year (and no increase in partnership minimum gain in such year). If, however, the \$700,000 nonrecourse loan were subordinate in priority to the \$100,000 recourse loan, under paragraph (b)(4)(iv)(c) of this section, only \$630,000 of the adjusted basis of the building would be allocated to the \$700,000 nonrecourse loan (the excess of the \$730,000 adjusted tax basis of the building at the end of the partnership's third taxable year over the balance of the superior \$100,000 recourse liability). In that case, the balance of the \$700,000 nonrecourse liability would exceed the adjusted tax basis of the building so allocated by \$70,000 so that there would be \$70,000 of minimum gain (and a \$70,000 increase in partnership minimum gain) in the partnership's third taxable year.

(vi) Assume the same facts as originally stated in (i) except that the partnership obtains a nonrecourse loan of \$200,000 at the end of its fourth taxable year, which is secured by a second mortgage on the building, and distributes this cash to its

partners at the beginning of its fifth taxable year. In addition, in its fourth and fifth taxable years, the partnership again generates rental income of \$95,000, operating expenses of \$10,000, interest expense of \$80,000, and a cost recovery deduction of \$90,000, resulting in a net taxable loss of \$85,000. Also assume that the partnership has distributed its \$5,000 of operating cash flow for each year (\$95,000 of rental income less \$10,000 of operating expense and \$80,000 of interest expense) to RM and HB at the end of each such year. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liabilities at the end of its fourth taxable year, the partnership would realize \$360,000 of gain (\$1,000,000 amount realized less \$640,000 adjusted tax basis). Thus, the net increase in partnership minimum gain during the partnership's fourth taxable year is \$290,000 (\$360,000 of minimum gain at the end of the fourth year less \$70,000 of minimum gain at the end of the third year). Because the partnership did not distribute any of the proceeds of the loan it obtained in its fourth year during that year, the amount of partnership nonrecourse deductions for that year is \$290,000. Under paragraph (b)(4)(iv)(b) of this section, if the partnership had distributed the proceeds of that loan to its partners at the end of its fourth year, the partnership's nonrecourse deductions for that year would have been reduced by the amount of that distribution because the proceeds of that loan are allocable to an increase in partnership minimum gain under paragraph (b)(4)(iv)(g) of this section. Since the nonrecourse deductions for the partnership's fourth taxable year exceed its actual deductions for that year, all \$180,000 of the partnership's deductions for that year are treated as nonrecourse deductions, and the \$110,000 excess nonrecourse deductions will be treated as an increase in minimum gain in the partnership's fifth taxable year under paragraph (b)(4)(iv)(b) of this section.

	RM	HB
Capital account at end of year 3 (including cash flow distributions)	(\$63,000)	(\$7,000)
Plus: Rental income in year 4	85,500	9,500
Less: Nonrecourse deduction in year 4	(162,000)	(18,000)
Less: Cash flow distributions in year 4	(4,500)	(500)
Capital account at end of year 4	(\$144,000)	(\$16,000)

At the end of the partnership's fourth taxable year, RM's and HB's shares of partnership minimum gain are \$225,000 and \$25,000, respectively, and RM is deemed to be obligated to restore a deficit balance of \$225,000 in RM's capital account at the end of that year. If the partnership were to dispose of the building in full satisfaction of the nonrecourse liabilities at the end of its fifth taxable year, the partnership would realize \$450,000 of gain (\$1,000,000 amount realized less \$550,000 adjusted tax basis). Therefore, the net increase in partnership minimum gain during the partnership's fifth taxable year is

\$200,000 (\$110,000 deemed increase plus the \$90,000 by which minimum gain at the end of the fifth year exceeds minimum gain at the end of the fourth year (\$450,000 less \$360,000)). At the beginning of its fifth year, the partnership distributed the \$200,000 of loan proceeds. Under paragraph (b)(4)(iv)(g)(3) of this section, the first \$110,000 of this distribution (an amount equal to the deemed increase in partnership minimum gain for the year) is considered allocable to an increase in partnership minimum gain for such year. As a result, the amount of nonrecourse deductions for the partnership's fifth taxable year is \$90,000 (\$200,000 net increase in minimum gain less \$110,000 distribution of nonrecourse liability proceeds that are allocable to an increase in minimum gain), and such nonrecourse deductions consist solely of the \$90,000 cost recovery deduction allowable with respect to the building. As a result of the distributions during the partnership's fifth taxable year, the total distributions to the partners over the partnership's life will equal \$225,000. Therefore, the last \$25,000 distributed to the partners during the fifth year will be divided equally between them under the partnership agreement. Thus, out of the \$200,000 distribution of loan proceeds at the beginning of the partnership's fifth taxable year, the first \$180,000 is distributed 90 percent to RM and 10 percent to HB, and the last \$20,000 is divided equally between them.

	RM	HB
Capital account at end of year 4	(\$144,000)	(\$16,000)
Plus: Net income in year 5 (without nonrecourse deduction)	4,500	500
Less: Nonrecourse deduction in year 5	(81,000)	(9,000)
Less: Distribution of loan proceeds	(172,000)	(28,000)
Less: Cash flow distribution in year 5	(2,500)	(2,500)
Capital account at end of year 5	(\$395,000)	(\$55,000)

At the end of the partnership's fifth taxable year, RM's share of partnership minimum gain is \$405,000 (\$225,000 share of minimum gain at the end of the fourth year plus \$180,000 of nonrecourse deductions for the fifth year) and a \$99,000 distribution of nonrecourse liability proceeds that are allocable to an increase in minimum gain) and HB's share of partnership minimum gain is \$45,000 (\$25,000 share of minimum gain at the end of the fourth year plus \$9,000 of nonrecourse deductions for the fifth year and an \$11,000 distribution of nonrecourse liability proceeds that are allocable to an increase in minimum gain). Accordingly, RM is considered obligated to restore a deficit balance of \$405,000 in RM's capital account at the end of that year.

(vii) Assume the same facts as originally stated in (i) except that RM and HB personally guarantee the "first" \$100,000 of the \$800,000 nonrecourse loan (i.e., only if the building is worth less than \$100,000 will they be called upon to make up any deficiency).



Under paragraph (b)(4)(iv)(c) of this section, only \$630,000 of the adjusted tax basis of the building is allocated to the \$700,000 nonrecourse portion of the loan because the collateral will be applied first to satisfy the \$100,000 guaranteed portion, in effect making it superior in priority to the remainder of the loan. On the other hand, if RM and HB were to guarantee the "last" \$100,000 (i.e., if the building is worth less than \$800,000, they will be called upon to make up the deficiency up to \$100,000), \$700,000 of the adjusted tax basis of the building would be allocated to the \$700,000 nonrecourse portion of the loan because the guaranteed portion in effect would be inferior in priority to it.

(viii) Assume the same facts as originally stated in (i) except that the \$800,000 loan is made by RM, the limited partner. Under paragraph (b)(4)(iv)(h) of this section, the \$800,000 obligation does not constitute a nonrecourse liability of the partnership for purposes of this paragraph (b)(4)(iv) because RM, a partner, bears the economic risk of loss for that loan within the meaning of § 1.752-1T(c)(3). The \$800,000 loan does, however, constitute a partner nonrecourse debt since that obligation is a nonrecourse debt (within the meaning of paragraph (b)(4)(iv)(k)(2) of this section) for which a partner bears the economic risk of loss. In the partnership's third taxable year, partnership minimum gain would have increased by \$70,000 if such debt were a nonrecourse liability of the partnership. Thus, under paragraph (b)(4)(iv)(h)(6) of this section, there is a net increase of \$70,000 in the minimum gain attributable to the \$800,000 partner nonrecourse debt for the partnership's third taxable year, and \$70,000 of the \$90,000 cost recovery deduction from the building for the partnership's third taxable year constitutes a partner nonrecourse deduction with respect to such debt. See paragraph (b)(4)(iv)(h)(3) of this section. Under paragraph (b)(4)(iv)(h)(2) of this section, this partner nonrecourse deduction must be allocated to RM, the partner that bears the economic risk of loss for that liability, and RM will, as a result of this allocation, be considered obligated to restore a deficit balance in RM's capital account of \$70,000. See paragraph (b)(4)(iv)(h)(5) of this section.

(ix) Assume the same facts as in (viii) except that the \$800,000 loan from RM to the partnership is a purchase money loan that "wraps around" a \$700,000 underlying nonrecourse note (also secured by the building) issued by RM to an unrelated person in connection with RM's acquisition of the building. Under these circumstances, RM bears the economic risk of loss with respect to only \$100,000 of the liability within the meaning of § 1.752-1T(c)(3). See § 1.752-1T(j) (example (18)). Therefore, for purposes of paragraph (b)(4)(iv) of this section, the \$800,000 liability will be treated as a \$700,000 nonrecourse liability of the partnership and a \$100,000 partner nonrecourse debt (inferior in priority to the \$700,000 liability) of the partnership for which RM bears the economic risk of loss. Under paragraph (b)(4)(iv)(h) of this section, \$70,000 of the \$90,000 cost recovery deduction realized in the partnership's third taxable year constitutes a partner nonrecourse deduction that must be allocated to RM.

**Example (21).** (i) RD and PK form a general partnership to acquire and operate residential real properties. Each partner contributes \$150,000 to the partnership. The partnership obtains a \$1,500,000 nonrecourse loan and purchases 3 apartment buildings (on leased land) for \$720,000 ("Property A"), \$540,000 ("Property B"), and \$540,000 ("Property C"), respectively. The nonrecourse loan is secured only by the 3 buildings, and no principal payments are due for 5 years. In each of the partnership's first 3 taxable years, it generates rental income of \$225,000, operating expenses (including land lease payments) of \$50,000, interest expense of \$175,000, and cost recovery deductions on the 3 properties of \$150,000 (\$60,000 on Property A, \$45,000 on Property B, and \$45,000 on Property C), resulting in a net taxable loss of \$150,000 in each of those years. If the partnership were to dispose of the 3 apartment buildings in full satisfaction of its nonrecourse liability at the end of its third taxable year, it would realize \$150,000 of gain (\$1,500,000 amount realized less \$1,350,000 adjusted tax basis). Since the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during that year) is \$150,000 and the partnership did not distribute any proceeds of a nonrecourse liability that are allocable to an increase in partnership minimum gain, the amount of partnership nonrecourse deductions for that year is \$150,000, consisting of cost recovery deductions allowable with respect to the 3 apartment buildings of \$150,000. The result would be the same if the partnership obtained 3 separate nonrecourse loans that were "cross-collateralized" (i.e., if each separate loan were secured by all 3 of the apartment buildings).

(ii) Assume the same facts as originally stated in (i) and that at the beginning of the partnership's fourth taxable year, the partnership (with the permission of the nonrecourse lender) disposes of Property A for \$835,000 and uses a portion of the proceeds to repay \$600,000 of the nonrecourse liability, reducing the balance to \$900,000. As a result of the disposition, the partnership recognizes gain of \$295,000 (\$835,000 amount realized less \$540,000 adjusted tax basis). Also during the partnership's fourth taxable year it generates rental income of \$135,000, operating expenses of \$30,000, interest expense of \$105,000, and cost recovery deductions of \$90,000 (\$45,000 on each remaining building). If the partnership were to dispose of the remaining two buildings in full satisfaction of its nonrecourse liability at the end of the partnership's fourth taxable year, it would realize gain of \$180,000 (\$900,000 amount realized less \$720,000 aggregate adjusted tax basis), which represents the amount of partnership minimum gain at the end of such year. Since the amount of partnership minimum gain increased from \$150,000 to \$180,000 during the partnership's fourth taxable year, the amount of partnership nonrecourse deductions for such year is \$30,000, consisting of cost recovery deductions allowable with respect to the two remaining apartment buildings. No minimum gain chargeback is required for the taxable year, even though the partnership disposed of one of the properties subject to

the nonrecourse liability during the year, because there is no net decrease in partnership minimum gain for the year.

**Example (22).** (i) OC and DR form a limited partnership to acquire and lease machinery that is 5-year recovery property. The partnership elects under section 48(q)(4) to reduce the amount of investment tax credit in lieu of adjusting the tax basis of such machinery. OC, the limited partner, and DR, the general partner, contribute \$100,000 each to the partnership, which obtains an \$800,000 nonrecourse loan and purchases the machinery for \$1,000,000. The nonrecourse loan is secured only by the machinery. The principal amount of the loan is to be repaid \$50,000 per year during each of the partnership's first 5 taxable years, with the remaining \$550,000 of unpaid principal due on the first day of the partnership's sixth taxable year. The partnership agreement provides that the partners' capital accounts will be determined and maintained in accordance with § 1.704-1(b)(2)(iv), distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partner's positive capital account balances (as set forth in § 1.704-1(b)(2)(ii)(b)(2)), DR will be required to restore any deficit balance in DR's capital account following the liquidation of DR's interest (as set forth in § 1.704-1(b)(2)(ii)(b)(3)), and OC will not be required to restore any deficit balance in his capital account following the liquidation of his interest. The partnership agreement contains a qualified income offset (as defined in § 1.704-1(b)(2)(ii)(d)), and, as of the end of each partnership taxable year discussed herein, the items described in § 1.704-1(b)(2)(ii)(d) (4), (5), and (6) are not reasonably expected to cause or increase a deficit balance in OC's capital account. In addition, the agreement contains a minimum gain chargeback (in accordance with paragraph (b)(4)(iv)(e) of this section). The partnership agreement provides that, except as otherwise required by its qualified income offset and minimum gain chargeback provisions, all partnership items will be allocated equally between OC and DR. Finally, the partnership agreement provides that all distributions, other than distributions in liquidation of the partnership or of a partner's interest in the partnership, will be made equally between OC and DR. In the partnership's first taxable year it generates rental income of \$130,000 interest expense of \$80,000, and a cost recovery deduction of \$150,000, resulting in a net taxable loss of \$100,000. In addition, the partnership repays \$50,000 of the nonrecourse liability, reducing that liability to \$750,000. Allocations of these losses equally between OC and DR have substantial economic effect. partnership minimum gain for the year.

	OC	DR
Capital account on formation	\$100,000	\$100,000
Less: net loss in year 1	(50,000)	(50,000)
Capital account at end of year 1	50,000	50,000

In the partnership's second taxable year, it generates rental income of \$130,000, interest expense of \$75,000, and a cost recovery deduction of \$220,000 resulting in a net taxable loss of \$165,000. In addition, the partnership repays \$50,000 of the nonrecourse liability, reducing that liability to \$700,000, and distributes \$2,500 of cash to each partner. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the end of that year, it would realize \$70,000 of gain (\$700,000 amount realized less \$630,000 adjusted tax basis). Therefore, the amount of partnership minimum gain at the end of that year (and the net increase in partnership minimum gain during the year) is \$70,000, and the amount of partnership nonrecourse deductions for the year is \$70,000 since the partnership did not distribute any proceeds of a nonrecourse liability to the partners during that year. The partnership nonrecourse deductions for its second taxable year consist of \$70,000 of the cost recovery deductions allowable with respect to the machinery. Pursuant to the partnership agreement, all partnership items comprising the net taxable loss of \$165,000, including the \$70,000 nonrecourse deduction, are allocated equally between OC and DR. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect.

	OC	DR
Capital account at end of year 1	\$50,000	\$50,000
Less: net loss in year 2 (without nonrecourse deduction)	(47,500)	(47,500)
Less: nonrecourse deduction in year 2	(35,000)	(35,000)
Less: distribution	(2,500)	(2,500)
Capital account at end of year 2	(35,000)	(35,000)

This allocation of the \$70,000 nonrecourse deduction equally between OC and DR satisfies requirement (2) of paragraph (b)(4)(iv)(d) of this section because the allocation is consistent with allocations, which have substantial economic effect, of other significant partnership items attributable to the machinery. Since the remaining requirements of paragraph (b)(4)(iv)(d) of this section are satisfied, the allocation of nonrecourse deductions is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's second taxable year, OC's and DR's shares of partnership minimum gain are \$35,000 each. Therefore, pursuant to the next to the last sentence in paragraph (b)(4)(iv)(f) of this section, OC is treated as obligated to restore a deficit balance in his capital account of \$35,000. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the beginning of the partnership's third taxable year (and had no

other economic activity in that year), the partnership minimum gain would be decreased from \$70,000 to zero. OC's and DR's shares of that net decrease would be \$35,000 each. Upon such a disposition, the minimum gain chargeback would require that OC and DR each be allocated \$35,000 of that gain (before any other allocation is made under section 704(b) with respect to partnership items for the partnership's third taxable year).

(ii) Assume the same facts as originally stated in (i) and that DT is admitted to the partnership at the beginning of the partnership's third taxable year. At the time of DT's admission, the fair market value of the machinery is \$900,000. DT contributes \$100,000 to the partnership (the partnership invests \$95,000 of this in undeveloped land and holds the other \$5,000 in cash) in exchange for an interest in the partnership. In connection with DT's admission to the partnership, the partnership's machinery is revalued on the partnership's books to reflect its fair market value of \$900,000. Pursuant to § 1.704-1(b)(2)(iv)(f), the capital accounts of OC and DR are adjusted upwards to \$100,000 each to reflect the revaluation of the partnership's machinery. This adjustment reflects the manner in which the partnership gain of \$270,000 (\$900,000 fair market value minus \$630,000 adjusted tax basis) would be shared if the machinery were sold for its fair market value immediately prior to DT's admission to the partnership.

	OC	DR
Capital account before DT's admission	(35,000)	(35,000)
Deemed sale adjustment	135,000	135,000
Capital account adjusted for DT's admission	100,000	100,000

The partnership agreement is modified to provide that, except as otherwise required by its qualified income offset and minimum gain chargeback provisions, partnership income, gain, loss, and deduction, as computed for book purposes, will be allocated equally among the partners, and such allocations will be reflected in the partners' capital accounts. The partnership agreement also is modified to provide that depreciation and gain or loss, as computed for tax purposes, with respect to the machinery will be shared among the partners in a manner that takes account of the variation between such property's \$630,000 adjusted tax basis and its \$900,000 book value, in accordance with § 1.704-1(b)(2)(iv)(f) and the special rule contained in § 1.704-1(b)(4)(i). Finally, the partnership agreement is modified to provide that DT will not be required to restore any deficit balance in DT's capital account following the liquidation of DT's interest. Since the requirements of § 1.704-1(b)(2)(iv)(g) are satisfied, the capital accounts of the partners (as adjusted) continue to be maintained in

accordance with § 1.704-1(b)(2)(iv). If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability immediately following the revaluation of the machinery, it would realize no book gain (\$700,000 amount realized less \$900,000 book value). Thus, as a result of the revaluation of the machinery upward by \$270,000, the partnership minimum gain is reduced from \$70,000 immediately prior to such revaluation to zero. Under paragraph (b)(4)(iv)(f) of this section, OC's and DR's shares of that decrease are \$35,000 each.

(iii) Assume the same facts as in (ii) and that also during the partnership's third taxable year the partnership generates rental income of \$130,000, interest expense of \$70,000, a cost recovery deduction of \$210,000, and a book depreciation deduction (attributable to the machinery) of \$300,000. As a result the partnership has a net taxable loss of \$150,000 and net book loss of \$240,000. In addition, the partnership repays \$50,000 of the nonrecourse liability (after the date of DT's admission), reducing the liability to \$650,000, and distributes \$5,000 of cash to each partner. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the end of the year, \$50,000 of book gain would result (\$650,000 amount realized less \$600,000 book value). Therefore, the amount of partnership minimum gain at the end of the year is \$50,000, which represents a net decrease in partnership minimum gain of \$20,000 during the year. (This is so even though there would be an increase in partnership minimum gain in the partnership's third taxable year if minimum gain were computed with reference to the adjusted tax basis of the machinery.) Nevertheless, pursuant to the next to the last sentence of paragraph (b)(4)(iv)(c) of this section, the amount of nonrecourse deductions of the partnership for its third taxable year is \$50,000 (the net increase in partnership minimum gain during the year determined by adding back the \$70,000 decrease in partnership minimum gain attributable to the revaluation of the machinery to the \$20,000 net decrease in partnership minimum gain during the year). The \$50,000 of partnership nonrecourse deductions for the year consist of book depreciation deductions allowable with respect to the machinery of \$50,000. Pursuant to the partnership agreement all partnership items comprising the net book loss of \$240,000 including the \$50,000 nonrecourse deduction, are allocated equally among the partners. The allocation of these items, other than the nonrecourse deductions, has substantial economic effect. Consistent with the special partners' interests in the partnership rule contained in § 1.704-1(b)(4)(i), the partnership agreement provides that the \$210,000 cost recovery deduction for the partnership's third taxable year is, in accordance with section 704(c) principles, shared \$55,000 to OC, \$55,000 to DR, and \$100,000 to DT.



	OC		DR		DT	
	Tax	Book	Tax	Book	Tax	Book
Capital account at end of year 2.....	(\$35,000)	\$100,000	(\$35,000)	\$100,000	\$100,000	\$100,000
Less: nonrecourse deduction.....	(9,166)	(16,666)	(9,166)	(16,666)	(16,666)	(16,666)
Plus: items other than nonrecourse deduction in year 3.....	(25,834)	(63,334)	(25,834)	(63,334)	(63,334)	(63,334)
Less: distribution.....	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)
Capital account at end of year 3.....	(75,000)	15,000	(75,000)	15,000	15,000	15,000

The allocation of the \$50,000 nonrecourse deduction equally among OC, DR, and DT satisfies requirement (2) of paragraph (b)(4)(iv)(d) of this section because the allocation is consistent with allocations, which have substantial economic effect, of other significant partnership items attributable to the machinery. Since the remaining requirements of paragraph (b)(4)(iv)(d) of this section are satisfied, such allocation is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's third taxable year, OC's, DR's, and DT's shares of partnership minimum gain are \$16,666 each.

(iv) Assume the same facts as in (iii) and that during the partnership's fourth taxable year the partnership generates rental income of \$130,000, interest expense of \$65,000, a cost

recovery deduction of \$210,000, and a book depreciation deduction (attributable to the machinery) of \$300,000. As a result, the partnership has a net taxable loss of \$145,000 and a net book loss of \$235,000. In addition, the partnership repays \$50,000 of the nonrecourse liability, reducing that liability to \$600,000, and distributes \$5,000 of cash to each partner. If the partnership were to dispose of the machinery in full satisfaction of the nonrecourse liability at the end of the year, \$300,000 of book gain would result (\$600,000 amount realized less \$300,000 book value). Therefore, the amount of partnership minimum gain as of the end of the year is \$300,000, which represents a net increase in partnership minimum gain during the year of \$250,000. Thus, since the partnership did not distribute any proceeds of a nonrecourse liability that are allocable to an increase in

partnership minimum gain, the amount of partnership nonrecourse deductions for that year equals \$250,000, consisting of book depreciation deductions of \$250,000. Pursuant to the partnership agreement, all partnership items comprising the net book loss of \$235,000, including the \$250,000 nonrecourse deduction, are allocated equally among the partners. That allocation of all items, other than the nonrecourse deductions, has substantial economic effect. Consistent with the special partners' interests in the partnership rule contained in § 1.704-1(b)(4)(i), the partnership agreement provides that the \$210,000 cost recovery deduction for the partnership's fourth taxable year is, in accordance with section 704(c) principles, shared \$55,000 to OC, \$55,000 to DR, and \$100,000 to DT.

	OC		DR		DT	
	Tax	Book	Tax	Book	Tax	Book
Capital account at end of year 3.....	(\$75,000)	\$15,000	(\$75,000)	\$15,000	\$15,000	\$15,000
Less: nonrecourse deduction.....	(45,833)	(83,333)	(83,333)	(83,333)	(83,333)	(83,333)
Plus: items other than nonrecourse deduction in year 4.....	12,499	5,000	12,499	5,000	5,000	5,000
Less: distribution.....	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)
Capital account at end of year 4.....	(113,334)	(68,333)	(113,333)	(68,333)	(68,333)	(68,333)

The allocation of the \$250,000 nonrecourse deduction equally among OC, DR, and DT satisfies requirement (2) of paragraph (b)(4)(iv)(d) of this section. Since the remaining requirements of paragraph (b)(4)(iv)(d) of this section are satisfied, such allocation is deemed to be made in accordance with the partners' interests in the partnership. At the end of the partnership's third taxable year, OC's, DR's, and DT's shares of partnership minimum gain are \$100,000 each.

(v) Assume the same facts as (iv) and that at the beginning of the partnership's fifth taxable year it sells the machinery for \$650,000 (using \$600,000 of the proceeds to repay the nonrecourse liability), resulting in a

taxable gain of \$440,000 (\$650,000 amount realized less \$210,000 adjusted tax basis) and a book gain of \$350,000 (\$650,000 amount realized less \$300,000 book basis). The partnership has no other items of income, gain, loss, or deduction for such year. As a result of the sale, partnership minimum gain is reduced from \$300,000 to zero, reducing OC's, DR's, and DT's shares of partnership minimum gain to zero from \$100,000 each. The minimum gain chargeback requires that OC, DR, and DT each be allocated \$100,000 of that gain (an amount equal to each partner's share of the net decrease in partnership minimum gain resulting from the sale) before any allocation is made to them under section 704(b) with respect to partnership items for

the partnership's fifth taxable year. Thus, the allocation of the first \$300,000 of book gain \$100,000 to each of the partners is deemed to be made in accordance with the partners' interests in the partnership under paragraph (b)(4)(iv)(e) of this section. The allocation of the remaining \$50,000 of book gain equally among the partners has substantial economic effect. Consistent with the special partners' interests in the partnership rule contained in § 1.704-1(b)(4)(i), the partnership agreement provides that the \$440,000 taxable gain is, in accordance with section 704(c) principles, shared \$161,667 to OC, \$161,667 to DR, and \$116,666 to DT.

	OC		DR		DT	
	Tax	Book	Tax	Book	Tax	Book
Capital account at end of year 4.....	(\$113,334)	(\$68,333)	(\$113,334)	(\$68,333)	(\$68,333)	(\$68,333)
Plus: minimum gain chargeback.....	138,573	100,000	138,573	100,000	100,000	100,000
Plus: additional gain.....	23,094	16,666	23,094	16,666	16,666	16,666
Capital account before liquidation.....	48,333	48,333	48,333	48,333	48,333	48,333

**Example (29).** (i) A partnership owns 4 properties, each of which is subject to a nonrecourse liability of the partnership. During a taxable year of the partnership, the following events take place. First, the partnership generates a cost recovery deduction (for both book and tax purposes) with respect to Property W of \$10,000 and repays \$5,000 of the nonrecourse liability secured only by that property, resulting in an increase in minimum gain with respect to that liability of \$5,000. Second, the partnership generates a cost recovery deduction (for both book and tax purposes) with respect to Property X of \$10,000 and repays none of the nonrecourse liability secured by that property, resulting in an increase in minimum gain with respect to that liability of \$10,000. Third, the partnership generates a cost recovery deduction (for both book and tax purposes) of \$2,000 on Property Y and repays \$11,000 of the nonrecourse liability secured only by that property, resulting in a decrease in minimum gain with respect to that liability of \$9,000 (although at the end of that year, there remains minimum gain with respect to that liability). Finally, the partnership borrows \$5,000 on a nonrecourse basis, giving as the only security for that liability Property Z, which is a parcel of undeveloped land with an adjusted tax basis (and book value) of \$2,000, resulting in a net increase in minimum gain with respect to that liability of \$3,000. The net increase in partnership minimum gain during that year is \$9,000, so that the amount of nonrecourse deductions of the partnership for that taxable year is \$9,000. Those nonrecourse deductions consist of \$3,000 of cost recovery deductions with respect to Property W and \$6,000 of cost recovery deductions with respect to Property X. The amount of nonrecourse deductions consisting of cost recovery deductions is determined as follows. With respect to the nonrecourse liability secured by Property Z, with respect to which there is no cost recovery deduction, the amount of cost recovery deductions that constitutes nonrecourse deductions is zero. Similarly, with respect to the nonrecourse liability secured by Property Y, for which there is no increase in minimum gain, the amount of cost recovery deductions that constitutes nonrecourse deductions is zero. With respect to each of the nonrecourse liabilities secured by Properties W and X, which are (i) secured by property with respect to which there are cost recovery deductions and (ii) for which there is an increase in minimum gain, the amount of cost recovery deductions that constitutes nonrecourse deductions equals the product obtained by multiplying the net increase in partnership minimum gain (\$9,000) times a fraction, the numerator of which is the total cost recovery deductions with respect to the partnership property securing that particular liability to the extent of the increase in minimum gain with respect to that liability and the denominator of which is the sum of the numerators for each such liability. Thus, for the liability secured by Property W, the amount is \$9,000 times \$5,000/\$15,000. For

the liability secured by Property X, the amount is \$9,000 times \$10,000/\$15,000. (If one depreciable property secured 2 partnership nonrecourse liabilities, the amount of cost recovery or book depreciation with respect to that property would be allocated among such liabilities in accordance with the method by which adjusted basis is allocated under § 1.704-1(b)(2)(iv)(c)).

(ii) Assume the facts as in (i) except that the loan secured by Property Z is \$15,000 (rather than \$5,000), resulting in a net increase in minimum gain with respect to that liability of \$13,000. Thus, the net increase in partnership minimum gain is \$19,000, and the amount of nonrecourse deductions of the partnership for that taxable year is \$19,000. Those nonrecourse deductions consist of \$5,000 of cost recovery deductions with respect to Property W, \$10,000 of cost recovery deductions with respect to Property X, and a pro rata portion of the partnership's other items of deduction, loss, and section 705(a)(2)(B) expenditure for that year. The method for computing the amounts of cost recovery deductions that constitute nonrecourse deductions is the same as in (i) for the liabilities secured Properties Y and Z. With respect to each of the nonrecourse liabilities secured by Properties W and X, the amount of cost recovery deductions that constitutes nonrecourse deductions equals the total cost recovery deductions with respect to the partnership property securing that particular liability to the extent of the increase in minimum gain with respect to that liability.

#### § 1.704-1 [Amended]

Par. 5. Section 1.704-1 is amended as follows:

1. Paragraph (b)(0) is amended by removing the words "Nonrecourse liabilities of the partnership where a person related to a partner has economic risk of loss . . . 1.704-1(b)(4)(iv)(h)" from the table and adding, in their place, the words "Effective date and cross reference . . . 1.704-1(b)(4)(iv)(h)."

2. Paragraph (b)(2)(ii)(c) is amended by adding the following new sentence to the end thereof: "For purposes of this paragraph (b)(2), if a partner contributes a promissory note to the partnership during a partnership taxable year beginning after December 29, 1988 and the maker of such note is a person related to such partner (within the meaning of § 1.752-1T(h), but without regard to subdivision (4) of that section), then such promissory note shall be treated as a promissory note of which such partner is the maker."

3. Paragraph (b)(2)(ii)(h) is amended by adding the following new sentence to the end thereof: "For purposes of the preceding sentence, sections 267(b) and

707(b)(1) shall be applied for partnership taxable years beginning after December 29, 1988 by (1) substituting "80 percent or more" for "more than 50 percent" each place it appears in such sections, (2) excluding brothers and sisters from the members of a person's family, and (3) disregarding section 267(f)(1)(A)."

4. Paragraph (b)(2)(ii)(d)(6) is amended by removing from the last parenthetical the words "under paragraph (b)(4)(iv)(e) of this section."

5. Paragraph (b)(4)(iv)(h) is revised to read as follows:

(h) *Effective date and cross reference.* The rules of this paragraph (b)(4)(iv) generally are effective only for partnership taxable years beginning on or before December 29, 1988. See § 1.704-1T(b)(4)(iv)(m) for transition rules. For the rules generally applicable to allocations attributable to nonrecourse liabilities for partnership taxable years beginning after December 29, 1988, see § 1.704-1T(b)(4)(iv). See paragraph (b)(1)(ii) of this section for additional rules regarding the effective date of this section.

#### PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 6. The authority for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

#### § 602-101 [Amended]

Par. 7. Section 602.101(c) is amended by inserting the following in the appropriate places in the table:

- "1.752-4T . . . [1545-1090]."
- "1.704-1T(b)(4)(iv)(m)(2) . . . [1545-1090]."

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

Lawrence B. Gibbs,  
Commissioner of Internal Revenue.

Approved:

O. Donaldson Chapoton,  
Assistant Secretary of the Treasury.

December 2, 1988.

[FR Doc. 88-29765 Filed 12-29-88; 8:45 am]

BILLING CODE 4830-01-M



## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Parts 1 and 602

[PS-229-84]

**Treatment of Partnership Liabilities; Allocations Attributable to Nonrecourse Liabilities**

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

**SUMMARY:** In the rules and regulations portion of this issue of the *Federal Register*, the Internal Revenue Service is issuing final and temporary regulations concerning the treatment of partnership liabilities and the allocation of deductions attributable to nonrecourse debt. The temporary regulations reflect changes to the applicable tax law made by section 79 of the Tax Reform Act of 1984. The text of the temporary regulations also serves as the comment document for this notice of proposed rulemaking.

**DATES:** Written comments and requests for a public hearing must be delivered or mailed by March 30, 1989.

**ADDRESS:** Send comments and requests for a public hearing to: Internal Revenue Service, Attn: CC:CORP:T:R (PS-229-84), Room 4429, Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Robert E. Shaw, 202-343-8459, or Mary Munday, 202-377-9470 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****Paperwork Reduction Act**

The collections of information contained in this notice of proposed

rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer TR:FP, Washington, DC 20224.

The collections of information in this regulation are in §§ 1.752-4T(c) and 1.704-1T(b)(4)(iv)(m)(2). This information is required by the Internal Revenue Service to administer sections 752 and 704(b). The respondents are partnerships who wish to make the elections under §§ 1.752-4T(c) and 1.704-1T(b)(4)(iv)(m)(2).

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

*Estimated total annual reporting burden:* 417 hrs.

The estimated annual burden per respondent varies from 3 minutes to 6 minutes, depending on individual circumstances, with an estimated average of 5 minutes.

*Estimated number of respondents:* 5,000.

*Estimated annual frequency of responses:* 1.

**Background**

The temporary regulations in the Rules and Regulations portion of this issue of the *Federal Register* amend the Income Tax Regulations (26 CFR Part 1)

under sections 752 and 704(b) of the Internal Revenue Code of 1986.

For the text of the temporary regulations, see T.D. 8237 published in the Rules and Regulations portion of this issue of the *Federal Register*. The preamble to the temporary regulations explains the amendments to the regulations.

**Special Analyses**

These rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for interpretative regulations. Therefore, these rules do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6) and a Regulatory Flexibility Analysis is not required.

**Comments and Request for a Public Hearing**

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably a signed original) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety. A public hearing will be scheduled and held upon written request by any person who submits written comments on the proposed rules. Notice of the time and place for the hearing will be published in the *Federal Register*.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 88-29764 Filed 12-29-88; 8:45 am]

BILLING CODE 4830-01-M

Friday  
December 30, 1988

## Part III

## Department of Health and Human Services

## Food and Drug Administration

## 21 CFR Part 179

Irradiation in the Production, Processing, and Handling of Food; Final Rule; Denial of Request for Hearing and Response to Objection

Federal Register



## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## FOOD AND DRUG ADMINISTRATION

## 21 CFR Part 178

[Docket Nos. 81N-0004 and 84F-0230]

## Irradiation in the Production, Processing, and Handling of Food

AGENCY: Food and Drug Administration.

ACTION: Final rule; denial of requests for hearing and response to objections.

**SUMMARY:** The Food and Drug Administration (FDA) is denying the requests that it has received for a hearing on the final rules that amended the food additive regulations to authorize the use of gamma radiation for the treatment of pork to control *Trichinella spiralis* and for the treatment of certain other foods. After reviewing the objections to the two final rules and the requests for a hearing, FDA has concluded that none of the objections has provided the information necessary to justify a hearing. FDA, however, is amending the language in the regulation that describes minor dry ingredients that may be radiation sterilized because objections and experience have shown that this language is ambiguous.

**DATES:** The amendment in 179.26(b) (21 CFR 179.26(b)) is effective December 30, 1988; written objections on the amendment and requests for a hearing on the amendment by January 30, 1989.

**ADDRESS:** Written objections on the amendment to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Clyde A. Takeguchi, Center for Food Safety and Applied Nutrition (HFF-330), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5740.

**SUPPLEMENTARY INFORMATION:****I. Background**

In the Federal Register of July 22, 1985 (50 FR 29658), in response to a petition by Radiation Technology, Inc., FDA issued a final rule authorizing the irradiation of fresh pork to control *Trichinella spiralis*. FDA based its decision on data in the petition and in its files. The agency had published a notice announcing the filing of the petition (FAP 4M3789) in the Federal Register of July 23, 1984 (49 FR 29682).

In the Federal Register of April 18, 1986 (51 FR 13376), FDA issued a final rule, referred to herein as the "omnibus

rule," that: (1) permitted manufacturers to use radiation at doses not to exceed 1 kilogray (kGy)(100 krad) to inhibit the growth and maturation of fresh foods and to disinfect food of arthropod pests; (2) permitted manufacturers to use radiation at doses not to exceed 30 kGy (3 Mrad) to disinfect dry or dehydrated aromatic vegetable substances (such as spices and herbs) of microorganisms; (3) required that foods that are irradiated be labeled to show this fact both at the wholesale and at the retail level; and (4) required that manufacturers maintain process records of irradiation for a specified period and make such records available for FDA inspection. FDA initiated this action by publishing a proposal in the Federal Register of February 14, 1984 (49 FR 5713).

**A. Requests for hearing on final rules**

Section 409(f) of the Federal Food, Drug, and Cosmetic Act (the act), 21 U.S.C. 348(f), provides that, within 30 days after publication of an order relating to a food additive regulation, any person adversely affected by such an order may file objections specifying with particularity the provisions of the order considered objectionable, stating reasonable grounds for the objections, and requesting a public hearing on such objections.

Under 21 CFR 171.110 of the food additive regulations, objections and requests for a hearing are governed by 21 CFR Part 12 of FDA's regulations. Under 21 CFR 12.22(a), (1) each objection must be submitted on or before the 30th day after the date of publication of the final rule; (2) each objection must be separately numbered; (3) each objection must specify with particularity the provision of the regulation or proposed order objected to; (4) each objection on which a hearing is requested must specifically so state; failure to request a hearing on an objection constitutes a waiver of the right to a hearing on that objection; and (5) each objection requesting a hearing must include a detailed description and analysis of the factual information to be presented in support of the objection. Failure to include a description and analysis for an objection constitutes a waiver of the right to a hearing on that objection.

FDA received 59 objections to the irradiated pork rule and 245 objections to the omnibus rule. Many of the objections expressed general opposition to food irradiation but identified no substantive question to which the agency can respond. Because these objections failed to raise any basis on which to question the validity of the final rules, the agency is denying them.

Seventeen objections to the irradiated pork rule and 53 objections to the omnibus rule pointed to a specific aspect of the rule but did not request a hearing. Twenty objections to the irradiated pork rule and 12 objections to the omnibus rule requested a hearing. These objections are addressed below.

Some of the objections requested a stay of the regulations. In the Federal Register of February 23, 1987 (52 FR 5450), FDA denied these requests because the public interest did not require a stay. FDA evaluated each of the contentions made in support of a stay and concluded that they failed to create significant doubts about the safety of the food irradiated under the conditions of either of the two regulations.

**B. Standard for granting a hearing**

The criteria for deciding whether to grant or deny a hearing are stated in 21 CFR 12.24(b). The regulation states that a hearing will be granted when the material submitted shows the following:

- (1) There is a genuine and substantial issue of fact for resolution at a hearing. A hearing will not be granted on issues of policy or law.
- (2) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions.
- (3) The data and information submitted, if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by the person. A hearing will be denied if the Commissioner concludes that the data and information submitted are insufficient to justify the factual determination urged, even if accurate.
- (4) Resolution of the factual issue in the way sought by the person is adequate to justify the action requested. A hearing will not be granted on factual issues that are not determinative with respect to the action requested, e.g., if the Commissioner concludes that the action would be the same even if the factual issue were resolved in the way sought, or if a request is made that a final regulation include a provision not reasonably encompassed by the proposal.

(5) The action requested is not inconsistent with any provision in the act or any regulation in this chapter particularizing statutory standards. The proper procedure in those circumstances is for the person requesting the hearing to petition for an amendment or waiver of the regulation involved.

(6) The requirements in other applicable regulations, e.g., 21 CFR 10.20, 12.21, 12.22, 314.200, 430.20(b), 514.200, and 601.7(a), and in the notice promulgating the final regulation or the notice of opportunity for hearing are met.

A party seeking a hearing is required to meet a "threshold burden of tendering evidence suggesting the need for a hearing." *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 214-215 (1980), reh. den., 445 U.S. 947 (1980), citing *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973). An allegation that a hearing is necessary to "sharpen the issues" or to "fully develop the facts" does not meet this test. *Georgia Pacific Corp. v. U.S. E.P.A.*, 671 F.2d 1235, 1241 (9th Cir. 1982). If a hearing request fails to identify any evidence that would be the subject of a hearing, there is no point in holding one.

A hearing request must not only contain evidence, but that evidence must raise a material issue of fact concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n v. FDA*, 673 F.2d 1083, 1085 (9th Cir. 1982). Where the issues raised in the objection are, even if true, legally insufficient to alter the decision, the agency need not grant a hearing. *Dyestuffs and Chemicals, Inc. v. Flemming*, 271 F.2d 281 (8th Cir. 1959), cert. denied, 362 U.S. 911 (1960). FDA need not grant a hearing in each case where an objector submits additional information or posits a novel interpretation of existing information. (See *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971)). Stated another way, a hearing is justified only if the objections are made in good faith, and if they "draw in question in a material way the underpinnings of the regulation at issue." *Pactra Industries v. CPSC*, 555 F.2d 677 (9th Cir. 1977). Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy. (See *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969); *Sun Oil Co. v. FPC*, 256 F.2d 233, 240 (5th Cir.), cert. denied, 358 U.S. 872 (1958)).

Even if the objections raise material issues of fact, FDA need not grant a hearing if those same issues were adequately raised and considered in an earlier proceeding. Once an issue has been so raised and considered, a party is estopped from raising that same issue in a later proceeding without new evidence. The various judicial doctrines dealing with finality are validly applied to the administrative process. In explaining why these principles "self-

evidently" ought to apply to an agency proceeding, the D.C. Circuit wrote:

The underlying concept is as simple as this: Justice requires that a party have a fair chance to present his position. But overall interests of administration do not require or generally contemplate that he will be given more than a fair opportunity.

*Retail Clerks Union, Local 1401, R.C.I.A. v. NLRB*, 463 F.2d 316, 322 (D.C. Cir. 1972). (See *Costle v. Pacific Legal Foundation*, supra at 1106. See also *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968)).

**C. Objections to the pork regulation and the omnibus regulation**

Six of the 20 objections to the irradiated pork rule that requested a hearing did not point to any specific aspect of the rule. Six of the 12 objections to the omnibus rule that requested a hearing were either form letters or objections that requested a hearing on the subject but that did not point to any specific aspect of the rule that they sought to challenge. Because no evidence was submitted in support of these objections, they raise no factual issue for resolution and, therefore, do not justify a hearing. The agency will not discuss them further.

One objection to the omnibus rule requested a hearing but was not submitted to FDA until after the close of the objection period. Hence, this objection failed to satisfy the requirements of 21 U.S.C. 348(f)(1) and need not be considered further by the agency. *ICMAD v. HEW*, 574 F.2d 553, 558 n.6 (D.C. Cir.), cert. denied, 439 U.S. 893 (1978). Issues raised in the tardy objection were also raised in other objections, however, and thus will be addressed in this document.

One of the objectors to the omnibus rule, the Health and Energy Institute, on behalf of itself and the Environmental Policy Institute (HEI), submitted numerous objections. However, HEI submitted very little evidence in support of these objections. HEI did promise, with respect to several of its objections, to submit evidence at any hearing that is held. FDA evaluated these objections. Most did not present enough information to draw the agency's action into question in a material way. These the agency proceeded to consider without further information from HEI. However, some of the objections did suggest the possible existence of a substantial issue of fact but did not identify enough evidence to determine whether these objections provided an appropriate basis for an evidentiary hearing. On February 2, 1987, the agency wrote to

HEI and asked it to submit additional information on this latter group of objections to aid FDA in deciding whether any of them justified a hearing (Ref. 1). HEI provided additional information on March 8, 1987 (Ref. 2).

On May 5, 1987, the agency again wrote to HEI and requested two references that HEI had cited in its March 8, 1987, submission but that were not available in FDA's files (Ref. 3). FDA gave HEI 14 days to supply copies of these references. On May 21, 1987, HEI provided one of these references, an article cited by that reference, and two additional articles, but it was unable to obtain the second reference that FDA had requested (Ref. 4).

There was considerable overlap in the objections to the two rules on irradiation. Some objections raised in response to the pork rule are, in fact, more applicable to the omnibus rule. Therefore, FDA will deal with the objections to both rules together.

Because HEI provided the most detailed objections, its objections will be the focus of much of this document. Where other objections raised the same or a similar issue as one raised by HEI, FDA will incorporate these other objections in its description of the issue. The agency has grouped together all objections that raise the same concern and has analyzed most of the objections according to the following four-part format: (1) A statement of a specific position or conclusion set forth by FDA in the final rule; (2) a summary of the challenge to that conclusion and of the basis for the request for a hearing, if one was made; (3) a discussion of whether the objection justified a hearing on that objection; and (4) where appropriate, a review of the evidence relevant to the objection.

**II. Safety of Food Irradiation**

In both the pork and omnibus final rules, FDA concluded that food irradiated under specified conditions is safe. FDA based its conclusion primarily on an analysis (49 FR 29682; 51 FR 13376 at 13378) that demonstrated that foods irradiated at doses permitted under these final rules undergo only minimal chemical change and are toxicologically indistinguishable from nonirradiated foods. The agency considered the sensitivity of a variety of state-of-the-art toxicology testing regimens, including extraction and concentration of radiolytic products, to determine the best way of evaluating the safety of irradiated foods (Ref. 5). The agency's analysis also included a review by the Bureau of Foods Irradiated Foods Task Group (Task Group) of all available



animal feeding studies with irradiated foods (Ref. 6). The Task Group concluded that the studies did not provide evidence that irradiated food caused adverse toxicological effects (51 FR 13376 at 13378). Based on these reviews and on the information in the agency's files, the agency concluded that there is an adequate margin of safety for foods irradiated under the conditions of these final rules, and that no further toxicological testing need be required (51 FR 13376 at 13378.)

Several objections stated that FDA's conclusion on the safety of irradiation is based on assumptions and theoretical analyses. These objections stated that the agency should have relied on evidence such as animal feeding studies. The most detailed statement of this point was made by HEI in its objection to the omnibus rule. HEI stated that: "... the FDA promulgated a regulation to allow increased food irradiation, declaring the process and resulting food safe, based on mere assumptions of safety, rather than on scientific tests which demonstrate the safety of the process, and the FDA has ignored scientific testing data and other scientific evidence which suggests adverse impacts from consuming irradiated food \* \* \*." In support of this general statement, HEI made 22 specific objections, each of which, it claimed, justified a hearing. The agency has considered each of these objections, and it finds that none of them presents a genuine and material issue of fact that would justify a hearing on the general issue that HEI has raised.

A discussion of the objections related to the safety of food irradiation follows.

#### A. Estimates of consumption of irradiated foods

In 1979, FDA established the Bureau of Foods Irradiated Food Committee (BFIFC) to review the existing agency policy concerning the irradiation of foods (Ref. 5). BFIFC was charged to recommend "toxicologic [testing] requirements appropriate for assessing the safety of irradiated food \* \* \*, where the degree of testing is consistent with the potential risk as predicated on the level of human exposure."

##### 1. BFIFC exposure estimates

HEI stated that "BFIFC used incorrect dietary data to declare safety." In support of this objection, HEI stated that:

BFIFC assumed that consumption of irradiated food would constitute only 10 percent of the human diet (51 FR 13377), despite petitions before the agency to allow irradiation of additional foods that might

increase total consumption of foods that have been irradiated.

(Paragraph L1. from HEI's May 19, 1986, objection.)

A hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 CFR 12.24 (b)(4)). In this objection, HEI has challenged the correctness of BFIFC's conclusions on the grounds that BFIFC was incorrect on the portion of the diet that will be irradiated. However, the BFIFC report makes clear that its conclusions were not based on the portion of the diet that would be irradiated. In concluding that food irradiated at doses not exceeding 1 kGy (100 krad) is safe for human consumption, BFIFC stated: "This [conclusion] is based solely on an estimate of the concentration of individual URP's [unique radiolytic products] produced by the radiation dose to the food, and pertains even if a high portion of the total human diet is irradiated at 100 krad" (emphasis added) (Ref. 5). Therefore, because this objection fails to challenge the finding that provides the actual basis for BFIFC's conclusion, it does not provide the basis for a hearing.

Furthermore, HEI's objection that BFIFC assumed that consumption of irradiated food would constitute only 10 percent of the human diet is incorrect. What BFIFC said was that conceivably 40 percent of a person's diet could be irradiated if the process is widely adopted, but that it was unlikely that more than 10 percent would be irradiated (51 FR 13376 at 13377). BFIFC's considerations were not restricted to the foods permitted to be irradiated under this rule but included all foreseeable applications of food irradiation.

In reaching its own conclusion about the safety of irradiation, FDA did not rely solely on the BFIFC report, as HEI's objection seemed to imply. Instead, FDA relied on the totality of evidence before it, including the report from the Task Group and the other evidence referenced in the proposal and omnibus rule. On this basis, the agency concluded that irradiation of food under the conditions that it specified is safe.

##### 2. Irradiation of Certain Aromatic Vegetable Substances

The agency decided that certain aromatic vegetable substances, such as dried spices and seasonings, can be irradiated safely at a dose of up to 30 kGy (3 Mrad) (51 FR 13376 at 13378). This decision was based primarily on two factors. First, FDA found that the amount of radiolytic products that

would be consumed from irradiated spices and seasonings is so small that such irradiated foods can be considered safe (51 FR 13376 at 13380). Second, the agency determined that the aromatic vegetable substances allowed to be irradiated are not sources of nutrients (51 FR 13376 at 13381), and that nutrient losses that might result from irradiation of these ingredients are of no concern. Because of comments related to language on spice consumption in the BFIFC report, the agency noted in the omnibus rule that it had not based its safety decision on an assumption that total consumption of spices would not exceed 0.01 percent of the daily diet and, indeed, recognized that total consumption of all spices would exceed 0.01 percent (51 FR 13376 at 13380).

HEI in its objection, states that:

The FDA contends that because foods such as individual spices comprise less than 0.01 percent of the total diet of an individual, consequences of eating such foods need not be addressed. This ignores the fact that the total amount of all spices will exceed 0.01 percent of the diet for a wide variety of persons, which under FDA's own regulation would require toxicological testing to be performed. However, the FDA then expands its food list for exposures up to 3 megarads to include other food items such as teas and seeds, which may constitute a far greater portion of an individual's diet, especially if that individual consumes several cups of tea a day or consumes seeds and nuts in large quantities. FDA totally fails to address the proportion of an individual's diet with regard to teas and seeds. Many vegetarians consume far more than 0.01 percent of their total diet in the form of teas or seeds such as sunflower seeds and alfalfa seeds. Evidence regarding dietary consumption of any foods that could be irradiated under the proposed new regulations would be presented at a public hearing.

(HEI Para. L9.) (Emphasis by HEI.)

This objection does not provide any basis for a hearing. Whether spices constitute more than 0.01 percent of the diet is not an issue. The agency estimated in the omnibus rule, "a probable intake of dried spices and culinary herbs of up to 3 grams per person per day. For the general population, this constitutes 0.1 percent of the total diet of 3 kilograms." (51 FR 13376 at 13380.)

Nor has HEI justified a hearing on the safety of the consumption of irradiated spices at a level of 0.1 percent of the diet. In the omnibus rule, FDA concluded that consumption of irradiated spices at this level is safe (51 FR 13376 at 13380). In support of this conclusion, FDA relied upon the BFIFC report (Ref. 5), the Task Group report (Ref. 6), and on other information in its files. HEI has not tendered any evidence

that would challenge FDA's reliance on this material or that would suggest that this conclusion is not correct.

Moreover, HEI is not correct that under FDA's regulations, the fact that the amount of spices in the total diet will exceed 0.01 percent would require toxicological testing to be performed. FDA has not adopted regulations that require toxicological testing of a food ingredient if that ingredient constitutes a certain portion of the diet, and HEI has not cited any regulation that imposes such a requirement. HEI appears to be referring to a recommendation in the BFIFC report that was mentioned in the advance notice of proposed rulemaking (ANPR) (46 FR 18992; March 27, 1981). The BFIFC report took the position that irradiation of any individual ingredient that constituted less than 0.01 percent of the diet was not of sufficient concern to require further toxicological testing.

This report was a recommendation to the agency, not a regulation. In response to a comment on the proposal, the agency stated that radiolytic products from different spices are likely to be different, and that the intent of the recommendation in BFIFC's report was not to set a precise dietary percentage limit of 0.01 percent but rather to acknowledge that the amounts of radiolytic products that would potentially be consumed from irradiated dried spices and seasonings are so small that such irradiated foods can be considered safe as ordinarily used. Based on the BFIFC report and other information available to it, the agency concluded that irradiation of spices under the conditions permitted by the regulation is safe (51 FR 13376 at 13380). HEI has not provided any basis on which to contest this conclusion. Therefore, this objection does not provide any basis for a hearing.

Nonetheless, HEI has pointed to a possible source of confusion caused by the wording of the regulation. In final rules issued on July 5, 1983 (48 FR 30613 at 30614), and April 18, 1985 (50 FR 15415), the agency listed numerous spices, seasonings, and culinary herbs that are permitted to be irradiated. The list included several seeds, such as caraway seeds and celery seeds, as well as substances such as orange petals and chamomile used to prepare herbal teas. In the omnibus final rule, FDA decided to describe these substances generically rather than by a specific list. It adopted the term "aromatic vegetable substances." The agency established five categories of such substances that included all the individual substances on the original list, as well as other

aromatic vegetable substances used as minor ingredients (51 FR 13376 at 13381).

This generic listing has been the source of some confusion. The agency has consistently referred to these dry or dehydrated aromatic vegetable substances that can be irradiated at doses not exceeding 30 kGy as ingredients that are not sources of nutrients but that are used in small amounts solely for their aromatic and flavoring characteristics. HEI has pointed to two examples of seeds—sunflower seeds and alfalfa seeds—that are not necessarily used in small amounts for their aromatic and flavoring characteristics but that may be used in other ways and that may actually be sources of nutrients. Grains (such as wheat, rice, or oats) are also examples of seeds that would not be considered "aromatic vegetable substances" within the meaning of this regulation. Only seeds that are used solely for their aromatic and flavoring properties, and that are not important sources of nutrients, are aromatic vegetable substances that may be irradiated under this regulation at doses not exceeding 30 kGy to control microorganisms. To make this clear, FDA is adding the phrase "when used as ingredients in small amounts solely for flavoring or aroma" after the term "aromatic vegetable substances" in § 179.26(b).

The agency has also found that the term "vegetable seasonings" has not been well understood. This term could be interpreted to include numerous substances whose irradiation at the 30 kGy level FDA did not intend to approve. For example, FDA intended this term to mean seasonings that are used in a manner similar to spices and never intended it to include vegetable pieces used for seasoning purposes under various standards of identity, such as 21 CFR 155.130 (Canned corn). Vegetable pieces used in such a manner may constitute a larger portion of the diet than the agency considered. To eliminate this confusion, the agency is revising the term "vegetable seasonings" to read "vegetable seasonings that are used to impart flavor but that are not either represented as, or appear to be, a vegetable that is eaten for its own sake." Thus, onion pieces could not be irradiated, while onion powder could be. The agency believes that all of the substances that it intended to permit to be irradiated will be adequately described by this new terminology.

In addition, because FDA approved the irradiation of specific substances used in herbal teas in the July 1983 and April 1985 final rules, the agency listed "teas" among the categories of dry

aromatic vegetable substances in the omnibus rule. Herbal teas, however, are not the same as the product commonly known as "tea", i.e., the product derived from the shrub *Thea sinensis* L. The agency is unaware of any reason to irradiate tea itself, as opposed to those products called "herbal teas," and has no information that anyone has ever proposed to irradiate tea. The agency believes that it erred in including the word "teas" in the regulation because the term "culinary herbs" encompasses any dry herbal tea product.

Therefore, the agency is modifying the wording of paragraph § 179.26(b) as follows: (1) To add the phrase "when used as ingredients in small amounts solely for flavoring or aroma" after the term "aromatic vegetable substances"; (2) to add the words "that are used to impart flavor but that are not either represented as, or appear to be, a vegetable that is eaten for its own sake" after the words "vegetable seasonings"; and (3) to remove the word "teas" from the list of types of substances that may be irradiated at the 30 kGy level.

#### B. Need for Toxicological Testing

The agency concluded that foods irradiated at the levels permitted by the regulation need not be tested toxicologically because the types and concentrations of radiolytic products in these foods after irradiation would be such that even with the most sensitive toxicological testing it would not be possible to measure any toxicological effects (51 FR 13376 at 13378).

HEI stated:

BFIFC admitted that "some radiolytic products may be unique to irradiated foods," termed such chemicals "unique radiolytic products (URPs)" and then assumed that such URPs would not constitute more than 3 parts per million concentration in food (51 FR 13377). Each food item could have its individual URPs, so a wide variety of URPs is possible in the fruits, vegetables, grains, and other foods that could be irradiated under the new regulation. The concentration of URPs is not the crucial factor, since cancer can be initiated by a single URP or carcinogenic chemical. FDA presents no scientific proof that those radiolytic products unique to irradiated foods are "chemically similar to known natural food components (and) are likely to be toxicologically similar also" (51 FR 13378). FDA should require extensive studies to be performed to demonstrate the safety of these chemicals before human consumption is permitted. Specifically, concentrated amounts [of] radiolytic products should be fed to animals in carefully controlled studies to test for potential mutagenicity and carcinogenicity, as suggested by Drs. Samuel Epstein and John Gofman in *Science* Vol. 223, p. 1354. Until these types of studies are performed there is



no basis for the wholesale approval of irradiation. Since FDA's regulation did not require studies to test for the long-term health impact of these chemicals, it is in violation of the Food, Drug and Cosmetic Act, and evidence will be presented at the public hearing.

(HEI Para. 1.3.) (Emphasis by HEI.)

In this objection, HEI has made a number of allegations about the significance of FDA's decision not to require toxicological testing before concluding that irradiation of food in the circumstances set forth in § 179.26 is safe. However, HEI has failed to make an adequate proffer to support a hearing on any of these allegations.

Under FDA's regulations, a hearing will not be granted on the basis of mere allegations. (21 CFR 12.24(b)(2)). Consistent with this regulation, the relevant case law provides that where a party requesting a hearing only offers allegations without an adequate proffer to support them, the agency may properly disregard those allegations. *General Motors Corp. v. FERC*, 656 F.2d 791, 798 n. 20 (D.C. Cir. 1981). For example, FDA need not grant a hearing on HEI's claim that each irradiated food item has its own individual URP's because HEI has not presented any evidence to support this claim.

Furthermore, HEI's allegation that BFIFC "assumed" (emphasis by HEI) that " \* \* \* URP's would not constitute more than 3 parts per million concentration in food \* \* \* is also without support. As noted in the final rule, BFIFC based its estimate of the likely concentration of URP's in foods on a review of experimental data showing the amount and type of chemical change likely to be caused by a given amount of radiation (51 FR 13376 at 13377). HEI has not presented any evidence that challenges the basis for BFIFC's analysis or the agency's reliance on that analysis.

HEI asserts that the concentration of URP's is not the crucial factor but again has not provided any evidence or rationale to support its assertion. Even if HEI is correct that cancer can theoretically be initiated by a single URP or carcinogenic chemical, to justify a hearing, HEI would have to provide some evidence that would reasonably link low levels of URP's to the causation of cancer. HEI has not presented any such evidence.

As discussed earlier in this document and in the omnibus rule, FDA examined all available data from animal feeding studies with irradiated foods and found no link between irradiated food and cancer (51 FR 13376 at 13378). Therefore, HEI's assertion is a mere allegation that is not supported by any evidence. FDA

will not grant a hearing on the basis of such an assertion (21 CFR 12.24(b)(2)).

HEI's allegation that FDA has not presented scientific evidence that radiolytic products are chemically and toxicologically similar to known natural food components is untrue. The agency did cite specific articles on the radiation chemistry of food components in the proposed omnibus rule (49 FR 5714 at 5721, Ref. 7 to 12; see also 51 FR 13376 at 13380) and included other references in the administrative file (Docket No. 81N-0004). The agency considered this information in its safety evaluation of radiolytic products.

While FDA has the ultimate burden of proof when it approves the use of a food additive, in the sense that the agency must find the additive to have been shown safe, once the agency makes a finding in a listing document, the burden shifts to an objector to come forward with evidence that calls that finding into question. *American Cyanamid Co. v. FDA*, 606 F.2d 1307, 1314-1315 (D.C. Cir. 1979). To justify a hearing, HEI would have to present some evidence that suggests that there are significant toxicological or chemical differences between radiolytic products and known natural food components. HEI has failed to present any such evidence and, thus, has not provided a basis for a hearing.

HEI contends that until carcinogenicity and mutagenicity studies are performed on concentrated radiolytic products, as suggested by Epstein and Gofman in a letter to the editor of *Science* (Ref. 17), there is no basis for the wholesale approval of irradiation. Epstein and Gofman stated that, "Stable radiolytic products could be extracted from irradiated food by various aqueous and nonaqueous solvents, which could then be concentrated and subsequently tested."

BFIFC, in its report (Ref. 5, p. 16), explicitly considered testing requirements, including the option of testing extracted and concentrated radiolytic products. Based on its review of the available literature dealing with the identity, amount and potential toxicity of radiolytic products, BFIFC recommended that such testing was not necessary to assure the safety of foods irradiated at doses below 1 kGy or of minor ingredients irradiated at doses below 50 kGy because of the low potential concentration of radiolytic products in such foods. The agency, in the omnibus rule, agreed with the recommendation and concluded that foods irradiated under the conditions of the regulation are safe, and that no additional toxicological testing should be required (51 FR 13376 at 13378).

HEI has not justified a hearing on this conclusion. Epstein and Gofman's letter merely presents a general assertion. HEI has not supported it with any evidence that the levels of radiolytic products formed in food irradiated under the conditions of the regulation would be so high as to require that toxicological testing be done or to call into question FDA's conclusion that foods that have been irradiated are safe. Therefore, HEI has not justified a hearing on this issue under 21 CFR 12.24(b)(2).

Finally, HEI asserts that because FDA did not require long-term animal studies, it is in violation of the act. This is a legal issue. Thus, it cannot serve as a basis for a hearing because a hearing will be granted only on the basis of a substantial issue of fact, not on issues of policy or law (21 CFR 12.24(b)(1)).

FDA discussed applicable sections of the act in the omnibus rule. The agency stated that, "Section 409 of the act lists the [safety] criteria which must be considered by the agency before a food additive regulation is issued. The statute does not prescribe what safety tests should be performed but leaves that determination to the discretion of scientists." (51 FR 13376). As stated above, FDA's scientists have concluded that foods irradiated at the levels permitted need not be tested toxicologically, and the agency agreed with this conclusion (51 FR 13376 at 13378). HEI has not cited any authority that contradicts FDA's conclusions about the type of data that is necessary to support the approval of the use of a food additive. Therefore, FDA finds that this aspect of HEI's objection is without merit.

#### C. Animal Feeding Studies

As stated in the previous response, FDA concluded that foods irradiated in accordance with this regulation are safe on the basis of the findings and conclusions of BFIFC, the Task Group, and other information in the agency files.

#### 1. Consideration of Wholesomeness Studies

HEI stated that:

The FDA admits that "useful information has been learned from those feeding studies where there has been some exaggeration of dose relative to that prescribed by this regulation," and argues that such information establishes the safety of food irradiated in accordance with the regulation (51 FR 13382). In a review of 1,223 wholesomeness studies conducted by J. Barna for the Hungarian Academy of Sciences in 1979, study results were classified as either neutral, adverse, or beneficial. Each study could have several outcomes, since studies could address more

than one issue. Barna found 1,414 adverse effects, 185 beneficial effects, and 7,191 neutral effects \* \* \*. A more detailed compilation of adverse effects identified in the Barna study, prepared by [the] Coalition for Alternatives in Nutrition and Healthcare, is attached as Exhibit B. FDA's Irradiated Foods Task Group did not take into account this review of safety studies compiled by J. Barna, despite their objective to "compile and summarize the toxicology data pertaining to irradiated foods." 51 FR 13378 FDA should have considered these studies when reviewing relevant toxicological data, and should not have simply dismissed the adverse evidence. Testimony of scientists regarding this FDA failure will be presented at the public hearing.

(HEI Para. 1.16.)

A hearing will not be granted on the basis of mere allegations or general descriptions and contentions (21 CFR 12.24 (b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held". *Pineapple Growers Ass'n of Hawaii v. FDA* 673 F.2d 1083, 1085 (9th Cir. 1982).

HEI alleges, without elaboration or support, that the Task Group did not take into account the review article by Barna (Ref. 18). This statement is belied by the record. The Task Group considered the 1979 Barna article cited by HEI, listed it and all of the available relevant studies cited therein in the bibliography of reports evaluated by the Task Group (Ref. 19), and placed this listing along with the evaluation forms for these studies on public display. Thus, HEI's objection is without merit and is not a basis for a hearing.

HEI also misrepresents the conclusions of Barna's article. Contrary to what HEI implies, Barna did not conclude that the irradiation of food is unsafe. In fact, Barna carefully reviewed the technological, biotechnical, and analytical inadequacies that " \* \* \* may lead to adverse effects \* \* \* which could be mistaken as consequences of radiation treatment \* \* \*" and concluded that " \* \* \* neither beneficial nor adverse effects of irradiated food consumption are consistent, unambiguous and reproducible. Neither of them can be traced back to a given food or group of foods or level of radiation dose." (Ref. 18, p. 205 and p. 266.)

Furthermore, contrary to HEI's allegation, FDA did not dismiss any adverse evidence. The agency stated in the omnibus rule that the Task Group examined in detail all studies that either raised questions concerning the possibility of adverse effects or that appeared to support a conclusion that the irradiated food studied is safe and concluded that studies with irradiated foods do not show adverse toxicological

effects (51 FR 13376 at 13378). This review of available toxicology data included an attempt to identify any consistent patterns or trends of adverse effects reported in different studies. The agency found no patterns or trends that would demonstrate that a reported adverse toxicological effect was attributable to irradiation of the food (51 FR 13376 at 13384). HEI has not pointed to specific evidence that FDA either dismissed without cause or misinterpreted in making this finding. Thus, it has failed to justify a hearing.

#### 2. Consideration of Possible Adverse Effects

HEI stated that:

The Irradiated Foods Task Group, which reviewed available toxicological data concerning irradiated foods, examined 69 studies in detail (51 FR 13378). Thirty-two of these 69 studies indicated adverse effects from irradiated foods, yet the Task Group concluded that the studies did not show adverse effects. This cannot be considered "scientific" nor honest. Evidence regarding the Task Group report and the problems associated with it will be presented at the public hearing.

(HEI Para. 1.5.)

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held". *Pineapple Growers Ass'n of Hawaii v. FDA, supra*.

The Task Group examined in detail those studies, referred to above, that appeared on their face to show adverse effects. The Task Group found that because of problems associated with diet or inadequate experimental design, any adverse toxicological effects reported in these studies could not be attributed to irradiation of the food (Ref. 6). In the omnibus rule, FDA noted that it relied on the findings of the Task Group in concluding that foods irradiated under the conditions of the regulation are safe (51 FR 13376 at 13378). HEI has not submitted any specific information from any of the studies to challenge the Task Group's analysis nor cited any evidence that calls into question the safety of foods irradiated under the conditions of the regulation.

A promise to present evidence regarding alleged problems associated with studies reviewed by the Task Group does not provide a sufficient basis on which to grant a hearing. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp. v. FERC*, 656 F.2d 791, 798 n.20

(D.C. Cir. 1981). HEI has failed to make such a proffer on this issue and thus has failed to demonstrate that a hearing is appropriate on whether the Task Group conclusions are correct.

#### D. Polyploidy

In the omnibus rule, the agency responded to comments claiming that polyploidy (chromosomal changes) had been shown by workers at the National Institute of Nutrition (NIN), Hyderabad, India, to be a toxic consequence in animals and humans of ingestion of irradiated wheat (Ref. 20). The agency cited a summary of a report (51 FR 13376 at 13385) by a scientific committee (hereafter called "the Indian Committee") that was commissioned by the Indian Government to investigate why studies done at NIN were contradicted by studies conducted at the Bhaba Atomic Research Centre (BARC) in Bombay, which showed no adverse effect. The Indian Committee had conducted an indepth review of the data from both laboratories and concluded that there was no evidence that increased polyploidy was associated with ingestion of irradiated wheat (Ref. 21). FDA's Task Group (Ref. 22) reviewed the studies performed at NIN during the 1970's and the findings of the Indian Committee. Based on the Task Group's review and other available evidence, the agency accepted the finding of the Indian Committee that the conclusions reached by investigators at NIN were not supported by the raw data (51 FR 13376 at 13385).

HEI disagreed with FDA's decision, stating:

A study by Bhaskaram, et al, \* \* \* found increased incidence of chromosomal changes (polyploidy) in the blood of malnourished children fed freshly irradiated wheat, and subsequent studies found similar results in test animals. Food irradiation proponents have charged that this study was fraudulent and was repudiated by the National Institute of Nutrition in India which sponsored the study. Relevant correspondence regarding this study is attached as Exhibit C, verifies that the study has not been repudiated by the National Institute of Nutrition, and indicates other studies conducted that relate to this issue. The FDA claims that some unnamed "committee of Indian scientists" has refuted this study, but their refutation does not appear in the refereed scientific literature or in the journal in which the original study appeared (51 FR 13385). The evidence identified in Exhibit C and further evidence supporting the concerns raised by the Bhaskaram study would be presented at the public hearing. In addition, the National Institute of Nutrition replicated the freshly irradiated wheat studies in monkeys and found increased incidence of polyploid cells. VIJAYALAXMI, "Cytogenetic Studies in



Monkeys Fed Irradiated Wheat," *Toxicology* 9: 1978: 181-184. The fact that this study was performed and confirmed the previous findings of Bhaskaram was not mentioned in the FDA final rule. The above evidence and additional evidence will be presented at public hearings.

(HEI Para. 1.18.)

HEI's exhibit C contains a copy of the Bhaskaram study with malnourished children (Ref. 20); a copy of a November 14, 1984, memorandum from Martin Welt, Ph.D., to the Executive Director of HEI and other members of a panel discussion on "Alternate Uses—Focus on Food Irradiation," stating that the study may have been fraudulent, that authorities at NIN had repudiated the study, and that an Expert Committee appointed by the International Food Irradiation Project found that the study was without merit; a February 20, 1985, letter from Dr. P.S. Elias of the International Project in the Field of Food Irradiation, stating that the Joint FAO/IAEA/WHO Expert Committee on Food Irradiation (JECFI) considered the Bhaskaram study when it gave full toxicological clearance to irradiation of food up to 10 kGy (1 Mrad); an April 2, 1985, letter from Dr. B.S. Narasinga Rao, Director, NIN, explaining why the NIN studies on irradiated wheat were conducted; and a January 18, 1986, letter from Dr. S.G. Srikantia, former Director of NIN, stating that NIN had not repudiated the Bhaskaram study and listing published studies designed to determine whether irradiated foods cause polyploidy or dominant lethal mutations.

Because HEI stated that it would present further evidence supporting the concerns raised by the Bhaskaram study at a hearing, on February 2, 1987, FDA requested that HEI set forth in detail that further evidence. On March 6, 1987, HEI responded by largely reiterating its objection:

FDA relied upon an unpublished, unnamed "committee of Indian scientists" who challenged a study published in a refereed scientific journal by Bhaskaram, et al., finding polyploidy in the blood of malnourished children fed wheat freshly irradiated at doses legalized by FDA.

Food irradiation promoters suggested that the study was fraudulent during a November 8, 1984 panel on food irradiation at the American Nuclear Society/European Nuclear Society joint meeting held in Washington, DC. A panel member even claimed that the study was repudiated by the director of the Institute conducting the study. We wrote to the Institute, and they responded that they stand behind their study. In fact, similar problems with freshly irradiated wheat have been demonstrated in the blood of both monkeys and mice.

(HEI's emphasis) HEI further stated that:

... FDA cites the "committee" report as having been "presented to the Joint Expert Committee in 1976," although agency personnel later had to retract their claim.

The so-called committee of Indian scientists turned out to be two researchers who submitted a "confidential" report to the Ministry of Health and Family Planning in India. The report was requested because research undertaken by the Bhabha Atomic Research Centre (BARC) reported different results than those found by NIN. BARC was seeking approvals to irradiate food. The two person committee submitted a confidential, unpublished report critical of NIN in 1976, and NIN responded with a confidential report to the Indian Government verifying the validity of their work and refuting in detail the claims and conclusions of the critical report. They also included independent evaluations of their data by two of the country's [India's] foremost cytogeneticists. Additional correspondence regarding this issue is attached.

(HEI March 6, 1987, response, p. 8 (Ref. 2).)

HEI also stated that it felt that studies on dominant lethal mutations that were cited in Dr. Srikantia's letter submitted in support of its original objection should be addressed; cited a study by Hickman, et al., "Rat Feeding Studies on Wheat Treated with Gamma-Radiation I. Reproduction" (Ref. 23) as a disturbing finding that suggests the need for further research in these areas; and cited a passage from Conning, "Evaluation of the Irradiation of Animal Feedstuffs" (Ref. 24) which refers to a study on the effect of an irradiated diet on lymphocyte number.

The "additional correspondence" attached to the March 6th submission consisted of a letter from the Coalition to Stop Food Irradiation (CSFI) to Food Chemical News, a trade newspaper, explaining CSFI's understanding of the history of the Indian Committee report, with enclosures. The enclosures consisted of a letter from FDA to CSFI providing documentation on how FDA received the summary report of the Indian Committee and correspondence between Dr. S.G. Srikantia, former Director of NIN, and Professor J. Schubert of Michigan State University, concerning whether the NIN study was described as fraudulent by members of the November 8, 1984, panel.

The objection, and the attached correspondence, appear to address several subjects, many of which are not related to the finding of polyploidy. The agency will address the polyploidy question first, then deal with all other studies not related to polyploidy but cited in this objection.

#### 1. Allegations That NIN Study Is Fraudulent

First, HEI challenges allegations that the Bhaskaram study was fraudulent. However, such allegations are not an issue in this rulemaking. FDA did not base its conclusion on a finding that the data were fraudulent. FDA concluded in the final rule that the available data from NIN did not provide an appropriate basis on which to conclude that increased polyploidy was caused by ingesting irradiated wheat. Thus, a hearing need not be granted on whether these studies are fraudulent.

#### 2. Whether NIN Has Refuted the Conclusions of the Indian Committee and the Significance of That Fact

Second, HEI argued that certain individuals do not accept the conclusions of the Indian Committee appointed by the Indian Ministry of Health and Family Planning to resolve the question of whether polyploidy is caused by eating freshly irradiated wheat. HEI stated that NIN responded to the Indian Government in a document that verifies the validity of the NIN studies and that refutes the Indian Committee report in detail. However, neither HEI nor anyone else has submitted this document to FDA. HEI thus implies that data or analyses not seen by FDA could resolve this issue in its favor.

The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. To justify a hearing, HEI would have had to submit the NIN response or some other evidence that challenges the findings and conclusions of the Indian Committee and that would cause the agency to change its conclusion.<sup>1</sup> HEI

<sup>1</sup> FDA received a letter, dated September 26, 1986, from Dr. Srikantia, Director of NIN when the Bhaskaram study was conducted, stating that the Indian Committee report was a confidential document submitted to the Government of India at the Government's request. He said that he had submitted a reply to the Government, and that two well-known cytogeneticists had examined NIN's data in depth and had agreed with NIN's findings. FDA wrote to Dr. Srikantia on October 27, 1986, and November 24, 1986, stating that FDA was not aware of his rebuttal and invited him to submit any information to FDA that would be relevant to the issue raised by objections. Dr. Srikantia replied on December 18, 1986, but did not submit a copy of his rebuttal to the Indian Committee or of any other report. Instead, he simply stated that he disagreed with the report of the Indian Committee; that many would agree that the polyploidy studies were of good design; that two well-known cytogeneticists in India independently reviewed NIN's work on polyploidy in children, monkeys, and rats and have agreed with its conclusions; and that NIN's

Continued

has not submitted any such evidence. Thus, HEI has not provided a basis for a hearing.

#### 3. Citation of Indian Committee Report

HEI's third point is that FDA made an error in the way in which it cited the Indian Committee report.<sup>2</sup> FDA agrees

observation that polyploidy in children quickly disappeared after cessation of feeding with freshly irradiated wheat was not at variance with biological possibilities. He also reiterated NIN's position that wheat subjected to irradiation must be stored for 3 months to be safe for consumption. He stated that just because wheat is likely to be stored for even longer periods does not negate NIN's findings on freshly irradiated wheat.

<sup>2</sup> Because of the controversy over the mutually contradictory findings at two Government laboratories, the Indian Ministry of Health and Family Planning appointed a committee of two University scientists (Indian Committee) to identify the cause of the discrepancy between the data from these two groups. The Indian Committee (Ref. 21) critically examined the data from both laboratories and concluded that an important reason for the conclusion regarding increased polyploidy was the abnormally low frequency of polyploidy (0.0 percent) in the cells of children not eating irradiated wheat (Ref. 20). The Indian Committee also stated that cells from the malnourished children at the beginning of the study exhibited a fuzzy appearance and could not be counted properly. They concluded that the frequency of 1.8 percent polyploid cells found in children eating freshly irradiated wheat was well within the normal range of healthy human beings.

The Indian Committee also examined studies by Vijayalaxmi reporting polyploidy in rats and mice fed freshly irradiated wheat. They evaluated the techniques used by NIN workers to determine the fraction of polyploid cells and found that the method used yielded highly variable and unreproducible results. They concluded that the differences between Vijayalaxmi's findings and those of researchers at BARC "mainly lie in the faulty and biased selection of the sample" and that "the results from animals fed freshly irradiated wheat are compatible with those from animals fed unirradiated wheat." The Indian Committee did not consider the monkey study, which was published after the Indian Committee report; however, there is no evidence that the Vijayalaxmi study in monkeys was designed to overcome the serious problems of faulty and biased selection of the sample noted by the Indian Committee in the two earlier studies by the same author.

The 1976 meeting of the Joint FAO/IAEA/WHO Expert Committee on Food Irradiation (JECFI) in Geneva, Switzerland considered the question of polyploidy. JECFI noted the contradictory results of different investigators (Ref. 28). They also noted that the significance of observations of polyploidy are unclear because the range of the observations of the incidence of polyploidy varies considerably between normal groups of the same species of animal, and that the toxicological implications of an increased incidence of polyploidy are not understood. However, they concluded that resolution of the contradictory conclusions was not necessary because the studies on freshly irradiated wheat were not relevant to actual practice considering that wheat is usually stored longer than 12 weeks; and no increase in polyploidy was reported by any investigator, including those at NIN, for wheat stored 12 weeks after irradiation. They recommended unconditional acceptance of wheat and ground wheat products irradiated for the purpose of disinfection to a maximum dose of 1 kGy (100 krad) and did not recommend an explicit storage requirement. Dr. Srikantia, the Director of NIN, was a member of the JECFI that made this recommendation.

that it incorrectly cited this report as a "Report Submitted to the Joint FAO/IAEA/WHO Expert Committee on the Wholesomeness of Irradiated Food, 1976" (51 FR 13376 at 13398). HEI is correct that the committee report was commissioned by the Ministry of Health and Family Planning in India to determine why results from the BARC differed from those reported by NIN.

However, FDA's error in citing this report did not affect the availability of this information. The agency placed a copy of the report summary on public file with the other references. The incorrect citation also did not change the report's conclusions, the validity of its conclusions, or the validity of the agency's conclusions based on that report. Therefore, because the agency's misquotation of the report did not affect the proceeding in any material way, and because HEI has not alleged that it did, the misquotation does not provide a basis for granting a hearing (21 CFR 12.24(b)(4)).

#### 4. The Monkey Study

Fourth, HEI states that Vijayalaxmi, at NIN, replicated the freshly irradiated wheat studies in monkeys and found increased incidence of polyploid cells (Ref. 25), thus confirming the previous findings of Bhaskaram.

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii v. FDA*, supra. Although FDA did not explicitly cite the monkey study in the omnibus rule, the administrative record shows that this study was among the NIN studies that the Task Group and FDA considered. The agency based its conclusion on the findings of the Task Group and on the other information in the administrative record (51 FR 13376 at 13378). The Task Group concluded (Ref. 22) that none of the studies on polyploidy done at NIN, including those reported both by Bhaskaram (Ref. 20) and Vijayalaxmi (Ref. 25, 26, and 27), was reliable.

A person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. To justify a hearing, HEI would have had to submit some evidence that challenges the conclusion that all the NIN studies were not reliable. For example, this standard could have been met if HEI had provided evidence that the monkey study was designed to correct the

problems with the earlier NIN studies that were noted by the Indian Committee and by the agency (Ref. 22) or had provided evidence that the design of the NIN studies was not flawed. HEI, however, has failed to proffer any such evidence and thus has not provided any basis to justify a hearing on this objection.

#### 5. Letter From Dr. Srikantia

Dr. Srikantia's January 18, 1986, letter to HEI stated that NIN had not repudiated the Bhaskaram study.

FDA did not state that NIN had repudiated the study, nor did it base its conclusion on a finding that the data were repudiated by NIN. Such an allegation is not an issue in this rulemaking. FDA concluded in the final rule that the available data from NIN did not provide an appropriate basis on which to conclude that increased polyploidy was caused by ingesting irradiated wheat.

Dr. Srikantia's letter referred to reports on studies designed to detect polyploidy, including three reports other than those performed at NIN (Ref. 29, 30, and 31). Two of the cited reports (Refs. 29 and 30) did not find increased polyploidy in the cells of animals fed irradiated food or freshly irradiated diets. One of these two reported the results of six in vivo genetic toxicity tests using three different irradiated foods: fish, dates, and chicken (Ref. 29). The tests were as follows: sex-linked recessive lethal mutations in *Drosophila* (dried dates only); chromosome aberrations in bone marrow of Chinese hamsters; micronucleus test in rats, mice, and Chinese hamsters; sisterchromatid exchange to bone marrow of mice and Chinese hamsters, as well as in spermatogonia of mice; and DNA metabolism in spleen cells of Chinese hamsters. The authors concluded that none of the tests provided any evidence of genetic toxicity. The agency had reviewed preliminary reports of some of these tests and referenced them in the omnibus rule (51 FR 13376 at 13397) and in the administrative file (81N-0004). The second study (Ref. 30) did not find an increase in frequency of polyploid cells in the bone marrow of rats fed irradiated wheat. The agency had reviewed this study and listed it in the administrative file.

In the third report cited, Renner (Ref. 31) concluded that "(f)eeding a standard diet freshly irradiated with high doses (>3 Mrads) has a transitory effect in the bone marrow of Chinese hamsters as evidenced by an increased incidence of polyploid cells" but that "there is no

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evidence for any mutagenic effect being produced as a result of feeding an irradiated diet." He noted that the irradiation dose required for insect disinfestation is less than 100 kilorads, and no effects on polyploidy incidence were seen at doses below 2,000 kilorads (2 Mrad). Thus, this study does not provide evidence that polyploidy occurs in animals fed food irradiated under conditions of the regulation. HEI has not explained why this study supports its contention or cited any study other than those conducted at NIN that has reported an association between eating food freshly irradiated at a dose permitted under the regulation and polyploidy. Thus, HEI has failed to provide a basis for a hearing.

Dr. Srikantia's letter also cited seven studies on dominant lethal mutations, two of which reported an effect and five of which reported no effect. FDA discussed the two studies on dominant lethal mutations that reported an effect in the omnibus rule (51 FR 13376 at 13385 and 13387) and concluded that one study, conducted at NIN, was unreliable, and that the observations in the other study were not evidence of dominant lethal mutation and could not be reproduced in three comparable studies. (See also the section on "Dominant Lethal Tests.") Neither HEI nor Dr. Srikantia has proffered any evidence or explanation that challenges or calls into question the agency's analysis of these studies. Nor has HEI provided any explanation of why it considers studies on dominant lethal mutations to be relevant to polyploidy. Therefore, HEI has not provided a basis for a hearing on this question.

#### 6. Hickman Study

In its March 6, 1987, letter HEI stated that a study by Hickman et al. (Ref. 23):

"... concluded that wheat irradiated at least 2 to 5 weeks before feeding showed no adverse reproductive effects. Yet the study tables reveal that twice as many stillbirth[s] occurred in those fed wheat irradiated at 200 krad compared to the control. Four litters in the 200 krad irradiated wheat group were stillborn, compared to one in the control group. Such disturbing findings suggest the need for further research in these areas."

(HEI March 6, 1987, response, p. 9 (Ref. 2).)

The Hickman study investigated whether reproductive effects are caused by feeding wheat treated with gamma radiation to rats and does not discuss polyploidy. The authors of the study concluded that this study showed no adverse effects. The number of stillbirths in the high dose group, though higher than the concurrent controls, was still within the normal range for this rat

colony. Moreover, the number of stillbirths in the group fed wheat irradiated at a dose permitted by the omnibus rule was less than that of the concurrent controls. The agency agreed that the authors' conclusions were valid and referenced this study in the omnibus rule (51 FR 13376 at 13386). HEI has not provided any basis on which to challenge the conclusions of the authors and of FDA. Nor has HEI proffered any evidence to relate this study to polyploidy. Instead, HEI has merely suggested that such findings indicate a need for further research in these areas. A hearing will not be granted on the basis of mere allegations or contentions (21 CFR 12.24(b)(2)). Thus, HEI's reference to the Hickman study does not provide a basis for a hearing.

#### 7. Conning Review

Finally, in its March 6, 1987 letter, HEI stated that:

Conning, D.M., "Evaluation of the Irradiation of Animal Feedstuffs," in P.S. Elias and A.J. Cohen, ed's, *RECENT ADVANCES IN FOOD IRRADIATION*, 247 at 263 (1983) cites a study by Ehrenber. (sic) L. et al which found a 15 to 20 percent reduction in the lymphocyte count in male Sprague-Dawley rats, whether fed within 96 hours of irradiation or after storage for up to 1 year. Lymphocytopenia was produced by all diets irradiated at or above 6 kGy. Conning notes at page 268: "The agents responsible for the lymphocytopenia induced by irradiated laboratory diets have not been identified or their mechanism of action satisfactorily explained. There appears to be no published work that contradicts these findings, the various studies by Huisman being inadequate in a number of respects. A possible effect on the immune system has still not been ruled out and further carefully-controlled experiments in this area using adult animals are warranted, particularly in the light of the Russian study which indicated that long-term feeding of an irradiated diet produces kidney damage possibly by an immunological mechanism."

(March 6, 1987, response, p. 9 (Ref. 2).)

In his review, Conning (Ref. 24) cited two studies by Ehrenberg and colleagues (Ref. 32 and 33). One of these studies (Ref. 32) reported that lymphocytopenia was produced by feeding diets irradiated at or above 6 kGy, but not at 2 kGy. The other study (Ref. 33) reported a 15 to 20 percent reduction in lymphocyte counts in rats fed diets irradiated at 30 to 90 kGy. As Conning stated, "... the effect was at the limit of detection, a 60 kGy irradiated diet resulting in only a 7% reduction in the lymphocyte number" (Ref. 24).

HEI has not provided any reason for considering these studies relevant to its objection that irradiated food causes polyploidy. Further, the effects reported

in these studies are not relevant to the uses of irradiation permitted under the conditions of the regulation, which limits irradiation of foods other than minor ingredients to a dose not exceeding 1 kGy. HEI has not provided any basis for finding that studies with food irradiated at such exaggerated doses have any relevance to the safety of food irradiated under the conditions set forth in 21 CFR 179.26. Thus, this aspect of HEI's objection does not provide a basis for a hearing.

Moreover, FDA's Task Group considered these studies and determined that they suffered from such serious methodological deficiencies that no valid conclusions could be drawn on the basis of the data from them (Ref. 19). HEI has not contested this determination. Nor did other feeding studies reviewed by the agency show a similar effect.

The long-term rat feeding study done in the Soviet Union and referred to by Conning is also unrelated to polyploidy. The authors of the study reported damage to kidneys and testes in rats fed irradiated feed. The agency addressed this study in a response to a comment on the omnibus rule (51 FR 13376 at 13386) and concluded that because of the lack of data in available reports on this study, in contrast to the considerable amount of data that FDA had from other studies that showed no effects, the results described in these Soviet Union reports did not raise substantial questions about the safety of food irradiated under the conditions of this regulation (51 FR at 13376 at 13386). (This study is discussed elsewhere in the document. See section II. E. "Studies Reporting Effects on Kidney and Testes.") HEI has not provided any basis, nor cited any evidence, that would call the agency's conclusion into question. Thus, it has failed to justify a hearing on this aspect of the objection.

In sum, HEI's reference to Conning and the studies that Conning cites in his review article does not justify a hearing on polyploidy because HEI has not provided any basis for considering these studies relevant to polyploidy. In addition, FDA had considered virtually all of the studies cited by Conning and found them not to provide a reliable basis on which to make conclusions about the safety of the uses of food irradiation at issue in this proceeding. HEI has not challenged these findings.

Thus, HEI has merely disagreed with the agency's conclusion that the studies conducted at NIN in India do not provide a basis on which to find that adverse effects would be caused by ingestion of irradiated foods and has not

provided any evidence that would challenge the findings of the Indian Committee or the analysis of the agency. Instead, HEI has submitted letters from persons associated with the studies that say that they have not retracted their work and has referred to other studies unrelated to polyploidy. HEI has not proffered any evidence to show that polyploidy is a true adverse effect from ingestion of irradiated food that should be considered further by the agency. Thus, HEI's objection consists of mere allegations and contentions and of references to data previously considered by the agency that do not challenge the agency's conclusion. Consequently, the objection does not provide an adequate basis for a hearing.

#### 8. FDA's Consideration of Scientific Evidence

In another assertion, related to the Bhaskaram study, HEI stated that:

The FDA argues that animal testing is not always necessary to declare a food additive or process safe, where by "sound reasoning" it can determine otherwise (51 FR 13382). The FDA goes on to dismiss animal testing data which indicates hazards from consuming irradiated food, which cannot be considered the use of "sound reasoning." Animal testing was not "too insensitive to show an effect from irradiation of food at the doses allowed," in some studies, such as the study by Bhaskaram et al. "Effects of feeding irradiated wheat to malnourished children," 28 THE AMERICAN JOURNAL OF CLINICAL NUTRITION 130 (Feb. 1975). This study found blood abnormalities in malnourished children fed freshly irradiated wheat. This is but one example of FDA's failure to protect public health by acting on evidence of harm from food irradiation. If ignoring scientific studies indicating harm is FDA's "sound reasoning," then FDA is incapable of "sound reasoning." Further evidence regarding this issue will be presented at the public hearing, including additional scientific studies and testimony by scientists.

(HEI Para. I.15.)

The agency asked HEI on February 2, 1987, to set forth in detail the factual information and analysis that it intended to present at a hearing.

On March 6, 1987, HEI stated:

The FDA assumption that doses of 100,000 rads will not create any harmful effects in food was not based upon the scientific animal feeding literature or other documented research. It should be characterized as a hope or a theory, rather than as a fact. Dr. Donald Louria is in the process of reviewing the five studies considered by a 1982 FDA panel as "adequate" to support the safety of irradiated foods. Two of the five studies reviewed thus far suffer flaws, according to Dr. Louria. We are now asking other scientists to review these studies, now that they have been identified.

(HEI March 6, 1987, response, p. 6 (Ref. 2).)

A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii v. FDA*, supra.

In this objection, HEI alleges that FDA has dismissed animal testing data that indicate that there is a hazard from irradiated foods and has ignored scientific evidence. To justify a hearing on these assertions, HEI must point to some evidence that FDA did not consider that would challenge the conclusions of the agency or that shows that the agency has not correctly analyzed testing data. The only specific evidence that HEI has pointed to in support of its allegations is the Bhaskaram study (Ref. 20). HEI's objection must provide at least a plausible basis on which to find that FDA is incorrect in finding that this study is unreliable. As the discussion in the preceding section makes clear, however, HEI has failed to do so. Thus, the objector has not met its "threshold burden of tendering evidence suggesting the need for a hearing." (See *Costle v. Pacific Legal Foundation*, supra.)

Moreover, a hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 FR 12.24(b)(4)). Even if the agency agreed that two of the five studies referred to by HEI in its March 6, 1987, submission suffer flaws, this fact would not change the agency's conclusion that there is an adequate margin of safety for foods irradiated under the conditions of the regulation. Although the agency found that the studies in question were supportive of its conclusion on safety, those studies were not the primary basis for FDA's conclusion that foods irradiated under the conditions of the regulation are safe. FDA's conclusion was based on its review of all available evidence, including the findings, rationale, and conclusion of BFIFC and of the Task Group (51 FR 13376 at 13378). HEI has not proffered any evidence that would call this evidence into question. Thus, HEI has not justified a hearing.

HEI promised to present additional scientific studies and testimony by Dr. Donald Louria or other scientists at a hearing but did not specify what evidence it would present. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. A person seeking a hearing must meet a threshold burden of

tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. Because HEI failed to submit the promised scientific reviews and to specify the evidence it would present at a hearing, FDA has no way of determining whether this evidence justifies a hearing. Therefore, HEI has failed to meet its threshold burden.

#### E. Studies Reporting Effects on Kidney and Testes

In the spring of 1984, the U.S. Department of Agriculture (USDA) submitted to FDA several reports of studies conducted with radiation-sterilized chicken (hereafter referred to as "the Raltech studies") (49 FR 40623; October 17, 1984). These studies were conducted to test the safety of chicken irradiated in the frozen state, in the absence of air, at sterilizing doses. The food tested and the conditions of irradiation were totally different from those that FDA proposed to permit. Nonetheless, the agency received several comments on its omnibus proposal alleging that effects on the kidneys and testes, and on the survival of mice in one of these studies, showed that foods irradiated under the conditions of the proposal had not been shown to be safe (51 FR 13376 at 13386). Although these studies were not directly relevant to the safety evaluation of the irradiated foods permitted by this rule, FDA thoroughly evaluated them to determine whether any adverse effects had been demonstrated that would raise new safety questions or that would challenge the basis of FDA's analysis. FDA found that no adverse effects had been shown that could be attributed to irradiation of the food (50 FR 29658). The adverse effects noted appeared to be attributable either to chance occurrence or to giving mice such a high proportion of chicken meat in the diet. FDA concluded that these studies provided no information that would cast doubt on the safety of the foods that could be irradiated under either the pork rule (50 FR 29658) or the omnibus rule (51 FR 13376 at 13386).

In the omnibus final rule, FDA also responded to comments concerning a study done in the Soviet Union that reported damage to kidneys and testes of rats fed irradiated lab chow. The agency concluded that the data reported in the two available reports on this study are inadequate to conclude that irradiation of the diet caused adverse effects, and that, considering the far larger amount of data from other similar studies that showed no effects, these reports did not raise substantial



questions about the safety of food irradiated under the conditions of this regulation (51 FR 13376 at 13386).

#### 1. Objection to omnibus rule

##### HEI stated:

The FDA stated that one comment noted increased kidney damage in the Raltech irradiated chicken studies (51 FR 13386), and the FDA did not address this concern in item no. 33. [Comment 33 in the omnibus rule.] In item no. 34, the FDA cited two Russian reports that found damage to kidneys and testes in rats fed irradiated feed, but dismissed these studies. Evidence regarding the studies which FDA chose to uphold and evidence regarding the original studies, so that the FDA conclusions can be evaluated properly, would be presented at the public hearing. (HEI Para. I.21.)

##### Further, HEI stated that:

The FDA cites a report prepared by Raltech scientists which was reviewed by Donald W. Thayer, Chief of the Food Safety Laboratory of the Eastern Regional Research Center of the Department of Agriculture in SUMMARY OF SUPPORTING DOCUMENTS FOR WHOLESOMENESS STUDIES OF PRECOOKED (ENZYME INACTIVATED) CHICKEN PRODUCTS IN VACUUM SEALED CONTAINERS EXPOSED TO DOSES OF IONIZING RADIATION SUFFICIENT TO ACHIEVE "COMMERCIAL STERILITY" (51 FR 13386).] Dr. Thayer concluded that "two of the studies namely the dominant lethal study and the chronic toxicity, oncogenicity, multigeneration reproductive study with mice had some possibly adverse findings which will require careful consideration before the process can be declared safe" (at page 9).] The Agency concluded that independent examination of the lesions did not support classification of the lesions as carcinogenic, but the FDA fails to explain the increased deaths in the study group fed gamma irradiated chicken. Further testimony regarding this study would be offered at a public hearing. (HEI Para. I.20.)

FDA asked HEI on February 2, 1987, to set forth in detail the factual information that it intended to present at a hearing. On March 6, 1987, the objector responded by stating that:

Dr. Donald Louria, New Jersey College of Medicine, will be asked to comment on the validity of the original research study on kidney damage and testes, and to explain whether other studies refute the studies suggesting damage or whether these studies differ from those showing damage. (HEI March 6, 1987, response, p. 11 (Ref. 2).)

Although HEI stated its disagreement with FDA's evaluation of the Raltech studies of mice fed radiation-sterilized chicken, it has not identified any evidence that would call into question any of the agency's conclusions. HEI has not identified any evidence, nor offered any reason, that would provide a basis on which to find that a study on radiation-sterilized chicken is relevant

to a rule that does not permit either the irradiation of food at the levels necessary to sterilize chicken or the irradiation of chicken.

As discussed in the omnibus rule, the agency concluded that the decreased survival in the female mice was not treatment-related because it occurred in only one sex group, and because the decrease was only marginal (51 FR 13376 at 13386). HEI has not proffered any evidence to challenge this conclusion. Rather, HEI simply asserts that further testimony regarding this study would be offered at a hearing. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that supports the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. HEI has failed to meet that threshold. Therefore, a hearing on this objection is denied.

Moreover, the agency noted that mice in all groups fed chicken meat (both nonirradiated and irradiated) showed signs of kidney damage (51 FR 13376 at 13386). The incidence of this effect was far higher in the mice fed frozen nonirradiated chicken than in either of the groups fed irradiated chicken. Therefore, the agency concluded that the effects were the result of the high protein content of the chicken diets rather than of the irradiation of some diets (51 FR 13376 at 13386). HEI has not proffered any evidence to challenge this conclusion.

Nor has HEI identified any specific, reliable evidence that would challenge FDA's conclusion that the reported results of the Soviet Union rat study were not supported by data and were contradicted by other studies. As FDA stated in the omnibus rule (51 FR 13376 at 13386), critical information necessary to verify that the reported effects are treatment related is not available. It is the objector's burden to come forward with evidence that would show that the agency's analysis is incorrect. *American Cyanamid Co. v. FDA*, supra, 606 F.2d at 1314-1315. HEI has not met this burden.

The agency attempted to obtain the raw data from the study done in the Soviet Union through several sources but could not obtain such information. The Counselor, Foreign Affairs Administration, Soviet Ministry of Health responded to FDA's request by stating that "the indicated materials are the intellectual property of the authors of the experiment and cannot be forwarded to the Administration's scientists" (Ref. 34).

As for Dr. Thayer's statement, HEI stated:

Dr. Thayer concluded that "two of the studies namely the dominant lethal study and the chronic toxicity, oncogenicity, multigeneration reproductive study with mice had some possibly adverse findings which will require careful consideration before the process can be declared safe."

This statement was drawn by HEI, somewhat out of context, from a report to FDA (Ref. 35) by USDA that summarized the studies on radiation-sterilized chicken that it was submitting to FDA. Dr. Thayer's complete statement was:

On balance these studies supported the conclusion that the irradiation sterilized chicken products were wholesome, however, two of the studies namely the dominant lethal study and the chronic toxicity, oncogenicity, multigeneration reproductive study with mice had some possibly adverse findings which will require careful consideration before the process can be declared safe. (Ref. 35, p. 9.)

Thus, Dr. Thayer's statement merely alerted FDA to review these studies more fully.

As discussed above, the agency did review the Raltech mouse study and found no effects on mice that could be attributed to the consumption of irradiated food. Furthermore, in the summary report, Dr. Thayer went on to discuss the reason for highlighting the dominant lethal study. He stated:

There was no evidence that any of the diets induced dominant lethal effects in mice which ate chicken as 35% of the total diet; however, again the positive control, in this case triethylenemelamine, did not induce lethal mutations in spermatid and spermatozoan stages of spermatogenesis in mice \* \* \*. (Ref. 33, p. 22.)

Dr. Thayer was pointing out that this dominant lethal study would not be considered a valid study in determining the safety of radiation-sterilized chicken. However, even if this study were valid, it would not justify a hearing because, as stated earlier, the Raltech studies on radiation-sterilized chicken are not relevant to this omnibus rulemaking.

Thus, the Thayer report cited by HEI does not support HEI's contention that irradiated food is unsafe. Because HEI has not proffered any other evidence that supports its general contention, it has failed to meet the threshold burden of tendering evidence that suggests that there is a need for a hearing on this issue (see *Costle v. Pacific Legal Foundation*, supra, and (21 CFR 12.24(b)(2)).

HEI has also stated that Dr. Louria will be asked to comment on the validity of the "original research study." A

hearing cannot be granted on a mere statement that someone will testify about the validity of a study without a proffer as to what that person will testify to that demonstrates that there is a genuine and substantial issue of fact that provides a basis for a hearing. Thus, a hearing on this objection is denied.

#### 2. Objection to irradiated pork rule

Public Citizen Health Research Group (HRG), in its objection to the irradiated pork rule, also argued that FDA's dismissal of increased testicular tumors in the radiation sterilized chicken study was inappropriate in light of the Soviet Union report on damage to the testes. HRG did not indicate that it intended to present any evidence at a hearing, however.

To justify a hearing, a challenge to an agency's factual conclusion must present a live controversy. *Community Nutrition Institute v. Young*, supra, 773 F.2d at 1364. In addition, the objection must raise a material issue concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n v. FDA*, supra, 673 F.2d at 1085. HRG's objection fails to meet these requirements.

HRG's objection to the irradiated pork rule appears to draw upon a comment that FDA received in the omnibus rulemaking concerning the rat study conducted in the Soviet Union. At the time of HRG's objection, FDA had not fully considered this comment.

Ultimately, FDA decided, as it explained in the final rule in the omnibus proceeding (51 FR 13376 at 13386), that the Soviet reports lacked critical information necessary for proper evaluation of the study. The burden then shifted to HRG to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this study. However, HRG failed to submit an objection to the agency's conclusion.

As a result, there is no reason to hold a hearing on this objection because there is no live controversy and thus no material issue on which a hearing could be held. In the absence of some explanation from HRG for why the Soviet Union reports on the rat study are valid in spite of the deficiencies cited by the agency, or for why the agency was wrong in finding that there were deficiencies, it is undisputed that those reports do not provide an appropriate basis on which to question the safety of pork irradiated in accordance with the irradiated pork regulation. Therefore, the information submitted by HRG does not justify the factual determination urged, and FDA is denying HRG's request for a hearing on this issue under 21 CFR 12.24(b)(3).

Moreover, the agency carefully considered the possibility of a treatment-related incidence of testicular tumors in the radiation-sterilized chicken study. As discussed in the omnibus rule, agency scientists examined the histology slides and concluded that the evidence did not support a treatment-related induction of testicular tumors (50 FR 29658; 51 FR 13376 at 13386). HRG did not submit any evidence that would call the agency's evaluation of the histology slides into question.

#### F. Alleged Effects on Fertility

As discussed above, FDA reviewed and evaluated all available animal feeding studies, including reproduction studies, and placed a list of such studies along with the results of its review on public file as references in its omnibus rule (51 FR 13376 at 13397).

The agency made clear in the omnibus rule that, based on the Task Group's examination of all the data, FDA concluded that studies with irradiated foods do not show adverse toxicological effects (51 FR 13376 at 13378; Ref. 36). HEI stated that,

Fertility effects of eating irradiated foods are addressed by the FDA (51 FR 13387 [sic]), which chose to ignore studies finding adverse impacts. Critiques of the studies dismissed by the FDA along with critiques of the studies accepted by the FDA would be presented at a public hearing on the issue. (HEI Para. I.22.)

A hearing will not be granted on mere allegations (21 CFR 12.24(b)(2)). In this objection, HEI has not met its "threshold burden of tendering evidence suggesting the need for a hearing." *Costle v. Pacific Legal Foundation*, supra, 445 U.S. 198, 214 (1980). HEI alleges that the agency ignored studies that found that consumption of irradiated food had an adverse impact on fertility but has not cited or identified a single such study. Thus, HEI's objection consists of the bald assertion that the agency ignored studies that found an adverse impact on fertility. Without a proffer of evidence to support this assertion, HEI has not justified a hearing (21 CFR 12.24(b)(2).)

#### G. Early Studies on Irradiated Bacon

As discussed in the omnibus rule (51 FR 13376 at 13384), FDA issued a regulation in 1963 to permit radiation sterilization of bacon based on summaries of feeding studies submitted in a petition (28 FR 1456; February 15, 1963). However, following evaluation of the complete reports of these studies, FDA concluded that the sponsor had not met its burden for demonstrating safety (33 FR 12055; August 24, 1968) and revoked the bacon regulation (33 FR 15416; October 17, 1968).

Objections to the irradiated pork rule stated that FDA should not have issued the irradiated pork regulation because of these studies on irradiated bacon. Some objections noted that these earlier studies caused FDA to revoke its regulation on irradiated bacon. Two of these objections requested a hearing. In the most complete discussion of this issue, HRG stated that:

In 1963, in response to a petition from the Army, the FDA approved the irradiation for canned bacon. However, in 1968, the FDA rescinded this approval after it reviewed the studies upon which this approval was based and found that they raised doubts about the safety of irradiated bacon \* \* \*. So far as we know, this conclusion has never been reversed. However, before FDA can state that irradiated bacon, or other pork products, are safe, the conclusions from 1968 must be addressed. (Objection No. 27 by HRG, p. 2 (Ref. 37).)

HRG's objection to the irradiated pork rule appears to draw upon a comment that FDA received in the omnibus rulemaking concerning the revocation of the bacon regulation. At the time of HRG's objection, FDA had not fully considered this comment. As it explained in the final rule in the omnibus proceeding (51 FR 13376 at 13384), the agency reconsidered its 1968 action and concluded that the data on radiation-sterilized bacon are of such poor quality that they were inadequate to demonstrate either safety or adverse effects (51 FR 13376 at 13384). The burden then shifted to HRG and the other objectors to maintain the viability of this objection by proffering some information that called into question the agency's conclusion. However, HRG and the other objectors did not object to the agency's discussion and resolution of this issue in the omnibus rule.

As a result, there is no reason to hold a hearing on this objection because there is no live controversy and thus no material issue on which a hearing could be held. In the absence of some explanation from HRG or the other objectors for why the irradiated bacon reports are valid in spite of the deficiencies cited by the agency, or for why the agency was wrong in finding that there were deficiencies, it is undisputed that those reports do not provide an appropriate basis on which to question the safety of pork irradiated in accordance with the irradiated pork regulation. Therefore, the information submitted by HRG does not justify the factual determination urged, and FDA is denying HRG's request for a hearing on this issue under 21 CFR 12.24(b)(3).

Moreover, the agency did not consider it necessary to discuss irradiated



canned bacon in the irradiated pork rule because radiation-sterilized canned bacon is not relevant to the irradiation of fresh pork to control *Trichinella spiralis*. Radiation-sterilized canned bacon, irradiated at doses of 27.9 kGy and 55.8 kGy, is a significantly different product than fresh pork irradiated at doses between 0.3 and 1.0 kGy, as permitted in the July 22, 1985, regulation. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp. v. FERC*, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981). HRC and the other objectors have not proffered any evidence or explanation as to why radiation-sterilized canned bacon has any relevance to the safety of fresh pork irradiated under the conditions set forth in 21 CFR 179.26. Thus, they have failed to provide a basis on which a hearing could be held.

#### H. *Drosophila* Study

In the omnibus rule, FDA responded to a comment alleging that a mutagenicity (sex-linked recessive lethal) study in fruit flies (*Drosophila*) raised on radiation-sterilized chicken meat showed an effect consistent with chromosomal damage (51 FR 13376 at 13386). The study (Ref. 38) showed no evidence of mutagenicity. However, the authors of the study also reported data that showed fewer offspring in all groups raised on chicken meat, as compared to those raised on the standard diet for fruit flies, with the fewest offspring in the groups raised on irradiated diets. The agency concluded that this effect could occur for a number of reasons unrelated to reproductive toxicity, and that mammalian data on reproduction, which are more relevant to humans than are *Drosophila* data, do not show a pattern or trend indicative of adverse reproductive effects (51 FR 13376 at 13386). Therefore, the agency found that this observation of fewer offspring in fruit flies fed radiation-sterilized chicken meat was not relevant to the determination of the safety of foods irradiated in compliance with the omnibus regulation.

HEI stated that:

"The Final Report on the Evaluation of the Mutagenicity of Irradiated Sterilized Chicken by the Sex-linked Recessive Lethal Test in *Drosophila melanogaster*" by Raltech Scientific Services revealed that fruit flies fed gamma irradiated chicken had seven times fewer offspring than those fed heat treated chicken (See Exhibit D). Efforts to enrich the basal food medium did not affect this finding, and further details of this study would be provided at a public hearing. While the FDA chose to consider this finding an "unreliable indicator of an adverse reproductive effect" (51 FR 13386), other scientists consider the

findings alarming and would provide testimony to that effect at a public hearing. The FDA urged that studies on mammals would be more appropriate for reproduction information, but the planned two year Raltech study on rats to look for multigenerational effects was aborted after only 39 weeks, and its results are therefore not adequate to declare safety. (HEI Para. L19.)

On February 2, 1987, the agency asked HEI to set forth in detail the factual information and analysis that it intended to present in support of this objection at a hearing. HEI submitted a reply on March 6, 1987. Only one of the points that HEI made in its March 6 reply was related in any way to its original objection. In addition to amplifying its original objection regarding the reproductive effects noted in the Raltech *Drosophila* study, HEI referred to the following: a Raltech study of mice fed radiation-sterilized chicken; a Raltech study of rats fed radiation-sterilized chicken; promised testimony by a genetics expert; a study of DNA metabolism in spleen cells of Chinese hamsters fed irradiated fish; and a study of mutation in *Drosophila* fed X-irradiated DNA. FDA has considered all of the points that HEI made in its submissions and, for the reasons considered below, finds that none provide any evidence or rationale that could show that radiation sterilization of chicken caused adverse reproductive effects in *Drosophila*. Neither have they shown why these studies should be considered relevant to the safety of foods irradiated under the conditions of this rule. Thus, in this objection HEI has failed to raise an issue of fact that would justify a hearing (21 CFR 12.24(b)(1)). For the sake of clarity, the agency will discuss each of the points in turn, starting with the Raltech *Drosophila* study.

#### 1. Raltech studies

a. *Raltech Drosophila* study. In its March 6, 1987, response, HEI stated that:

Dr. Thayer reported " . . . an unexplained significant reduction in the production of offspring in cultures of *D. melanogaster* reared on gamma irradiated chicken. This response was dose related and was not overcome by the addition of vitamin supplements." In fact, the table already submitted (which was not part of the Thayer report) demonstrates that the fruit flies fed gamma irradiated chicken have seven times fewer offspring than those fed thermally processed (cooked) chicken. A dose response pattern occurred with higher concentrations of gamma-irradiated chicken producing fewer offspring.

Food irradiation proponents declared the results irrelevant, since fruit flies don't normally eat chicken. The table clearly shows that fruit flies consuming no chicken

had far more offspring, but it is certainly fair to compare the groups eating the chicken diets or the study would not have been funded in the first place. The positive control, the chicken diet with a known hazardous chemical, led to better reproduction than either the electron or gamma irradiated diets. The fruit flies eating electron irradiated chicken had about three times more offspring than those fed gamma treated chicken, but far fewer offspring than those eating heat treated chicken. (HEI March 6, 1987, response, p. 10 (Ref. 2).)

To justify a hearing, HEI would have to proffer evidence to support its allegation that the *Drosophila* sex-linked recessive lethal mutagenic study with radiation-sterilized chicken meat is relevant for evaluating reproduction effects in mammals, specifically, humans, from foods permitted to be irradiated under FDA's regulation. It has failed to proffer any such evidence.

The sex-linked recessive lethal test in *Drosophila melanogaster* is a standard test designed to detect a particular mutagenic effect, namely, a preferential decrease in male offspring (e.g., see EPA's Toxic Substances Control Act Test. Guidelines, 50 FR 39252 at 39441; September 27, 1985). The study done by Raltech (Ref. 38) with radiation-sterilized chicken did not show this sex-linked recessive mutagenic effect.

Although there was no mutagenic effect observed in this test, the authors noted that *Drosophila* raised on chicken meat had substantially fewer offspring, compared to controls, with the fewest offspring from the *Drosophila* raised on gamma irradiated chicken. As stated above, FDA in its omnibus final rule discounted the significance of this finding on the grounds that the Raltech *Drosophila* study was an unreliable indicator of adverse reproductive effects (51 FR 13376 at 13386).

While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co. v. FDA*, supra, 606 F.2d at 1314-1315. To justify a hearing on this determination, HEI would have to proffer some evidence that demonstrates the relevance of the finding to the safety of food irradiated under the conditions permitted by the omnibus rule or to provide some basis for challenging the reasons that FDA gave for discounting this finding. HEI has failed to do so. It has merely reasserted that there was a finding of reduced offspring.

Significantly, a second study with frozen chicken and gamma irradiated chicken showed that this effect was seen with both types of chicken and was directly related to the amount of chicken meat in the diet (Ref. 38). Based on these results, the agency concluded in the omnibus rule that the observed effect on reproduction could be caused by a number of factors other than irradiation (51 FR 13376 at 13386). HEI has not proffered any evidence that would contradict this conclusion and that would tie this effect directly to irradiation.

Furthermore, as the agency pointed out in the omnibus rule, this test with *Drosophila* has not been designed or validated for testing reproductive toxicity. Reproductive tests are designed to provide information concerning the effects of a test substance on gonadal function, conception, parturition, lactation, weaning and the development of offspring and are therefore carried out in mammalian species (Ref. 39 and, for example, see 50 FR 39252 at 39432). An observation from a study not designed or controlled to test for reproductive effects cannot be used in place of a study so designed and controlled, although it can raise questions for resolution in mammalian reproductive toxicity studies. As stated in the omnibus rule (51 FR 13376 at 13386), mammalian data on reproduction have shown no consistent patterns or trends indicative of adverse reproductive effects from irradiated foods.

Nor has HEI proffered any explanation as to why a study on radiation-sterilized chicken is relevant to the safety of foods irradiated under the conditions permitted by this rule. Rather, HEI has merely asserted that "other scientists consider this finding [of reduced offspring] alarming" and promised to provide testimony at a hearing. A hearing cannot be granted on a mere statement that someone will testify about the relevance of the study without a proffer as to what that person will testify to that demonstrates that there is a genuine and substantial issue of fact that provides a basis for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. Thus, HEI has failed to justify a hearing on this issue (21 CFR 12.24(b)(2)).

b. *Raltech mouse* study. In its response, HEI also referred to an increased number of deaths among mice fed gamma-irradiated chicken.

In studies of mice fed test diets before birth to death or scheduled termination, survival of both sexes was significantly reduced for those fed gamma irradiated food, and the group eating gamma irradiated chicken had the highest incidence of several tumors

among those analyzed. To counter claims of possible harm, the National Toxicology Program assembled a new panel to review the slides on lesions in the test animals, and this panel declared that the lesions were not cancerous. Nonetheless, this panel failed to explain the increased number of deaths among the animals eating gamma irradiated chicken. It did demonstrate disagreement among experts. (HEI March 6, 1987, response, p. 10 (Ref. 2).)

Again, HEI has not proffered evidence or explained why this study (Ref. 40), in which radiation-sterilized chicken (irradiated at a dose of 56 kGy) was fed to the mice, is relevant to a rule that does not permit radiation sterilization of chicken. Furthermore, HEI has not proffered any evidence to support its contention that survival was significantly decreased in both sexes. The agency noted a marginally decreased survival in the female mice of the group fed gamma-irradiated chicken but not in the male mice (51 FR 13376 at 13386). Because the decreased survival reported was marginal and occurred only in one sex group, the agency did not consider it to be treatment-related. HEI has not proffered evidence to support its allegation or to challenge the agency's conclusion or to demonstrate why the study should even be considered in this proceeding. In the absence of such a proffer from HEI, there is no basis to find that a meaningful hearing can be held on HEI's claim. (See *Pineapple Growers Ass'n v. FDA*, supra, 673 F.2d at 1085.)

HEI also alleges that mice fed gamma-irradiated chicken meat had the highest incidence of "several tumors" but does not specify any tumor type and does not provide any evidence to show that any specific tumor is treatment-related. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). Because HEI has failed to make any proffer in support of its assertion, FDA may properly disregard it. *General Motors Corp. v. FERC*, supra, 798 n.20 (D.C. Cir. 1981). Thus, HEI has failed to justify a hearing on this issue.

The agency's review of this study raised concern about the possible treatment-related incidence of only one tumor type, testicular tumors. As discussed in the irradiated pork rule and in the omnibus rule, after examining the histopathology slides, agency scientists concluded that the evidence did not support a treatment-related induction of testicular tumors (50 FR at 29658; 51 FR 13376 at 13386).

Moreover, as noted by HEI, the National Toxicology Program's Board of Scientific Counselors also concluded

that the data on testicular tumors do not demonstrate a carcinogenic response. The agency agreed with that conclusion. HEI has not proffered any evidence to challenge the agency's analysis and conclusion (51 FR 13376 at 13386).

c. *Raltech rat* study. HEI stated that a rat study that was not completed should be repeated.

Although Dr. Thayer did not highlight the problem, one study to explore offspring effects had to be terminated prematurely due to excessive mortality among pups in all diet groups. The study, intended to last two years, was cancelled after only 9 months. Instead of repeating the study to determine the true long-term reproductive effects, the researchers declared the process safe on their limited 9 month data. Critics charge this is a violation of good scientific practice. (HEI March 6, 1987, response, p. 10 (Ref. 2).)

HEI has not proffered any evidence or explained why a study on rats fed radiation-sterilized chicken is necessary to reach a conclusion about the validity of a rule that does not authorize the radiation sterilization of chicken. Nor has it provided any evidence showing that the study raises a health issue about an irradiated food. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). Because HEI has failed to make any proffer in support of its assertion FDA may not properly disregard this study. *General Motors Corp. v. FERC*, supra, 798 n.20 (D.C. Cir. 1981). Thus, HEI has failed to justify a hearing on this issue.

The rat study cited by HEI was terminated due to lactation failure in the parent females. This effect was present across all diet groups (i.e., irradiated and control), with no evidence of toxicity due to the test diets (Ref. 41). In order to justify a hearing on this question, HEI must point to evidence either that the terminated study raises a safety issue that challenges the agency's conclusion that food irradiated under the conditions of the omnibus rule is safe, or that such a study is necessary to reach such a conclusion.

Because HEI has not proffered any evidence to support its contention that the absence of a rat reproduction study with radiation-sterilized chicken raises a question on the safety of food irradiated under the conditions of the regulation, it has failed to meet a threshold burden of tendering evidence that suggests there is a need for a hearing on this issue. (See *Costle v. Pacific Legal Foundation*, supra, 445 U.S. 214-215, 21 CFR 12.24(b)(2).)

d. *Testimony by a genetics expert*. HEI promised to provide testimony by a



genetics expert regarding the Raltech studies:

Genetic experts like Dr. Cecil B. Jacobson, Director of the Reproductive Genetics Center, will be asked to comment on the relevance of the Raltech findings, which he considered important. (HEI March 6, 1987, response, p. 11 (Ref. 2).)

Announcement of a proposed witness is not a basis for justifying a hearing. HEI has stated that it would ask for testimony from someone like Dr. Jacobson. The mere assertion that an individual may testify on the Raltech findings, without any indication as to what he will testify to, does not provide a sufficient basis on which to grant a hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. HEI has failed to do so. Thus, it has not established that a factual issue that would justify a hearing exists.

## 2. Other studies

HEI cited two other studies: a study that reported an effect on DNA metabolism in spleen cells of Chinese hamsters fed irradiated fish (Ref. 29) and a study that reported mutation in *Drosophila* fed x-irradiated DNA (Ref. 42). HEI said of these studies:

Renner, et al., "An Investigation of the Genetic Toxicology of Irradiated Foodstuffs Using Short-term Test System. III—*In Vivo* Tests in Small Rodents and in *Drosophila Melanogaster*," 20 FOOD CHEM. TOXIC. 867 (1982). This study found that feeding irradiated fish affected DNA metabolism in the spleen cells of Chinese hamsters. Although not cited in the author's summary, Table 6 indicates a significantly different distribution of chromosome number from the control group and the group given unirradiated chicken for number of cells with a chromosome number (2N) 22 at p. 873. This finding should also be considered in regard to Item 18, above.

(HEI March 6, 1987, response, p. 11 (Ref. 2).)

Parkash, O., "Induction of Sex-linked Recessive Lethals and Visible Mutations by Feeding X-Irradiated DNA to *Drosophila Melanogaster*," 205 NATURE 312 (Jan. 18, 1965). This study quotes Muller as asserting, "It is hardly conceivable that the variety of types of viable mutations could be induced *en masse* by any agent without there being some appreciable effect on the lethal mutation frequency also". Their study fed irradiated DNA to fruit flies and detected a mutagenic effect. The authors state at p. 313, "Further, if our conclusions are substantiated, one might infer that the sterilization of food by using high doses of ionizing radiations is not desirable".

(HEI March 6, 1987, response, p. 11 (Ref. 2).)

The Renner and Parkash studies have nothing to do with the effect of irradiated food on the number of offspring and thus provide no evidence to support HEI's assertion that the reduced number of offspring in *Drosophila* fed radiation-sterilized chicken was caused by irradiation. Renner et al., reported that six *in vivo* genetic toxicity tests (including a study on DNA metabolism in spleen cells) were carried out on hamsters fed irradiated or nonirradiated cooked chicken, dried dates, and cooked fish (Ref. 29). The agency had reviewed preliminary reports of some of these tests and referenced them in the omnibus rule (51 FR 13376 at 13397) and in the administrative file (81N-0004). The authors concluded that none of the tests provided any evidence of genetic toxicity induced by irradiation. Thus, this study does not provide any basis on which to question the safety of food irradiation.

Table 6, cited in HEI's objections, enumerates the number of cells with chromosomal aberrations in each of the experimental groups. It is true that, in Table 6, the authors reported a difference in the proportion of cells with the normal number of chromosomes in the different treatment groups. However, the proportion of cells with the normal number of chromosomes was greater in the hamsters fed irradiated fish than in those fed the control diet (emphasis added). HEI has not explained how a greater proportion of normal cells and a corresponding lesser proportion of abnormal cells in the hamsters fed irradiated fish provides a basis for concluding that ingestion of irradiated foods leads to any adverse effects. Thus, HEI has not justified a hearing on the basis of the Renner study.<sup>3</sup>

Parkash, in a preliminary study, reported a sex-linked recessive lethal effect when fruit flies were fed irradiated DNA (Ref. 42). As discussed earlier, a sex-linked recessive lethal study is designed as an indicator of mutagenicity. HEI has not provided evidence to show how this mutagenicity

<sup>3</sup> Moreover, HEI states that this effect should be considered in regard to Item 18 of their objection (see the earlier discussion on polyploidy). Table 6 demonstrates that there were no increased chromosomal aberrations or polyploid cells in the bone marrow cells of Chinese hamsters given diets of irradiated or unirradiated chicken, dates, or fish for 6 days, and that the number of cells with the normal number of chromosomes was higher in the hamsters fed irradiated fish than in those fed untreated fish or the control diet (emphasis added). This evidence contradicts HEI's contention that irradiated food fed to animals results in polyploid cells in the bone marrow cells. HEI has not provided any explanation as to how this evidence can be considered to support its claim.

study can be used to support its claim that irradiated food causes adverse effects on fertility.

Under FDA's regulations, a hearing will not be granted on the basis of mere allegations (21 CFR 12.24(b)(2)). Consistent with this regulation, the relevant case law provides that where a party requesting a hearing only offers allegations without an adequate proffer to support them, the agency may properly disregard those allegations. *General Motors Corp. v. FERC*, 658 F.2d 791, 798 n. 20 (D.C. Cir. 1981). In the absence of an explanation of how the Parkash study relates to the alleged adverse effects on fertility in the Raltech study, there is no basis for a hearing on this aspect of the objection.

In addition, Parkash stated that "if our conclusions are substantiated, one might infer that the sterilization of food by using high doses of radiations is not desirable." However, the mutagenic effect reported by Parkash could not be reproduced in later studies (Refs. 43 and 44) designed to test the effect of irradiated DNA on *Drosophila*. These studies, along with the agency's evaluation of the studies, were included in the administrative record of the omnibus rulemaking (see Refs. 3 and 4 in the omnibus rule; 51 FR 13376 at 13397). To justify a hearing on the basis of the Parkash study, HEI would have to provide some basis to find that the Parkash study could be relied on in the face of Parkash's own statement and of the findings in the studies reported in Refs. 43 and 44. HEI failed to do so. Thus, HEI has failed to justify the factual determination its objection urged and thus has failed to justify a hearing on the Parkash study under 21 CFR 12.24(b)(3).

## I. Dominant Lethal Tests

HRG objected to the irradiated pork rule and requested a hearing based on a possible risk of chromosome damage. HRG stated that:

A number of studies also raise the possibility that consumption of irradiated food may damage the chromosomes. Such effects have been shown in dominant lethal tests on rats and mice.

In reviewing these and other studies, Dr. Jonathan Ward, of the University of Texas Medical Branch, and an expert in genetic toxicology, concluded that "these studies as a group fail to either prove or disprove the existence of a hazard from the use of irradiated food. It appears possible that unstable mutagenic products may be produced in foods by irradiation . . . . It is difficult to believe that adequate tests of the effects on radiation of food can be conducted without individually evaluating the

components of the foods for which radiation sterilization is intended."

(HRG objection, p. 3 (Ref. 37).)

To justify a hearing, a challenge to an agency's factual conclusion must present a live controversy. *Community Nutrition Institute v. Young*, supra, 773 F.2d at 1364. In addition, the objection must raise a material issue on which a meaningful hearing might be held. *Pineapple Growers Ass'n v. FDA*, supra, 673 F.2d at 1085. HRG's objection fails to meet these requirements.

HRG's objection to the irradiated pork rule quotes a letter from Dr. J. Ward to the Commissioner of FDA. FDA dealt with this letter as a comment in the omnibus rulemaking. At the time of HRG's objection, FDA had not fully considered this comment. Ultimately, FDA responded to this comment in the final rule in the omnibus proceeding (51 FR 13376 at 13385 and 13387), stating that two of the three studies that reported dominant lethal effects were unreliable, and that there was no biological significance to the reported adverse effects in the third study because the results could not be reproduced in three comparable studies. The burden then shifted to HRG to maintain the viability of its objection by proffering some information that called into question the agency's conclusion on this matter. However, HRG failed to object to that conclusion.

As a result, there is no reason to hold a hearing on this objection because there is no live controversy and thus no material issue on which a hearing could be held. In the absence of some explanation from HRG for why the dominant lethal studies showed that irradiation of the food caused the reported effect, in spite of the agency's determination to the contrary in the omnibus rule, it is undisputed that those reports do not provide an appropriate basis on which to question the safety of pork irradiated in accordance with the irradiated pork regulation. Therefore, HRG's objection would not justify the factual determination urged, and FDA is denying HRG's request for a hearing on this issue under 21 CFR 12.24(b)(3).

Moreover, the agency notes that even Dr. Ward's letter does not state that these studies demonstrate that irradiated food caused dominant lethal mutations. Dr. Ward stated only that "these studies as a group fail to either prove or disprove the existence of a hazard from the use of irradiated food . . . . I would encourage the FDA to carefully evaluate the existing data" (Ref. 45). The agency did not base its decision on safety solely on these studies but did carefully evaluate all

available toxicology data (51 FR 13376 at 13378). Therefore, there is no dispute with the letter cited by HRG in its objection.

## J. In Vitro Effects of Irradiated Sugar Solutions

In the omnibus rule, the agency responded to a comment that sugars irradiated in simple solution have been shown to cause toxic biological effects during *in vitro* testing (51 FR 13376 at 13383). The agency agreed that such effects were seen with simple sugar solutions but cited reports that found that irradiation of sugars in food, that is, in typically complex food matrices, does not produce the same toxic effect that occurs when these sugars are irradiated in simple solution. The agency stated:

There is ample evidence that the types and quantities of radiolytic products from irradiation of sugar solutions are not only dose dependent but are also dependent on specific conditions such as oxygen concentration and metal ions present in foods but not present in simple sugar solutions. (51 FR 13376 at 13383.)

The agency concluded that " . . . irradiated aqueous sugar solutions are unsuitable models for predicting and extrapolating toxicity of irradiated foods . . . . Additionally, no evidence indicates that irradiated foods, including those containing sugars, will cause adverse toxic effects to animals or humans."

(51 FR 13376 at 13383.)

HEI's objection stated:

The FDA admitted that "irradiated solutions of sugars have been shown to cause biological effects *in vitro*" (51 FR 13383), but argued that the adverse findings would not apply to complex food matrices. Evidence of the applicability of these findings to fruits and vegetables would be offered at a public hearing.

(HEI Para. I.17.)

On February 2, 1987, the agency asked HEI to set forth in detail the factual information and analysis that it intended to present at a hearing. On March 6, 1987, HEI responded by citing a 1982 study by Adam on radiolysis of *alpha, alpha*-trehalose in concentrated aqueous solution (Ref. 46); two *in vitro* mutagenic studies, one conducted by Holsten et al. (Ref. 47) on the effect of irradiated sugar solutions on leucocyte cell cultures; and two chapters on radiation chemistry of foods, one by Basson (Ref. 49) and the other by Beyers et al. (Ref. 50), from a 1983 book, "Recent Advances in Food Irradiation."

A hearing will not be granted on the basis of mere allegations or general

descriptions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful hearing might be held." *Pineapple Growers Ass'n of Hawaii v. FDA*, supra, 673 F.2d 1085.

As stated earlier, FDA does not dispute that irradiated sugar solutions have caused toxic effects in cell cultures. However, the agency concluded in the omnibus rule that irradiated sugar solutions are unsuitable models for predicting toxicity of irradiated foods (51 FR 13376 at 13383). The first article cited by HEI (Ref. 46) reports on experiments showing that common food components mixed with sugar solutions can affect the final composition of radiolytic products formed from the sugar, consistent with FDA's conclusion that the types and quantities of radiolytic products depend on specific conditions present in foods but not present in simple sugar solutions (51 FR 13376 at 13383). The other two articles (Refs. 47 and 48) merely report the results of *in vitro* tests with simple sugar solutions.

HEI has not provided any evidence or rationale for concluding that *in vitro* toxicity studies using simple sugar solutions are suitable models for evaluating the safety of eating foods, such as fruits and vegetables, irradiated under the conditions of the regulation. To justify a hearing, HEI must provide some basis on which to find that FDA's conclusion on the relevance of these studies was incorrect. It has failed to do so, however. Thus, the objector has not met its "threshold burden of tendering evidence suggesting the need for a hearing." (See *Costle v. Pacific Legal Foundation*, supra.)

Moreover, the authors of the chapters (Refs. 49 and 50) cited by HEI concluded that radiolysis products from carbohydrates, including simple sugars, are not a hazard (Ref. 49, p. 23), and that *in vitro* studies with simple sugars are not applicable to the safety of irradiated fruits and vegetables (Ref. 50, p. 176). This conclusion is consistent with the agency's analysis, and these chapters were referenced by FDA in its final rule (51 FR 13376 at 13379 and 13383).

HEI cites selected parts of these chapters out of context to reach a conclusion that is opposite to that of the authors. HEI stated that:

This study [by Basson] states, " . . . the chemical changes following irradiation of a model fruit cell are dominated by the radiolytic decomposition of the sugar fraction" at page 12. It notes at page 13, "The radiolysis of oxygen in dilute aqueous solutions leads almost exclusively to the production of hydrogen peroxide," which is



"mildly cytotoxic . . ." Rapid destruction of hydrogen peroxide is claimed for fruits, but that is not the same as total destruction of possible hazardous molecules. The importance of sugar exposure to radiation should be apparent from the statement at page 12, "The maximum yields of all radiolytic products due to an individual component have been calculated and it is clear how the carbohydrates (glucose, sucrose, fructose) contribute overwhelmingly to the product spectrum." Given the importance of sugars in the average daily diet, radiation effects on sugars cannot be "assumed" to be safe.

(HEI March 6, 1987, response, p. 7 (Ref. 2).)

HEI, however, eliminates the conclusions reached by the author. Basson stated:

No consistent mutagenic activity due to these products could be shown using the Ames test and none was observed in a host-mediated assay. Furthermore, it was shown that the presence of other fruit components eliminated any genotoxic activity and this is consistent with the observation that real fruits do not develop genotoxic activity in test systems as a result of irradiation.

The radiolysis of oxygen in dilute aqueous solutions leads almost exclusively to the production of hydrogen peroxide. In these model systems, hydrogen peroxide has been shown to react readily with a number of food components such as enzymes, trace metals and certain amino acids. Thus although hydrogen peroxide is mildly cytotoxic it does not present a hazard when produced in the presence of typical fruit components because of its rapid destruction.

(Ref. 49, p. 12.)

Thus, Basson's discussion explains why in vitro studies of irradiated sucrose solutions are not good models for irradiated fruits. The agency agreed with Basson's analysis in the omnibus rule (51 FR 13376 at 13383). HEI has proffered no evidence for challenging this conclusion. Thus, the Basson chapter, rather than justifying resolution of the issue of the significance of in vitro studies of irradiated sugar solutions in the way sought by HEI, supports exactly the opposite conclusion. (See 21 CFR 12.24(b)(3).)

HEI cites the chapter by Beyers et al.:

This paper summarizes research that the FDA should carefully scrutinize. While the authors of this study conclude that irradiation is no more destructive to food than heating, the destruction caused by irradiation will often be added to heating in cooking preparation of food.

The Beyers study cites evidence of harmful effects of ionizing radiation, such as mutagenicity studies carried out on various irradiated sugar solutions cited at page 175. The spot test and the Ames test were used to detect mutagenic effects of irradiated sugar solutions and radiolytic products of the sugars. The results were positive for sugar solutions in four cases for the spot test and in

three cases for the Ames test. The host-mediated assay was negative for all four. We do not believe that one should dismiss the adverse findings and rely only on the tests which showed no mutagenicity. The Beyers new work found all five irradiated sugars studied to be mutagenic in at least one instance and found the presence of oxygen had a marked influence on the mutagenic response of irradiated sugar solutions. The authors concluded that the interaction of these sugars with other components of actual fruits could account for the absence of mutagenic response in animal feeding studies, but we contend that the danger of irradiated sugars needs further study.

(HEI March 6 response, p. 7 (Ref. 2).)

HEI's contention "that the danger of irradiated sugars needs further study" adds nothing to the discussion above. HEI states that the chapter summarizes research that FDA should scrutinize but then disagrees with the authors' analysis, without providing any evidence to support its disagreement, and ignores the authors' cautionary advice on misinterpretation of data. In this article the authors state:

To assess the relevance of the observed mutagenic effects on the safety of irradiated foods, experiments were carried out on mammalian cells (Swiss albino male mice). None of the four tester strains which had shown biological activity in the *in vitro* experiments showed any evidence of an increased reversion frequency. It was pointed out that extrapolation of findings with cell cultures and simple forms of life to the more complex mammalian systems should be carried out with great caution as they may be meaningless.

(Ref. 50, p. 176.)

Scrutiny of the evidence that HEI has referenced reveals that that evidence does not challenge FDA's conclusion that the in vitro studies are not applicable to the safety of fruits and vegetables irradiated under the conditions of the regulation.

Thus, HEI's objection, when fully analyzed, consists of its unsupported allegation that the results of in vitro testing of irradiated sugars are applicable to complex food matrices. As stated earlier, a bare contention without facts cannot be a basis for a hearing. Because HEI has not proffered any evidence that supports its general contention, it has failed to meet a threshold burden of tendering evidence that suggests there is a need for a hearing on this issue (See *Costle v. Pacific Legal Foundation*, *supra*) (21 CFR 12.24(b)(2).)

#### K. Effect on Pathogenic Microorganisms

In the omnibus rule, the agency addressed comments that asserted that irradiation intended to eliminate one food hazard may affect the microbial

spoilage patterns of foods, thereby creating a new food hazard. These comments expressed concern that *Clostridium botulinum* spores would survive irradiation and would produce botulin toxin without typical signs of food spoilage. The agency concluded that this concern did not apply to the uses of irradiation permitted under the regulation because dry foods (such as spices) do not provide a growth medium for *C. botulinum* spores, and a 1 kGy radiation dose is too low to change normal spoilage patterns (51 FR 13376 at 13381).

#### 1. Change in spoilage patterns

HEI stated that:

FDA admits that irradiation intended to eliminate one food hazard may affect the microbial spoilage patterns of food, thereby creating a new hazard, especially the *C. botulinum* spores (51 FR 13381) [sic]. The FDA argues that this concern does not apply to irradiation of dry foods or foods treated below 100,000 rad. FDA has not addressed the issue of botulism in wet foods, such as canned tomatoes or other wet foods approved for irradiation under this rule. The FDA regulation would continue to allow irradiation of fresh pork below 100,000 rads, and botulism organisms that might be present on fresh pork will not be destroyed by 100,000 rads of radiation. However, in an April 7, 1986 letter to Martin A. Welt, FSIS Deputy Administrator Dr. Ronald E. Engel warned: "After careful review of the scientific literature by our scientists, outside consultants, and the FDA (Food and Drug Administration), it was concluded that there are no data to support the microbiological safety of irradiated vacuum-packaged pork at an absorbed dose of 30-100 kilorad. Further, we believe that any initiative to sell and distribute perishable irradiated products through the mail or through methods other than the usual commercial distribution channels should not be permitted . . . . When a vacuum-packaged fresh pork product has been irradiated between 30-100 kilorad there is a concern that a potential health hazard might result from further reducing the natural flora and allowing *Clostridium botulinum* spores, if present, to produce toxin under conditions where typical spoilage is not evident." (emphasis added [by HEI]).

The FDA has clearly failed to properly address this important concern, and further evidence will be offered at a public hearing.

(HEI Para. I.13.)

A hearing will not be granted on the basis of mere allegations or general descriptions and contentions (21 CFR 12.24(b)(2)). HEI alleges that the agency had not addressed the issue of botulism in "wet" foods.\* FDA's conclusion in the

\* The agency assumes that HEI's use of the term "wet" foods was to distinguish "dry" foods, such as spices, from all other foods that contain significant amounts of water.

final rule that irradiation of food below 1 kGy will destroy few spoilage bacteria and thus will not change normal spoilage patterns applied to all food, including "wet" foods (51 FR 13376 at 13381). Thus, FDA did address this issue.

While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co. v. FDA*, *supra*, 606 F.2d at 1314-1315. HEI has not presented any evidence to demonstrate that irradiation of "wet" foods under the conditions permitted would affect the common spoilage pattern enough to create a new microbial hazard with botulism. In the absence of such evidence, HEI has provided no basis to justify a hearing.

Moreover, HEI's reference to botulism in canned tomatoes demonstrates a lack of understanding about what is permitted under this regulation and about food processing practices. Fresh tomatoes may be irradiated at low doses to control insects or to inhibit ripening, but such extra processing would not normally be done for a product to be thermally processed nor for a canned product. More important, any effect of precanning radiation processing on spoilage organisms or *C. botulinum* spores, even at doses permitted by this regulation, would be superseded by the total sterilization of the food during the canning process.

HEI's objection was filed to the omnibus rule, which did not pertain to the irradiation of pork. Irradiation of pork was permitted under the rule issued on July 22, 1985 (50 FR 29658). HEI's objection was submitted nearly 9 months after publication of the irradiated pork rule in the Federal Register, long after the 30-day objection period. Therefore, HEI's objection with respect to pork is not timely. *ICMAD v. HEW*, 574 F.2d 553, 558 n.8 (D.C. Cir.), *cert. denied* 39 U.S. 893 (1978).

Moreover, HEI's statement that "[t]he FDA regulation would continue to allow irradiation of fresh pork below 100,000 rads, and botulism organisms that might be present on fresh pork will not be destroyed by 100,000 rads of radiation" is not an issue in dispute. HEI has not presented any evidence to show that irradiation of pork under these conditions will affect the common spoilage pattern enough to create a new microbial hazard with botulism. Therefore, under 21 CFR 12.24(b)(2), HEI has failed to justify a hearing with this allegation.

The USDA letter cited by HEI deals only with the vacuum packaging of low dose irradiated pork and shipment of such pork through the mail. As noted in the letter, vacuum packaging of irradiated pork is not permitted by USDA. (USDA has jurisdiction over meat products under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*.) A hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 CFR 12.24(b)(4)). Vacuum packaging of pork is not an issue in these final rules and thus not a basis for granting a hearing.

As for HEI's claim that it would produce further evidence at a hearing, as stated above, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, *supra*, 445 U.S. at 214. Thus, HEI has not proffered any evidence relevant to its contention that irradiation of food under the conditions of this regulation would create a new microbiological hazard.

#### 2. Mutation of microorganisms

In adopting the omnibus rule, FDA considered comments that irradiation may create or produce potentially harmful radiation-resistant bacteria, new bacteria, or viral mutants. The agency concluded that the possibility was remote that organisms affected by mutations would be more virulent or more harmful than those created in nature (51 FR 13376 at 13382).

HEI stated that:

The FDA dismissed the problem of the creation of mutant bacteria and viruses by suggesting that mutations do occur naturally, and the increased mutations caused by ionizing radiation should therefore be ignored or discounted (51 FR 13361) [sic]. Diseases such as AIDS may well be the product of mutant viruses, and public health authorities would certainly agree that steps to prevent the spread of such viruses are essential to maintaining public health. Yet the FDA, without specific scientific evidence to support it, argues that mutant viruses or bacteria cannot be more harmful than those occurring naturally. The FDA further argues that if a hazard might exist naturally, the FDA has no obligation to prevent the increase of such a hazard. This attitude is clearly in violation of the Federal Food, Drug and Cosmetics [sic] Act. The proposed doses of irradiation are clearly doses that will allow bacteria and viruses to survive on foods, since very high doses (generally in the millions of rads) are needed to kill them. Ionizing radiation is a well established mutagenic agent, and the FDA response to comments warning of this danger is simply speculative and inadequate. Further evidence by appropriate scientists

and professionals will be offered at the public hearing.

(HEI Para. I.14.)

A party requesting an evidentiary hearing cannot rely merely on speculation to support its request. To justify a hearing on this objection, HEI must offer some evidence that supports its contention that dangerous mutant viruses or bacteria will be created by irradiation of food at the levels permitted by FDA. For example, this standard could have been met if HEI had submitted evidence on the types of mutant viruses and bacteria found in irradiated foods, evidence on the conditions that exist during irradiation that make it likely that mutations affecting safety will occur, or some other evidence that would provide a basis to call into question FDA's conclusion that the possibility that harmful mutant organisms will be produced is remote. Yet, HEI has not made any such proffer. HEI has provided no evidence to support its allegations.

The agency finds that this objection is merely a general description of HEI's position, and that it does not raise a factual issue for resolution at a hearing. Therefore, HEI has failed to justify a hearing under 21 CFR 12.24(b)(2).

HEI's promise to provide unspecified evidence does not remedy this deficiency. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that supports the need for a hearing. *Costle v. Pacific Legal Foundation*, *supra*, 445 U.S. at 214.

There is no dispute that radiation, like heat, can cause mutations but that does not mean that irradiation of food causes mutations that present new safety problems. In response to a comment in the omnibus rule (51 FR 13376 at 13382), FDA referenced a report of a 1982 meeting of the Board of the International Committee on Food Microbiology and Hygiene of the International Union of Microbiological Societies (Ref. 51). At that meeting, the Board concluded that "Irradiation induced genetic mutation of pathogens in food did not create an increased hazard to health and in the Board's opinion there would be no qualitative difference between the kind of mutation induced by ionizing irradiation and that induced by any other pasteurization/partial preservation methods such as heat treatment or vacuum drying." Other studies have come to the same conclusion (See Refs. 52 to 54).



## 3. Effect on aflatoxin production

In the omnibus rule (51 FR 13376 at 13381), FDA responded to a comment that cited studies by Priyadarshini and Tulpule in which aflatoxin producing organisms were added to wheat after irradiation and autoclaving (steam sterilization), as well as to wheat that had been autoclaved only. Increased levels of aflatoxin were reported in the wheat that had been irradiated. FDA concluded that the studies did not replicate actual food handling practices in that wheat would not be steam-sterilized in addition to being irradiated, and that infection with aflatoxin producing organisms would ordinarily occur before harvest. FDA noted that it had no evidence that would lead it to conclude that food irradiated and stored under normal handling practices would show increased aflatoxin production and concluded that the results cited did not justify modification of the rule.

In its proposal for the omnibus rule (49 FR 5714 at 5717), FDA cited a report by Schindler that irradiation of mold spores in aqueous suspension may increase aflatoxin production but noted that other studies had shown either no increase or a decrease in aflatoxin production after irradiation. FDA tentatively concluded in the proposal that because this study did not replicate actual use conditions its results were not an adequate basis for concluding that irradiation of food should not be permitted. Comments on the proposal did not address the Schindler study on whether an adequate study must replicate actual use conditions.

HEI objected to the omnibus final rule on the ground that:

The FDA dismissed evidence that aflatoxin production can be increased by exposure to ionizing radiation, citing two studies by Priyadarshini & Tulpule as being inappropriate because "the studies referenced do not replicate actual food-handling practices" (51 FR 13381) [sic]. Whether a scientific study replicates food handling practices is not the issue here. The issue is whether a greater danger to consumers is created by the increased production of fungal toxins due to irradiation. Aflatoxin production is already a well known problem in terms of our food supply. Since naturally occurring aflatoxin contamination of foods has been identified as a problem in many countries \* \* \*, the FDA ought to be aware of this problem. The FDA earlier cited Schindler, A.F., et al., "Enhanced Aflatoxin Production by *Aspergillus flavus* and *Aspergillus parasiticus* after Gamma Irradiation of the Spore Inoculum [sic].": JOURNAL OF FOOD PROTECTION, 43:7-9, 1980, and Applegate, K.L. and J.R. Chipley, "Increased Aflatoxin Production by *Aspergillus flavus* via Cobalt Irradiation," POULTRY SCIENCE, 52:1492-1496, 1973, which found increased aflatoxin production

after irradiation. The above studies compared non-irradiated foods with irradiated foods, and found greater aflatoxin production in the irradiated foods. While all of these studies were conducted in laboratories, where before and after conditions could be properly evaluated, one cannot claim that the aflatoxins will magically disappear from the food environment before foods reach a food irradiator. The scientific literature indicates that the Environmental Protection Agency considers aflatoxins a potent carcinogenic hazard, and therefore, the FDA should either present evidence to refute the scientific studies cited above or prevent its use based upon the greater danger of aflatoxin production on foods so treated. Further evidence regarding the stimulation of aflatoxins would also be offered at a public hearing.

(HEI Para. I.12.)

On March 6, 1987, HEI responded to an FDA request for the evidence that it intended to present on this issue by citing a statement by Horace Graham in a 1980 book (Ref. 55) that more information is needed. HEI also cited: an EPA document that ranked aflatoxin B-1 high in its list of suspected carcinogens; a statement by Dr. Lester Crawford (Associate Administrator of the Food Safety and Inspection Service, USDA) that "if studies show increased aflatoxin production on irradiated foods, he would be concerned, since aflatoxin is considered most carcinogenic;" a book section on aflatoxin toxicity and mechanism of action; and a study on an epidemic of hepatitis in humans who consumed contaminated maize.

Given FDA's conclusion in the final rule that "[t]he agency has no evidence that would lead it to conclude that food irradiated and stored under normal handling practices would show increased aflatoxin production" (51 FR 13376 at 13381), it is not enough for HEI to assert that the issue is not whether the study replicates food handling practices. To justify a hearing, HEI must point to some basis for finding that FDA's conclusion is wrong. HEI must either point to some evidence that the aflatoxin concentration on food under actual food handling conditions would be increased by irradiation or explain why the laboratory studies that FDA stated are not relevant to actual food handling practice should be considered relevant. HEI has failed to do so. Therefore, HEI has failed to justify a hearing.

While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid*

*Co. v. FDA*, supra, 606 F.2d at 1314-1315. HEI has not presented any evidence to challenge FDA's conclusion that foods irradiated and stored under normal handling practices do not show increased aflatoxin production. In the absence of such evidence, HEI has provided no basis to justify a hearing.

FDA does not disagree with HEI's statement in its March 6, 1987, submission that aflatoxin B-1 is a carcinogen; that a significant increase in aflatoxin in the food supply would be of concern; that aflatoxins are toxic; and that aflatoxin consumption has been associated with outbreaks of hepatitis. Furthermore, FDA has never claimed that "aflatoxins will magically disappear from the food environment before foods reach a food irradiator," as stated in HEI's original objection.

None of this information, however, challenges FDA's conclusion that foods irradiated and stored under normal handling practices do not show increased aflatoxin production. Because HEI has failed to challenge FDA's conclusion, it has failed to justify a hearing on that conclusion. A hearing will not be granted if there is no genuine issue of fact for resolution (21 CFR 12.24(b)(1)).

The statement by Graham cited by HEI states that "[m]ore information on the effects of low level irradiation on mycotoxin-producing molds is needed \* \* \*." Graham (Ref. 55) goes on to say that post-irradiation handling of any food, including grains, should be done in such a way as to preclude the outgrowth of toxin-forming, or any other type, of spoilage organism. He stressed the importance of the storage temperatures, the relative humidity of the storage atmosphere, and the water content of the food product. Graham referenced a study by Behere et al. (Ref. 56). This study, which closely resembled actual food handling conditions, showed no radiation-related increase in the amount of toxin produced in grains artificially infected with *A. flavus* before or after irradiation at a dose of 0.2 kGy (Ref. 56). The authors of the study stated that the storage experiments showed that the moisture content of the grain was critical for fungal growth and aflatoxin production. Thus, Behere's study, and hence Graham's chapter cited by HEI, are consistent with FDA's conclusion that foods irradiated and stored under normal handling practices do not show increased aflatoxin production. Consequently, this study does not create an issue of fact and does not provide a basis for a hearing on FDA's conclusion (21 CFR 12.24(b)(1)).

## L. Trichinosis

Several objections to the irradiated pork rule stated that there are no significant benefits to food irradiation, and that other methods to control *Trichinella spiralis* exist. In addition, they stated that trichinosis is not a serious health problem and requested a hearing because there are cheaper and safer ways to control trichinosis.

FDA concluded that irradiation of pork at 0.3 to 1 kGy is a safe and effective means of controlling *Trichinella spiralis*. The seriousness of the health hazard from trichinosis or the availability of alternative methods for preventing this health problem are not factors that can be considered under the Food Additives Amendment.\* Rather, a decision to permit use of an additive must be based solely on consideration of whether it is safe under the conditions of use, and whether it performs the intended technical effect. Thus, even if the objectors could show there are cheaper and safer ways to control trichinosis, such a showing would not provide an appropriate basis for the agency to change its conclusion. Therefore, the objectors did not justify a hearing under 21 CFR 12.24(b)(4).

## M. Free Radical Formation

In the final rule, FDA stated that free radicals are formed during irradiation of food and dissipate quickly in the presence of water (51 FR 13376 at 13379). Free radicals formed in dry spices and seasonings are known to persist for long periods of time while these foods remain dry but dissipate quickly when the dry ingredient is added to moist foods (51 FR 13376 at 13379). FDA noted that free radical reactions are also common during conventional food processing. The agency stated that the important question in deciding on the safety of irradiated foods was not whether free radicals may be formed, but whether a toxic radiolytic product could be formed in sufficient amounts to make the food unsafe. FDA concluded that the evidence does not show that toxic radiolytic products are formed in sufficient amounts to cause concern about the safety of irradiated foods (51 FR 13376 at 13378).

HEI objected on the basis that:

\* The agency still believes, however, that trichinosis is a serious public health hazard and infections can lead to death. Although the incidence of trichinosis has declined in recent years, there are still enough outbreaks from eating insufficiently cooked pork to warrant concern. In fact, there are probably more incidents of trichinosis than of food-borne botulism (Ref. 57). Treatments such as the use of irradiation ensure that pork products are not the sources of trichinella infection.

Free radical formation is currently a prime area of investigation of cancer induction, and should not be ignored merely because such substances may be present (and causing cancer) in other foods. FDA's comment that "[because] irradiation produces free radicals as reactive intermediates in the food itself, the high water content of all fresh food provides a medium for their rapid degradation" (51 FR 13379). This statement is erroneous for two reasons. First, this statement clearly contradicts FDA's approval of spice irradiation, which the agency states was "based on the fact that the amount of chemical change in the solid, dry state of a food is less than would occur when substantial portions of liquid are present" (51 FR 13380). Secondly, the issue with free radicals is that they form new chemical bonds of unknown toxicity which are then ingested into the body. FDA's statement that "they are not likely to persist or be present at all in food by the time that food reaches the consumer" (51 FR 13379) is misleading at best, as the dangers of free radicals do not necessarily consist of their reactions *inside the body*, but rather within the food prior to consumption. Since FDA does not know what the long-term health effects of consuming such foods is, it should withdraw its regulation and hold a public hearing to consider evidence as to the adverse effects of such foods.

(HEI Para. I.6 Emphasis added by HEI.)

The agency asked HEI on February 2, 1987, to set forth in detail the factual information and analysis on this objection that it intended to present at a hearing.

On March 6, 1987, the objector: (1) Stated that Dr. George Tritsch would testify on the relationship of free radical formation and cancer, (2) cited three articles discussing free radicals in food, and (3) referred to statements by two persons that more studies should be done. HEI's original objection and supplementary response raise several distinct concerns, none of which present an issue of fact that would justify the granting of a hearing on the safety of food irradiation.

## 1. Alleged contradiction

In the original objection, HEI stated that "FDA's comment that '[because] irradiation produces free radicals as reactive intermediates in the food itself, the high water content of all fresh food provides a medium for their rapid degradation' (51 FR 13379) \* \* \* is erroneous" because it "contradicts FDA's approval of spice irradiation, which the agency states was 'based on the fact that the amount of chemical change in the solid, dry state of a food is less than would occur when substantial portions of liquid are present' (51 FR 13380)." HEI has not explained why it believes that these statements are contradictory.

HEI's allegation appears to be based on a misunderstanding of free radical chemistry. In foods with high water content, the free radicals that are produced during irradiation degrade quickly to form radiolytic products (51 FR 13376 at 13380). Thus, the free radicals are short-lived and chemical change occurs readily. In dry, solid foods, such free radicals are less able to react to form radiolytic products and therefore persist longer as free radicals (51 FR 13376 at 13380). In general, the amount of radiolytic products formed by irradiation is less in those foods that are dry than in foods with high water content (49 FR 5714 at 5716).

The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. By merely asserting that the statements are contradictory but not submitting any evidence to support that assertion, HEI has failed to demonstrate that an issue of fact exists. Thus, there is no basis for a hearing on this assertion under 21 CFR 12.24(b)(2).

## 2. Free radicals and cancer research

HEI stated that George Tritsch, Ph.D., a researcher at the Roswell Park Memorial Institute, would summarize scientific investigation into free radical formation and its relation to induction of cancer.

A hearing request must raise a material issue of fact concerning which a meaningful hearing might be held. *Pineapple Growers Ass'n v. FDA*, supra, 673 F.2d at 1085. The statement that "free radical formation is currently a prime area of investigation of cancer induction" is not in dispute. Thus, this statement does not justify a hearing under 21 CFR 12.24(b)(1).

Moreover, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. To justify a hearing, HEI would have to provide some basis to believe that the investigations to be summarized by Tritsch raise questions about the safety of irradiated foods. The mere assertion that an individual will summarize investigations on the relationship of free radical formation and cancer does not establish that such investigations are relevant to the safety of irradiated foods and therefore justify a hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214, and HEI has not done so with respect to this objection.



## 3. Production of free radicals in food

HEI referred to articles by Basson (Ref. 49), Simic et al. (Ref. 58), and Kesavan (Ref. 59) as evidence that free radical formation occurs in foods exposed to ionizing radiation. HEI stated:

Basson \* \* \* notes at page 11, "When the model fruit cell is irradiated, nearly all the incident energy is absorbed by the water (80-90% of the cell mass) and leads to the production of water free radicals \* \* \*"

Simic, et al. \* \* \* point out that radiation-induced free radical reactions which occur in irradiated foods are responsible for all the biological and chemical effects, desirable or undesirable, producing a variety of radiolytic products that are dependent on dose, dose rate, temperature, atmosphere, physical state and extent of hydration. We [HEI] believe that the radiolytic products in each food item should be examined on a case by case basis, rather than granting blanket safety approval for all food irradiated at low doses, since such safety cannot rationally be assumed.

\* \* \* Kesavan, discussing irradiation of food, admits, "Dry seeds and food subjected to high doses do contain large amounts of free radicals." Kesavan suggests that since these free radicals dissipate with storage, we should not be concerned. Since FDA does not require storage of irradiated foods until dissolution of free radicals, and since some studies suggest adverse effects from freshly irradiated food (Bhaskaram, discussed later), we disagree.

(HEI March 6, 1987, response, p. 1 (Ref. 2).)

The statements that HEI references do not justify the granting of a hearing. A hearing will not be granted unless there is a genuine and substantial issue of fact for resolution (21 CFR 12.24(b)(1)). FDA does not dispute the statements made by the authors of these references. The agency agrees that free radicals are formed in food during irradiation (51 FR 13376 at 13379).

The first two references that HEI cites are simply examples of many similar reports that discuss radiation chemistry of foods and food components. FDA used these reports to support its finding that products formed during irradiation are predictable.

On the basis of these reports, HEI asserts that radiolytic products in each food item should be examined on a case-by-case basis. Yet, HEI has not cited anything in these two reports that supports this assertion. Neither Basson nor Simic et al., state that food items must be evaluated on an individual basis nor does either author present any evidence that would justify a case-by-case evaluation. Thus, all that HEI has really presented is an unsupported statement of its belief on how safety assessments should be made. A hearing will not be granted on the basis of mere

allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). Because HEI has failed to make any proffer that supports its assertion, FDA may properly disregard it. *General Motors Corp. v. FERC*, 656 F. 2d 791, 798 n. 20 (D.C. Cir. 1981). Thus, HEI has failed to justify a hearing on this issue.

HEI, in discussing the Kesavan article, implies that the amount of free radicals in dry foods is a basis for requiring a mandatory storage period, although Kesavan did not reach this conclusion. HEI claims that irradiated foods are unsafe because FDA has not required a minimum storage period.

In the omnibus rule, FDA found that it was not necessary to establish a minimum storage period because there was no evidence that pointed to such a need. To establish that an issue exists, and thus to justify a hearing, HEI would have to point to evidence that shows that FDA erred, and that some minimal storage period is necessary to dissipate free radicals and to assure the safety of irradiated food. *American Cyanamid Co. v. FDA*, supra, 606 F. 2d at 1314-1315. HEI has not cited any study in which free radicals in foods were found to cause harm. It references only the Bhaskaram study in support of its claim that adverse effects are associated with freshly irradiated food. As previously discussed, however, FDA considered the Bhaskaram study (See II. D. *Polyploidy* above) and found that it does not provide a valid basis on which to judge the safety of such food. HEI has not cited any other evidence to support its contention here. Therefore, HEI has not provided any basis for concluding that the presence of free radicals in irradiated food requires that a mandatory storage period for that food needs to be established and thus has failed to meet its threshold burden of tendering evidence that suggests the need for a hearing on this issue. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. Thus, HEI has failed to justify a hearing under 21 CFR 12.24(b)(1).

Moreover, a study designed specifically to address whether free radicals that might persist in food pose a serious safety concern has been conducted (cited as reference 34 by FDA in the omnibus rule). In that study, "Long Term Animal Feeding Study for Testing the Wholesomeness of Irradiated Diet with a High Content of Free Radicals" (Refs. 60 and 61), rats were fed a diet containing 35 percent dry milk that was irradiated at 45 kGy shortly before feeding and that still contained a high quantity of free radicals, as measured by electron

paramagnetic resonance spectrometry. This use of a very high radiation dose for a large fraction of the diet is far in excess of what is permitted by the omnibus rule. The authors reported no treatment-related toxicological effects from the free radicals present in the milk-powder diet.

## 4. Need for more studies

HEI referred to a statement on food irradiation by USDA's A.E. Olson at the Second National Conference for Food Protection (1984), and quoted from a 1980 book, *Safety of Foods*, by Graham (Ref. 55). Of Dr. Olson's statement, HEI stated:

A.E. Olson, of the U.S. Department of Agriculture, recently said in the proceedings of the Second National Conference for Food Protection, May 1984, regarding food irradiation: "As this process becomes important in the preparation of a particular food, studies should be undertaken on the possible formation of toxic compounds in that food and the effects on [sic] the processing on nutrient bioavailability. Particular attention should be directed to the possible formation of any previously unidentified compounds in that food and how they may affect food safety and nutrition."

(HEI March 6, 1987, response, p. 2 (Ref. 2).)

HEI also asserted that Graham's chapter, "Safety and Wholesomeness of Irradiated Foods" (Ref. 55) stated that: " \* \* \* more work needs to be done before convincing conclusions can be arrived at regarding carcinogenicity of irradiated foods, despite the large number of studies already conducted."

A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). The statements that HEI cites concern food irradiation in general. HEI has failed to show that either of these general statements raises questions about the agency's specific findings on minor dry ingredients and foods irradiated at a low dose. In general, the agency agrees with Olson and Graham that particular attention should be directed to the possible formation of any previously unidentified compounds in irradiated food and to how these compounds may affect food safety and nutrition. In this instance, however, the agency found that the evidence was adequate to conclude that food irradiated under the conditions of the regulation is safe. HEI has not presented any basis to believe that either author would disagree. Thus, in the absence of evidence that ties Olson's or Graham's statements to the specific uses at issue here, HEI's assertions based on these statements

are no more than mere allegations and do not provide a basis for a hearing.

## N. Chemical Changes Caused by Irradiation

The agency considered the chemical changes caused by irradiation and concluded that the chemical differences between foods processed at radiation doses permitted by the regulation and nonirradiated foods are very small and do not affect the safety of the foods (51 FR 13376 at 13377).

HEI stated that:

BFIFC admitted that new chemicals are formed in foods exposed to ionizing radiation, but did not address the safety of chemicals formed in such foods unless they were "unique to irradiated foods" (51 FR 13377). Harmful chemicals have been identified in foods exposed to ionizing radiation, and some of these chemicals are known to be carcinogenic, such as benzene and formaldehyde. BFIFC ignored the data in the scientific literature and the data submitted in comments responding to the proposed regulation. Data to be presented at public hearings is already part of the Docket Record of FDA, and should have been incorporated into the final regulation.

(HEI Para. L.2.)

There are two aspects to this objection that must be analyzed to determine if HEI has provided the basis for a hearing: (1) The objection's assertion with respect to harmful chemicals being created in irradiated food; and (2) the assertion that BFIFC, or more importantly, FDA, ignored data.

## 1. Creation of harmful chemicals

Under FDA's regulations and the relevant case law, to present a substantial issue of fact, an objection must do more than make general allegations. It must specifically identify reliable evidence that supports its contentions (21 CFR 12.24(b)(2)). Here, HEI contends that harmful chemicals are formed in food that is irradiated but specifically identifies only benzene and formaldehyde as substances that are formed. Therefore, FDA will consider whether HEI has demonstrated that a substantial issue of fact exists with respect to whether the production of these two chemicals during irradiation affects the safety of the food that is irradiated.

To establish a basis for a hearing, data and information must be submitted that, if established at a hearing, would be adequate to justify resolution of a factual issue in the way sought by the objector and to justify the action requested (21 CFR 12.24(b)(3)). Thus, HEI must provide some basis to find that the levels of benzene or formaldehyde that would be formed in food under the conditions of the

regulation raise sufficient concern to affect the conclusion reached by FDA that food irradiated in accordance with 21 CFR 179.28 is safe. Based on its review of HEI's objection, FDA finds that HEI has not done so and, therefore, has not justified a hearing on the effects of benzene and formaldehyde in irradiated food.

a. *Benzene*. HEI has not provided any evidence to show either that benzene is formed in food irradiated under the conditions of the regulation, or that the amount of benzene that might be formed when food is irradiated would be toxicologically significant. Instead, HEI has merely asserted that the entire record previously considered by FDA provides the basis for its contention. Such a general allegation, without any specific evidence to support it, does not provide a basis for a hearing (21 CFR 12.24(b)(2)).

The agency cited a report showing that an increased amount of benzene was found when frozen beef was irradiated in the absence of air at a sterilizing dose, 56 kGy (5.6 Mrad), a level much greater than that permitted by this regulation (Ref. 14). The concentration of benzene in this radiation-sterilized beef was reported as 19 parts per billion (ppb). After cooking, the beef contained 15 ppb benzene, compared to 2 ppb and 3 ppb benzene in cooked beef that has been heat sterilized or frozen but not irradiated. In a 1977 report for the Department of the Army entitled, "Evaluation of the Health Aspects of Certain Compounds Found in Irradiated Beef" (Ref. 14), the Federation of American Societies for Experimental Biology's (FASEB's) Select Committee on the Health Aspects of Irradiated Beef (the Select Committee) stated that much larger amounts of benzene had been found in eggs and refrigerated haddock that had not been irradiated. The Select Committee noted that benzene had also been reported in 20 other nonirradiated foods by numerous workers, but comparison with irradiated samples was difficult because of the lack of quantitative data for the nonirradiated foods.

The Select Committee concluded that the small addition of benzene from radiation-sterilized beef would contribute only a trivial increment to the normal body burden and is unlikely to increase significantly whatever hazard exists from other sources. FDA is not aware of any evidence that would call this conclusion into question, and HEI has not cited any. If benzene is formed in food during irradiation under the conditions of this regulation, FDA would expect the concentration to be far lower than in the radiation-sterilized beef

because the permitted dose is less than one-fiftieth of that used with the beef.

b. *Formaldehyde*. The agency does not dispute that formaldehyde may be a secondary reaction product of carbohydrates in aqueous solutions irradiated in the presence of oxygen (Ref. 62). To justify a hearing under 21 CFR 12.24(b)(3), HEI must proffer evidence that formaldehyde: (1) Is carcinogenic when ingested; (2) is formed in food irradiated under the conditions of the regulation; and (3) if formed, is formed in amounts sufficient to raise a health concern. HEI has not provided evidence on any of these three points and thus has failed to justify a hearing.

Formaldehyde is an intermediate in normal amino acid metabolism in the body and is found at the parts per million level in human blood (Ref. 63). Moreover, formaldehyde has been reported to occur in various foods that have not been irradiated, including: red meats, poultry, fish, eggs, cheese, fresh fruits, beer, and soft drinks, generally in the low parts per million range (Refs. 64 to 67). HEI did not state its basis for describing formaldehyde as carcinogenic, but the agency assumes that HEI is referring to a study in which formaldehyde, administered intranasally to rats, produced carcinomas at the site of application (Ref. 68). The agency previously has concluded that this study is not relevant to the question of whether formaldehyde is carcinogenic when ingested. The agency, in its denial of requests for a hearing on aspartame, concluded that formaldehyde is not carcinogenic when ingested (49 FR 6672; February 22, 1984). HEI has not cited any evidence that would call this conclusion into question and thus has not provided any basis for reconsidering that conclusion.

In the aspartame decision, the agency considered chronic studies in which hexamethylenetetramine was administered to three strains of mice for 60 weeks in drinking water in doses of 0.5 to 5 percent and to Wistar rats in drinking water at 1 percent for 104 weeks. Because hexamethylenetetramine is degraded in the acid medium of the stomach to formaldehyde and ammonia, these studies directly tested whether orally administered formaldehyde is carcinogenic. In the hexamethylenetetramine studies, no evidence of carcinogenic activity was found in any of the test groups (49 FR 6672 at 6680).

In addition, referring to the rat study (Ref. 68) that showed that formaldehyde administered intranasally produced



carcinomas in the nasal cavities, the agency stated: "The site of the carcinomas strongly indicates that the neoplastic process is a localized, not a systemic, reaction to the known irritating and cytotoxic properties of formaldehyde. No increase in tumor incidence was observed at sites remote to direct exposure. The same study supports the further conclusion that direct exposure to relatively high concentrations of formaldehyde gas is necessary before the carcinogenic process occurs" (49 FR 6672 at 6680).

Therefore, with respect to formaldehyde, the agency has not found, and HEI has not cited, any evidence that formaldehyde is carcinogenic when ingested; that formaldehyde is found in irradiated foods at levels significantly different than in nonirradiated food; or that formaldehyde is harmful when ingested at the levels normally found in food. Thus, HEI has not provided any evidence demonstrating that a material issue of fact exists.

## 2. Whether FDA ignored data

In its objection, HEI stated that "BFIFC admitted that new chemicals are formed in foods exposed to ionizing radiation, but did not address the safety of chemicals formed in such foods unless they were 'unique to irradiated foods' (51 FR 13377)."

HEI's allegation that BFIFC did not address the safety of chemicals unless they were unique is not supported by the administrative record. BFIFC considered both the probable total yield of radiolytic products and the fraction of such products that may be unique before concluding that: "Based on what we have learned from our review of all aspects of food irradiation it is apparent that any toxicological testing requirements must also be predicated on the amounts of new chemical constituents generated by the irradiation process (URP's)" (emphasis added). Thus, BFIFC considered all radiolytic products, not only new or unique radiolytic products. A hearing will not be held unless there is a genuine and substantial issue of fact for resolution (21 CFR 12.24(b)(1)), and HEI has failed to show that such an issue exists on this point.

HEI also alleges that "BFIFC ignored the data in the scientific literature and the data submitted in comments responding to the proposed regulation. Data to be presented at public hearings is already part of the Docket of FDA, and should have been incorporated into the final regulation." It should be pointed out that BFIFC's main task was to determine what types of toxicological testing requirements would be

appropriate to assure the safety of irradiated foods. BFIFC was a temporary committee that ceased to exist nearly 4 years before FDA issued the proposal that elicited comments on irradiation. Therefore, BFIFC could not have considered data submitted in comments responding to the proposed regulation. However, FDA in its omnibus rulemaking considered not only the BFIFC report, but also other information in the agency's files, including the data submitted with comments to the proposed regulation.

HEI has not identified any specific data that FDA or BFIFC ignored. It has not, for example, cited any studies that were available at the time FDA was considering the omnibus rule, but that the agency failed to consider. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp. v. FERC*, supra, 656 F.2d at 798 n.20. HEI has failed to make such a proffer on this issue and thus has failed to demonstrate that a hearing is appropriate on whether the agency ignored data.

## O. Production of Hydrogen Peroxide in Irradiated Foods

In the omnibus rule, FDA responded to a comment that hydrogen peroxide is produced by irradiation and may contribute to carcinogenesis. The agency stated that it had previously considered a Japanese study (Ref. 69) concerning the potential carcinogenicity of hydrogen peroxide and concluded that the evidence does not demonstrate that hydrogen peroxide is a carcinogen (51 FR 13376 at 13379; see also 46 FR 2341; January 9, 1981). FDA further noted that any hydrogen peroxide formed would be rapidly degraded by natural enzymes and antioxidants in food, and that any residual hydrogen peroxide, if present, would be considerably less than that encountered ordinarily in foods and environmental sources.

HEI stated:

The FDA admitted "the formation of detectable quantities of hydrogen peroxide, organic peroxides, and hydroperoxides during irradiation of foods in the presence of oxygen," but erroneously claimed that such peroxides would disappear before food consumption (51 FR 13379). While the FDA might regard the Japanese study finding duodenal cancer caused in C57B mice by hydrogen peroxide as inconclusive, the FDA offers no evidence to disprove the study findings. Further evidence regarding the dangers of peroxides will be offered at the public hearing, along with the reasons for considering the Japanese study important.

(HEI Para. 1.7.) (Emphasis by HEI.)

This objection raises the question of the extent to which FDA may rely on the

determination that it made in the 1981 rulemaking that hydrogen peroxide has not been shown to be a carcinogen. A similar question was raised in *Community Nutrition Institute v. Novitch*, 773 F.2d 1356 (D.C. Cir. 1985). In that case, in the course of challenging FDA's approval of the use of aspartame in ready-to-drink beverages, the objector also challenged the agency's approval of certain dry uses of aspartame. The court rejected the latter challenge, stating: "The agency's conclusions concerning the safety of the dry use of aspartame, except to the extent that new evidence suggests that the FDA may not rely on these prior findings in its deliberations on wet use, may not be raised again in this proceeding in the interests of administrative finality and judicial economy." (*Id.* at 1362-1363.)

Consequently, in this proceeding, the agency can rely on the findings that it made about hydrogen peroxide in earlier rulemakings except to the extent that new evidence that raises questions about the agency's conclusion is presented.

The agency subjected the data from the Japanese study cited by HEI to an in-depth analysis in its final decision on the safe use of hydrogen peroxide as a sterilizing agent for food packaging materials (46 FR 2341; January 9, 1981). After review, including consultation with the authors of the study, the agency concluded that the results of the study did not provide sufficient evidence to designate hydrogen peroxide as a carcinogen. FDA placed the manuscripts of the Japanese study and memoranda of FDA's Cancer Assessment Committee on public display in the Dockets Management Branch under Docket No. 79F-0318.

In addition, FDA has recently completed its review of whether hydrogen peroxide is generally recognized as safe (GRAS) for direct addition to food (51 FR 27169; July 30, 1986). The agency discussed the Japanese study in its November 17, 1983, GRAS proposal (46 FR 52323).

For the objector to raise a material question of fact about the safety of hydrogen peroxide, it must point to evidence that is inconsistent with FDA's conclusions. Yet, HEI has not provided any information to support its claim that hydrogen peroxide is carcinogenic, or that other peroxides are present in irradiated foods in hazardous amounts. While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward

with evidence that calls into question FDA's conclusion. HEI has failed to present any such evidence. *American Cyanamid Co. v. FDA*, supra, 606 F.2d at 1314-1315. Rather, HEI merely promised to provide further evidence at a hearing on the dangers of peroxides and on a study that FDA had previously evaluated in depth in a proceeding in which no one requested a hearing.

A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. As discussed above, HEI has not proffered any evidence on hydrogen peroxide to challenge the agency's conclusion that food irradiated under the conditions of the regulation is safe. Thus, a hearing on this objection is denied.

In addition, HEI's statement that FDA "erroneously claimed that such peroxides would disappear before food consumption (51 FR 13379)" is a bald assertion, without any proffer of evidence to support it. HEI has not cited any evidence that hydrogen peroxide would remain in irradiated food at significant levels. A hearing will not be granted on the basis of mere allegations or denials (21 CFR 12.24(b)(2)). Thus, HEI has failed to justify a hearing on this point.

## P. Radiolytic Products

BFIFC stated that radiolytic product generation is dependent primarily upon the amount of energy absorbed by the food. Based on a review of available literature identifying and quantifying substances produced in foods by radiation, BFIFC estimated that irradiation of food at 1 kGy would generate approximately 30 parts per million of radiolytic products. BFIFC used experimental data on irradiated and nonirradiated food to estimate that approximately 90 percent of the radiolytic products identified were known natural food components and noted that the remaining 10 percent were chemically similar to known natural food components (51 FR 13376 at 13378). Based on the findings of BFIFC and the Task Group, and on its review of the other information in the administrative record of the omnibus proceeding, FDA concluded that food irradiated under the conditions of the regulation is safe (51 FR 13376 at 13378).

## 1. Effect of irradiation on pesticide residues

In response to a comment about the fate of pesticide residues on produce, the agency concluded that the total amount of radiolytic products from pesticide chemicals on foods that are irradiated will be virtually nil, and that these radiolytic products do not pose a hazard to health (51 FR 13376 at 13380). HEI stated that:

The FDA admitted that a pesticide chemical present on irradiated food could be chemically changed by the irradiation process (51 FR 13360) [sic]. The FDA offered no scientific evidence regarding the types of changes that might be expected, but a mere "guess" or "estimate" regarding the parts per million to be found in food. This is equivalent to guessing that a potential hazard is harmless, and does not carry out the FDA mandate to assure safety. Further evidence regarding these dangers and the FDA failure to assess them will be offered at the public hearing.

(HEI Para. 1.8.)

(See Objection No. 159 in Docket.)

To justify a hearing, an objector must meet a threshold burden of tendering evidence suggesting a need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. It must point to facts that provide a basis on which to question the agency's conclusions. *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982). Here, to raise questions about FDA's conclusions, HEI would have to point to some evidence that would lead one to conclude that degradation products are more toxic than the pesticide itself, and that the amount of degradation products is sufficient to make a difference in the toxicity of the resulting residue mixture. HEI has not proffered any evidence, however.

Although HEI promises to offer evidence at a hearing, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of a hearing. A person requesting a hearing must support its allegations with an adequate proffer of evidence. *General Motors Corp. v. FERC*, 656 F.2d 791, 798 n.20 (D.C. Cir. 1981). Rather than presenting evidence, HEI asserts that FDA did not adequately justify its conclusions. Such an assertion will not justify a hearing. While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. *American Cyanamid Co. v. FDA*, supra, 606 F.2d at 1314-1315. HEI has failed to present any such

evidence. Thus, it has not provided any basis for a hearing.

## 2. Metabolism of radiolytic products

One objection to the omnibus regulation which did not request a hearing took exception to FDA's response to a comment concerned that highly toxic unidentified radiolytic products may be present at low concentrations. The objector cited FDA's response and objected as follows:

P. 13386—"Such URP's may be free radical coupling products of lipid and protein-derived radicals, dimers, and cross-linked products. However, enzymatic hydrolysis . . . by normal digestive enzymes is expected to yield normal molecular subunits such as fatty acids, amino acids, monosaccharides . . . Many of the coupling products may involve carbon-carbon bonds that are not degraded by digestive enzymes.

(See Objection No. 159 in Docket.)

The agency has considered this objection and has found it to be without merit. The objector has misrepresented the agency's analysis on coupling products by omitting the words "of some of these compounds." The agency stated in the omnibus rule that URP's may be formed, including some that are structurally atypical of parent molecules, such as free radical coupling products of lipid and protein-derived radicals, dimers, and cross-linked products, and that some of these would be digested normally (51 FR 13376 at 13386). BFIFC had concluded that enzymatic hydrolysis of such radiolytic products by digestive enzymes would metabolize the majority of such radiolytic products to yield normal molecular subunits, such as fatty acids, amino acids, and other components that would result normally from the digestion of the parent molecules (Ref. 5). Neither the agency nor BFIFC said or implied that all coupled or crosslinked products would be digested to normal components. BFIFC's analysis did show, however, that while it was assuming coupled products to be unique, most of these products would be metabolized in the same way as other food components, and the amount of products with uncharacterized toxic potential would be reduced considerably.

Therefore, the objector has not pointed to any problem in the agency's position but has focused on the production of possible unique radiolytic products. The agency did consider the possible production of such products and concluded that the possibility of their formation would be extremely low, and that they would be virtually impossible to detect toxicologically (51 FR 13376 at 13378).



As noted in the omnibus rule (51 FR 13376 at 13379), the important issue that the agency has had to consider is the probability that a toxic radiolytic end-product will be formed in sufficient amounts to make the food unsafe. The agency's review of hundreds of animal feeding studies produced no evidence of the presence of radiolytic products in toxic amounts in foods radiated under conditions consistent with those permitted under the omnibus rule. This failure to find toxic amounts of radiolytic products supports the agency's conclusion on safety. The objector has provided no information to challenge this conclusion.

### 3. Toxicity of radiolytic products

One objection to the omnibus regulation which did not request a hearing took exception to FDA's discussion of the usefulness of the toxicological studies that the agency reviewed:

P. 13384—" \* \* if a potent toxic material were present at any level of toxicological significance in irradiated foods ingested by test animals, some consistent toxicological signs would be manifest in the studies." Why? These studies you reviewed covered a wide variety of foods, tested animals, dosages of radiation used, diets used, etc. One should not expect consistent toxicological signs. On p. 13380 you state " \* \* radiolytic products from different spices are likely to be different." The same is true of different fruits and vegetables, so the toxicological effects would be expected to be different here too. Don't you think so?

(See Objection No. 159 in Docket.)

Most foods, including those tested in animal feeding studies, are composed mainly of water, carbohydrates, fats, and proteins as well as lesser amounts of vitamins, minerals, and a large variety of flavoring components. Because the same constituents dominate the composition of many foods, one would expect similar products from foods with similar composition.

The major reaction resulting from irradiating foods that have a significant water content, such as fruits and vegetables, involves reaction of free radicals of water with other food constituents, such as carbohydrates. Thus, while it is true that if a potent toxicant were formed in irradiated food, its toxic significance would not be the same at all doses or in all foods, it does not follow that if a potent toxicant were present in irradiated food, there would be no correlation among the studies FDA reviewed. Therefore, because FDA reviewed a large amount of animal feeding study data, a potent toxicant should have shown some pattern in

similar studies with similar foods. FDA did not see such a pattern.

Because the data from tests with a wide variety of foods at a variety of doses do not provide evidence of a potent toxic material, the likelihood of finding a toxic effect with food irradiated under the limited conditions permitted by this rule is so small as to be insignificant. The objector has merely disagreed with the agency's conclusion and has not provided any evidence to the contrary.

### Q. Test for Quantity of Radiolytic Products in Food

HEI stated:

FDA has not developed an empirical test for measuring effectively the quantities of residual toxic radiolytic products and unique radiolytic products present in irradiated foods. FDA should withdraw its regulation until research into developing such a test, currently underway at the National Bureau of Standards, is completed. Evidence regarding this issue and the work underway at NBS will be presented at the public hearing.

(HEI Para. I.4.)

Under FDA's regulations, a hearing will not be granted on factual issues that are not determinative with respect to the action requested (21 CFR 12.24(b)(4)). HEI has failed to point to any specific way in which the rule itself is inadequate without a test. HEI has not explained what it means by "an empirical test," what such a test would accomplish, or what allegedly toxic or unique radiolytic products require quantitative measurement. Thus, HEI has not provided a basis for a hearing.

Furthermore, HEI has not provided any basis to find that the work done at the National Bureau of Standards (NBS) is relevant to this proceeding. The work conducted at NBS was a research project funded by USDA in 1986. This project was directed primarily at developing an analytical method for determining whether poultry has been irradiated. The project involved detection of a radiolytic product of an amino acid found in proteins. It was not designed to be applicable to the foods covered by this regulation.

### R. Possible Synergistic Effect

A synergistic effect is an action by two or more substances to produce an effect that each substance is incapable of producing by itself. Such an effect can be beneficial or detrimental. The agency does not ordinarily consider hypothetical synergistic effects unless there is reason to believe that there will be synergistic effects that present a safety concern. It did not consider such effects in this rulemaking because

available evidence did not suggest that there are any such effects.

HEI stated that:

The FDA fails to address the potentially synergistic effects of new chemicals created by the food irradiation process in different foods [sic] items that might be ingested by an individual. Evidence of such synergistic effects would be presented at a public hearing.

(HEI Para I.10.)

HEI has not presented any evidence to show that there is any likelihood that synergistic effects will occur among the chemicals created in food by irradiation. Rather, HEI's request for a hearing merely alleges that such effects will occur, without providing any supporting evidence other than a vague offer to present evidence at the hearing. Mere allegations are insufficient to justify a hearing. An objector must make an adequate proffer of evidence to support its allegations and to show that they provide a basis on which to call into question the agency's conclusions. *Cerro Wire & Cable Co. v. FERC*, supra, 877 F. 2d at 129.

Moreover, a hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of that hearing. The person seeking a hearing must meet a threshold burden of tendering evidence that suggests the need for a hearing. *Costle v. Pacific Legal Foundation*, supra, 445 U.S. at 214. By merely making the bald assertion that the possibility of synergistic effects exists and by failing to submit any evidence to support that assertion, the objector has failed to demonstrate that an issue of fact exists with respect to the possible synergistic effects of radiolytic products and thus has failed to justify the granting of a hearing.

FDA is not aware of any evidence that radiolytic products produce synergistic effects. FDA stated in the omnibus rule that experiments have shown that very few, if any, of the radiolytic products are unique to irradiated foods (51 FR 13376 at 13378). One can speculate on possible synergism among any of the thousands of chemical components that are naturally present in the daily diet, but unless one has reason to believe that a particular effect may occur, such speculation is likely to be fruitless and, therefore, an inappropriate subject for study. HEI has not provided a plausible hypothesis or appropriate information that would lead one to suspect adverse synergistic effects from components of irradiated foods.

### S. Induced Radioactivity: Sodium-24

One objection to the irradiated pork rule stated that when pork has been irradiated, sodium-24 becomes a pure gamma emitter in the pork for 24 hours after treatment, thereby creating a dangerous situation for 24 hours. The objector did not submit any data to support this objection, nor did it request a hearing.

The agency has considered this objection and has found it to be without merit. FDA stated in its 1981 advance notice of proposed rulemaking that "the use of ionizing radiation of appropriate source energy does not induce any detectable radioactivity in foods when measured by methods that can easily detect the presence of radioisotopes that occur naturally in foods" (46 FR 18992; March 27, 1981). The report that served as a basis for this statement (Ref. 70) noted that sodium-24 can be produced and measured in foods when they are irradiated by sources with energy levels in excess of 12 million electron volts (MeV) but not after irradiation by sources of 10 MeV or less. The agency has limited the use of sources of radiation to those that produce radiation at energies of 10 MeV or less (21 CFR 179.26(a)). The radiation energies of cobalt-60 and cesium-137 are both below 2 MeV. The agency is not aware of any evidence to demonstrate that irradiation of pork under the conditions of the regulation produces measurable amounts of sodium-24.

### T. Summary

In this section on safety, the agency has addressed objections to its conclusion that foods irradiated under the conditions of the regulation are safe.<sup>6</sup> The agency has considered these objections and finds that none of them justifies a hearing under the criteria outlined in 21 CFR 12.24(b). Thus, the agency is denying all of the objections and requests for a hearing on the safety of the irradiation of food under the conditions set forth in 21 CFR 179.26.

### III. Effect on Nutritional Quality

As stated earlier, some changes in food chemistry occur during irradiation processing. Such changes can occur in nutrients as in other components of food. Although certain nutrients in particular food commodities are extremely sensitive to irradiation, there would not be a significant effect on a consumer's diet from food irradiation

<sup>6</sup> HEI made 21 specific objections on safety, each of which, it claimed, justified a hearing. HEI made a 22d objection on the nutritional quality of irradiated foods. This objection is discussed in the next section.

unless the consumer depended on a particularly sensitive food for a major portion of the dietary need for a particularly sensitive nutrient. Just as with other processing methods, the nutritional consequences of irradiating a food must be evaluated by considering the likely effect on the diet as a whole.

As a comparison, the freezing process is probably the best preservation method for retention of vitamin content; however, this method is not without some effect on the processed food. For example, some vegetables lose up to 14 percent of vitamin C and from 3 to 8 percent of thiamine when frozen. In the case of pork chops, an excellent source of thiamine, losses in this vitamin following 6 months of frozen storage have been reported to range from an insignificant amount to as much as 40 percent (Refs. 71 and 72).

Before freezing, most vegetables are blanched to inactivate enzymes that would otherwise cause unacceptable changes in sensory properties and nutritive value during frozen storage. Losses of vitamin C during water blanching and cooling of eight common vegetables (e.g., green beans, broccoli, and spinach) range as high as 70 percent, with an average loss of around 25 percent. Losses of thiamine in some of these same vegetables range as high as 80 percent.<sup>7</sup>

Nevertheless, although some nutrient losses occur during processing, one would not say that freezing renders such foods to be nutritionally unwholesome or unsafe. The same criteria for determining safety and wholesomeness must be applied to processing by irradiation.

Any change caused by irradiation will be dose dependent, so that the significance becomes less as the dose gets smaller. The agency cited several references in its proposal (49 FR 5714 at 5721) that demonstrate that there are no significant nutrient differences between nonirradiated foods and foods irradiated at a dose below 1 kGy (100 krad). FDA agreed with those reports and concluded that nutritional variations in foods irradiated under the conditions of the regulation are nearly always negligible and therefore of no significance to human health. Because the agency considered food irradiated under the conditions of the regulation to be no different nutritionally from nonirradiated foods, and because no comment submitted evidence to the contrary, the agency concluded that destruction of nutrients was not an issue

<sup>7</sup> Many papers have been published to document such results. A succinct summary in tabular form is contained in Ref. 73.

in this rulemaking (51 FR 13376 at 13381).

HEI stated that:

Nutrient destruction is generally admitted regarding exposure to ionizing radiation, but the FDA states that there is no nutritional difference between unirradiated food and food irradiated at levels below 100,000 rads (51 FR 13381). This claim is false, and relevant evidence will be submitted at the public hearing. For example, an initial study conducted at the USDA's Eastern Regional Research Center in Philadelphia found that pork irradiated at 100 krad suffered a 20% loss of thiamine. Since nutrient losses at doses higher than 100 krad are usually dose related and are well documented (See Exhibit A, Tony Webb, "Food Irradiation in Britain" pp. 14 & 15), it is unreasonable to claim that losses magically disappear at lower levels.

(HEI Para. I.11.)

On February 2, 1987, FDA requested that HEI submit the information that it intended to present at a hearing to support its contention that nutritional differences in food irradiated under the conditions of the regulation are significant. In its reply of March 6, 1987, HEI cited 10 documents but did not include copies of any of those documents. Seven of the documents that HEI cited were on the effect of irradiation on vitamins and other nutrients, including natural antioxidants; two articles were on the effect of irradiation on fats; and one reference discussed nutritional loss as a function of dose. FDA searched its files for the documents mentioned by HEI and was able to locate all but two. On May 5, 1987, the agency again wrote to HEI and requested the two references that were not available in the agency's files. HEI provided one of the references but was unable to locate the second.

### A. Original Objection

In its objection, HEI challenged FDA's statement in the omnibus rule that " \* \* the available literature indicated that there are no nutritional differences between unirradiated food and food irradiated at levels below 1 kGy (100 krad) \* \* " (51 FR 13376 at 13381). It is not clear, however, whether HEI is claiming that irradiation of some foods will reduce the amounts of some nutrients, or that foods irradiated under the conditions of this regulation will adversely affect the nutritional status of humans who consume these foods. FDA did not intend to imply that there are never changes in nutrient levels when food is irradiated. FDA's statement was intended to mean that the nutrient losses below 1 kGy are so small as to be of no nutritional consequence for the human diet. Because the amount of chemical change is directly proportional



to dose, it is reasonable to conclude that some fraction of the nutrients may be lost at any dose, and that the amount lost will approach zero as the dose approaches zero. FDA has never claimed "that losses magically disappear at lower levels \* \* \*" as HEI apparently asserts in its objection.

To justify a hearing on this point, it is not enough for HEI to simply assert that some nutrient loss can occur. HEI must present evidence that suggests that nutrient losses in food irradiated at doses permitted by the regulation are sufficiently large and would so affect the diet that such food would be nutritionally unwholesome or unsafe. A hearing will not be held unless resolution of a factual issue in the way sought by the objector is adequate to justify the action requested (21 CFR 12.24(b)(4)).

In its objection, HEI stated that an unpublished USDA study \* \* \* found that pork irradiated at 100 Krad suffered a 20% loss of thiamine." HEI has neither provided any evidence from such a study nor provided any basis for why its statement, if true, would show that irradiated pork is unsafe. A hearing will not be held unless a factual issue can be resolved by specifically identified reliable evidence (21 CFR 12.24(b)(2)).

HEI also stated that other \* \* \* relevant evidence will be submitted at the public hearing \* \* \*. As stated above, FDA requested that HEI submit the information it intended to present, and HEI responded by citing 10 documents. These documents and the questions they raise are considered below.

#### B. Effect on Nutrients

Seven of the documents HEI cited referred to the possible loss of nutrients, such as vitamins, when food is irradiated. HEI cited one reference (Ref. 50) on the effects of irradiation on the vitamin C content of orange juice, one reference on the effects of irradiation on beta carotene in solution, and one reference to an unpublished USDA study on the thiamine content of irradiated bacon in the raw, cooked, or freeze-dried form. HEI stated that:

Ascorbic acid losses in orange juice amounted to 10% to 70% after irradiation with 2.5 to 10.0 kGy according to Beyers, M. et al., "Chemical Consequences of Irradiation of Subtropical Fruits," in P.S. Elias and A.J. Cohen, ed's, RECENT ADVANCES IN FOOD IRRADIATION, 171 at 178 (1983).

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

Snaawaert, F. et al., "Influence of Gamma Irradiation on the Provitamin A (Beta-

Carotene) in Solution," in RADIATION PRESERVATION OF FOOD, IAEA & FAO: Vienna, 29 (1973). Table II demonstrates dose related reduced Beta-carotene at doses ranging from 3.36 to 205 krad. The researchers stated, "At doses higher than 200 krad Beta-carotene tends to degrade completely."

(HEI March 6, 1987, response, p. 4 (Ref. 2).)

A recent report submitted to USDA's Food Safety and Inspection Service by the Agricultural Research Service reported that "thiamine content of bacon in raw, cooked, or freeze-dried form degraded at a significantly higher rate during cooking if the bacon had been irradiated," according to Food Chemical News 42 (Nov. 10, 1986). We have not yet obtained a copy of this report, but we believe that it should be considered by FDA.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

HEI cited testimony before Congress, on behalf of the National Nutritional Foods Association, on a bill to provide Federal coordination for the continued development and commercialization of food irradiation. The testimony claimed that irradiation would reduce the concentration of natural "protective materials," such as antioxidants, in proportion to the radiation dose and operating conditions.

(HEI March 6, 1987, response, p. 4 (Ref. 2).)

HEI also cited three review articles that discuss loss of vitamins and other nutrients in irradiated foods.

Dennison, R.A. and E.M. Ahmed, "Review of the Status of Irradiation Effects on Citrus Fruits", from PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON FOOD IRRADIATION, June 8-10, 1986, IAEA/FAO, 619 at 627 (1987). Vitamin C losses indicated by several studies are summarized at p. 627.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

Murry, T.K.[sic], "Nutritional Aspects of Food Irradiation," presented to the Joint FAO/IAEA/WHO Expert Committee on the Wholesomeness of Irradiated Food, Oct. 27-Nov. 3, 1980. This paper cites a variety of studies evaluating nutritional aspects of irradiated food. It admits that nutritional losses occur at low doses, but dismisses them by stating that they are less than those found with other food processes. Canned foods are well known to be nutritionally depleted, and the consumer can readily tell that a food was canned since it is purchased in a can or jar. Irradiated food can be sold as "fresh," with only a misleading symbol, after April 18, 1988, and consumers are unlikely to realize that the food is processed and that vitamin content is reduced. Murry reported that Azar observed losses of up to 22% in thiamine as well as riboflavin, niacin, and pyridoxine in rice.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

Vakil, Urmila K. et al., "Nutritional and Wholesomeness Studies with Irradiated

Foods: India's Program," RADIATION PRESERVATION OF FOOD, IAEA & FAO: Vienna 673 (1973). Table IV shows losses in nutrients when wheat is irradiated at doses of 20 krad and 200 krad. They found that 8 to 12% of total thiamine, riboflavin and niacin were lost due to radiation treatment. Up to 25-35% of alpha-tocopherol, localized in the germ, was lost with radiation doses of 20 and 200 krad. An overall increase of about 8% in free amino acid levels was observed on irradiation up to 1 Mrad. Ionizing radiation caused fragmentation of the starch and proteins in wheat. B vitamins were reduced in irradiated shrimp.

(HEI March 6, 1987, response, p. 5 (Ref. 2).)

The issue raised by HEI must be a material issue concerning which a meaningful hearing might be held. Pineapple Growers Ass'n of Hawaii v. FDA, supra 1085. As discussed above, the agency recognizes that irradiation can produce nutrient losses under some conditions but has concluded that such effects are not a safety concern under the conditions of the regulation.

To justify a hearing, HEI must provide evidence that nutritional loss in a food irradiated under the conditions of this regulation either renders the food unsafe or has a significant effect on the diet of humans (see 21 U.S.C. 348(c)(5)(B)). While, as stated above, FDA has the ultimate burden of proof when it approves the use of a food additive, once the agency makes a finding of safety in a listing document, the burden shifts to an objector to come forward with evidence that calls into question FDA's conclusion. American Cyanamid Co. v. FDA, supra, 606 F. 2d at 1314-1315.

Despite the fact that it referenced numerous documents, HEI has submitted no information to support its allegation that nutritional differences in food irradiated under the conditions of the regulation are significant to human health and are a safety concern. For example, in the first three studies cited above, none of the foods discussed can be irradiated under the conditions of the regulation.

The statement of the National Nutritional Foods Association cited by HEI contends that "antioxidants" occurring naturally in food are chemically consumed in reaction with other radiolytic products. However, either the authors of the statement nor HEI has provided evidence to support the contention that irradiation of food under the conditions of the regulation will result in a significant reduction in these "protective materials" or to show that any reduction that might occur would be detrimental to the consumer.

The other three articles cited by HEI are compilations of data from many studies. None of these authors concluded that losses of nutrients from foods irradiated at doses permitted by the regulation are of any significance to human health. For example, HEI cites Murray as stating that nutritional losses "are less than those found with other food processes." \* \* \* Another of these cited authors (Vakil) concluded that "[c]ompositional changes and nutritional losses due to irradiation are comparable to those caused by conventional processing methods \* \* \*." HEI has not provided any rationale to show why these articles would support its contention that losses of nutrients from foods irradiated under conditions permitted by the regulation would render the food unsafe or have a significant effect on human health. Thus HEI has not provided any basis for a hearing.

Moreover, HEI's statement that \* \* \* consumers are unlikely to realize that the [irradiated] food is processed \* \* \* is not true. The agency requires that the labeling of an irradiated food must state that the food has been irradiated (21 CFR 179.26(c)). (See also IV. Labeling).

#### C. Effect on Fats

HEI cited two references on the toxicity or indigestibility of fats with high peroxide values (rancid fats) (Refs. 75 and 76).

Draybill [sic], H.F., "Nutritional and Biochemical Aspects of Foods Preserved by Ionizing Radiation," 50 J. HOME ECONOMICS 695 (Nov. 19, 1958) citing Andrews, J.S., Mead, J.F., and Griffith, W.H., "Toxicity of lipid peroxides in the rat," 15 FED. PROC. 918 (1956), states, "Highly peroxidized oils (peroxide number of 3,000) produced by irradiation and oxidation are toxic when fed to rats at 20 per cent level in diet, but fats of lower peroxide numbers (peroxide number below 400) when fed at same level in a diet to rats were nontoxic and maintained normal growth (8)." The nutritive value of the macronutrients is apparently adversely affected.

Schreiber, Manuel, and E.S. Nasset, "Digestion of Irradiated Fat in Vivo," 14 J. APPLIED PHYS 639 (1959) concluded that "irradiation of lard is detrimental to digestion in the dog." This study found that irradiation increased the peroxide value of lard from 1-2 to 176, and that in 14 months of cold storage the peroxide value continued to rise. The damaged irradiated fats apparently caused

\* HEI also cited an article by Azar (Ref. 74), referenced by Murray, that reported 22 percent loss of thiamine and other vitamins in irradiated rice, without reporting the dose applied. HEI did not provide a copy of this study when FDA requested it for review. In the absence of this article, the agency cannot evaluate this evidence. A reference to information that is not available cannot serve as a basis for a hearing to consider such information.

poor digestion, with irradiated lard failing to leave the stomach in normal time periods.

(HEI March 6, 1987, response, p. 3 (Ref. 2).)

Neither of these studies provides a basis for a hearing. Both studies are directed to the health effects of fats and oils with high peroxide content (rancid fats). The toxicity or indigestibility of rancid fats is not in dispute, however.

Peroxides are produced in fats by a variety of means, including heating and storage as well as by irradiation in the presence of air. HEI has not provided any reason to believe that rancidity is a consequence of irradiating foods under the conditions of this regulation. However, even if irradiation causes rancidity of foods, this fact would not cause the agency to change its conclusion. Foods with a high fat peroxide content (rancid fats) are not eaten because they are unpalatable. It is unlikely that any food that would become rancid when irradiated would be irradiated because such an irradiated food would not be marketable. Therefore, these studies would not provide a basis for finding irradiation to be unsafe and thus do not provide a basis for granting a hearing under 21 CFR 12.24(b)(4).

#### D. Control of Dose

HEI stated that:

While setting an upper limit of 100,000 rads for food preservation helps limit nutrient losses due to radiation (since nutrient losses increase with dose), in practice, it is quite possible that foods will get even higher doses than planned. In a petition to the FDA to allow higher irradiation doses for spices (3,000,000 rads), R.L. Hall, Vice President—Science & Technology of McCormick & Company, Inc., stated, "In existing large-scale irradiators, it is quite likely that an overdose of up to 250% can be expected." Control of dose is clearly not as simple as it sounds. Measurable losses of food nutrients at doses higher than 100,000 rads may suggest losses occurring at lower doses, whether or not these losses are easily measured.

(HEI March 6, 1987, response, p. 2 (Ref. 2).)

HEI appears to misunderstand both the requirements of the regulation and the practical significance of the variation in dose during processing. In its proposal, FDA discussed the dose variation that a given bag, barrel, or pallet of food receives during irradiation. In an example, it stated that in a typical use application, one portion of the container may receive three times (or 300 percent) as much radiation as the portion receiving the smallest dose (49 FR 5714 at 5717). Hall's statement refers to the need for a margin 250 percent above the minimum dose, similar to

FDA's estimate. The petition that HEI refers to requested that the maximum dose be set high enough to allow a minimum dose that is effective. The dose of 1 kGy (100,000 rads) permitted by this regulation is the maximum dose allowed for foods that are sources of nutrients, not the minimum. Because of the variation in dose at different positions of a container during irradiation, treatment to a maximum dose of 1 kGy means that other portions of the container are likely to receive less than 0.5 kGy and the overall average dose is likely to be less than 0.75 kGy. Thus, food irradiated under the conditions of the regulation will not receive a dose greater than the maximum allowed. In fact, on the average, food will receive a considerably lower dose than that permitted by the regulation, not a higher dose.

HEI has not provided any evidence that any food irradiated under the conditions of the regulation will receive a dose of radiation that is greater than that allowed. Thus, there is no issue of fact in dispute for resolution at a hearing (21 CFR 12.24(b)(2)).

#### IV. Labeling

In the omnibus rule, the agency required wholesale and retail labeling of all food that has been irradiated (first generation food) because the irradiation of food, like other processing, could affect its organoleptic characteristics. The agency did not require special retail labeling for an irradiated ingredient in a multiple-ingredient food (second generation food) because such a food has obviously been processed, and the effects of radiation on individual ingredients would likely have no significant effect on the final product (51 FR 13376 at 13389).

#### A. Use of Term "Ionizing"

One objection to the omnibus final rule, which did not include a request for a hearing, stated that because infrared, ultraviolet, and visible radiation, as well as microwaves and radiowaves, are all nonionizing forms of radiation, labeling the food as treated "by irradiation" or "with radiation", without stating the type of radiation, misleads the consumer. The objector stated that "[i]t is clearly hypocritical of the FDA to say it encourages consumer education but not require it in the form of explicit labels stating that the radiation is ionizing."

The objector is correct that there are several forms of radiation, not all of which are ionizing. However, requiring the use of unfamiliar technical terms

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does not necessarily convey useful information to most consumers. The word "radiation" is commonly used for the type of radiation emitted by radioactive matter or by X-ray machines, i.e., ionizing radiation. The agency chose to require only this simple term on a label because the agency felt that it would inform the consumer at least as well as the more technical terminology (51 FR 13376 at 13387).<sup>9</sup> The objector did not provide any evidence that the additional word would increase the understanding of most consumers. However, the agency does permit the manufacturer to state specifically the type of radiation used in the treatment, e.g., "Treated with ionizing radiation," or "Treated with gamma radiation," if the more specific description is indeed applicable (51 FR 13376 at 13388).

#### B. Petition to Reconsider the Labeling Statement

The agency received a petition to reconsider the labeling provisions and decided to treat that petition as an objection because FDA received it within the 30 day objection period. The objector (Docket No. 81-N0004/PRC) argued in its objection that the required statement "Treated with radiation" is misleading. He provided data from a limited consumer survey as the basis for proposing that the required statement be replaced by the word "picowaved" or "irradiated".

In this consumer survey, consumers in one city were asked whether they would think that food that was labeled "treated with radiation" contained radiation, and whether they would buy such food. Consumers in another city were asked the same question except the term "ionizing radiation" was used on the hypothetical label. A majority of respondents stated that they would not buy food labeled in this way because it might be radioactive. No consumers were asked about their understanding of the words "picowaved" or "irradiated."

The agency recognizes that many consumers do not understand the meaning of the word "radiation," but it believes that any confusion created by use of the terms "radiation" or "irradiation" can be corrected by proper consumer education. The petitioner provided no evidence that the phrasing requested would be more informative than that required by the regulation. Therefore, FDA rejects this request.

<sup>9</sup> FDA does not require a statement that the food has been irradiated on foods treated by nonionizing radiation. Therefore, there should be no confusion of terms.

#### C. Retail Labeling

##### 1. Label statement

Several objections to the irradiated pork rule stated that the label for pork treated with radiation should so indicate and objected that the regulation did not require special labeling. One of the objectors requested a hearing.

These objectors are confused about what the irradiated pork rule did. It amended 21 CFR 179.22(b) by adding pork to the list of foods that may be irradiated. Paragraph (c) of 21 CFR 179.22 required the statement "Treated with gamma radiation" on labels of irradiated food. The irradiated pork rule did not exempt pork from the labeling requirement in 21 CFR 179.22(c). Thus, the objections to the irradiated pork rule were wrong in concluding that the regulation did not require special labeling.

Section 179.22(c) was superseded by the omnibus rule, which also establishes labeling requirements for all irradiated foods. Thus, under the former 21 CFR 179.22 or the current 21 CFR 179.26, labels of irradiated pork must state that the food has been irradiated. Consequently, these objections raise no issue to be resolved at a hearing.

##### 2. International logo

One objector, the petitioner for the irradiated pork regulation, requested that the international logo for irradiation be used as an alternative to specific wording required by 21 CFR 179.22(c).

The agency concluded in the omnibus rule that an internationally used logo should be placed on labels and labeling, along with specified wording that would explain the meaning of the logo to consumers until the logo became readily recognized. Underlying this action is a finding by the agency that consumers are not aware of the meaning of the logo, and that it would therefore not be appropriate at this time to place the logo on a food label without an appropriate explanation. The objector has not presented anything other than a mere assertion that the logo is an appropriate alternative to the wording required by the agency. Therefore, the agency rejects this alternative.

##### 3. Two year "sunset clause"

Several objections to the omnibus rule expressed opposition to a 2-year "sunset clause" for the required label statement that accompanies the international, or "radura," logo. They claimed that the logo, by itself, is misleading and will not provide the needed information to the consumer. The objectors said that it is unrealistic to expect all consumers to become informed about the logo in a 2-

year period, and that the use of the logo alone would be objectionable. Some of the objectors requested a hearing.

On February 18, 1988, the agency published a proposal to extend the wording requirement (52 FR 4856) and provided 30 days for comment on this proposal. On April 18, 1988, the agency published a final regulation that discussed all comments and extended the wording requirement another 2 years until April 18, 1990 (52 FR 12756). Thus, the agency has agreed that 2 years was too short a time for the wording requirement and has amended the regulation accordingly. Consequently, these requests for a hearing are moot.

#### D. Ingredient Labeling

Several objections were opposed to irradiation of an ingredient without requiring special labeling on all foods that contain that ingredient. Some of the objectors requested a hearing on whether FDA should require ingredient labeling. The most comprehensive statement of this objection was submitted by HEI, which stated that:

The FDA ably defends its decision to label irradiated foods to consumers, and then ignores the arguments for informing consumers in the case of irradiated food ingredients. The importance of giving consumers the right to choose is not obliterated by the combination of more than one food item into a food product, so food ingredients should be treated the same as individual food items. FDA did not reveal its selective interpretation of its own rules regarding the labeling of irradiated foods in its proposed rule, so the issue of food ingredients was not addressed in the comments on the proposed rules. Nothing in current law (21 CFR 179) nor in the FDA regulation states that irradiated ingredients are exempt from labeling. Under these regulations, many foods could therefore be exempted from the labeling requirement under the ingredients loophole . . . Evidence to be presented at the hearings will include consumer demands to be properly informed about the processes to which food has been subjected, the ability of food processors to provide the required labels for food ingredients as well as for individual food items, the logic and necessity of extending the labeling requirements to food ingredients. Evidence would be presented by various consumer organizations such as the National Coalition to Stop Food Irradiation, Coalition for Alternatives in Nutrition and Healthcare, and market research experts, physicians, and scientists.

(HEI Para. III.)

Before establishing a labeling requirement, the agency must have some evidence that such a requirement is necessary and consistent with the

law.<sup>10</sup> The act requires that the label of a food fabricated from two or more ingredients bear the common or usual name of each ingredient (except that spices, flavorings, and colorings need not be declared by name) (21 U.S.C. 343(i)). The act does not require that the label declare details of processing for each ingredient. Special labeling could be required if the processing is material in light of representations made for the food or material with respect to consequences that may result from using the food (21 U.S.C. 321(n)).

FDA concluded that finished foods that had been irradiated should bear special labeling because such processing could cause changes in organoleptic or storage properties. Such changes could be significant in light of the fact that such foods would be perceived as unprocessed without special labeling (51 FR 13376 at 13388, 13389). On the other hand, FDA had no evidence that irradiation of an ingredient would affect the characteristics of a multiple ingredient food in any significant way. Therefore, the agency concluded that the labeling requirements for irradiated ingredients should be the same as for any other processed ingredients, namely, to declare them by their common or usual name without any requirement for stating whether they were processed (51 FR 13376 at 13389).

To justify a hearing, the objectors must proffer evidence that raises an issue of fact with respect to the agency's finding. The objector would have to present evidence that irradiation of an ingredient affected the final product to such an extent that the common or usual name was no longer appropriate, or that the consequences that may result from use of the final food are such that the consumer needs advance notice that an ingredient has been irradiated. HEI has failed to proffer any such evidence, however. HEI merely has stated that it would present evidence from various consumer organizations at a hearing. A hearing cannot be justified on the basis of a promise that some unidentified evidence will be provided at the time of the hearing.

The contention that labeling for irradiated ingredients was not addressed in the proposal is not correct. In the February 14, 1984, proposal (49 FR 5714), FDA requested comment on: (1) Whether it should require any type of label statement on food that has been

<sup>10</sup> With respect to food labeling, the consumer's right to know has been defined by Congress in the requirements of the Federal Food, Drug, and Cosmetic Act. The agency has no basis to impose additional requirements once a manufacturer has met the statutory obligation.

treated by irradiation; and (2) if so, whether the statement should be required only on every food that has been irradiated (first generation food) or also on finished food with respect to each irradiated ingredient (second generation food) (see 49 FR 5714 at 5718). In the proposal, the agency set out its tentative conclusion that special labeling need not be required either when an ingredient was irradiated, or when a whole food was irradiated, and it requested comment on that tentative conclusion. FDA ultimately changed its mind and concluded that all foods that have been irradiated should bear special labeling. However, the agency also concluded that it could find no reason to require special labeling of a food that contains an ingredient processed by irradiation. Thus, the agency did in fact give notice in the proposal that it would consider whether to require special labeling of foods that contain irradiated ingredients.

The objector's statement that neither the current law nor FDA regulations state that irradiated ingredients are exempt from labeling raises an issue of law. Thus, it cannot serve as a basis for a hearing because a hearing will be granted only on the basis of a substantial issue of fact, not on issues of policy or law (21 CFR 12.24(b)(1)). Moreover, the agency has not exempted irradiated ingredients from any requirement of law or regulation. It has simply required special labeling for a finished food that has been irradiated so that consumers will know that it has been processed. As stated earlier, the act requires only that the presence of an ingredient be declared on a label, not a declaration of whether the ingredient has been processed. The objectors have proffered no rationale for concluding that the labeling requirement in this rule is inconsistent with the law.

#### V. Source of Radiation

One objection to the irradiated pork rule, from a radiation processing company, stated that the sources of radiation should not be limited to cobalt-60 and cesium-137 but should be consistent with the text and the spirit of § 179.26 in the proposed omnibus regulation. The objector requested a hearing.

A hearing will not be granted on factual issues that are not determinative to modifying the regulation (21 CFR 12.24(b)(4)). The irradiated pork rule was based on a petition limited to the two sources of radiation listed. Thus, the objector in requesting consideration of the use of an electron beam source is raising an issue that was not part of that rulemaking. However, in the rulemaking

resulting in the omnibus rule, the agency considered use of all radiation sources and issued a rule that permits the use of an electron beam source for the use sought by the objector. Therefore, this objection is moot and needs no further consideration.

#### VI. Worker Safety

FDA referred comments on the proposed omnibus rule that related to worker safety and plant safety to the Occupational Safety and Health Administration (OSHA) and the Nuclear Regulatory Commission (NRC) because those agencies have jurisdiction over such issues. They advised FDA that current regulatory procedures are adequate to ensure the safety of the worker and of the general public (51 FR 13376 at 13395). HEI requested a hearing, stating:

The FDA has promulgated a regulation to allow food irradiation using radioactive sources, x-ray equipment, and electron beam equipment without requiring proper and adequate regulations regarding equipment, periodic inspection of facilities and equipment, training of personnel, and related necessary regulations to ensure both worker safety and the safety of the general public.

(HEI Para. IV)

A hearing will not be granted on questions related to regulatory authority outside of FDA's jurisdiction (21 CFR 12.24(b)(5)). The agency stated in the omnibus rule that regulations on worker safety and public safety are governed by laws administered by government agencies other than the FDA. If the objector has any evidence demonstrating that worker safety or the safety of the general public in the vicinity of radiation facilities is not being protected adequately, it should submit such evidence to the agency with regulatory control over operation of the facility. Instead, HEI asserts that FDA's regulation concerning the safety of food does not impose requirements that are properly considered by other agencies under other laws. HEI has proffered no legal basis for issuing worker safety requirements in a food additive regulation nor any reason why its concern is not the proper responsibility of other agencies. Nor has it proffered any factual evidence to support its allegation that current regulations are inadequate. Thus, HEI has not provided any basis for a hearing.

#### VII. Environmental Impact

In the March 27, 1981, advance notice of proposed rulemaking, the agency requested comments on all aspects of food irradiation, including any environmental impact (46 FR 18992 at



18993). The agency considered the potential environmental impact when preparing the 1984 proposal and stated that: (1) existing safeguards in the Occupational Safety and Health Administration (OSHA), the Nuclear Regulatory Commission (NRC), the Department of Transportation (DOT), and FDA regulations are adequate to ensure that there will be no adverse environmental impact; (2) radiolytic products formed during processing are of no environmental concern and to the extent that irradiation would replace fumigation by toxic chemicals, it would reduce the amount of toxic residues entering the environment from fumigation; and (3) no evidence exists that exposure to radiation will result in mutant pathogens (49 FR 5714 at 5721). The agency tentatively concluded that the action would not have a significant impact on the human environment and announced that its finding of no significant impact and its environmental assessment document were available for public review. The agency responded to comments on this issue in the omnibus rule and concluded that none of the comments provided any information that would cause it to alter its previous determination (51 FR 13376 at 13395 and 13396).

#### A. Inadequate Review

HEI requested a hearing on a claim that the regulation allowed greatly expanded uses of food irradiation without an adequate environmental assessment or an appropriate environmental impact statement. HEI's claim was based on two contentions: (1) that there is insufficient assurance that the government agencies responsible for protecting the public from radiation are capable of carrying out that responsibility, and (2) that FDA did not document its claim in the omnibus rule that concerns over the formation of mutant pathogens at food irradiation facilities are unfounded. With respect to the second contention, HEI stated:

Evidence will be presented from the scientific literature and from appropriate scientists regarding the probability and danger of mutant pathogens being created, and the need for further environmental assessment and preparation of an environmental impact statement regarding this issue.

(HEI Para. V.)

Neither of HEI's contentions justifies a hearing. A hearing will not be granted on the basis of mere allegations or general descriptions of positions and contentions (21 CFR 12.24(b)(2)). HEI must, at a minimum, "raise a material issue concerning which a meaningful

hearing might be held." *Pineapple Growers Ass'n of Hawaii v. FDA, supra*.

HEI's first contention merely states an opinion that laws on worker and public safety are not properly enforced. As discussed earlier, before it issued its omnibus rule, FDA was advised by the relevant agencies that current regulatory procedures are adequate to ensure that there will be no adverse environmental effects either to the worker or the general public. If HEI wishes to challenge current regulatory procedures, HEI should raise the issue with the agencies in question.

The second contention simply disagrees with FDA's conclusion on the likelihood of producing mutant microorganisms that are more virulent or harmful than the parent microorganism. The agency has responded to this issue earlier in the section on "Mutation of microorganisms." HEI has not proffered any evidence in support of this contention and, thus, has not justified a hearing.

#### B. Environmental Assessment

In the irradiated pork rule published on July 22, 1985, the agency stated that FDA's environmental regulations (21 CFR Part 25) had been replaced by a more recent rule published in the Federal Register of April 28, 1985 (50 FR 16636), and cited the new section that would be applicable to a decision of this type. The new environmental regulation, which became effective on July 25, 1985, set forth policies and supplemental procedures for compliance with the National Environmental Policy Act of 1969 (NEPA).

Several objections to the irradiated pork rule requested a hearing and stated that FDA issued its rule on July 22, 1985, to avoid doing an environmental assessment according to the environmental rules that became effective July 25, 1985.

The accusation that FDA ignored its environmental rule is without merit. The environmental rule that became effective on July 25, 1985, did not establish any requirements that were not followed by FDA in its July 22, 1985, decision. On December 11, 1979 (44 FR 71742), FDA stated in its proposal to revise its rules governing the preparation of environmental impact documents under NEPA, that it would follow the procedures required by that proposal pending publication of the final rule. The final environmental rule that became effective July 25, 1985, did not change those procedures. The objectors have not cited any aspect of the new environmental regulation that was not satisfied by the procedures that the

agency followed in adopting the irradiated pork rule. Thus, the objectors have failed to demonstrate that an issue of fact exists and therefore have not justified a hearing under 21 CFR 12.24(b)(1).

#### C. Petitioner Cited for Violations

Several objections requested a hearing and stated that the petitioner for the irradiated pork rule was cited for safety and environmental violations and should not be entrusted with the safety of food.

A hearing will not be granted on factual issues that are not determinative to the action requested (21 CFR 12.24(b)(4)). A food additive regulation is not a license for an individual petitioner but is a conclusion that actions in compliance with the regulation are safe. The fact that a petitioner was cited for violations is not relevant to whether the use of irradiation to treat food under the conditions of the regulation is safe. Therefore, such information is not a basis for granting a hearing.

#### VIII. 30-Day Objection Period

Notice was given in the Federal Register of July 23, 1984 (50 FR 29682), that FDA was considering a petition to permit irradiation of pork. The irradiated pork regulation, issued a year later on July 22, 1985, provided for a 30-day period for anyone adversely affected by the ruling to file an objection.

Several objections to the irradiated pork rule requested a hearing and stated that the 30-day time period for filing objections is unrealistic and particularly unfair and discriminatory to those located away from the Washington, DC, area.

A hearing will not be granted on issues of policy or law (21 CFR 12.24(b)(1)). The time period for objections is established by statute. Section 409(f) of the act (21 U.S.C. 348(f)) provides that any person adversely affected by publication of an order may file objections within 30 days after such order. Thus, the time period for objections is not an issue on which a hearing can be held.

#### IX. References

The following sources referred to in this document have been placed on display in the Dockets Management Branch (address above), and may be seen between 9 a.m. and 4 p.m., Monday through Friday. References marked with an asterisk [\*] are not on display but are available as published books.

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X. Summary and Conclusions

Based on a comprehensive evaluation of all relevant evidence, the agency concluded that food irradiated under the conditions of the April 18, 1986, omnibus final rule and the July 22, 1985, irradiated pork final rule is safe. The agency received objections to these rules relating to food safety, nutritional quality, labeling, worker safety, environmental impact, the statutory objection period, and the permitted sources of radiation. The agency has determined that the information submitted by the objectors does not raise material issues of fact that would justify an evidentiary hearing on any of the objections. The agency has also determined that the objections do not demonstrate a basis for revoking or amending the regulations except for clarifying wording on the items permitted to be irradiated. Thus, for the reasons stated in the discussions above, FDA is responding to the objections by amending the regulation as stated below and by denying all requests for a hearing.

XI. Objections

Any person who will be adversely affected by the amendment to § 179.26(b) regarding the description of aromatic vegetable substances may at any time on or before January 30, 1988

file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 179

Food additives, Food labeling, Food packaging, Irradiation of foods, Radiation protection, Reporting and recordkeeping requirements, Signs and symbols.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 179 is amended to read as follows:

PART 179—IRRADIATION IN THE PRODUCTION, PROCESSING, AND HANDLING OF FOOD

1. The authority citation for 21 CFR Part 179 continues to read as follows:

Authority: Secs. 201(s), 409, 72 Stat. 1784-1788 as amended (21 U.S.C. 321(s), 348); 21 CFR 5.10; §§ 179.25 and 179.26 also are issued under secs. 402, 403, 703, 704, 52 Stat. 1046-1048 as amended, 1057, 67 Stat. 477 as amended (21 U.S.C. 342, 343, 373, 374); 21 CFR 5.10, 5.11.

2. Section 179.26 is amended in the table in paragraph (b) by revising the fifth entry under the headings "Use" and "Limitations" to read as follows:

§ 179.26 Ionizing radiation for the treatment of food.  
\* \* \* \* \*  
(b) \* \* \*

Use	Limitations
For microbial disinfection of the following dry or dehydrated aromatic vegetable substances when used as ingredients in small amounts solely for flavoring or aroma: culinary herbs, seeds, spices, vegetable seasonings that are used to impart flavor but that are not either represented as, or appear to be, a vegetable that is eaten for its own sake, and blends of these aromatic vegetable substances. Turmeric and paprika may also be irradiated when they are to be used as color additives.	Not to exceed 30 kGy (3 Mrad).

Dated: December 21, 1988.  
John M. Taylor,  
Associate Commissioner for Regulatory Affairs.  
[FR Doc. 88-29885 Filed 12-29-88; 8:45 am]  
BILLING CODE 4160-01-M



# **federal register**

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Friday  
December 30 1988

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## **Part IV**

### **Department of Commerce**

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International Trade Administration

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**Binational Panel Reviews and  
Extraordinary Challenge Committees;  
United States-Canada Free-Trade  
Agreement; Notice**



## DEPARTMENT OF COMMERCE

## International Trade Administration

## Binational Panel Reviews and Extraordinary Challenge Committees: United States-Canada Free-Trade Agreement

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** Under Article 1904 of the United States-Canada Free-Trade Agreement ("Agreement") signed on January 2, 1988, the Government of the United States and the Government of Canada negotiated rules of procedure for Article 1904 binational panels and Article 1904 extraordinary challenge committees.

**EFFECTIVE DATE:** These rules take effect on the date that the Agreement enters into force.

**FOR FURTHER INFORMATION CONTACT:** Lisa B. Koteen, (202) 377-1754, or Jean Heilman Grier, (202) 377-0833.

## SUPPLEMENTARY INFORMATION:

## Background

Chapter 19 of the U.S.-Canada Free-Trade Agreement ("Agreement") establishes a mechanism for replacing domestic judicial review of determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. These panels acting in place of national courts will, if requested, expeditiously review final determinations to determine whether they are consistent with the antidumping or countervailing duty law of the country that made the determination. Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) amends U.S. law to implement Chapter 19 of the Agreement.

The Rules of Procedure for Article 1904 Binational Panel Reviews are intended to give effect to the provisions of Chapter 19 of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement. These Rules set forth the procedures for requesting and conducting panel reviews.

The Rules of Procedure for Article 1904 Extraordinary Challenge Committees are intended to give effect to the provisions of Chapter 19 of the Agreement with respect to extraordinary challenges conducted pursuant to Article 1904 of the

Agreement. These Rules prescribe the procedures for the initiation, conduct, and completion of extraordinary challenges of panel reviews.

These Rules are the result of negotiations between the United States and Canada to carry out Article 1904 of the Agreement.

## Rules of Procedure for Article 1904 Binational Panel Reviews

## U.S.-Canada Free Trade Agreement

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## Preamble

## The Parties.

Having regard to Chapter Nineteen of the Free Trade Agreement between Canada and the United States of America;

Acting pursuant to Article 1904.14 of the Agreement;

Adopt the following Rules of Procedure, which shall come into force on the same day as the Agreement comes into force and shall from that day govern all panel reviews conducted pursuant to Article 1904 of the Agreement.

## Short Title

1. These Rules may be cited as the *Article 1904 Panel Rules*.

## Statement of General Intent

2. These Rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to panel reviews conducted pursuant to Article 1904 of the Agreement and are designed to result in decisions of panels within 315 days after the commencement of the panel review. The purpose of these Rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904. Where a procedural question arises that is not covered by these Rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these Rules.

## Interpretation

3. In these Rules,

"Agreement" means the Free Trade Agreement between Canada and the United States of America, signed on January 2, 1988;

"Code of Conduct" means the code of conduct established by the Parties pursuant to Article 1910 of the Agreement;

"Complainant" means a Party or interested person that files a Complaint pursuant to rule 39;

"Counsel" means

(a) With respect to a panel review of a final determination made in the United States, a person entitled to appear as counsel before a federal court in the United States; and

(b) With respect to a panel review of a final determination made in Canada, a person entitled to appear as counsel before the Federal Court of Canada;

"Counsel of record" means a counsel referred to in subrule 21(1);

"Deputy Minister" means the Deputy Minister of National Revenue for Customs and Excise or his successor and includes any person authorized to perform any power, duty or function of the Deputy Minister under the *Special Import Measures Act*;

"Final determination" includes, in the case of Canada, a definitive decision within the meaning of subsection 77.1(1) of the *Special Import Measures Act*; "First Request for Panel Review" means

(a) Where only one Request for Panel Review is filed for review of a final determination, that Request; and

(b) Where more than one Request for Panel Review is filed for review of the same final determination, the Request that is filed first;

"Government information" means

(a) With respect to a panel review of a final determination made in Canada, information

(i) The disclosure of which would be injurious to international relations or national defense or security,

(ii) That constitutes a confidence of the Queen's Privy Council for Canada, or

(iii) Contained in government to government correspondence that is transmitted in confidence, and

(b) With respect to a panel review of a final determination made in the United States, information classified in accordance with Executive Order No. 12065 or its successor;

"Interested person" means a person that, pursuant to the laws of the country in which a final determination was made, would be entitled to commence proceedings for judicial review of the final determination;

"Investigating authority" means the competent investigating authority that issued the final determination subject to review;

"Legal holiday" means

(a) With respect to the United States section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Martin Luther King's Birthday (third Monday in January), Washington's Birthday (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (second Monday in October), Veterans' Day (November 11), Thanksgiving Day (fourth Thursday in November), Christmas Day (December 25), any day designated as a holiday by the President or the Congress of the United States, and any day on which the offices of the Government of the United States located in the District of Columbia are officially closed; and

(b) With respect to the Canadian section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Good Friday, Easter Monday, Victoria Day (third Monday in May), Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Remembrance Day (November 11), Christmas Day (December 25), Boxing Day (December 26), and any other day fixed as a statutory holiday by the Government of Canada or by the province in which the section is located; "Panel" means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement for the purpose of reviewing a final determination;

"Participant" means any of the following that files a Complaint pursuant to rule 39 or a Notice of Appearance pursuant to rule 40:

(a) A Party,

(b) An investigating authority,

(c) An interested person, and

(d) In the case of a panel review of a final determination made in Canada, a person that, pursuant to the laws of Canada, would be entitled to appear and be represented in a judicial review of the final determination;

"Party" means the Government of Canada or the Government of the United States;

"Person" means

(a) An individual,

(b) A Party,

(c) An investigating authority,

(d) A government of a province, state or other political subdivision of the country of a Party,

(e) A department, agency or body of a Party or of a government referred to in paragraph (d), or

(f) A partnership, corporation or association;

"Pleading" means a Request for Panel Review, a Complaint, a Notice of Appearance, a Change of Service Address, a Designation of Record, a Notice of Motion, a Notice of Change of Counsel of Record, a brief and any other written submission filed by a participant;

"Privileged information" means

(a) With respect to a panel review of a final determination made in Canada, information of the investigating authority that is subject to solicitor-client privilege under the laws of Canada or constitutes part of the deliberative process with respect to the final determination and with respect to which the privilege has not been waived; and

(b) With respect to a panel review of a final determination made in the United States, information of the investigating

authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States and with respect to which the privilege has not been waived;

"Proof of service" means

(a) With respect to a panel review of a final determination made in Canada,

(i) An affidavit of service stating by whom the document was served, the day of the week and date on which it was served, where it was served and the manner of service, or

(ii) An acknowledgment of service by counsel for a participant stating by whom the document was served, the day of the week and date on which it was served and the manner of service and, where the acknowledgment is signed by a person other than the counsel, the name of that person followed by a statement that the person is signing as agent for the counsel; and

(b) With respect to a panel review of a final determination made in the United States,

(i) A certificate of service in the form of a statement of the date and manner of service and of the name of the person served, signed by the person who made service, or

(ii) An acknowledgment of service by the person served stating by whom the document was served and the date and manner of service;

"Proprietary information" means

(a) With respect to a panel review of a final determination made in the United States, business proprietary information under the laws of the United States, and

(b) With respect to a panel review of a final determination made in Canada, information that was accepted by the Deputy Minister or the Tribunal as confidential in the proceedings before the Deputy Minister or the Tribunal and with respect to which the person that designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information; "Responsible Secretariat" means the section of the Secretariat located in the country in which the final determination under review was made;

"Responsible Secretary" means the Secretary of the responsible Secretariat;

"Secretariat" means the Secretariat established pursuant to Article 1909 of the Agreement;

"Secretary" means the Secretary of the United States section or the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on behalf of the Secretary;

"Service address" means

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(a) With respect to a Party, the facsimile number, if any, and address filed as the service address of the Party with the Secretariat.

(b) With respect to a person other than a Party, the facsimile number, if any, and address of the counsel of record for the person or, where the person is not represented by counsel, the facsimile number, if any, and address set out by the person in a Request for Panel Review, Complaint or Notice of Appearance as the address at which the person may be served, or

(c) Where a Change of Service Address has been filed by a Party or the person, the facsimile number, if any, and address set out as the service address in that form;

"Service list" means, with respect to a panel review,

(a) Where the final determination was made in the United States, the list maintained by the investigating authority of persons that have been served in the proceedings leading to the final determination, and

(b) Where the final determination was made in Canada, the list of persons to whom notice of the final determination was sent by the Deputy Minister or the list of persons that appeared in the proceedings before the Tribunal, as the case may be;

"Tribunal" means the Canadian Import Tribunal or its successor and includes any person authorized to act on its behalf.

4. The definitions set forth in Article 1911 of the Agreement are hereby incorporated into these Rules.

5. Where these Rules require notice to be given, it shall be given in writing.

#### Part I—General

##### *Duration and Scope of Panel Review*

6. A panel review commences on the day on which a first Request for panel Review is filed with the Secretariat and terminates on the day on which a Notice of Completion of Panel Review is effective.

7. Panel review shall be limited to

(a) The allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review; and

(b) Procedural and substantive defenses raised in the panel review.

##### *Responsibilities of the Secretary*

8. The normal business hours during which the offices of the Secretariat shall be open to the public shall be 9:00 a.m. to 5:00 p.m. each weekday except

(a) In the case of the United States section of the Secretariat, legal holiday of that section; and

(b) In the case of the Canadian section of the Secretariat, legal holidays of that section.

9. The responsible Secretary shall provide administrative support for each panel review and shall make the arrangements necessary for the oral proceedings and meetings of each panel, including court reporters to record the oral proceedings and, if required, interpreters to provide simultaneous translation.

10. Each Secretary shall maintain a file for each panel review comprised of either the original or a copy of all documents filed in the panel review. The file number assigned to a first Request for Panel Review shall be the Secretariat file number for all documents filed or issued in that panel review. All documents filed shall be stamped by the Secretariat to show the date and time of receipt.

11. The responsible Secretary shall forward to the other Secretary a copy of all documents filed in the office of the Secretary in a panel review and all orders and decisions issued by a panel.

12. (1) Where under these Rules a responsible Secretary is required to cause a notice or other document to be published in the *Canada Gazette* and the *Federal Register*, the responsible Secretary shall forthwith

(a) Cause the notice or other document to be published in the publication of the country in which the responsible Secretariat is located; and

(b) Send a copy of the notice or other document to the other Secretary, together with a request that the other Secretary cause the notice or other document to be published in the publication of the other country.

(2) On receipt of a request referred to in subrule (1)(b) the other Secretary shall comply with the request as soon as possible.

13. (1) Each Secretary and every member of the staff of the Secretariat shall, before taking up his duties, file

(a) A Disclosure Undertaking, in the form referred to in Schedule A, with the Deputy Minister and the Tribunal; and

(b) A Protective Order Application, in the form referred to in Schedule B, with the International Trade Administration of the United States Department of Commerce and the United States International Trade Commission.

(2) Where a Secretary or a member of the staff of the Secretariat files a Disclosure Undertaking or Protective Order Application in accordance with subrule (1), the appropriate investigating authority shall issue to the Secretary or the member a Disclosure Order or a Protective Order, as the case may be.

14. (1) Every panelist, assistant to a panelist, court reporter and translator shall, before taking up his duties in a panel review, file with the investigating authority a Disclosure Undertaking, in the form referred to in Schedule A or a Protective Order Application, in the form referred to in Schedule B, as the case may be.

(2) Where a panelist, an assistant to a panelist, a court reporter or a translator files a Disclosure Undertaking or a Protective Order Application in accordance with subrule (1), the investigating authority shall issue the Disclosure Order or Protective Order, as the case may be.

(3) The responsible Secretary shall ensure that every panelist, assistant to a panelist, court reporter and translator, before taking up his duties in a panel review, files with the responsible Secretariat

(a) In the case of a panelist, four copies of a Disclosure Order or of a Protective Order, signed by him; and

(b) In any other case, four copies of a Disclosure Order or of a Protective Order.

15. Where a document containing proprietary information or privileged information is filed with the Secretariat in a panel review, each Secretary shall ensure that

(a) The document is stored in an area dedicated to the storage of documents containing proprietary information or privileged information and the area is identified as such an area;

(b) The wrapper of the document is clearly marked to indicate that it contains proprietary information or privileged information, as the case may be; and

(c) Access to the document is limited to

(i) In all cases, officials of and counsel for the investigating authority whose final determination is under review,

(ii) In the case of proprietary information, the person who submitted the proprietary information to the investigating authority or counsel for that person,

(iii) In the case of proprietary information, persons who have filed with the responsible Secretariat a Disclosure Order or Protective Order with respect to the document, and

(iv) In the case of privileged information filed in a panel review of a final determination made in the United States, persons with respect to whom the panel has ordered disclosure of the privileged information under rule 55, if the persons have filed with the responsible Secretariat a Protective Order with respect to the document.

16. (1) Each Secretary shall permit access by any person to the information in the file in a panel review that is not proprietary information or privileged information and shall provide copies of that information on request and payment of an appropriate fee.

(2) Each Secretary shall, in accordance with subrule 15(c) and the terms of the applicable Disclosure Order, Protective Order or order of the panel

(a) Permit access to proprietary information or privileged information in the file of a panel review; and

(b) On payment of an appropriate fee, provide a copy of the information referred to in subrule (a).

(3) No document filed in a panel review shall be removed from the offices of the Secretariat except in the ordinary course of the business of the Secretariat or pursuant to the direction of a panel.

##### *Internal Functioning of Panels*

17. (1) A panel may adopt its own internal procedures, not inconsistent with these Rules, for routine administrative matters.

(2) Subject to subrule 26(b), meetings of a panel may be conducted by means of a telephone conference call.

18. The deliberations of a panel shall take place in private and remain secret and only panelists may take part in the deliberations. Staff of the responsible Secretariat and assistants to panelists may be present by permission of the panel.

##### *Computation of Time*

19. (1) In computing any time period fixed in these Rules or by an order or decision of a panel, the day from which the time period begins to run shall be excluded and, subject to subrule (2), the last day of the time period shall be included.

(2) Where the last day of a time period computed in accordance with subrule (1) falls on a legal holiday of the responsible Secretariat, that day and any other legal holiday of the responsible Secretariat immediately following that day shall be excluded from the computation.

20. A panel may extend any time period fixed in these Rules if

(a) Adherence to the time period would result in unfairness or prejudice to a participant or the breach of a general legal principle of the country in which the final determination was made;

(b) The time period is extended only to the extent necessary to avoid the unfairness, prejudice or breach;

(c) The decision to extend the time period is concurred in by four out of the five panelists; and

(d) In fixing the extension, the panel takes into account the intent of the Rules to secure just, speedy and inexpensive reviews of final determinations.

##### *Counsel of Record*

21. (1) A counsel who signs any document filed pursuant to these Rules on behalf of a participant shall be the counsel of record for the participant from the date of filing until a change is effected in accordance with subrule (2).

(2) A participant may change its counsel of record by filing with the responsible Secretariat a Notice of Change of Counsel of Record signed by the new counsel, together with proof of service on the former counsel and the other participants.

##### *Filing, Service and Communications*

22. Subject to subrules 14(3), 41(5)(b), 41(6), and 48(1) and rules 43, 52 and 55, no document is filed with the Secretariat until one original and eight copies of the document are received by the responsible Secretariat during its normal business hours and within the time period fixed for filing.

23. The responsible Secretary shall be responsible for the service of documents as follows:

(a) Notices of Intent to Commence Judicial Review shall be served on each Party and the investigating authority;

(b) Requests for Panel Review, Complaints and Notices of Appearance shall be served on the Parties, the investigating authority and the persons listed on the service list; and

(c) Disclosure Orders, Protective Orders, decisions and orders of a panel and Notices of Completion of Panel Review shall be served on the participants.

24. (1) Subject to subrule (4), all documents filed by a participant, other than the administrative record, an item of the administrative record filed pursuant to subrule 41(5) or rule 43 and documents required by rule 23 to be served by the responsible Secretary, shall be served by the participant on the counsel of record of the other participants, or where a participant is not represented by counsel, on the participant.

(2) A proof of service shall appear on, or be affixed to, all documents referred to in subrule (1).

(3) Where a document is served by an expedited delivery courier or mail service, the date of service set out in the affidavit of service or certificate of service shall be

(a) In the case of a panel review of a final determination made in the United States, the day on which the document is consigned to the courier service or is mailed; and

(b) In the case of a panel review of a final determination made in Canada, the date that is five days after the day on which the document is consigned to the courier service or is mailed.

(4) A document containing proprietary information or privileged information shall be under seal in accordance with rule 46 and shall be served only on

(a) The investigating authority; and

(b) Participants that have been granted access to the proprietary information or privileged information under a Disclosure Order, Protective Order or order of the panel, as the case may be.

25. (1) Subject to subrule 26(a), service of a document may be effected in the following manner:

(a) By delivering a copy of the document to the service address of the participant;

(b) By sending a copy of the document to the service address of the participant by facsimile transmission or an expedited delivery courier or mail service, such as express mail in the United States or Priority Post in Canada; or

(c) By personal service on the participant.

26. Where proprietary information or privileged information is disclosed in a panel review to a person pursuant to a Disclosure Order or Protective Order, the person shall not

(a) File, serve or otherwise communicate the proprietary information or privileged information by facsimile transmission; or

(b) Communicate the proprietary information or privileged information by telephone.

27. Service on an investigating authority shall not constitute service on a Party and service on a Party shall not constitute service on an investigating authority.

##### *Pleadings and Simultaneous Translation of Panel Reviews in Canada*

28. Rules 29 to 31 apply with respect to a panel review of a final determination made in Canada.

29. Either English or French may be used by any person or panelist in any document or oral proceeding.

30. (1) Subject to subrule (2), any order or decision, including the reasons therefor, issued by a panel shall be made available simultaneously in both English and French where



(a) In the opinion of the panel, the order or decision is in respect of a question of law of general public interest or importance; or

(b) The proceedings leading to the issuance of the order or decision were conducted in whole or in part in both English and French.

(2) Where

(a) An order or decision issued by a panel is not required by subrule (1) to be made available simultaneously in English and French, or

(b) An order or decision is required by subrule (1)(a) to be made available simultaneously in both English and French but the panel is of the opinion that to make the order or decision available simultaneously in both English and French would occasion a delay prejudicial to the public interest or result in injustice or hardship to any participant, the order or decision, including the reasons therefor, shall be issued in the first instance in either English or French and thereafter at the earliest possible time in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subrule (1) or (2) shall be construed as prohibiting the oral delivery in either English or French of any order or decision or any reasons therefor.

(4) No order or decision is invalid by reason only that it was not made or issued in both English and French.

31. (1) Any oral proceeding conducted in both English and French shall be translated simultaneously.

(2) Where a participant requests simultaneous translation of oral proceedings in a panel review, the request shall be made as early as possible in the panel review and preferably at the time of filing a Complaint or Notice of Appearance.

(3) Where the chairperson of a panel is of the opinion that there is a public interest in the panel review, the chairperson may direct the responsible Secretary to arrange for simultaneous translation of any of the oral proceedings in the panel review.

**Costs**

32. Each participant shall bear the costs of and incidental to its own participation in any panel review.

**Part II—Commencement of Panel Review**

**Notice of Intent to Commence Judicial Review**

33. (1) Where an interested person intends to commence judicial review of

a final determination, the interested person shall

(a) Where the final determination was made in the United States, serve a Notice of Intent to Commence Judicial Review on

(i) Both Secretaries,

(ii) The investigating authority, and

(iii) All persons listed on the service list; and

(b) Where the final determination was made in Canada,

(i) Serve a Notice of Intent to Commence Judicial Review on both Secretaries and all persons listed on the service list, and

(ii) Cause the Notice of Intent to Commence Judicial Review to be published in the *Canada Gazette*.

(2) Where the final determination referred to in subrule (1) was made in Canada, the Secretary of the Canadian section shall serve a copy of the Notice of Intent to Commence Judicial Review on the investigating authority.

(3) Every Notice of Intent to Commence Judicial Review referred to in subrule (1) shall include the following information:

(a) The name and service address of the interested person filing the Notice;

(b) The name and telephone number of counsel for the interested person or, where the interested person is not represented by counsel, the telephone number of the interested person;

(c) The title of the final determination for which judicial review is sought, the investigating authority that issued the final determination, the file number assigned by the investigating authority and the appropriate citation if the final determination was published in the *Canada Gazette* or the *Federal Register*; and

(d) The date on which the notice of the final determination was received by the other Party if the final determination was not published in the *Canada Gazette* or the *Federal Register*.

**Request for Panel Review**

34. (1) A Request for Panel Review shall be made in accordance with the requirements of

(a) Section 77.11 or 96.3 of the *Special Import Measures Act* and regulations made thereunder;

(b) Section 516A of the *Tariff Act of 1930*, as amended, and regulations made thereunder; or

(c) Section 408 of the *United States-Canada Free Trade Agreement Implementation Act of 1988*, as amended, and regulations made thereunder.

(2) A request for Panel Review shall contain the following information:

(a) The name and service address of the Party or interested person requesting panel review;

(b) The name and telephone number of counsel for the Party or interested person or, where the interested person is not represented by counsel, the telephone number of the interested person;

(c) The title of the final determination for which panel review is requested, the investigating authority that issued the final determination, the file number assigned by the investigating authority and the appropriate citation, if the final determination was published in the *Canada Gazette* or the *Federal Register*;

(d) The date on which notice of the final determination was received by the other Party, if the final determination was not published in the *Canada Gazette* or the *Federal Register*;

(e) Where a Notice of Intent to Commence Judicial Review has been served and the sole reason that the Request for Panel Review is made is to require review of the final determination by a panel, a statement to that effect; and

(f) The Service list.

35. (1) On receipt of a first Request for Panel Review filed within the time period fixed in the Act referred to in paragraph 34(1)(a), (b) or (c) pursuant to which the Request for Panel Review is made, the responsible Secretary shall

(a) Forthwith forward a copy of the Request to the other Secretary;

(b) Forthwith inform the other Secretary of the Secretariat file number; and

(c) Serve a copy of the first Request for Panel Review on the persons listed on the service list together with a statement setting out the date on which the Request was filed and stating that

(i) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with rule 39 within 30 days after the filing of the first Request for Panel Review.

(ii) A Party, investigating authority or interested person that does not file a Complaint may participate in the panel review by filing a Notice of Appearance in accordance with rule 40 within 45 days after the filing of the first Request for Panel Review.

(iii) In the case of a final determination made in Canada, any person that would be entitled to appear and be represented in a judicial review of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with rule 40 within 45 days after the

filing of the first Request for Panel Review, and

(iv) The panel review shall be limited to the allegations of error of fact or law, including the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and the procedural and substantive defense raised in the panel review.

(2) On the filing of a first Request for Panel Review each Secretary shall forthwith cause a notice of that Request to be published in the *Canada Gazette* and the *Federal Register*. The notice shall state that a Request for Panel Review has been received and shall specify the date on which the Request was filed, the final determination for which review is requested and the information set out in subrule (1)(c).

**Joint Panel Reviews**

36. (1) Subject to subrules (3) and 37(1), where a panel is established to review a final determination made under paragraph 41(1)(a) of the *Special Import Measures Act* that applies with respect to particular goods of the United States and a first Request for Panel Review of a final determination made under paragraph 43(1) of that Act with respect to those goods is filed, on the request of a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in the latter panel review, the final determinations shall be reviewed jointly by one panel unless a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in that panel review objects.

(2) Subject to subrules (3) and 37(2), where a panel is established to review a final determination made under section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended, that applies with respect to particular goods of Canada and a first Request for Panel Review of a final determination made under section 705(b) or 735(b) of that Act with respect to those goods is filed, on the request of a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in the latter panel review, the final determinations shall be reviewed jointly by one panel unless a participant in the former panel review or an interested person listed in the service list of the latter panel review that certifies that it intends to become a participant in that panel review objects.

(3) A request for joint panel review or an objection to joint panel review may

be filed at any time before, but no later than, 20 days after the first Request for Panel Review of the final determination made under paragraph 43(1) of the *Special Import Measures Act* or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, is filed.

37. (1) Where a panel is established to review a final determination made under paragraph 41(1)(a) of the *Special Import Measures Act* that applies with respect to particular goods of the United States and a Request for Panel Review of a negative final determination made under paragraph 43(1) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel.

(2) Where a panel is established to review a final determination made under section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended, that applies with respect to particular goods of Canada and a Request for Panel Review of a negative final determination made under section 705(b) or 735(b) of that Act with respect to those goods is filed, the final determinations shall be reviewed jointly by one panel.

38. (1) Subject to subrule (2), where final determinations are reviewed jointly pursuant to rule 36 or 37, the time periods fixed for the review of the final determination made under paragraph 43(1) of the *Special Import Measures Act* or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, shall apply.

(2) Where final determinations are reviewed jointly pursuant to rule 37, the panel shall issue its decision with respect to the final determination made under paragraph 43(1) of the *Special Import Measures Act* or section 705(b) or 735(b) of the *Tariff Act of 1930*, as amended, and where the panel remands the final determination to the investigating authority and the Determination on Remand is affirmative, the panel shall promptly thereafter issue its decision with respect to the final determination made under paragraph 41(1)(a) of the *Special Import Measures Act* or section 705(a) or 735(a) of the *Tariff Act of 1930*, as amended.

**Complaint**

39. (1) Any interested person that intends to make allegations of errors of fact or law, including the jurisdiction of the investigating authority, with respect to the final determination shall file with the responsible Secretariat a Complaint within 30 days after the filing of a first Request for Panel Review of a final determination.

(2) Every Complaint referred to in subrule (1) shall contain the following information:

(a) The name and service address of the complainant;

(b) The name and telephone number of the counsel for the complainant or, where the complainant is not represented by counsel, the telephone number of the complainant;

(c) The Secretariat file number for the panel review;

(d) The precise nature of the Complaint, including the applicable standard of review and the allegations of error of fact or law, including the jurisdiction of the investigating authority; and

(e) Where the final determination was made in Canada, a statement as to whether the complainant

(i) Intends to use English or French in pleadings and oral proceedings before the panel, and

(ii) Requests simultaneous translation of any oral proceedings.

**Notice of Appearance**

40. Within 45 days after the filing of a first Request for Panel Review of a final determination, the investigating authority and any other person that is entitled to and proposes to participate in the panel review and that has not filed a Complaint in the panel review shall file with the responsible Secretariat a Notice of Appearance containing the following information:

(a) The name and service address of the investigating authority or other person filing the Notice of Appearance;

(b) The name and telephone number of the counsel for the investigating authority or other person filing the Notice of Appearance, and, where the person is not represented by counsel, the telephone number of the person;

(c) The Secretariat file number for the panel review;

(d) In the case of a Notice of Appearance filed by an investigating authority, admissions, if any, with respect to the allegations set out in the Complaints;

(e) A statement as to whether appearance is made in support of

(i) The investigating authority,

(ii) A complainant, or

(iii) Both the investigating authority and a complainant; and

(f) Where the final determination was made in Canada, a statement as to whether the person filing the Notice of Appearance

(i) Intends to use English or French in pleadings and oral proceedings before the panel, and

(ii) Requests simultaneous translation of any oral proceedings.



## Record for Review

41. (1) The investigating authority whose final determination is under review shall file with the responsible Secretariat, within 5 days after the expiration of the time period fixed for filing a Complaint, an Index comprised of a descriptive list of all items contained in the administrative record with proof of service of the Index on persons listed on the service list.

(2) An Index referred to in subrule (1) shall, where applicable, identify those items that contain proprietary information, privileged information or government information by a statement to that effect.

(3) Within 10 days after an Index is filed pursuant to subrule (1), each complainant shall, and any other participant may, file with the responsible Secretariat, together with proof of service on the investigating authority and on the other participants, a Designation of Record, designating those items in the Index that the complainant or participant considers relevant to the panel review and requests be filed by the investigating authority.

(4) Where a complainant or participant, in a Designation of Record referred to in subrule (3), designates an item identified as containing privileged information, the complainant or participant shall file, together with the Designation of Record, a Notice of Motion for disclosure of the document containing the privileged information in accordance with subrule 55(1).

(5) Within 15 days after the expiration of the time period fixed for filing a Designation of Record, the investigating authority shall file with the responsible Secretariat

(a) The final determination including reasons for the final determination, if any;

(b) Subject to subrules (6), (7) and (8), two copies of

(i) Any item listed in the Index and designated by the complainants or participants pursuant to subrule (3) and any other item listed in the Index that the investigating authority considers relevant to the panel review, or

(ii) The administrative record; and

(c) The Index marked to identify those items filed by the investigating authority.

(6) Where a document containing proprietary information is filed under subrule (5)(b) or rule 43, it shall be filed under seal in accordance with rule 46 and, where a non-proprietary description of the proprietary information has been filed with the investigating authority, four copies of

that description shall be filed with the Secretariat at the same time as the document.

(7) No privileged information shall be filed with the responsible Secretariat unless it is filed pursuant to an order of a panel made under subrule 55 (3)(b), (7) or (8).

(8) No government information shall be filed with the Secretariat unless the investigating authority, after having reviewed the government information and, where applicable, pursued appropriate administrative review procedures, determines that the information may be disclosed.

42. The responsible Secretary shall give notice to all participants of the date on which the administrative record is filed pursuant to subrule 41(5).

43. Subject to subrules 41 (6), (7) and (8), where a panel directs, on its own motion or pursuant to the motion of a participant, that any part of the administrative record relevant to the panel review be filed with the responsible Secretariat, the investigating authority shall forthwith file two copies of the part with the responsible Secretariat.

## Part III—Panels

## Announcement of Panel

44. On the completion of the selection of a panel, the responsible Secretary shall notify the participants and the other Secretary of the names of the panelists.

## Violation of Code of Conduct

45. Where a participant in a panel review believes that a panelist is in violation of the Code of Conduct, the participant shall forthwith notify a Party in writing of the alleged violation.

## Part IV—Proprietary Information and Privileged Information

## Filing under Seal

46. (1) Where, under these Rules, a document containing proprietary information or privileged information is required to be filed under seal with the Secretariat or is required to be served under seal, the document shall be filed or served in accordance with this rule and, where the document is a pleading, with rule 59.

(2) A document filed or served under seal shall be

(a) Bound separately from all other documents;

(b) Clearly marked

(i) In the case of a document containing proprietary information, "proprietary" or "confidential", and

(ii) In the case of a document containing privileged information, "privileged"; and

(c) Contained in an opaque inner and an opaque outer wrapper.

(3) An inner wrapper referred to in subrule (2)(c) shall disclose

(a) That proprietary information or privileged information is enclosed, as the case may be; and

(b) The Secretariat file number of the panel review.

47. Filing or service of proprietary information or privileged information with the Secretariat shall not constitute a waiver of the designation of the information as proprietary information or privileged information.

## Disclosure Orders and Protective Orders

48. (1) A counsel of record or a professional retained by, or under the control or direction of, a counsel of record who wishes disclosure of proprietary information in a panel review shall file a Disclosure Undertaking, in the form referred to in Schedule A, or a Protective Order Application, in the form referred to in Schedule B, as the case may be, with respect to the proprietary information as follows:

(a) Four copies with the responsible Secretariat; and

(b) One copy with the investigating authority.

(2) A Disclosure Undertaking or Protective Order Application referred to in subrule (1) shall be served

(a) Where the Disclosure Undertaking or Protective Order Application is filed before the expiration of the time period fixed for filing a Notice of Appearance in the panel review, on the persons listed in the service list; or

(b) In any other case, on all participants, in accordance with subrule 24(1).

49. Where a Disclosure Undertaking or Protective Order Application is filed pursuant to subrule 48(1), the investigating authority shall serve the Disclosure Undertaking or Protective Order Application on the person that submitted the proprietary information to the investigating authority.

50. (1) The investigating authority shall, within 30 days after a Disclosure Undertaking or Protective Order Application is filed with it in accordance with subrule 48(1), serve on the person who filed the Disclosure Undertaking or Protective Order Application

(a) A Disclosure Order or Protective Order as the case may be; or

(b) A notification in writing setting out the reasons why a Disclosure Order or Protective Order is not issued.

(2) At the same time as serving the document referred to in subrule (1) (a) and (b), the investigating authority shall serve a copy of the document on the person that submitted the proprietary information.

51. (1) Where an investigating authority refuses to issue a Disclosure Order or Protective Order to a counsel of record or to a professional retained by, or under the control or direction of, a counsel of record or where the investigating authority issues a Disclosure Order or Protective Order with terms unacceptable to the counsel of record, the counsel of record may file with the responsible Secretariat a Notice of Motion requesting that the panel review the decision of the investigating authority.

(2) Where, after consideration of any response made by the investigating authority referred to in subrule (1), the panel decides that a Disclosure Order or Protective Order should be issued or that the terms of a Disclosure Order or Protective Order should be modified, the panel shall so notify counsel for the investigating authority.

(3) Where the final determination was made in the United States and the investigating authority fails to comply with the notification referred to in subrule (2), the panel may issue such orders as are just in the circumstances, including, without limiting the generality of the foregoing,

(a) An order refusing to permit the investigating authority to make certain arguments in support of its case or striking certain arguments from its pleadings; or

(b) An order resolving issues relating to the non-disclosed information in a manner contrary to the position of the investigating authority.

52. Where a Disclosure Order or Protective Order is issued to a person in a panel review, the person shall file four copies of the Disclosure Order or of the Protective Order with the responsible Secretariat.

53. A Disclosure Order or a Protective Order may be amended by the investigating authority at any time in a panel review if the person named in the Disclosure Order or Protective Order signs a declaration acknowledging that his Disclosure Undertaking of Protective Order Application applies with respect to the amendment.

54. Where a Disclosure Order or Protective Order is issued to a person, the person is entitled

(a) To access to the document; and

(b) Where the person is a counsel of record, to a copy of the document containing the proprietary information, on payment of an appropriate fee, and to service of pleadings containing the proprietary information.

## Privileged Information

55. (1) A Notice of Motion for disclosure of a document in the administrative record identified as containing privileged information shall set out

(a) The reasons why disclosure of the document is necessary to the case of the participant filing the Notice of Motion; and

(b) A statement of any point of law or legal authority relied on, together with a concise argument in support of disclosure.

(2) Within 10 days after a Notice of Motion referred to in subrule (1) is filed, the investigating authority shall, if it intends to respond, file the following in response:

(a) An affidavit of an official of the investigating authority stating that, since the filing of the Notice of Motion, the official has examined the document and has determined that disclosure of the document would constitute disclosure of privileged information; and

(b) A statement of any point of law or legal authority relied on, together with a concise argument in support of non-disclosure.

(3) After having reviewed the Notice of Motion referred to in subrule (1) and the response referred to in subrule (2), if any, the panel may order

(a) That the document shall not be disclosed; or

(b) That the investigating authority file two copies of the document under seal with the responsible Secretariat in order that two panelists may examine the document.

(4) In a panel review of a final determination made in the United States, before examining a document in accordance with subrule (6) or (8), a panelist shall file with the responsible Secretariat four copies of a Protective Order with respect to the document, signed by him.

(5) The panel shall select the two panelists to make the examination referred to in subrule (3)(b) in such a way that one is a lawyer who is a citizen of Canada and the other a lawyer who is a citizen of the United States.

(6) The two panelists selected under subrule (5) shall

(a) Examine the document *in camera*; and

(b) Communicate their decision, if any, to the panel.

(7) The decision referred to in subrule (6)(b) shall be issued as an order of the panel.

(8) Where the two panelists selected under subrule (5) fail to come to a decision, the panel shall

(a) Examine the document *in camera*; and

(b) Issue an order with respect to the disclosure of the document.

(9) Where an order referred to in subrule (7) or (8) is to the effect that the document shall not be disclosed, the responsible Secretary shall return all copies of the document to the investigating authority by serving them under seal on the investigating authority.

56. In a panel review of a final determination made in the United States, where, pursuant to subrule 55 (3)(b), (7) or (8) disclosure of a document is granted to a person, the investigating authority shall issue to that person a Protective Order with respect to that document in accordance with the order of the panel.

## Violations of Disclosure Undertakings and Protective Orders

57. Where any person alleges that the terms of a Disclosure Undertaking or Protective Order have been violated, the panel shall refer the allegations to the investigating authority for investigation and, where applicable, the imposition of sanctions in accordance with section 77.26 of the *Special Import Measures Act* or section 777(d) of the *Tariff Act of 1930*, as amended.

## Part V—Written Proceedings

## Form and Content of Pleadings

58. (1) Every pleading filed in a panel review shall have a heading that sets out the following information:

(a) The title of and the Secretariat file number for the panel review, if assigned;

(b) A brief descriptive title of the pleading; and

(c) The name and service address of the participant on whose behalf the pleading is filed.

(2) Every pleading filed in a panel review shall be on paper 8½ X 11 inches (216 millimetres by 279 millimetres) in size. The text of the pleading shall be printed, typewritten or reproduced legibly on one side only with a margin of approximately 1½ inches (40 millimetres) on the left-hand side with double-spacing between each line of text, except for quotations of more than 50 words, which shall be indented and single-spaced. Footnotes, titles, schedules, tables, graphs and columns of figures shall be presented in a readable



form. Briefs shall be securely bound along the left-hand margin.

(3) Every pleading filed on behalf of a participant in a panel review shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.

59. (1) Where a participant files a pleading that contains proprietary information, the participant shall file two sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the proprietary information and labelled "Proprietary" or "Confidential" with the top of each page that contains proprietary information marked with the word "Proprietary" or "Confidential" and with the proprietary information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Proprietary" or "Non-Confidential" with each page from which proprietary information has been deleted bearing a legend indicating the location from which the proprietary information was deleted.

(2) Where a participant files a pleading that contains privileged information, the participant shall file two separate sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the privileged information and labelled "Privileged" with the top of each page that contains privileged information marked with the word "Privileged" and with the privileged information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Privileged" with each page from which privileged information has been deleted bearing a legend indicating the location from which the privileged information was deleted.

#### Filing of Briefs

60. (1) Every complainant and every participant that filed a Notice of Appearance in support of a complainant or in support of both a complainant and the investigating authority shall file a brief no later than 60 days after the day on which the administrative record is filed under subrule 41(5).

(2) The investigating authority and every participant that filed a Notice of Appearance in support of the investigating authority, other than a participant referred to in subrule (1), shall file a brief no later than 60 days after the expiration of the time period for the filing of briefs referred to in subrule (1).

(3) A reply brief may be filed by a complainant or by a participant that filed a Notice of Appearance in support of a complainant or in support of both a complainant and the investigating

authority, no later than 15 days after the expiration of the time period fixed for the filing of the brief of the investigating authority and shall be limited to rebuttal of matters that were contained in the briefs filed pursuant to subrule (2) and that were not addressed in the briefs filed pursuant to subrule (1).

(4) Any number of participants may join in a single brief, and any participant may adopt by reference any part of the brief of another participant.

(5) A participant may file a brief without appearing to present oral argument.

(6) Where a panel review of a final determination made by an investigating authority of the United States with respect to certain goods involves issues that may relate to the final determination of another competent investigating authority with respect to those goods, the latter investigating authority may file an *amicus curiae* brief in the panel review in accordance with subrule (2).

#### Failure to File Briefs

61. (1) Where a participant fails to file a brief within the time period fixed, the panel may order that the participant is not entitled

(a) To present oral argument;

(b) To service of any further pleadings, orders or decisions in the panel review; or

(c) To further notice of the proceedings in the panel review.

(2) Where no brief is filed by any complainant or by any interested person in support of any of the complainants within the time period fixed, a participant may make a motion for a panel decision dismissing the panel review.

(3) Where no brief is filed by an investigating authority or by any interested person in support of the investigating authority within the time period fixed, the complainant or an interested person in support of a complainant may make a motion for a panel decision referred to in rule 74 that is in accordance with the relief sought in its brief.

#### Content of Briefs

62. (1) Every brief shall contain information in the following order, divided into five parts:

Part I: A table of contents with page references and a table of authorities cited, with reference to the pages of the brief where they are cited and with cases alphabetically arranged;

Part II: A statement of the case;

(a) In the brief of a complainant or of a participant that filed a Notice of Appearance in support of a complainant

or in support of both a complainant and the investigating authority, this part shall contain a concise statement of the relevant facts;

(b) In the brief of an investigating authority or of a participant that filed a Notice of Appearance in support of the investigating authority, other than a participant referred to in paragraph (a), this part shall contain a concise statement of the position of the investigating authority or the participant with respect to the statement of facts set out in the briefs referred to in paragraph (a), including a concise statement of other facts relevant to its case; and

(c) In all briefs, references to evidence in the administrative record shall be made by page and, where practicable, by line.

Part III: A statement of the issues;

(a) In the brief of a complainant or of a participant that filed a Notice of Appearance in support of a complainant or in support of both a complainant and the investigating authority, this part shall contain a concise statement of the issues; and

(b) In the brief of an investigating authority or of a participant that filed a Notice of Appearance in support of the investigating authority, other than a participant referred to in paragraph (a), this part shall contain a concise statement of the position of the investigating authority or the participant with respect to each issue relevant to its case.

Part IV: Argument;

This part shall consist of the argument setting out concisely the points of law relating to the issues with applicable citations to authorities and the administrative record.

Part V: Relief;

This part shall consist of a concise statement of the precise relief requested.

(2) Paragraphs in Parts I to V of a brief may be numbered consecutively.

#### Motions

63. (1) A motion shall be made by Notice of Motion in writing unless the circumstances make it unnecessary or impracticable.

(2) Every Notice of Motion and affidavit in support thereof, if any, shall be filed with the responsible Secretariat together with proof of service on all participants.

(3) Every Notice of Motion shall contain the following information:

(a) The title of the panel review, the Secretariat file number for that panel review and a brief descriptive title indicating the purpose of the motion;

(b) A statement of the precise relief requested;

(c) A statement of the grounds to be argued, including a reference to any rule, point of law or legal authority to be relied on, together with a concise argument in support of the motion;

(d) A statement as to whether other participants consent to the motion, if ascertainable; and

(e) Where necessary, references to evidence in the administrative record by page and, where practicable, by line.

(4) The pendency of any motion in a panel review shall not alter any time period fixed in these Rules or by an order or decision of the panel.

64. Unless the panel otherwise orders, a participant may file a response to a Notice of Motion if the response is filed within 10 days after the Notice of Motion is filed.

65. Subject to rule 66, at the direction of the chairperson, the responsible Secretary shall fix a date, time and place for the hearing of a motion and shall notify all participants of the same.

66. (1) A motion may be disposed of without personal appearance by the participants.

(2) The panel may, subject to subrule 26(b), direct that a motion be heard by means of a telephone conference call with the participants.

#### Part VI—Oral Proceedings

##### Location

67. Oral proceedings in a panel review shall take place at the office of the responsible Secretariat or at such other location as the responsible Secretary may arrange.

##### Pre-hearing Conference

68. (1) A panel may hold a pre-hearing conference and the responsible Secretary shall give notice of the conference to all participants.

(2) A participant may request that the panel hold a pre-hearing conference by filing with the responsible Secretariat a written request setting out the matters that the participant proposes to raise at the conference.

(3) The purpose of a pre-hearing conference shall be to facilitate the expeditious advancement of the panel review by addressing such matters as

(a) The clarification and simplification of the issues;

(b) The procedure to be followed at the hearing of oral argument; and

(c) Any outstanding motions.

(4) Subject to subrule 26(b), a pre-hearing conference may be conducted by means of a telephone conference call.

(5) Following a pre-hearing conference, the panel shall promptly issue an order setting out its rulings with respect to the matters considered at the conference.

##### Oral Argument

69. (1) A panel shall commence the hearing of oral argument no later than 30 days after the expiration of the time period fixed for filing reply briefs. At the direction of the panel, the responsible Secretary shall notify all participants of the date, time and place for the oral argument.

(2) Oral argument, limited to the issues in dispute and subject to the time constraints set by the panel, shall, unless the panel otherwise orders, be presented in the following order:

(a) The complainants and any participant that filed a brief in support of a complainant or in support of both a complainant and the investigating authority;

(b) The investigating authority and any participant that filed a brief in support of the investigating authority, other than a participant referred to in subrule (a); and

(c) Argument in reply, in the discretion of the panel.

(3) If a participant fails to appear at oral argument, the panel may hear argument on behalf of the other participants that are present. If no participant appears, the panel may decide the case on the basis of briefs.

##### Subsequent Authorities

70. (1) At any time before or after the conclusion of oral argument but before the panel has issued its decision, a participant that has filed a brief may bring to the attention of the panel a decision or judgment of a court that is relevant to the panel review and that was issued subsequent to the filing of the brief or the conclusion of oral argument by filing with the responsible Secretariat a written request setting out the citation of the decision or judgment, the page reference of the brief of the participant to which the decision or judgment relates and a concise statement, no more than one page in length, of the relevance of the decision or judgment.

(2) A request referred to in subrule (1) shall be filed as soon as possible after the issuance of the decision or judgment by the court.

(3) Where a request referred to in subrule (1) is filed with the responsible Secretariat, any other participant may file a concise statement, no more than one page in length, in response within five days of the day that the request was filed.

##### Oral Proceedings in Camera

71. During that part of oral proceedings in which proprietary information or privileged information is presented, a panel shall not permit any

person other than the following persons to be present:

(a) The person presenting the proprietary information or privileged information;

(b) A person who has been granted access to the proprietary information or privileged information under a Disclosure Order, Protective Order or an order of a panel;

(c) In the case of proprietary information, a person as to whom the confidentiality of the proprietary information has been waived; and

(d) Officials of and counsel for the investigating authority.

#### Part VII—Decisions and Completions of Panel Reviews

##### Orders and Decisions

72. The responsible Secretary shall cause notice of every decision of a panel to be published in the *Canada Gazette* and the *Federal Register*.

73. Where a Notice of Motion requesting dismissal of a panel review is filed by a participant, the panel may issue an order terminating the panel review and, where the motion is consented to by all the participants, the panel shall issue an order terminating the panel review.

74. A panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of the panelists, in accordance with Article 1904.8 of the Agreement.

##### Panel Review of Action on Remand

75. (1) An investigating authority shall give notice of the action taken pursuant to a remand of the panel by filing with the responsible Secretariat a Determination on Remand is filed requesting that the panel review the Determination on Remand within the time specified by the panel.

(2) Where a participant files a Notice of Motion no later than 15 days after the day on which a Determination on Remand is filed requesting that the panel review the Determination on Remand, the panel shall, within 10 days after the Notice of Motion is filed, order a review of the Determination on Remand or dismiss the motion.

(3) Unless otherwise ordered by the panel, there shall be no oral argument in support of the motion referred to in subrule (2).

(4) Where a panel orders a review of a Determination on Remand, the responsible Secretary shall serve the order on all the participants, together with a notice stating that a participant may file.

(a) Written submissions in respect of the Determination on Remand no later



than 15 days after the day on which the order was issued; and

(b) A response to the written submission referred to in subrule (a) within 15 days after the submissions are filed.

(5) Where a panel orders a review of a Determination on Remand, the panel shall issue a written decision with respect to its review of the Determination on Remand no later than 90 days after the Determination on Remand is filed.

#### Re-examination of Orders and Decisions

76. A clerical error in an order or decision of a panel, or an error in an order or decision of a panel arising from any accidental oversight, inaccuracy or omission may be corrected by the panel at any time during the panel review.

77. (1) A participant may, within 10 days after a panel issues its decision, file a Notice of Motion requesting that the panel re-examine its decision for the purpose of correcting an accidental oversight, inaccuracy or omission and setting out

(a) The oversight, inaccuracy or omission with respect to which the request is made;

(b) The relief requested; and

(c) A statement as to whether other participants consent to the motion, if ascertainable.

(2) The grounds for a motion referred to in subrule (1) shall be limited to one or both of the following grounds:

(a) That the decision does not accord with the reasons therefor; or

(b) That some matter has been accidentally overlooked, stated inaccurately or omitted by the panel.

(3) No Notice of Motion referred to in subrule (1) shall set out any argument already made in the panel review.

(4) There shall be no oral argument in support of a motion referred to in subrule (1).

(5) Subject to subrule (6), there shall be no response to a motion referred to in subrule (1) unless the panel otherwise orders.

(6) Before granting a motion referred to in subrule (1), the panel shall give the participants an opportunity to file a response to the motion but in no case shall the time period fixed for the response be more than 15 days after the Notice of Motion is filed.

#### Delay in Delivery of Decisions

78. Where a panelist becomes unable to fulfill panel duties, is disqualified or dies, panel proceedings and computations of time shall be suspended, pending the appointment of a substitute panelist in accordance with

the procedures set out in Annex 1901.2 to Chapter Nineteen of the Agreement.

79. Where a panelist becomes unable to fulfill panel duties, is disqualified or dies after the oral argument, the chairperson may order that the matter be reheard on such terms as are appropriate after selection of a substitute panelist.

#### Part VIII—Completion of Panel Review

80. Where a panel issues an order referred to in rule 73 terminating the panel review, the responsible Secretary shall cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Panel Review, effective

(a) Where all the participants consent to the dismissal, on the day after the day on which the order of the panel is issued;

(b) Where no request for an extraordinary challenge committee is filed within 30 days after the order is issued, on the 31st day; and

(c) Where a request for an extraordinary challenge committee is filed within 30 days after the order is issued, on the day referred to in rule 59 of the *Extraordinary Challenge Committee Rules*.

81. Where a panel issues a decision referred to in subrule 61(2) or a decision referred to in rule 74 that affirms the final determination, the responsible Secretary shall, 31 days after the decision is issued and if no request for an extraordinary challenge committee is filed, cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Panel Review, effective on the 31st day.

82. Where a panel issues a decision referred to in rule 74 that remands to the investigating authority, the responsible Secretary shall, 46 days after the Determination on Remand is filed and if no Notice of Motion referred to in subrule 75(2) is filed and no request for an extraordinary challenge committee is filed, cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Panel Review effective on the 46th day.

83. Where a panel issues a decision referred to in subrule 75(5) and no request for an extraordinary challenge committee is filed, the responsible Secretary shall cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Panel Review, effective on the 31st day after that decision is issued.

84. Where a request for an extraordinary challenge committee is filed within 30 days or 45 days after the decision of the panel referred to in subrule 61(2), rule 74 or subrule 75(5), as

the case may be, the responsible Secretary shall cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Panel Review, effective on the day referred to in rule 59 of the *Extraordinary Challenge Committee Rules*.

85. Panelists are discharged from their duties on the day on which a Notice of Completion of Panel Review is effective.

#### Schedule A—Disclosure Undertaking Forms

Available from the Deputy Minister or the Tribunal, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

#### Schedule B—Protective Order Application Forms

Available from the International Trade Administration of the United States Department of Commerce or the United States International Trade Commission, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

#### Rules of Procedure for Article 1904 Extraordinary Challenge Committees

##### U.S.-Canada Free Trade Agreement

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##### Preamble

##### The Parties,

Having regard to Chapter Nineteen of the Free Trade Agreement between Canada and the United States of America;

Acting pursuant to Article 1904.14 of the Agreement;

Adopt the following Rules of Procedure, which shall come into force on the same day as the Agreement comes into force, and shall from that day govern all extraordinary challenge committee proceedings conducted pursuant to Article 1904 of the Agreement.

##### Short Title

1. These Rules may be cited as the *Extraordinary Challenge Committee Rules*.

##### Statement of General Intent

2. These Rules are intended to give effect to the provisions of Chapter Nineteen of the Agreement with respect to extraordinary challenges conducted pursuant to Article 1904 of the Agreement and to result in decisions typically within 30 days after the establishment of the committee. Where a procedural question arises that is not covered by these Rules, a committee may adopt an appropriate procedure to be followed.

##### Interpretation

3. In these Rules, "Agreement" means the Free Trade Agreement between Canada and the United States of America, signed on January 2, 1988;

"Code of Conduct" means the code of conduct established by the Parties pursuant to Article 1910 of the Agreement;

"Committee" means an extraordinary challenge committee established pursuant to Annex 1904.13 to Chapter Nineteen of the Agreement;

##### "Counsel" means:

(a) With respect to a panel review of a final determination made in the United States, a person entitled to appear as counsel before a federal court in the United States; and

(b) With respect to a panel review of a final determination made in Canada, a person entitled to appear as counsel before the Federal Court of Canada; "Counsel of record" means a counsel referred to in subrule 16(1);

"Deputy Minister" means the Deputy Minister of National Revenue for Customs and Excise or his successor and includes any person authorized to perform any power, duty or function of the Deputy Minister under the *Special Import Measures Act*;

"Final determination" includes, in the case of Canada, a definitive decision within the meaning of subsection 77.1(1) of the *Special Import Measures Act*;

"Investigating authority" means the competent investigating authority that issued the final determination that was the subject of the panel review to which an extraordinary challenge relates;

"Legal holiday" means:

(a) With respect to the United States section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Martin Luther King's Birthday (third Monday in January), Washington's Birthday (third Monday in February), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (second Monday in October), Veterans' Day (November 11), Thanksgiving Day (fourth Thursday in November), Christmas Day (December 25), any day designated as a holiday by the President or the Congress of the United States, and any day on which the offices of the Government of the United States located in the District of Columbia are officially closed; and

(b) With respect to the Canadian section of the Secretariat, Saturday, Sunday, New Year's Day (January 1), Good Friday, Easter Monday, Victoria Day (third Monday in May), Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Remembrance Day (November 11), Christmas Day (December 25), Boxing Day (December 26), and any other day fixed as a statutory holiday by the Government of Canada or by the province in which the section is located; "Panel" means a binational panel established pursuant to Annex 1901.2 to Chapter Nineteen of the Agreement, the decision of which is the subject of an extraordinary challenge;

"Participant" means a Party that files a Request for an Extraordinary

Challenge Committee and any of the following that files a Notice of Appearance pursuant to these Rules:

(a) A Party,

(b) A participant in the panel review that is the subject of the extraordinary challenge, and

(c) A panelist against whom an allegation referred to in Article 1904.13(a)(i) of the Agreement is made;

"Party" means the Government of Canada or the Government of the United States;

"Person" means:

(a) An individual,

(b) A Party,

(c) An investigating authority,

(d) A government of a province, state or other political subdivision of the country of a Party,

(e) A department, agency or body of a Party or of a government referred to in paragraph (d), or

(f) A partnership, corporation or association;

"Pleading" means a Request for an Extraordinary Challenge Committee, a Notice of Appearance, a Change of Service Address, a Notice of Change of Counsel of Record, a brief and any other written submission filed by a participant;

"Privileged information" means:

(a) With respect to an extraordinary challenge of a panel review of a final determination made in Canada, information of the investigating authority that is subject to solicitor-client privilege under the laws of Canada or constitutes part of the deliberative process with respect to the final determination and with respect to which the privilege has not been waived, and

(b) With respect to an extraordinary challenge of a panel review of a final determination made in the United States, information of the investigating authority that is subject to the attorney-client, attorney work product or government deliberative process privilege under the laws of the United States and with respect to which the privilege has not been waived;

"Proof of service" means:

(a) With respect to an extraordinary challenge of a panel review of a final determination made in Canada,

(i) An affidavit of service stating by whom the document was served, the day of the week and date on which it was served, where it was served and the manner of service, or

(ii) An acknowledgement of service by counsel for a participant stating by whom the document was served, the



day of the week and date on which it was served and the manner of service and, where the acknowledgement is signed by a person other than the counsel, the name of that person followed by a statement that the person is signing as agent for the counsel, and

(b) With respect to an extraordinary challenge of a panel review of a final determination made in the United States.

(i) A certificate of service in the form of a statement of the date and manner of service and of the name of the person served, signed by the person who made service, or

(ii) An acknowledgement of service by the person served stating by whom the document was served and the date and manner of service;

"Proprietary information" means:

(a) With respect to an extraordinary challenge of a panel review of a final determination made in the United States, business proprietary information under the laws of the United States, and

(b) With respect to an extraordinary challenge of a panel review of a final determination made in Canada,

information that was accepted by the Deputy Minister or the Tribunal as confidential in the proceedings before the Deputy Minister or the Tribunal and with respect to which the person that designated or submitted the information has not withdrawn the person's claim as to the confidentiality of the information;

"Responsible Secretariat" means, with respect to an extraordinary challenge of a panel review, the section of the Secretariat located in the country in which the final determination reviewed by the panel was made;

"Responsible Secretary" means the Secretary of the responsible Secretariat; "Secretariat" means the Secretariat established pursuant to Article 1909 of the Agreement;

"Secretary" means the Secretary of the United States section or the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on behalf of the Secretary;

"Service address" means:

(a) With respect to a Party or panelist, the facsimile number, if any, and address filed as the service address of the Party or panelist with the Secretariat,

(b) With respect to a participant other than a Party or panelist, the service address of the participant in the panel review, or

(c) Where a Change of Service Address has been filed by a participant, the facsimile number, if any, and address set out as the service address in that form;

"Tribunal" means the Canadian Import Tribunal or its successor and includes any person authorized to act on its behalf.

4. The definitions set forth in Article 1911 of the Agreement are hereby incorporated into these Rules.

5. Where these Rules require notice to be given, it shall be given in writing.

#### Part I—General

##### Duration of Extraordinary Challenge

6. An extraordinary challenge commences on the day on which a Request for an Extraordinary Challenge Committee is filed with the Secretariat and terminates on the day on which a Notice of Completion of Extraordinary Challenge is effective.

##### Responsibilities of the Secretary

7. The responsible Secretary shall provide administrative support for each extraordinary challenge proceeding and shall make the arrangements necessary for meetings and any oral proceedings and, if required, interpreters to provide simultaneous translation.

8. Each Secretary shall maintain a file for each extraordinary challenge comprised of either the original or a copy of all documents filed in the extraordinary challenge proceeding. All documents filed shall be stamped by the Secretariat to show the date and time of receipt.

9. The responsible Secretary shall forward to the other Secretary a copy of all documents filed with the responsible Secretary and all orders and decisions issued by a committee.

10. (1) Where under these Rules a responsible Secretary is required to cause a notice or other document to be published in the *Canada Gazette* and the *Federal Register*, the responsible Secretary shall forthwith:

(a) Cause the notice or other document to be published in the publication of the country in which the responsible Secretariat is located; and

(b) Send a copy of the notice or other document to the other Secretary, together with a request that the other Secretary cause the notice or other document to be published in the publication of the other country.

(2) On receipt of a request referred to in subrule (1)(b), the other Secretary shall comply with the request as soon as possible.

11. (1) Every member of a committee, assistant to a member of a committee, court reporter and translator shall, before taking up his duties in an extraordinary challenge proceeding, file with the investigating authority a Disclosure Undertaking, in the form

referred to in Schedule A or a Protective Order Application, in the form referred to in Schedule B, as the case may be.

(2) Where a member of a committee files a Disclosure Undertaking or a Protective Order Application in accordance with subrule (1), the investigating authority shall issue the Disclosure Order or Protective Order, as the case may be.

(3) The responsible Secretary shall ensure that every member of a committee, assistant to a member of a committee, court reporter and translator, before taking up his duties in an extraordinary challenge proceeding, files with the responsible Secretariat four copies of a Disclosure Order or of a Protective Order, as the case may be.

12. Where a document containing proprietary information, privileged information or personal information referred to in rule 39 is filed with the Secretariat in an extraordinary challenge proceeding, each Secretary shall ensure that

(a) The document is stored in an area dedicated to the storage of documents containing proprietary information, privileged information or personal information and the area is identified as such an area;

(b) The wrapper of the document is clearly marked to indicate that it contains proprietary information, privileged information or personal information, as the case may be; and

(c) Access to the document is limited to

(i) In all cases, officials of and counsel for the investigating authority whose final determination was reviewed by the panel,

(ii) In the case of proprietary information, the person who submitted the proprietary information to the investigating authority or counsel for that person,

(iii) In the case of proprietary information, persons who have filed with the responsible Secretariat a Disclosure Order or Protective Order with respect to the document,

(iv) In the case of privileged information filed in an extraordinary challenge of a decision of a panel with respect to a final determination made in the United States, persons with respect to whom the panel has ordered disclosure of the privileged information under rule 55 of the *Article 1904 Panel Rules*, if the persons have filed with the responsible Secretariat a Protective Order with respect to the document, and

(v) In the case of personal information, persons granted access to the information pursuant to an order of

the committee issued pursuant to subrule 45(b).

13. (1) Each Secretary shall permit access by any person to the information in the file in an extraordinary challenge proceeding that is not proprietary information, privileged information or personal information referred to in rule 39 and shall provide copies of that information on request and payment of an appropriate fee.

(2) Each Secretary shall, in accordance with subrule 12(c) and the terms of the applicable Disclosure Order, Protective Order or order of the panel or committee,

(a) Permit access to proprietary information, privileged information or personal information referred to in rule 39 in the file of an extraordinary challenge proceeding; and

(b) On payment of an appropriate fee, provide a copy of the information referred to in subrule (a).

(3) No document filed in an extraordinary challenge proceeding shall be removed from the offices of the Secretariat except in the ordinary course of the business of the Secretariat or pursuant to the direction of a committee.

##### Internal Functioning of Committees

14. (1) A committee may adopt its own internal procedures, not inconsistent with these Rules, for routine administrative matters.

(2) Subject to subrule 23(b), meetings of a committee may be conducted by means of a telephone conference call.

15. The deliberations of a committee shall take place in private and remain secret and only committee members may take part in the deliberations. Staff of the responsible Secretariat and assistants to committee members may be present by permission of the committee.

##### Computation of Time

16. (1) In computing any time period fixed in these Rules or by an order or decision of a committee, the day from which the time period begins to run shall be excluded and, subject to subrule (2), the last day of the time period shall be included.

(2) Where the last day of time period computed in accordance with subrule (1) falls on a legal holiday of the responsible Secretariat, that day and any other legal holiday of the responsible Secretariat immediately following that day shall be excluded from the computation.

17. A committee may in its discretion extend any time period fixed in these Rules if

(a) The extension is made solely in the interests of fairness and justice; and

(b) In fixing the extension, the committee takes into account the intent of the Rules to secure just, speedy and inexpensive final resolutions of challenges of decisions of panels.

##### Counsel of Record

18. (1) Until a change is effected in accordance with subrule (2), the counsel of record for a participant in an extraordinary challenge proceeding shall be

(a) The counsel for the participant in the panel review; or

(b) In the case of a Party that was not a participant in the panel review or of a panelist, the counsel who signs any document filed on behalf of the Party or panelist in the extraordinary challenge proceeding.

(2) A participant may change its counsel of record by filing with the responsible Secretariat a Notice of Change of Counsel of Record signed by the new counsel, together with proof of service on the former counsel and the other participants.

##### Filing, Service and Communications

19. Subject to subrule 11(3), no document is filed with the Secretariat until one original and six copies of the document are received by the responsible Secretariat during its normal business hours and within the time period fixed for filing.

20. (1) The responsible Secretary shall be responsible for the service of documents as follows:

(a) Requests for an Extraordinary Challenge Committee referred to in rule 34 shall be served, together with the applicable index, on the Party that did not make the Request and on all participants in the panel review;

(b) All documents referred to in rules 41 and 44 shall be served in accordance with those rules;

(c) Orders of a committee shall be served on all participants;

(d) Decisions of a committee shall be served on the Parties, the investigating authority and all participants; and

(e) Notices of Completion of Extraordinary Challenge shall be served on all participants.

(2) Where the decision of a committee referred to in subrule (1)(d) is with respect to a panel review of a final determination made in Canada, the decision shall be served by registered mail.

21. (1) Subject to subrule (4), all documents filed by a participant, other than documents required by rule 20 to be served by the responsible Secretary and documents referred to in subrules 35(b)(i) and 37(2)(a), shall be served by the participant on the counsel of record

of the other participants, or, where a participant is not represented by counsel, on the participant.

(2) A proof of service shall appear on, or be affixed to, all documents referred to in subrule (1).

(3) Where a document is served by an expedited delivery courier or mail service, the date of service set out in the affidavit of service or certificate of service shall be

(a) In the case of an extraordinary challenge of a panel review of a final determination made in the United States, the day on which the document is consigned to the courier service or is mailed; and

(b) In the case of an extraordinary challenge of a panel review of a final determination made in Canada, the date that is five days after the day on which the document is consigned to the courier service or is mailed.

(4) A document containing proprietary information, privileged information or personal information referred to in rule 39 shall be under seal in accordance with rule 47 and shall be served only on

(a) The investigating authority; and

(b) Participants that have been granted access to the information under a Disclosure Order, Protective Order or an order of the panel or committee, as the case may be.

22. (1) Subject to subrules 20(2) and 23(a), service of a document may be effected in the following manner:

(a) By delivering a copy of the document to the service address of the participant;

(b) By sending a copy of the document to the service address of the participant by facsimile transmission or an expedited delivery courier or mail service, such as express mail in the United States or Priority Post in Canada; or

(c) By personal service on the participant.

23. Where proprietary information, privileged information or personal information referred to in rule 39 is disclosed to a person in an extraordinary challenge proceeding, the person shall not

(a) File, serve or otherwise communicate the information by facsimile transmission; or

(b) Communicate the information by telephone.

24. Service on an investigating authority shall not constitute service on a Party and service on a Party shall not constitute service on an investigating authority.



**Legal Principles**

25. The general legal principles of the country in which a final determination was made apply in an extraordinary challenge of the decision of the panel with respect to the final determination.

26. A committee may, in its discretion, review any part of the record of the panel review relevant to the extraordinary challenge.

**Pleadings and Simultaneous Translation of Extraordinary Challenge Proceedings in Canada**

27. Rules 28 to 30 apply with respect to an extraordinary challenge of a panel review of a final determination made in Canada.

28. Either English or French may be used by any person, panelist or member of a committee in any document or oral proceeding.

29. (1) Subject to subrule (2), any order or decision, including the reasons therefor, issued by a committee shall be made available simultaneously in both English and French where

(a) In the opinion of the committee, the order or decision is in respect of a question of law of general public interest or importance; or

(b) The proceedings leading to the issuance of the order or decision were conducted in whole or in part in both English and French.

(2) Where

(a) An order or decision issued by a committee is not required by subrule (1) to be made available simultaneously in English and French, or

(b) An order or decision is required by subrule (1)(a) to be made available simultaneously in both English and French but the committee is of the opinion that to make the order or decision available simultaneously in both English and French would occasion a delay prejudicial to the public interest or result in injustice or hardship to any participant.

The order or decision, including the reasons therefor, shall be issued in the first instance in either English or French and thereafter at the earliest possible time in the other language, each version to be effective from the time the first version is effective.

(3) Nothing in subrule (1) or (2) shall be construed as prohibiting the oral delivery in either English or French of any order or decision or any reasons therefor.

(4) No order or decision is invalid by reason only that it was not made or issued in both English and French.

30. (1) Any oral proceeding conducted in both English and French shall be translated simultaneously.

(2) Where a participant requests simultaneous translation of an extraordinary challenge proceeding, the request shall be made as early as possible in the proceedings.

(3) Where a committee is of the opinion that there is a public interest in the extraordinary challenge proceedings, the committee may direct the responsible Secretary to arrange for simultaneous translation of the oral proceedings, if any.

**Costs**

31. Each participant shall bear the costs of and incidental to its own participation in any extraordinary challenge proceedings.

**Announcement of Committee**

32. On the completion of the selection of the members of a committee, the responsible Secretary shall notify the participants and the other Secretary of the names of the members of the committee.

**Violations of Disclosure Undertakings and Protective Orders**

33. Where any person alleges that the terms of a Disclosure Undertaking or Protective Order have been violated, the committee shall refer the allegations to the investigating authority for investigation and, where applicable, the imposition of sanctions in accordance with section 77.28 of the *Special Import Measures Act* or section 777(d) of the *Tariff Act of 1930*, as amended.

**Part II—Extraordinary Challenges Exclusively Under Article 1904.13(a) (ii) or (iii)****Requests for an Extraordinary Challenge Committee**

34. Where a Party, in its discretion, files a Request for an Extraordinary Challenge Committee that contains an allegation, other than an allegation referred to in Article 1904.13(a)(i) of the Agreement, the Party shall file the Request

(a) Within 30 days after the termination order of the panel referred to in rule 73 of the *Article 1904 Panel Rules* is issued;

(b) Where the decision of the panel referred to in rule 74 of the *Article 1904 Panel Rules* affirms the final determination, within 30 days after that decision is issued;

(c) Where the panel does not order a review of the Determination on Remand, within 45 days after the Determination on Remand is filed pursuant to rule 75(1) of the *Article 1904 Panel Rules*; or

(d) Where the panel orders a review of the Determination on Remand, within 30 days after the decision of the panel

referred to in subrule 75(5) of the *Article 1904 Panel Rules* is issued.

35. Every Request for an Extraordinary Challenge Committee referred to in rule 34 shall be

(a) In writing and shall include a concise statement of the allegations relied on together with a concise statement of how the actions alleged have materially affected the panel's decision and the way in which the integrity of the panel review process is threatened; and

(b) Accompanied by

(i) Those items of the record of the panel review relevant to the allegations contained in the Request, and

(ii) An index of the items referred to in subrule (i).

**Service of Requests for an Extraordinary Challenge Committee**

36. Where a Request for an Extraordinary Challenge Committee referred to in rule 34 is filed with the responsible secretariat, the responsible Secretary shall forthwith

(a) Forward a copy of the Request and the index to the other Secretary; and

(b) Serve a copy of the Request and the index in accordance with subrule 20(1)(a), together with a statement setting out the date on which the Request was filed and stating that briefs filed in the extraordinary challenge proceeding shall be filed within 21 days of that date.

**Notices of Appearance**

37. (1) Within 10 days after the Requests for an Extraordinary Challenge Committee referred to in rule 34 is filed, a Party of participants in the panel review that proposes to participate in the extraordinary challenge proceeding shall file with the responsible Secretariat a Notice of Appearance.

(2) Where a participant referred to in subrule (1) proposes to rely on a document in the record of the panel review that is not specified in the index referred to in subrule 35(b)(ii), the participant shall file, together with the Notice of Appearance,

(a) The document; and

(b) A statement identifying the document and requesting its inclusion in the extraordinary challenge record.

(3) On the request of a participant referred to in subrule (2), the responsible Secretary shall include the document in the extraordinary challenge record.

**Filing of Briefs**

38. All briefs filed in an extraordinary challenge proceeding under this Part shall be filed within 21 days after the

Request for an Extraordinary Challenge Committee is filed.

**Part III—Other Extraordinary Challenges****Personal Information**

39. In an extraordinary challenge proceeding that commences with a Request for an Extraordinary Challenge Committee referred to in subrule 40(1), the information referred to in subrules 40(1)(c) and (d) and in rule 43 and all the extraordinary challenge proceedings shall be treated as personal information and shall be kept confidential

(a) In all cases, until the day after the expiration of the time period fixed for filing a Notice of Motion pursuant to subrule 43(c); and

(b) In the case where a Notice of Motion is filed pursuant to subrule 43(c),

(i) Until the order of the committee referred to in subrule 45(a) is issued, or

(ii) Where the committee makes an order referred to in subrule 45(b), indefinitely, unless the committee changes its order.

**Requests for an Extraordinary Challenge Committee**

40. (1) Where a Party, in its discretion, files with the responsible Secretariat a Request for an Extraordinary Challenge Committee that contains an allegation referred to in Article 1904.13(a)(i) of the Agreement, the Party shall at the same time file

(a) Those items of the record of the panel review relevant to the allegations contained in the Request;

(b) An index of the items referred to in subrule (a)

(c) Any other material relevant to the allegations contained in the Request;

(d) An affidavit certifying that the Party gained knowledge of the action of the panelist giving rise to the allegation no more than 30 days preceding the filing of the Request if the Request is filed

(i) More than 30 days after the termination order of the panel referred to in rule 73 of the *Article 1904 Panel Rules* was issued;

(ii) Where the decision of the panel referred to in rule 74 of the *Article 1904 Panel Rules* affirms the final determination, more than 30 days after that decision was issued;

(iii) Where the panel did not order a review of the Determination on Remand, more than 45 days after the Determination on Remand was filed pursuant to rule 75(1) of the *Article 1904 Panel Rules*; or

(iv) Where the panel ordered a review of the Determination on Remand, more than 30 days after the decision of the

panel referred to in subrule 75(5) of the *Article 1904 Rules* was issued; and

(e) A Notice of Request for an Extraordinary Challenge Committee.

(2) No Request for an Extraordinary Challenge Committee referred to in subrule (1) may be filed if two years or more have elapsed since the day on which

(a) The termination order of the panel referred to in rule 73 of the *Article 1904 Panel Rules* was issued;

(b) Where the decision of the panel referred to in rule 74 of the *Article 1904 Panel Rules* affirmed the final determination, that decision was issued;

(c) Where the panel did not order a review of the Determination on Remand, the Determination on Remand was filed pursuant to rule 75(1) of the *Article 1904 Panel Rules*; or

(d) Where the panel ordered a review of the Determination on Remand, the decision of the panel referred to in subrule 75(5) of the *Article 1904 Panel Rules* was issued.

41. Where a Request for an Extraordinary Challenge Committee referred to in rule 40(1) is filed, the responsible Secretary shall serve a copy of

(a) The documents referred to in subrule 40(1) on the other Party and on the panelist against whom the allegation contained in the Request is made; and

(b) The index and the Notice referred to in subrules 40(1)(b) and (e) on all the participants in the panel review.

**Notices of Appearance**

42. Within 10 days after a Request for an Extraordinary Challenge Committee referred to in subrule 40(1) is filed, a Party or participant in the panel review that proposes to participate in the extraordinary challenge proceeding shall file with the responsible Secretariat a Notice of Appearance.

43. Within 15 days after a Request for an Extraordinary Challenge Committee referred to in subrule 40(1) is filed, a panelist against whom an allegation contained in the Request is made that proposes to participate in the extraordinary challenge proceeding

(a) Shall file a Notice of Appearance;

(b) May file, under seal, material to be included in the extraordinary challenge record relevant to the panelist's defense against the allegation; and

(c) May file an *ex parte* motion requesting that the extraordinary challenge proceeding be conducted *in camera*.

**Service of Requests and Appearances**

44. Where the time period fixed for filing an *ex parte* motion pursuant to subrule 43(c) has expired, the

responsible Secretary shall serve on all participants

(a) Where no motion is filed pursuant to that subrule, the documents referred to in subrules 40(1)(c) and (d) and rule 43;

(b) Where the committee issues an order referred to in subrule 45(a), the documents referred to in subrules 40(1)(c) and (d) and rule 43, in accordance with any order of the committee; and

(c) Where the committee issues an order referred to in subrule 45(b), the documents referred to in subrules 40(1)(c) and (d) and rule 43, in accordance with subrule 45(b)(ii) and any order made by the committee.

**Conduct of Proceedings**

45. The order of a committee on a motion referred to in subrule 43(c) shall set out

(a) That the proceedings shall not be held *in camera*; or

(b) That the proceedings shall be held *in camera* and that

(i) All the participants shall keep confidential all information received with respect to the extraordinary challenge proceeding and shall use the information solely for the purposes of the proceeding, and

(ii) The responsible Secretary shall serve, under seal, on all the participants the documents referred to in subrules 40(1)(b) to (d) and 43(a) and (b).

46. A committee may, in its discretion, decide the procedures to be followed in the extraordinary challenge proceeding and may, for that purpose, hold a pre-hearing conference to determine such matters as the presentation of evidence and oral argument.

**Part IV—Written Proceedings****Filing Under Seal**

47. (1) Where, under these Rules, a document containing proprietary information, privileged information or personal information referred to in rule 39 is required to be filed under seal with the Secretariat or is required to be served under seal, the document shall be filed or served in accordance with this rule and, where applicable, with rule 50.

(2) A document filed or served under seal shall be

(a) Bound separately from all other documents;

(b) Clearly marked

(i) In the case of a document containing proprietary information, "proprietary" or "confidential";

(ii) In the case of a document containing privileged information, "privileged", and



(iii) In the case of a document containing personal information referred to in rule 39, "personal information"; and

(c) Contained in an opaque inner and an opaque outer wrapper.

(3) An inner wrapper referred to in subrule (2)(c) shall disclose

(a) That proprietary information, privileged information or personal information is enclosed, as the case may be; and

(b) The Secretariat file number of the extraordinary challenge proceeding.

48. Filing or service of proprietary information, privileged information or personal information referred to in rule 39 with the Secretariat shall not constitute a waiver of the qualification of the information as proprietary information, privileged information or personal information.

#### Form and Content of Pleadings

49. (1) Every pleading filed in an extraordinary challenge proceeding shall have a heading that sets out the following information:

(a) The title of and the Secretariat file number for the extraordinary challenge proceeding;

(b) A brief descriptive title of the pleading; and

(c) The name and service address of the participant on whose behalf the pleading is filed.

(2) Every pleading filed in an extraordinary challenge proceeding shall be on paper 8½ X 11 inches (216 millimetres by 279 millimetres) in size. The text of the pleading shall be printed, typewritten or reproduced legibly on one side only with a margin of approximately 1½ inches (40 millimetres) on the left-hand side with double-spacing between each line of text, except for quotations of more than 50 words, which shall be indented and single-spaced. Footnotes, titles, schedules, tables, graphs and columns of figures shall be presented in a readable form. Briefs shall be securely bound along the left-hand margin.

(3) Every pleading filed on behalf of a participant in an extraordinary challenge proceeding shall be signed by counsel for the participant or, where the participant is not represented by counsel, by the participant.

50. (1) Where a participant files a pleading that contains proprietary information, the participant shall file two sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the proprietary information and labelled "Proprietary" or "Confidential" with the top of each page that contains proprietary information

marked with the word "Proprietary" or "Confidential" and with the proprietary information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Proprietary" or "Non-Confidential" with each page from which proprietary information has been deleted bearing a legend indicating the location from which the proprietary information was deleted.

(2) Where a participant files a pleading that contains privileged information, the participant shall file two separate sets of the pleading in the following manner:

(a) One set of pleadings under seal containing the privileged information and labelled "Privileged" with the top of each page that contains privileged information marked with the word "Privileged" and with the privileged information enclosed in brackets; and

(b) One set of pleadings labelled "Non-Privileged" with each page from which privileged information has been deleted bearing a legend indicating the location from which the privileged information was deleted.

(3) Where a participant files a pleading that contains personal information referred to in rule 39, the pleading shall be filed under seal and labelled "Personal Information".

#### Content of Briefs

51. (1) Every brief filed in an extraordinary challenge proceeding shall contain information in the following order, divided into five parts:

Part I: A table of contents with page references and a table of authorities cited, with reference to the pages of the brief where they are cited and with cases alphabetically arranged.

Part II: A statement of the case:

This part shall contain a concise statement of the relevant facts with references to the extraordinary challenge record by page and, where applicable, by line.

Part III: A statement of the issues:

(a) In the brief of a Party that files a Request for an Extraordinary Challenge Committee, this part shall contain a concise statement of the issues; and

(b) In brief of any other participant, this part shall contain a concise statement of the position taken by the participant with respect to the issues.

Part IV: Argument:

This part shall consist of the argument setting out concisely the points of law relating to the issues with applicable citations to authorities and the extraordinary challenge record.

Part V: Relief:

This part shall consist of a concise statement of the precise relief requested.

(2) Paragraphs of Parts I to V of a brief may be numbered consecutively.

#### Motions

52. Motions may be heard in the discretion of the committee.

#### Part V—Oral Proceedings

##### Oral Argument

53. Oral argument shall be in the discretion of the committee.

##### Oral Proceedings in Camera

54. During that part of oral proceedings in which proprietary information or privileged information is presented, a committee shall not permit any person other than the following persons to be present:

(a) The person presenting the proprietary information or privileged information;

(b) A person who has been granted access to the proprietary information or privileged information under a Disclosure Order or a Protective Order;

(c) A person as to whom the privilege has been waived with respect to the proprietary information; and

(d) Officials of and counsel for the investigating authority.

#### Part VI—Orders and Decisions

55. All orders and decisions of a committee shall be made by majority vote.

56. The responsible Secretary shall cause notice of every final decision of a committee and every order referred to in rule 55 to be published in the *Canada Gazette* and the *Federal Register*.

57. Where a Notice of Motion requesting dismissal of an extraordinary challenge proceeding is filed by a participant, the committee may issue an order terminating the proceeding and, where the motion is consented to by all the participants, the committee shall issue an order terminating the proceeding.

58. (1) A final decision of a committee shall

(a) Affirm the decision of the panel;

(b) Vacate the decision of the panel; or

(c) Where the Request for an Extraordinary Challenge Committee did not contain an allegation referred to in Article 1904.13(a)(i) of the Agreement, remand the decision of the panel to the panel for action not inconsistent with the final decision of the committee.

(2) Every final decision of a committee shall be issued in writing with reasons, together with any dissenting or concurring opinions of the members of the committee.

(3) Subrule (2) shall not be construed as prohibiting the oral delivery of the decision of a committee.

#### Part VII—Completion of Extraordinary Challenges

59. Where a committee issues an order terminating the extraordinary challenge proceeding, the responsible Secretary shall cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Extraordinary Challenge effective on the day after the day on which the order of the committee is issued.

60. Where a committee issues its final decision, the responsible Secretary shall cause to be published in the *Canada Gazette* and the *Federal Register* a Notice of Completion of Extraordinary Challenge effective on the day after

(a) The committee affirms the decision of the panel;

(b) The committee vacates the decision of the panel; or

(c) Where the committee remands the decision of the panel, the day after the panel gives notice to the committee that it has taken action not inconsistent with the committee's decision.

61. The members of the committee are discharged from their duties on the day on which a Notice of Completion of Extraordinary Challenge is effective in respect of the extraordinary challenge proceeding.

#### Schedule A—Disclosure Undertaking Forms

Available from the Deputy Minister or the Tribunal, as the case may be, in the form in use on the same day as the

Agreement comes into force or a form containing substantially the same terms.

#### Schedule B—Protective Order Application Forms

Available from the International Trade Administration of the United States Department of Commerce or the United States International Trade Commission, as the case may be, in the form in use on the same day as the Agreement comes into force or a form containing substantially the same terms.

Robert H. Brumley,

General Counsel.

Date: December 22, 1988.

[FR Doc. 88-29905 Filed 12-29-88; 8:45 am]

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# **federal register**

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Friday  
December 30, 1988

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## **Part V**

### **Department of Commerce**

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International Trade Administration

19 CFR Part 356

Panel Review Under Article 1904 of the  
U.S.-Canada Free-Trade Agreement;  
Interim-Final Rule and Request for  
Comments



## DEPARTMENT OF COMMERCE

## International Trade Administration

## 19 CFR Part 356

[Docket No. 81141-8241]

## Panel Review Under Article 1904 of the U.S.-Canada Free-Trade Agreement

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Interim-final rule and request for comments.

**SUMMARY:** Title IV of the United States-Canada Free-Trade Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) ("the FTA Act"), establishes procedures for review by a binational panel of United States antidumping and countervailing duty final determinations involving Canadian products and for requesting panel review of Canadian antidumping and countervailing duty final determinations involving products of the United States. Title IV implements Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement"). As authorized by section 405(d) of the FTA Act, these regulations are intended to implement certain administrative procedures required by Article 1904 of the Agreement and the FTA Act.

**DATES:** These regulations take effect on the date that the Agreement enters into force. See Supplementary Information, below. Written comments must be received not later than 60 days after the Agreement enters into force. The International Trade Administration will publish notice of the effective date of these regulations in the Federal Register.

**ADDRESS:** Address written comments to Lisa B. Koteen, Senior Counsel for Trade Agreements, Room B-099, U.S. Department of Commerce, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230.

**FOR FURTHER INFORMATION CONTACT:** Lisa B. Koteen, (202) 377-1754, or Jean Heilman Grier, (202) 377-0833.

**SUPPLEMENTARY INFORMATION:**  
Background

Chapter 19 of the Agreement establishes a mechanism for resolving disputes between the United States and Canada with respect to antidumping and countervailing duty cases. The central feature of the mechanism is the replacement of domestic judicial review of determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational

panels. The United States and Canada will continue to apply their own national antidumping and countervailing duty laws to goods imported from the other country. In such cases, independent binational panels acting in place of national courts will expeditiously review final determinations under these laws to decide whether they are consistent with the antidumping or countervailing duty law of the country that made the determination. These determinations include final determinations of sales at less than fair value and subsidization by the Department of Commerce ("the Department"), and final determinations by International Trade Commission as to whether a United States industry has been injured.

The Agreement provides that only the two governments may invoke the panel review process; however, the governments of the United States and Canada will automatically trigger panel review in response to a timely request from any person who otherwise could have challenged the determination in court. Counsel for (or representatives of) interested parties that were parties to the administrative proceeding that is being challenged will argue before the panel, as they would before a court. The Agreement also requires that the United States and Canada protect sensitive business information against unlawful disclosure in the panel review process.

Title IV of the FTA Act amends U.S. law to implement Chapter 19 of the Agreement by limiting judicial review in cases involving Canadian merchandise, establishing procedures whereby private parties may appeal for binational panel review, providing an organizational structure for administering U.S. responsibilities under Chapter 19 and making other conforming amendments to U.S. law. More specifically, section 405(d) of the FTA Act authorizes the Department, as the administering authority under Title VII of the Tariff Act of 1930 ("the Act"), to issue regulations to implement Chapter 19 of the Agreement.

The procedures for binational panels are being implemented through Rules of Procedure to be issued jointly by the United States and Canada. These regulations are intended to implement certain administrative procedures required by Chapter 19 of the Agreement before an administrative proceeding has been sent to the Court of International Trade or a binational panel, as well as the administrative responsibilities of the Department that continue during and after panel review. Regulations are necessary to provide for notice of intent to seek judicial review, request for panel

review, notice of receipt by Canada of scope determinations, continued suspension of liquidation, release of business proprietary and privileged information under protective order during a panel review, and sanctions for violations of such protective orders. The regulations complement the Rules of Procedure and should be used in conjunction with these Rules.

A detailed description of the interim-final rule is contained in the following section-by-section analysis.

## Section 356.1

This section provides the scope of Part 356, which is to implement Article 1904 of the Agreement.

## Section 356.2

This section provides definitions of terms used in Part 356.

## Section 356.3

There are two types of documents that put the Department on notice that an antidumping or countervailing duty final determination involving Canadian products may be subject to review: a Notice of Intent to Commence Judicial Review and a Request for Panel Review. The Department is also responsible for receipt of requests for panel review of final determinations made by the United States International Trade Commission and equivalent determinations, involving U.S. exports, made in Canada. This section contains the filing and service requirements for such documents. If the filing and service requirements are not fulfilled, any subsequent complaint filed by that party is invalid. 19 U.S.C. 1516a(g)(2) and (3). Paragraph (a) states that an original and six copies must be filed. This is to permit copies to be placed in the files of the United States and Canadian sections of the Secretariat and for each of the five panelists to receive copies of every document filed. The deadlines for filing are set out in other sections. There is no mailbox rule for filing because of the tight deadlines in panel reviews.

Paragraph (b) requires service on every person on the service list, except for those instances, described in section 516A(g)(8)(B)(ii) of the Act, in which the United States Secretary effects service. Details of service are set out in pertinent sections.

Paragraph (c) requires that service be effected in an expedited manner. The reason for this requirement is that the time periods throughout the panel review process are generally quite short compared to those in the courts. There is only a 10-day window after the filing of a Notice of Intent to Commence Judicial

Review in which to file a Request for Panel Review. First class mail probably would not allow sufficient time after receipt of a notice for the recipient to make an informed decision and to act expeditiously.

Paragraphs (f) and (g) provide the hours and location of the United States and Canadian sections of the Secretariat. The Secretariat, created for purposes of the panel process, performs only ministerial functions pursuant to the Agreement. Legal holidays include weekends and days when the U.S. government offices in the District of Columbia are closed. There will be no night box for filing documents after normal business hours.

## Section 356.4

This section identifies the persons that must be served with a Notice of Intent to Commence Judicial Review and sets forth the information required in the Notice. The Notice must be filed not later than 20 days after the final determination at issue. According to the Agreement and the FTA Act, if there is no Request for Panel Review, the party that filed the Notice of Intent to Commence Judicial Review may seek judicial review by following normal procedures, starting with a summons or summons and complaint filed within 30 days after the last date on which any Request for Panel Review must be filed.

## Section 356.5

A party to the proceeding may request panel review no later than 30 days after a final determination, a term defined in these regulations. A request for review of a Canadian antidumping or countervailing duty determination, as well as a determination by the Department or the U.S. International Trade Commission, may be filed with the United States Secretary, pursuant to section 408 of the FTA Act. Requests for Panel Review of Canadian determinations that are filed with the United States Secretary must likewise follow the requirements of this section, which itemizes the contents of a Request and the service requirements.

## Section 356.6

The Department occasionally receives requests to determine whether a particular product is or is not within the class or kind of merchandise covered by a dumping finding or an antidumping or countervailing duty order. These determinations are not expressly provided for by statute or regulation, except that section 516A(a)(2)(B)(vi) of the Tariff Act of 1930 establishes that they are subject to judicial review. The Agreement provides that these so-called

"scope determinations" are reviewable by a panel. Scope determinations are not published in the Federal Register; rather, they are mailed to the parties to the proceeding, including the foreign government in countervailing duty proceedings. Under the Agreement, scope determinations will be provided to the government of Canada regardless of whether the cases to which they pertain are antidumping duty orders or countervailing duty orders. The time period for commencing panel review of scope determinations begins with the receipt by Canada of a written notice from the Department. This section specifies how receipt is to be effected.

## Section 356.7

To commence a panel review of a scope determination, a party to the proceeding would have to file notice within 30 days of the date on which Canada received notice of the determination. To commence judicial review, the party would be required to file notice within 20 days of that date. This section provides the means by which a party to the proceeding may learn the date on which Canada received notice. The filing requirements in paragraph (b) follow the Department's filing requirements instead of those of the Secretariat. Paragraph (c) provides that the Department shall respond within five business days, which is intended to give an adequate opportunity for the requester to seek judicial review or to initiate the panel review process.

## Section 356.8

Upon request of a participant in a panel review, the Department would not order the Customs Service to liquidate suspended entries that are relevant to that participant until after the review is completed. This provision is necessary because, unless a party to the administrative proceeding seeks an injunction in court, the Department will instruct the U.S. Customs Service to liquidate entries after the Department issues a final determination in a review under section 751(b) of the Act, the International Trade Commission issues a final determination of a "changed circumstances" review under section 751(b), or the Department issues a determination as to the class or kind of merchandise covered by an antidumping or countervailing duty order. 19 U.S.C. 1516a(c). Binational Panels under Chapter 19 of the Agreement do not have injunctive powers, however. Section 401(a) of the FTA Act therefore provides a means for preventing automatic liquidation of entries pending completion of the panel process.

A domestic interested party that is a participant in a panel review may request that suspension continue for entries from producers, exporters, and importers affected by the panel review. Producers, exporters, and importers that are participating in the panel review also may request continued suspension, but only for entries of their merchandise.

## Section 356.9

Under section 403 of the FTA Act, during a binational panel review certain persons may have access to business proprietary information contained in the administrative record before the panel, but only if they apply for, and the Department issues, a protective order. The persons who are eligible for access are: the panelists; any staff, such as law clerks and secretaries, whom a panelist may employ; counsel for participants in the panel review, or other representatives, such as independent consultants whom counsel may retain for the panel review (and who are under the direction or control of counsel); the Secretaries of the U.S. and Canadian sections of the Secretariat and Secretariat personnel; and U.S. government officials who are members of an interagency committee, chaired by the Office of the United States Trade Representative, that would be called upon to consider requests to convene an extraordinary challenge committee to review a panel decision (or the members' designees). The last group is identified in section 405 of the FTA Act. The persons who have access to proprietary information without protective orders are: the participant that submitted the information; that participant's counsel; and officials of the Department who are directly involved in the panel review or were involved in the administrative proceeding at issue.

## Section 356.10

This section identifies the persons who must submit applications for protective order in order to receive access to the proprietary information in an administrative record and details the contents of the application forms. Persons in every category in § 356.9, except for paragraph (c), are eligible to apply for disclosure of proprietary information under protective order. As described in paragraph (b)(5), individuals covered by § 356.9(c), nonprofessionals who are full-time employees of panelists (but who are not members of the panel staff), or are full-time employees of counsel or consultants to counsel, such as law clerks, paralegals, and secretarial and clerical staff, would not submit

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protective order applications but would have access to the proprietary information at issue under the terms of any protective order issued to the panelist, attorney or consultant who employs them.

Paragraph (b) sets forth the procedures for eligible persons apply for a protective order. This paragraph indicates, in general, the contents of application forms, timing, and service requirements. Counsel and other representatives to parties to the proceeding who received access to business proprietary information under an administrative protective order during the administrative proceeding may retain the information and any materials that they prepared that contain such information pending issuance of a protective order under these regulations. Actual forms will be available from the Department. Paragraph (c) covers those persons to whom the Department is required to issue a protective order; i.e., panelists, members of the interagency group, extraordinary challenge committee members, the U.S. and Canadian secretaries, and their staffs. Paragraph (d) covers counsel or non-attorney professionals, to whom disclosure is not mandatory. They also must file copies of their protective orders with the Secretariat and serve all participants. Others who are granted protective orders, including the Secretaries and their staffs, panelists and their assistants, extraordinary challenge committee members, and members of the interagency group, must file copies of their protective orders with the Secretariat but are not required to serve copies on participants. Paragraph (f) provides for modification of a protective order.

#### Section 358.11

This section deals with release of privileged documents under protective order. On infrequent occasions, the administrative record under review may contain documents for which the Department claims privilege, namely an attorney-client, attorney work product, or government pre-decisional process privilege. See *Zenith Radio Corp. v. United States*, 784 F.2d 1577, 1579 (Fed. Cir. 1985).

The reason for classifying documents as privileged is to permit a free and frank exchange of views—between attorney and client in the first instance, in preparation for litigation in the second instance, and within an agency in the third. Candor and debate within the Department should be encouraged, but they could be constrained by the risk of disclosure to a judge or panelist

who subsequently reviews the ultimate administrative decision, particularly if the document contains recommendations at odds with that decision. See, e.g., *Sprague Electric Co. v. United States*, 462 F. Supp. 966 (Cust. Ct. 1978).

Under the Rules of Procedure for binational panel review under Article 1904 of the Agreement, the Department would not include privileged documents in the copy of the administrative record that is transmitted to the Secretariat for the panel's use, although the documents for which privilege is claimed would be listed in the index of the record. If there were any challenge to the privilege claim, the panel would first examine the affidavits in support of the claim of privilege to determine whether there is any question as to the validity of the claim or if the privilege were qualified and the challenger's need for access outweighed the Department's need to withhold the document from scrutiny. *Asahi Chemical Industry Co., Ltd. v. United States*, 1 CIT 21 (1980). If the affidavits were not dispositive, then the panel would select two lawyer representatives, one from each country, to examine *in camera* any document at issue. For the two representatives to examine the document, the Department would issue a protective order. Only if the two representatives could not agree whether the document should be disclosed, either as not privileged or, if privileged, under a protective order, would the full panel be granted access under protective order to examine the document and decide whether it should be disclosed.

In accordance with the process prescribed by the Rules of Procedure, this section provides the mechanics of applications for and issuance of protective orders for privileged information subject to panel review. The process is similar to that described in § 358.10 regarding protective orders for proprietary information.

If privileged information was relevant to an issue that is subsequently referred to an extraordinary challenge committee, then the extraordinary challenge committee members must also have access to the privileged information. The protective order mechanism is therefore extended to cover them. In addition, when privileged information is at issue, a protective order for privileged information would be issued to the U.S. Government officials who, as the responsible interagency group, must review a request for an extraordinary challenge committee.

**Section 358.12.** This section provides that a person determined to have violated a protective order or disclosure undertaking may be liable to the United States for a civil penalty not to exceed \$100,000 for each violation, barred from representing another person before the Department for a designated time period, denied access to proprietary information for a designated time period, or subject to other appropriate administrative sanctions. Sanctions can be also taken against persons other than the one who violated the protective order or disclosure undertaking, such as the firm, partner, associate, employee, employer, or client of that person.

**Section 358.13.** Under certain circumstances, explained in this section, the administrative law judge may modify or waive the rules in Subpart D.

**Section 358.14.** This section authorizes an Office Director under the Deputy Assistant Secretary for Investigations, International Trade Administration, to investigate an alleged breach of a protective order or disclosure undertaking and to report the facts to the Deputy Under Secretary for International Trade no later than 180 days after receiving information concerning a violation. The Director will conduct an investigation only if the information is received within 30 days after the alleged violation occurred or, as determined by the Director, could have been discovered through the exercise of reasonable and ordinary care. Paragraph (d) of this section provides examples of actions that constitute violations of an administrative protective order that shall serve as guidelines to each person subject to a protective order. Each day of a continuing violation shall constitute a separate violation as required by paragraph (4) of section 777(d) of the Act.

**Section 358.15.** Under this section the Deputy Under Secretary will either initiate a proceeding by issuing a charging letter or request an authorized agency of Canada to initiate a proceeding if there is reasonable cause to believe that a person has violated a protective order or disclosure undertaking and that sanctions are appropriate for the violation. If the Department receives a request to charge from an authorized agency of Canada, the Deputy Under Secretary will promptly initiate a proceeding by issuing a charging letter.

**Section 358.16.** A person against whom sanctions are proposed will be notified in a charging letter of allegations, proposed sanctions, and procedures for challenging imposition of

sanctions. The parties may settle a case by mutual agreement after issuance of a charging letter.

Consistent with state bar disciplinary proceedings, the person whose information is alleged to have been released is not a party to the proceedings. The interest being vindicated is that of the Department in ensuring that its rules against unauthorized disclosure are being followed.

**Section 358.17.** This section provides that the Deputy Under Secretary will request an authorized agency of Canada to initiate a proceeding to impose sanctions for violation of a protective order or a disclosure undertaking by issuing a letter of request to charge. The Deputy Under Secretary will issue this request instead of a charging letter under § 358.16 only if it is determined under § 358.15 that: (1) the charged or affected party, while not subjected to any of the sanctions set forth under § 358.12, could be subjected to sanctions imposed by an authorized agency of Canada; or (2) an authorized agency of Canada would otherwise be the more appropriate forum for the initiation of a proceeding.

**Section 358.18.** Interim sanctions may be imposed by the administrative law judge if necessary to preserve the interests of the Department, an authorized agency of Canada, or others. Notice and an opportunity to respond must be provided to a party against whom interim sanctions are proposed, except for emergency interim sanctions. Emergency interim sanctions to preserve the status quo may be imposed for a 48-hour period. Emergency interim sanctions are similar to a temporary restraining order and would require proof of irreparable harm. The Deputy Under Secretary will provide the Secretariat notice concerning the imposition or revocation of interim sanctions or emergency interim sanctions.

**Section 358.19.** A party may request a hearing pursuant to paragraph (4) of section 777(d) of the Act. The Department can request a hearing only if a hearing is in the interest of justice. The Under Secretary will appoint an administrative law judge to conduct the hearing and render an initial decision.

**Section 358.20.** This section sets forth procedures for discovery. Voluntary discovery is encouraged. The administrative law judge may enforce a proper discovery request and make any determination or enter any order in the proceedings if a party does not comply with the discovery order. In issuing a discovery order, the administrative law judge must consider the necessity to

protect proprietary information and cannot order the release of information if improper dissemination is likely to result.

**Section 358.21.** This section set forth procedures for issuance of a subpoena. Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. The authority to issue subpoenas for these proceedings is provided by paragraph (7)(A) of section 777(d) of the Act.

**Section 358.22.** This section directs the administrative law judge to order the parties to meet or confer prior to an administrative hearing to discuss simplification of issues, stipulations, and settlements.

**Section 358.23.** Under this section, there may be hearings where witnesses present testimony. Such hearings are to be held in Washington, DC, unless extraordinary circumstances are present. The administrative law judge has all authority necessary to conduct the hearing, including the authority to exclude persons or seal the record to protect proprietary information. The rules of evidence prevailing in courts of law shall not apply, and all evidentiary material the administrative law judge determines to be relevant and material to the proceeding and not unduly repetitious may be received into evidence and given appropriate weight. If testimony by a witness and the submission of real evidence is not necessary in a particular case, the presence of the parties or their representatives is not necessary and submissions may be through mailing or otherwise as the administrative law judge permits. The administrative law judge has authority to establish procedures to protect proprietary information from improper dissemination.

**Section 358.24.** This section sets forth rules for the Deputy Under Secretary to collect information from the charged or affected parties if no party has requested a hearing.

**Section 358.25.** Witnesses summoned before the Department shall be paid the same fees and mileage that are paid witnesses in the courts of the United States as authorized by paragraph (7)(E) of section 777(d) of the Act.

**Section 358.26.** The administrative law judge, if a hearing was requested, or the Deputy Under Secretary will issue an initial decision based solely on evidence received into the record within 20 days of the conclusion of a hearing or within 15 days of the date of service of final written submissions. The initial decision must state findings of fact and the

sanctions to be imposed, if any, which may be lesser included sanctions from those proposed but may not be more severe than those proposed. The burden of proof rests with the Department, which must prove a violation by a preponderance of the evidence. If the APO Sanctions Board (see below) has not issued a final decision within 60 days after the initial decision is issued, the latter becomes the final decision.

**Section 358.27.** The APO Sanctions Board, consisting of the Under Secretary for International Trade, the Under Secretary for Economic Affairs, and the General Counsel, or their designees, will review the initial decision. Parties have 30 days in which to submit comments on the initial decision to the Board. After that time period has expired, the Board may issue a final decision that: (1) Adopts the initial decision in whole or in part; (2) differs from the initial decision; or (3) remands the matter back to the administrative law judge or the Deputy Under Secretary. The final decision must state findings and sanctions if it differs from the initial decision. If there is a finding of a violation of a protective order or disclosure undertaking and that sanctions are to be imposed, that finding must be published in the *Federal Register* and will be provided to any Federal agency likely to have an interest in the matter. If a charged or affected party is subjected to a sanction under paragraph (a)(2) of § 358.12, the Deputy Under Secretary will provide such information to the ethics panel or other disciplinary body of the appropriate bar associations or other professional associations.

**Section 358.28.** This section provides that the parties may ask the APO Sanctions Board to reconsider a final decision. A party must file a motion for reconsideration with the Board within 30 days, or at a later date if material evidence is discovered which was not previously known.

**Section 358.29.** Proceedings shall not be public until the Department makes a final decision under these regulations, no longer subject to reconsideration, imposing a sanction (except as required for notification of the Secretariat with respect to interim sanctions or emergency interim sanctions). If the final decision is not to impose a sanction, proceedings would remain confidential. The public or nonpublic nature of proceedings which are settled would be dealt with in the settlement itself. These provisions are consistent with the approach taken by state bar associations in the conduct of attorney disciplinary proceedings.



This section also provides that the charged party, but not an affected party (i.e., someone who may be subject to the proposed sanctions), or the charged party's counsel may have access to proprietary information involved in the proceeding under protective order. Normally, such access will be required if the charged party is to have a reasonable opportunity to mount a defense.

**Section 356.30.** Sanctions may be imposed for violations of protective orders regarding privileged information, as well as proprietary information.

#### Administrative Procedure Act

This interim rule is exempt from all requirements of section 553 of the Administrative Procedure Act (5 U.S.C. 553), including notice and opportunity to comment and a delay of the effective date because it implements Chapter 19 of the Agreement and thus relates to a foreign affairs function of the United States.

#### Executive Order 12291

Because this rule concerns a foreign affairs function of the United States, it is not a rule within the meaning of section 1(a) of Executive Order 12291, and it is not subject to the requirements of that Order. Accordingly, no Regulatory Impact Analysis was prepared.

#### Paperwork Reduction Act

This rule does not contain a collection of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). The collections of information contained in these regulations occur within the course of ongoing investigations or actions initiated prior to the determinations that are reviewable by binational panels under the Agreement. Thus they are not covered by the Paperwork Reduction Act. See 5 CFR 1320.3(c).

#### Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because the rule was not required to be promulgated as a proposed rule before issuance as a final rule by section 553 of the Administrative Procedure Act or by any other law. Accordingly, neither an initial nor final Regulatory Flexibility Analysis has been or will be prepared.

#### Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612 (52 FR 41685, October 30, 1987).

#### Entry Into Force

It is anticipated that the Agreement will enter into force on January 1, 1989. The Office of the United States Trade Representative will confirm in a Federal Register notice the precise date of the Agreement's entry into force.

#### List of Subjects in 19 CFR Part 356

Antidumping, Canada, Countervailing duty, Imports, Judicial review, Trade agreements.

For the reasons set forth in the preamble, 19 CFR Part 356 is added to read as follows:

#### PART 356—PROCEDURES AND RULES FOR IMPLEMENTING ARTICLE 1904 OF THE UNITED STATES-CANADA FREE-TRADE AGREEMENT

##### Subpart A—Scope and Definitions

- Sec.  
356.1 Scope.  
356.2 Definitions.

##### Subpart B—Procedures for Commencing Review of Final Determinations

- 356.3 Filing and service requirements.  
356.4 Notice of intent to commence judicial review.  
356.5 Request for panel review.  
356.6 Receipt of notice of scope determinations by the government of Canada.  
356.7 Requests to determine when the government of Canada received notice of a scope determination.  
356.8 Continued suspension of liquidation.

##### Subpart C—Proprietary and Privileged Information

- 356.9 Persons authorized to receive proprietary information.  
356.10 Procedures for obtaining access to proprietary information.  
356.11 Procedures for obtaining access to privileged information.

##### Subpart D—Violation of a Protective Order or a Disclosure Undertaking

- 356.12 Sanctions for violation of a protective order or disclosure undertaking.  
356.13 Suspension of rules.  
356.14 Report of violation and investigation.  
356.15 Initiation of proceedings.  
356.16 Charging letter.  
356.17 Request to charge.  
356.18 Interim sanctions.  
356.19 Request for a hearing.  
356.20 Discovery.  
356.21 Subpoenas.  
356.22 Prehearing conference.  
356.23 Hearing.  
356.24 Proceeding without a hearing.  
356.25 Witnesses.  
356.26 Initial decision.  
356.27 Final decision.  
356.28 Reconsideration.  
356.29 Confidentiality.

Sec.  
356.30 Sanctions for violations of a protective order for privileged information.

Authority: 19 U.S.C. 1516a and 1677f(d).

#### Subpart A—Scope and Definitions

##### § 356.1 Scope.

This part sets forth procedures and rules for the implementation of Article 1904 of the United States-Canada Free-Trade Agreement under the Tariff Act of 1930, as amended by Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 1516a and 1677f(d)).

##### § 356.2 Definitions.

- For purposes of this Part: (a) "Act" means the Tariff Act of 1930, as amended;  
(b) "Administrative law judge" means the person appointed under 5 U.S.C. 3105 who presides over the taking of evidence as provided by Subpart D;  
(c) "Affected party" means a party against whom sanctions have been proposed for alleged violation of a protective order or disclosure undertaking but who is not a charged party;  
(d) "Agreement" means the Free-Trade Agreement between Canada and the United States of America entered into between the Government of Canada and the Government of the United States of America, signed on January 2, 1988;  
(e) "APO Sanctions Board" means the Administrative Protective Order Sanctions Board;  
(f) "Authorized agency of Canada" means any Canadian government agency that is authorized by Canadian law to request the Department to initiate proceedings to impose sanctions alleged violation of a disclosure undertaking;  
(g) "Binational panel" means a binational panel established pursuant to Annex 1901.2 to Chapter 19 of the Agreement for the purpose of reviewing a final determination;  
(h) "Canadian Secretary" means the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on behalf of the Secretary;  
(i) "Charged party" means a person who is charged by the Deputy Under Secretary with violating a protective order or an undertaking;  
(j) "Chief Counsel" means the Chief Counsel for Import Administration, U.S. Department of Commerce, or designee;  
(k) "Competent investigating authority" means the agency of a government that issued the final determination at issue which may be:  
(1) In the case of Canada,

(i) The Canadian Import Tribunal, or its successor, or

(ii) The Deputy Minister of National Revenue for Customs and Excise as defined in the Special Import Measures Act, of his successor; and

(2) In the case of the United States,  
(i) The International Trade Administration of the United States Department of Commerce, or its successor, or

(ii) The United States International Trade Commission, or its successor.

(l) "Court" means the United States Court of International Trade;

(m) "Date of service" means, for purposes of Subpart C only, the day a document is deposited in the mail or delivered in person;

(n) "Days" means calendar days, except that a deadline which falls on a weekend or holiday shall be extended to the next working day;

(o) "Department" means the U.S. Department of Commerce;

(p) "Deputy Under Secretary" means the Deputy Under Secretary for International Trade, U.S. Department of Commerce;

(q) "Director" means an Office Director under the Deputy Assistant Secretary for Investigations, U.S. Department of Commerce, or designee, if the panel review is of a final determination by the Department under section 751 of the Act, or an Office Director under the Deputy Assistant Secretary for Compliance, or designee, if the panel review is of a final determination by the Department under section 705(a) or 735(a) of the Act;

(r) "Disclosure undertaking" means the Canadian mechanism for protecting proprietary or privileged information during proceedings pursuant to Article 1904 of the Agreement, as prescribed by section 77.21(2) of the Special Import Measures Act;

(s) "Extraordinary challenge committee" means the committee established pursuant to section 407 of the FTA Act to review decisions of a panel or conduct of a panelist;

(t) "Final determination" has the meaning assigned to the term "final determination" by Article 1911 of the Agreement and includes a Canadian definitive decision within the meaning of subsection 77.1(1) of the Special Import Measures Act;

(u) "Lesser-included sanction" means a sanction of the same type but of more limited scope than the proposed sanction for violation of a protective order or disclosure undertaking; thus, a one-year bar on representation before the Department is a lesser-included sanction of a proposed seven-year bar.

(v) "Panel review" means review of a final determination pursuant to Chapter 19 of the Agreement;

(w) "Party to the proceeding" means a person that would be entitled, under section 516A of the Act, to commence proceedings for judicial review of a final determination;

(x) "Participant" means a party to the proceeding that files a Complaint or a Notice of Appearance in a panel review, or the Department;

(y) "Parties" means the Department and the charged party or affected party in an action under Subpart D;

(z) "Person" means, for purposes of Subpart D, an individual, partnership, corporation, association, organization, or other entity;

(aa) "Proprietary information" means information the disclosure of which the Department has decided is limited under the procedures adopted pursuant to Article 1904.14 of the Agreement, including business or trade secrets; production costs; terms of sale; prices of individual sales, likely sales, or offers; names of customers, distributors, or suppliers; exact amounts of the subsidies received and used by a person; names of particular persons from whom proprietary information was obtained; and any other business information the release of which to the public would cause substantial harm to the competitive position of the submitter; or information an authorized agency of Canada has decided is limited under the procedures adopted pursuant to Article 1904.14 of the Agreement;

(bb) "Protective order" means an administrative protective order issued by the Department under 19 C.F.R. 356.10(d)(2) or 356.11(c)(1);

(cc) "Scope determination" means a determination by the Department, reviewable under section 516A(a)(2)(B)(vi) of the Act, as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or an antidumping or countervailing duty order covering Canadian merchandise, or a reconsideration pursuant to subsection 59(1) of the Special Import Measures Act;

(dd) "Secretariat" means the Secretariat established pursuant to Article 1909 of the Agreement and includes the Secretariat sections located in both Canada and the United States;

(ee) "Service address" means the facsimile number, if any, and address set out by a party to the proceeding as the address of counsel at which the party may be served, or, where the party is not represented by counsel, the

facsimile number, if any, and address of the party;

(ff) "Service list" means the list maintained by the Department of parties to the proceeding;

(gg) "Under Secretary" means the Under Secretary for International Trade, U.S. Department of Commerce, or designee; and

(hh) "United States Secretary" means the Secretary of the United States section of the Secretariat and includes any person authorized to act on behalf of the Secretary.

#### Subpart B—Procedures for Commencing Review of Final Determinations

##### § 356.3 Filing and service requirements.

(a) No Notice of Intent to Commence Judicial Review or Request for Panel Review is filed by a party to the proceeding until the original and 6 copies of the document are received by the United States Secretary or the Canadian Secretary during normal business hours of the Secretariat and within the time fixed for filing.

(b) Where a Notice of Intent to Commence Judicial Review or Request for Panel Review is filed by a party to the proceeding, the party shall serve the document on all other parties to the proceeding and the competent investigating authority, except where the document is required to be served by the United States Secretary.

(c) Service of a document on a party to the proceeding may be effected in the following manner:

(1) By delivering a copy of the document to the service address of the party to the proceeding;

(2) By sending a copy of the document to the service address of the party to the proceeding by facsimile transmission or an expedited delivery courier or mail service, such as express mail; or

(3) By personal service on the party to the proceeding.

(d) Service of a document on the competent investigating authority may be effected in any manner provided in paragraph (c) of this section, when made on the General Counsel of the competent investigating authority.

(e) A certificate of service or certificate of receipt shall appear on, or be affixed to, the documents referred to in paragraph (a).

(f) Where a Notice of Intent to Commence Judicial Review or a Request for Panel Review is served by an expedited delivery courier or mail service, the date of service set out in the certificate of service shall be the day on



which the document is consigned to the courier service or mailed.

(g)(1) The normal business hours during which the offices of the United States section of the Secretariat shall be open to the public are 9:00 a.m. to 5:00 p.m. each weekday except for legal holidays of the United States section of the Secretariat, as defined in the rules of procedure adopted pursuant to Article 1904.14 of the Agreement.

(2) The normal business hours during which the offices of the Canadian section of the Secretariat shall be open to the public are 9:00 a.m. to 5:00 p.m. each weekday except for legal holidays of the Canadian section of the Secretariat, as defined in the rules of procedure adopted pursuant to Article 1904.14 of the Agreement.

(h)(1) The United States section of the Secretariat is located at Room 4012, U.S. Department of Commerce, Pennsylvania Ave. at 14th Street, NW., Washington, D.C. 20230.

(2) The Canadian section of the Secretariat is located at P.O. Box 1711, Ottawa, Ontario, Canada K1P5R5.

#### § 356.4 Notice of intent to commence judicial review.

(a) Where a party to the proceeding intends to commence judicial review of a final determination in the Court, the party shall serve a Notice of Intent to Commence Judicial Review on

(1) The United States Secretary and the Canadian Secretary;

(2) The competent investigating authority; and

(3) All parties to the proceeding.

(b) Every Notice of Intent to Commence Judicial Review referred to in paragraph (a) of this section shall include the following information:

(1) The name and service address of the party to the proceeding filing the Notice;

(2) The name and telephone number of the counsel for the party to the proceeding or, where the party is not represented by counsel, the telephone number of the party;

(3) The title of the final determination for which judicial review is sought, the case number assigned by the competent investigating authority, and the appropriate citation if the final determination was published in the *Federal Register*; and

(4) If the final determination is a scope determination, the date on which notice of the scope determination was received by the Government of Canada.

(c) A Notice of Intent to Commence Judicial Review shall be deemed to be timely filed if a Notice in compliance with these regulations is delivered no later than 20 days after

(1) The date the final determination was published in the *Federal Register*; or

(2) If the final determination is a scope determination, the date on which notice of the scope determination was received by the Government of Canada.

#### § 356.5 Request for panel review.

(a) Only a party to the proceeding may request binational panel review of a final determination. To make such a request, a party must file a Request for Panel Review with the United States Secretary no later than the date that is 30 days after:

(1) The date the final determination was published in the *Federal Register* or *Canada Gazette*; or

(2) If the final determination is a scope determination, the date on which notice of the scope determination was received by the government of the other country.

(b) Receipt of a request in compliance with these rules by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of section 516A(g)(8) of the Act.

(c) A Request for Panel Review shall contain the following information:

(1) The name and service address of the party to the proceeding requesting panel review;

(2) The name and telephone number of the counsel for the party to the proceeding or, where the party is not represented by counsel, the telephone number of the party;

(3) The title of the final determination for which panel review is requested, the case number assigned by the competent investigating authority, and the appropriate citation if the final determination was published in the *Federal Register* or *Canada Gazette*;

(4) Where a Notice of Intent to Commence Judicial Review has been served and the sole reason that the Request for Panel Review is made is to require review of the final determination by a panel, a statement to that effect;

(5) If the final determination is a scope determination, the date on which notice of the scope determination was received by the government of the other country; and

(6) The service list.

(d) Where a party to the proceeding files a Request for Panel Review with the Canadian Secretary, the United States Secretary shall serve a copy of the request on

(1) Any other party to the proceeding; and

(2) The competent investigating authority.

#### § 356.6 Receipt of notice of scope determination by the government of Canada.

(a) Where the Department has made a scope determination, notice of such determination shall be deemed received by the Government of Canada when a certified copy of the determination is delivered to the Chancery of the Embassy of Canada during its normal business hours.

(b) Where feasible, the Department, or an agent therefor, will obtain a certificate of receipt signed by a person authorized to accept delivery of documents to the Embassy of Canada acknowledging receipt of the scope determination. The certificate will describe briefly the document being delivered to the Embassy of Canada, state the date and time of receipt, and include the name and title of the person who signs the certificate. The certificate will be retained by the Department in its public files pertaining to the scope determination at issue.

#### § 356.7 Request to determine when the government of Canada received notice of a scope determination.

(a) Pursuant to section 516A(g)(10) of the Act, any party to the proceeding may request in writing from the Department the date on which the Government of Canada received notice of a scope determination made by the Department.

(b) A request shall be made by filing a written request and five copies thereof with the U.S. Department of Commerce, Import Administration, Room B-099, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230, containing the following information:

(1) The name, address, and telephone number of the counsel for the party to the proceeding filing the request; and

(2) The title and the case number assigned by the Department for the antidumping or countervailing duty proceeding in which the scope determination in question was made.

(c) The Department will respond to the request referred to in paragraph (b) within five business days of receipt.

#### § 356.8 Continued suspension of liquidation.

(a) *In General.* In the case of an administrative determination specified in clause (iii) or (vi) of section 516A(a)(2)(B) of the Act and involving Canadian merchandise, the Department shall not order liquidation of entries of merchandise covered by such a determination until the forty-first day after the date of publication of the notice described in clause (iii) or receipt of the determination described in clause

(vi), as appropriate. If requested, the Department will order the continued suspension of liquidation of such entries in accordance with the terms of paragraphs (b), (c), and (d) of this section.

(b) *Eligibility to Request Continued Suspension of Liquidation.* (1) A participant in a binational panel review that was a domestic party to the proceeding, as described in section 771(9) (C), (D), (E), (F), or (G) of the Act, may request continued suspension of liquidation of entries of merchandise covered by the administrative determination under review by the panel and that would be affected by the panel review.

(2) A participant in a binational panel review that was a party to the proceeding, as described in section 771(9)(A) of the Act, may request continued suspension of liquidation of the merchandise which it manufactured, produced, exported, or imported and which is covered by the administrative determination under review by the panel.

(c) A request for continued suspension of liquidation must include:

(1) The name of the final determination subject to binational panel review and the case number assigned by the Department;

(2) The caption of the binational panel proceeding;

(3) The name of the requesting participant;

(4) The requestor's status as a party to the proceeding and as a participant in the binational panel review; and

(5) The specific entries to be suspended by name of manufacturer, producer, exporter, or U.S. importer.

(d) *Filing and Service.* (1) A Request for Continued Suspension of Liquidation must be filed with the Assistant Secretary for Import Administration, Room B-099, Pennsylvania Avenue at 14th Street, NW., Washington, DC 20230, no earlier than the date on which the first request for binational panel review is filed and no later than ten days after the expiration of the period provided in § 356.5(a) of these rules for filing a Request for Panel Review. The envelope and the first page of the request must be marked: Panel Review—Request for Continued Suspension of Liquidation.

(2) The requesting party shall serve a copy of the Request for Continued Suspension of Liquidation on the United States Secretary and all parties to the proceeding included on the service list. No request will be accepted unless a certificate of service is attached indicating that proper service has been made.

(e) *Termination of Continued Suspension.* Upon the Department's determination that panel review, including any panel review of remand determinations and any review by an extraordinary challenge committee has been concluded, the Department will order liquidation of entries the suspension of which was continued pursuant to this section.

#### Subpart C—Proprietary and Privileged Information

##### § 356.9 Persons authorized to receive proprietary information.

Persons in paragraphs (a), (d) and (e) of this section shall, and persons in paragraphs (b) and (c) of this section may, be authorized by the Department to receive access to proprietary information if they comply with these regulations and such other conditions imposed upon them by the Department:

(a) The members of, and appropriate staff of, a binational panel or extraordinary challenge committee;

(b) Counsel to participants in panel reviews and professionals retained by, or under the direction or control of such counsel, provided that the counsel or professional does not participate in competitive decision-making activity (such as advice on production, sales, operations, or investments, but not legal advice) for the participant represented or for any person who would gain competitive advantage through knowledge of the proprietary information sought;

(c) Other persons who are retained or employed by and under the direction or control of a counsel or professional, panelist, or committee members who have been issued a protective order, such as paralegals, law clerks, and secretaries, if such other persons are

(1) Not involved in the competitive decision-making of a participant to the panel review or for any person who would gain competitive advantage through knowledge of the proprietary information sought; and

(2) Have agreed to be bound by the terms set forth on the application for protective order of the counsel or professional, panelist, or committee member;

(d) The Secretaries of the United States and Canadian sections of the Secretariat and persons retained or employed by the Secretaries, including court reporters hired by the Secretariat to transcribe panel reviews; and

(e) Such officials of the United States government as the United States Trade Representative informs the Department require access to proprietary information for the purpose of

evaluating whether the United States should seek an extraordinary challenge committee review of a panel determination.

##### § 356.10 Procedures for obtaining access to proprietary information.

(a) *Persons Who Must File an Application for Disclosure Under Protective Order.* In order to be permitted access to proprietary information in the administrative record of a final determination under review by a panel, all persons described in § 356.9 (a), (b), (d), or (e) shall file an application for a protective order.

(b) *Procedures for Applying for a Protective Order.*—(1) *Contents of Applications.* (i) The Department will adopt from time to time forms for submitting applications for disclosure of proprietary information pursuant to a protective order that incorporate the terms of this rule.

(ii) Such forms will require the applicant to submit a personal sworn statement stating, in addition to such other terms as the Department may require, that the applicant shall:

(A) Not disclose any proprietary information obtained under protective order and not otherwise available to the applicant, to any person other than (1) an official of the Department involved in the particular panel review in which the proprietary information is part of the administrative record, (2) the person from whom the information was obtained, (3) a person who has been granted access to the proprietary information at issue under section 356.9, and (4) a person employed and under the direction or control of a counsel or professional, panelist, or committee member who has been issued a protective order, such as a paralegal, law clerk, or secretary if such person (i) is not involved in competitive decision-making for a party to the panel review or for any person that would gain competitive advantage through knowledge of the proprietary information sought, and (ii) has agreed to be bound by the terms set forth in the application for protective order by the counsel, professional, panelist, or committee member;

(B) Not use any of the proprietary information not otherwise available to the applicant for purposes other than proceedings pursuant to Article 1904 of the Agreement; and

(C) Upon completion of the panel review, or at such earlier date as may be determined by the Department, return to the Department or certify to the Department the destruction of all documents released under the protective



order and all other documents containing the proprietary information (such as briefs, notes, or charts based on any such information received under the protective order).

(D) The sworn statement referred to in § 356.10(b) shall include an acknowledgement by the person providing it that breach thereof may subject the signatory to sanctions under § 356.12.

(2) *Timing of Applications.* Any person described in § 356.9(a) may file an application for disclosure under protective order after a Notice of Request for Panel Review has been filed with the Secretariat. Any person described in § 356.9(b) may file at the time that person files a Complaint or a Notice of Appearance. Any person described in § 356.9(d) may file an application at any time. Any person described in § 356.9(e) shall submit an application for filing by the United States Trade Representative along with notification to the Department.

(3) *Service of Applications.* (i) *Applications of Persons Described in § 356.9(b).* If a person described in paragraph (b) of section 356.9 files an application before the date on which notices of appearance must be filed in the panel review, such person shall concurrently serve four copies of such application on the United States Secretary and one copy on each person listed on the service list. If the application is filed after the deadline for filing a Notice of Appearance, such person shall serve four copies of the application on the United States Secretary and one copy on each participant in the panel review.

(ii) *Applications of Persons Described in Sections 356.9(a), (d), and (e).* Any person described in paragraph (a), (d), or (e) of § 356.9 who files an application with the Department shall file four copies with the United States section of the Secretariat, for placement in the public inspection files of the United States and Canadian sections of the Secretariat.

(iii) *Method of Service.* Service of an application may be effected by personal service or sending a copy of the document by facsimile, express mail, or by an expedited courier service.

(4) *Release to Employees of Panelists, Committee Members, and Counsel or Professionals.* A person described in paragraph (c) of § 356.9, including a paralegal, law clerk, or secretary, may be permitted access to proprietary information disclosed under protective order by the counsel or professional, panelist, or committee member who retains or employs such person, if such person has agreed to the terms of the

protective order issued to the counsel or professional, panelist, or committee member, by signing and dating a completed copy of the application for protective order of the representative panelist, or committee member in the location indicated in that application;

(5) *Counsel or Professional Who Retains Access to Proprietary Information Under a Protective Order Issued During the Administrative Proceeding.* Any Counsel or professional who has been granted access to proprietary information under protective order during an administrative proceeding that resulted in a final determination that becomes the subject of panel review may, if permitted by the terms of the protective order previously issued by the Department, retain such information until the applicant receives a protective order under this Part.

(c) *Issuance of a Protective Order to Persons Described in Section 356.9(a), (d), and (e).*—(1) *Issuance to Persons Described in § 356.9(a) and (d).* (i) Upon receipt by the Department of an application from a person described in paragraph (a) or (d) of § 356.9, the Department will issue a protective order authorizing disclosure of proprietary information included in the administrative record of the final determination that is the subject of the panel review at issue.

(ii) Any panelist to whom the Department issues a protective order must countersign the protective order, return one copy of the countersigned protective order to the Department, and file four copies with the United States section of the Secretariat.

(iii) When the Department issues a protective order to any person described in paragraph (a) of § 356.9, other than a panelist, that person shall file four copies with the United States section of the Secretariat.

(2) *Issuance to Persons Described in § 356.9(e).* Upon receipt by the Department from the United States Trade Representative of applications from persons requiring access to proprietary information for the purpose of evaluating whether the United States should request an extraordinary challenge committee, the Department will issue a protective order authorizing disclosure of proprietary information included in the record of the panel review at issue.

(3) The terms and obligations of any protective order issued under this paragraph will be the same as those established in § 356.10(b)(1).

(d) *Consideration of Applications from Counsel or Professionals.*—(1) *Opportunity to Object to Disclosure to Persons Described in § 356.9(b) or (c).*

The Department will not rule on an application for a protective order filed by a counsel or professional until ten days after the request is filed, unless there is compelling need to rule more expeditiously. Unless the Department has indicated otherwise, any person may file an objection to the application within seven days of filing of the application. Any such objection shall state the specific reasons in the view of such person why the application should not be granted. One copy of the objection shall be served on the applicant and on all persons who were served with the application. Service shall be facsimile, express mail, or by any expedited courier service. Any reply to an objection will be considered if it is filed before the Department renders a decision.

(2) *Approval of the Applications.* If appropriate, the Department will issue a protective order permitting the release of proprietary information to an applicant and will serve a copy of the protective order on the submitter of the proprietary information.

(3) *Denial of the Application.* If the Department denies an application, it shall issue a letter notifying the applicant of its decision and the reasons therefor, and will serve a copy of the letter on the submitter of the proprietary information.

(4) *Service of a Protective Order.* If the Department issues a protective order to a person pursuant to paragraph (d)(2) of this section, such person shall immediately file four copies of the protective order with the United States Secretariat and, as soon as the deadline for the filing of Notices of Appearances has passed in the appropriate panel review, shall serve a copy of that order upon all participants in that review. Service upon the Secretariat and the participants may be effected by any means permitted by the rules of procedure adopted by the United States and Canada to implement Article 1904 of the Agreement.

(f) *Modification or Revocation of Protective Orders.* (1) If any person believes that changed conditions of fact or law, or the public interest, may require that a protective order issued pursuant to this Part be modified or revoked, in whole or in part, such person may so inform the Department. The motion shall state the changed circumstances warranting such action and shall include materials and argument in support thereof. Such motion shall be served by the movant upon the person to whom the Protective Order was issued. Responses to the motion may be filed within 20 days after

the motion is filed unless the Department indicates otherwise. The Department may also consider such action *sua sponte*.

#### § 356.11 Procedures for obtaining access to privileged information.

(a) *Persons Who May Apply For Access to Privileged Information Under Protective Order.* (1) *Panelists.* If a panel decides that *in camera* examination of a document containing privileged information in an administrative record is necessary in order for the panel to determine whether the document, or portions thereof, should be disclosed under a Protective Order for Privileged Information to counsel or professionals retained by or under the direction or control of counsel, each panelist who is to conduct the *in camera* review, pursuant to the rules of procedure adopted by the United States and Canada to implement Article 1904 of the Agreement, shall file an application for disclosure of the privileged information under Protective Order for Privileged Information with the Department.

(2) *Designated Officials of the United States Government.* Where, in the course of a panel review, the panel has reviewed privileged information under a Protective Order for Privileged Information, and the issue to which such information pertains is relevant to the evaluation of whether the United States should request an extraordinary challenge committee, each official of the United States government whom the United States Trade Representative informs the Department requires access for the purpose of such evaluation shall file an application for a Protective Order for Privileged Information.

(3) *Members of an Extraordinary Challenge Committee.* Where an extraordinary challenge record contains privileged information and a Protective Order for Privileged Information was issued to counsel or professionals representing participants in the panel review at issue, each member of the extraordinary challenge committee shall file an application for a Protective Order for Privileged Information.

(4) *Other Designated Persons.* If the panel decides, in accordance with the rules of procedure adopted by the United States and Canada to implement Article 1904 of the FTA, that disclosure of a document containing privileged information is appropriate, any person identified in such a decision as entitled to release under Protective Order for Privileged Information, e.g., counsel or a professional under the direction or control of counsel, Secretariat personnel, or a member of the staff of

the panel, shall file an application for release under Protective Order for Privileged Information with the Department.

(b) *Contents of Applications for Release Under Protective Order for Privileged Information.* (1) The Department will adopt from time to time forms for submitting applications for disclosure of privileged information pursuant to a Protective Order for Privileged Information that incorporate the terms of this rule.

(2) Such forms shall require the applicant for release of privileged information under Protective Order for Privileged Information to submit a personal sworn statement stating, in addition to such other conditions as the Department may require, that the applicant will:

(i) Not disclose any privileged information obtained under protective order to any person other than

(A) Officials of the Department involved in the particular panel review in which the privileged information is part of the record;

(B) A person who has furnished a similar application and been issued a Protective Order for Privileged Information concerning the privileged information at issue;

(C) Such officials of the United States government as the United States Trade Representative informs the Department require access to privileged information for the purpose of evaluating whether the United States should seek an extraordinary challenge committee; and

(D) A person retained or employed by a representative or panelist who has been issued a Protective Order for Privileged Information, such as a paralegal, law clerk, or secretary, if such person has agreed to be bound by the terms set forth in the application for Protective Order for Privileged Information of the counsel, professional or panelist by signing and dating the completed application of the counsel, professional or panelist on the location indicated that application.

(ii) Use such information solely for purposes of the proceedings under Article 1904 of Agreement; and

(iii) Upon completion of the panel review, or at such earlier date as may be determined by the Department, to return to the Department or certify to the Department the destruction of all documents released under the Protective Order for Privileged Information and all other documents containing the privileged information (such as briefs, notes, or charts based on any such information received under the Protective Order for Privileged Information).

(3) The sworn statement referred to in section 356.11(b) shall include an acknowledgement by the person providing it that breach thereof may subject the signatory to sanctions under sections 356.12 and 356.30.

(c) *Issuance of Protective Orders for Privileged Information.* Upon receipt of an application for protective order under this section, the Department shall issue a protective order.

(d) *Service of Protective Order for Privileged Information.* (1) If the Department issues a Protective Order for Privileged Information to a counsel or professional, such person shall immediately file four copies of the application and Protective Order for Privileged Information with the United States section of the Secretariat and, as soon as the deadline for the filing of a Notice of Appearance has passed in the appropriate panel review, shall serve a copy of that application and order upon all participants in the panel review.

(2) If the Department issues a Protective Order for Privileged Information to any person described in paragraph (a) or (d) of section 356.9, such person shall file four copies of the application and Protective Order for Privileged Information with the United States section of the Secretariat.

(e) *Modification or Revocation of Protective Order for Privileged Information.* If any person believes that changed conditions of fact or law, or the public interest, require that a Protective Order for Privileged Information be modified or revoked, in whole or in part, such person may file with the Department a motion requesting such relief. The motion shall state the changes desired and the changed circumstances warranting such action and shall include materials and argument in support thereof. Such motion shall be served by the movant upon the person to whom the Protective Order for Privileged Information was issued. Responses to the motion may be filed within 20 days after the motion is filed unless the Department indicates otherwise. The Department may also consider such action *sua sponte*.

#### Subpart D—Violation of a Protective Order or a Disclosure Undertaking

##### § 356.12 Sanctions for Violation of a protective order or disclosure undertaking.

(a) A person determined under this Part to have violated a protective order or a disclosure undertaking may be subjected to any or all of the following sanctions:



(1) Liable to the United States for a civil penalty not to exceed \$100,000 for each violation;

(2) Barred from appearing before the Department to represent another for a designated time period from the date of publication in the *Federal Register* or *Canada Gazette* of a notice that a violation has been determined to exist;

(3) Denied access to proprietary information for a designated time period from the date of publication in the *Federal Register* or *Canada Gazette* of a notice that a violation has been determined to exist;

(4) Other appropriate administrative sanctions, including striking from the record of the panel review any information or argument submitted by, or on behalf of, the violating party or the party represented by the violating party; terminating any proceeding then in progress; or revoking any order then in effect; and

(5) Required to return material previously provided by the investigating authority, and all other materials containing the proprietary information, such as briefs, notes or charts based on any such information received under a protective order or a disclosure undertaking.

(b)(1) The firm of which a person determined to have violated a protective order or a disclosure undertaking is a partner, associate, or employee; any partner, associate, employer, or employee of such person; and any person represented by such person may be barred from appearing before the Department for a designated time period from the date of publication in the *Federal Register* or *Canada Gazette* of notice that a violation has been determined to exist or may be subjected to the sanctions set forth in paragraph (a) of this section as appropriate.

(2) Each person against whom sanctions are proposed under paragraph (b)(1) of this section is entitled to all the administrative rights set forth in this Subpart separately and apart from rights provided to a person subject to sanctions under paragraph (a), including the right to a charging letter, right to representation, and right to a hearing, but subject to joinder or consolidation by the administrative law judge under section 356.23(b).

#### § 356.13 Suspension of rules.

Upon request by the Deputy Under Secretary, a charged or affected party, or the APO Sanctions Board, the administrative law judge may modify or waive any rule in this Subpart upon determining that no party will be unduly prejudiced and the ends of justice will

thereby be served and upon notice to all parties.

#### § 356.14 Report of violation and investigation.

(a) An employee of the Department or any other person who has information indicating that the terms of a protective order or a disclosure undertaking have been violated will provide the information to a Director or the Chief Counsel.

(b) Upon receiving information which indicates that a person may have violated the terms of a protective order or an undertaking, the Director will conduct an investigation concerning whether there was a violation of a protective order or a disclosure undertaking, and who was responsible for the violation, if any. For purposes of this Subpart, the Director will be supervised by the Deputy Under Secretary with guidance from the Chief Counsel. The Director will conduct an investigation only if the information is received within 30 days after the alleged violation occurred or, as determined by the Director, could have been discovered through the exercise of reasonable and ordinary care.

(c) The Director will provide a report of the investigation to the Deputy Under Secretary, after review by the Chief Counsel, no later than 180 days after receiving information concerning a violation. Upon the Director's request, and if extraordinary circumstances exist, the Deputy Under Secretary may grant the Director up to an additional 180 days to conduct the investigation and submit the report.

(d) The following examples of actions that constitute violations of an administrative protective order shall serve as guidelines to each person subject to a protective order. These examples do not represent an exhaustive list. Evidence that one of the acts described in the guidelines has been committed, however, shall be considered by the Director as reasonable cause to believe a person has violated a protective order within the meaning of § 356.15.

(1) Disclosure of proprietary information to any person not granted access to that information by protective order, including an official of the Department or member of the Secretariat staff not directly involved with the panel review pursuant to which the proprietary information was released, an employee of any other United States, foreign government, or international agency, or a member of Congress or the Canadian Parliament.

(2) Failure to follow the detailed procedures outlined in the protective

order for safeguarding proprietary information, including maintaining a log showing when each proprietary document is used, and by whom, and requiring all employees who obtain access to proprietary information (under the terms of a protective order granted their employer) to sign and date a copy of that protective order.

(3) Loss of proprietary information.

(4) Failure to return or destroy all copies of the original documents and all notes, memoranda, and submissions containing proprietary information at the close of the proceeding for which the data were obtained by burning or shredding of the documents or by erasing electronic memory, computer disk, or tape memory, as set forth in the protective order.

(5) Failure to delete proprietary information from the public version of a brief or other correspondence filed with the Secretariat.

(6) Disclosure of proprietary information during a public hearing.

(e) Each day of a continuing violation shall constitute a separate violation.

#### § 356.15 Initiation of proceedings.

(a) If the Deputy Under Secretary concludes, after an investigation and report by the Director under § 356.14(c) and consultation with the Chief Counsel, that there is reasonable cause to believe that a person has violated a protective order or a disclosure undertaking and that sanctions are appropriate for the violation, the Deputy Under Secretary will, at his discretion, either initiate a proceeding under this Subpart by issuing a charging letter as set forth in § 356.16 or request that the authorized agency of Canada initiate a proceeding by issuing a request to charge as set forth in § 356.17. In determining whether sanctions are appropriate and, if so, what sanctions to impose, the Deputy Under Secretary will consider the nature of the violation, the resulting harm, and other relevant circumstances of the case. The Deputy Under Secretary will decide whether to initiate a proceeding no later than 60 days after receiving a report of the investigation.

(b) If the Department receives a request to charge from an authorized agency of Canada, the Deputy Under Secretary will promptly initiate proceedings under this Part by issuing a charging letter as set forth in § 356.16.

#### § 356.16 Charging letter.

(a) *Contents of Letter.* The Deputy Under Secretary will initiate proceedings by issuing a charging letter to each charged party and affected party which includes:

(1) A statement of the allegation that a protective order or a disclosure undertaking has been violated and the basis thereof;

(2) A statement of the proposed sanctions;

(3) A statement that the charged or affected party is entitled to review the documents or other physical evidence upon which the charge is based and the method for requesting access to, or copies of, such documents;

(4) A statement that the charged or affected party is entitled to a hearing before an administrative law judge if requested within 30 days of the date of service of the charging letter and the procedure for requesting a hearing, including the name, address, and telephone number of the person to contact if there are further questions;

(5) A statement that the charged or affected party has a right, if a hearing is not requested, to submit documentary evidence to the Deputy Under Secretary and an explanation of the method for submitting evidence and the date by which it must be received; and

(6) A statement that the charged or affected party has a right to retain counsel at the party's own expense for purposes of representation.

(b) *Settlement and Amendment of the Charging Letter.* The Deputy Under Secretary may amend, supplement, or withdraw the charging letter at any time with the approval of an administrative law judge if the interest of justice would thereby be served. If a hearing has not been requested, the Deputy Under Secretary will ask the Under Secretary to appoint an administrative law judge to make this determination. If a charging letter is withdrawn after a request for a hearing, the administrative law judge will determine whether the withdrawal will bar the Deputy Under Secretary from seeking sanctions at a later date for the same alleged violation. If there has been no request for a hearing, or if supporting information has not been submitted under § 356.28, the withdrawal will not bar future actions on the same alleged violation. The Deputy Under Secretary and a charged or affected party may settle a charge brought under this Subpart by mutual agreement at any time after service of the charging letter; approval of the administrative law judge or the APO Sanctions Board is not necessary.

(c) *Service of Charging Letter on a Resident of the United States.*

(1) Service of a charging letter on a United States resident will be made by:

(i) Mailing a copy by registered or certified mail addressed to the charged or affected party at the party's last known address;

(ii) Leaving a copy with the charged or affected party or with an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service for the party; or

(iii) Leaving a copy with a person of suitable age and discretion who resides at the party's last known dwelling.

(2) Service made in the manner described in paragraph (c)(1) (ii) or (iii) of this section shall be evidenced by a certificate of service signed by the person making such service, stating the method of service and the identity of the person with whom the charging letter was left.

(d) *Service of Charging Letter on a Non-resident.* If applicable laws or intergovernmental agreements or understandings make the methods of service set forth in paragraph (c) of this section inappropriate or ineffective, service of the charging letter on a person who is not a resident of the United States may be made by any method that is permitted by the country in which the person resides and that, in the opinion of the Deputy Under Secretary, satisfies due process requirements under United States law with respect to notice in administrative proceedings.

#### § 356.17 Request to charge.

Upon deciding to initiate a proceeding pursuant to § 356.15, the Deputy Under Secretary will request an authorized agency of Canada to initiate a proceeding for imposing sanctions for violations of a protective order or a disclosure undertaking by issuing a letter of request to charge that includes a statement of the allegation that a protective order or a disclosure undertaking has been violated and the basis thereof.

#### § 356.18 Interim sanctions.

(a) If the Deputy Under Secretary concludes, after issuing a charging letter under § 356.16 and before a final decision is rendered, that interim sanctions are necessary to protect the interests of the Department, an authorized agency of Canada, or others, including the protection of proprietary information, the Deputy Under Secretary may petition an administrative law judge to impose such sanctions.

(b) The administrative law judge may impose interim sanctions against a person upon determining that:

(1) There is probable cause to believe that there was a violation of a protective order or a disclosure undertaking and the Department is likely to prevail in obtaining sanctions under this Subpart.

(2) The Department, authorized agency of Canada, or others are likely to

suffer irreparable harm if the interim sanctions are not imposed, and

(3) The interim sanctions are a reasonable means for protecting the rights of the Department, authorized agency of Canada, or others while preserving to the greatest extent possible the rights of the person against whom the interim sanctions are proposed.

(c) Interim sanctions which may be imposed include any sanctions that are necessary to protect the rights of the Department, authorized agency of Canada, or others, including, but not limited to:

(1) Denying a person further access to proprietary information,

(2) Barring a person from representing another person before the Department,

(3) Barring a person from appearing before the Department, and

(4) Requiring the person to return material previously provided by the Department or the competent investigating authority of Canada, and all other materials containing the proprietary information, such as briefs, notes, or charts based on any such information received under a protective order or a disclosure undertaking.

(d) The Deputy Under Secretary will notify the person against whom interim sanctions are sought of the request for interim sanctions and provide to that person the material submitted to the administrative law judge to support the request. The notice will include a reference to the procedures of this section.

(e) A person against whom interim sanctions are proposed has a right to oppose the request through submission of material to the administrative law judge. The administrative law judge has discretion to permit oral presentations and to allow further submissions.

(f) The administrative law judge will notify the parties of the decision on interim sanctions and the basis therefor within five days of the conclusion of oral presentations or the date of final written submissions.

(g) If interim sanctions have been imposed, the investigation and any proceedings under this Subpart will be conducted on an expedited basis.

(h) An order imposing interim sanctions may be revoked at any time by the administrative law judge and expires automatically upon the issuance of a final order.

(i) The administrative law judge may reconsider imposition of interim sanctions on the basis of new and material evidence or other good cause shown. The Deputy Under Secretary or a person against whom interim



sanctions have been imposed may appeal a decision on interim sanctions to the APO Sanctions Board, if such an appeal is certified by the administrative law judge as necessary to prevent undue harm to the Department or authorized agency of Canada, a person against whom interim sanctions have been imposed or others, or is otherwise in the interests of justice. Interim sanctions which have been imposed remain in effect while an appeal is pending, unless the administrative law judge determines otherwise.

(j) The Deputy Under Secretary may request an administrative law judge to impose emergency interim sanctions to preserve the status quo. Emergency interim sanctions may last no longer than 48 hours, excluding weekends and holidays. The person against whom such emergency interim sanctions are proposed need not be given prior notice or an opportunity to oppose the request for sanctions. The administrative law judge may impose emergency interim sanctions upon determining that the Department or authorized agency of Canada is, or others are, likely to suffer irreparable harm if such sanctions are not imposed and that the interests of justice would thereby be served. The administrative law judge will promptly notify a person against whom emergency sanctions have been imposed of the sanctions and their duration.

(k) If a hearing has not been requested, the Deputy Under Secretary will request that the Under Secretary appoint an administrative law judge for making determinations under this section.

(l) The Deputy Under Secretary will notify the Secretariat concerning the imposition or revocation of interim sanctions or emergency interim sanctions.

#### § 356.19 Request for a hearing.

(a) Any party may request a hearing by submitting a written request to the Under Secretary within 30 days after the date of service of the charging letter. However, the Deputy Under Secretary may request a hearing only if the interests of justice would thereby be served.

(b) Upon timely receipt of a request for a hearing, the Under Secretary will appoint an administrative law judge to conduct the hearing and render an initial decision.

#### § 356.20 Discovery.

(a) *Voluntary Discovery.* All parties are encouraged to engage in voluntary discovery procedures regarding any matter, not privileged, which is relevant

to the subject matter of the pending sanctions proceeding.

(b) *Limitations on Discovery.* The administrative law judge shall place such limits upon the kind or amount of discovery to be had or the period of time during which discovery may be carried out as shall be consistent with the time limitations set forth in this Part.

(c) *Interrogatories and Requests for Admissions or Production of Documents.* A party may serve on any other party interrogatories, requests for admissions, or requests for production of documents for inspection and copying, and the party may then apply to the administrative law judge for such enforcement or protective order as that party deems warranted concerning such discovery. The party will serve a discovery request at least 20 days before the scheduled date of a hearing, if a hearing has been requested and scheduled, unless the administrative law judge specifies a shorter time period. Copies of interrogatories, requests for admissions, and requests for production of documents and responses thereto will be served on all parties. Matters of fact or law of which admission is requested will be deemed admitted unless, within a period designated in the request (at least 10 days after the date of service of the request, or within such further time as the administrative law judge may allow), the party to whom the request is directed serves upon the requesting party a sworn statement either admitting or denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully either admit or deny such matters.

(d) *Depositions.* Upon application of a party and for good cause shown, the administrative law judge may order the taking of the testimony of any person who is a party, or under the control or authority of a party, by deposition and the production of specified documents or materials by the person at the deposition. The application shall state the purpose of the deposition and shall set forth the facts sought to be established through the deposition.

(e) *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty to seasonably supplement his response with respect to any question directly addressed to

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at a hearing, the subject matter on which the witness is expected to testify, and the substance of the testimony.

(2) A party is under a duty to seasonably amend a prior response if the party obtains information upon the basis of which he or she

(i) Knows the response was incorrect when made; or

(ii) Knows that the response, though correct when made, is no longer true, and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the administrative law judge, agreement of the parties, or at any time prior to a hearing through new requests for supplementation of prior responses.

(f) *Enforcement.* The administrative law judge may order a party to answer designated questions, to produce specified documents or items, or to take any other action in response to a proper discovery request. If a party does not comply with such an order, the administrative law judge may make any determination or enter any order in the proceedings as he or she deems reasonable and appropriate. The administrative law judge may strike related charges or defenses in whole or in part, or may take particular facts relating to the discovery request to which the party failed or refused to respond as being established for purposes of the proceeding in accordance with the contentions of the party seeking discovery. In issuing a discovery order, the administrative law judge will consider the necessity to protect proprietary information and will not order the release of information in circumstances where it is reasonable to conclude that such release will lead to unauthorized dissemination of such information.

#### § 356.21 Subpoenas.

(a) *Application for Issuance of a Subpoena.* An application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge. An application for issuance of a subpoena requiring a person to appear and depose or testify and to produce specified documents, papers, books, or other physical exhibits at the taking of a deposition, at a prehearing conference, at a hearing, or under any other circumstances, shall be made in writing to the administrative law judge and

shall specify the material to be produced as precisely as possible, showing the general relevancy of the material and the reasonableness of the scope of the subpoena.

(b) *Use of Subpoena for Discovery.* Subpoenas may be used by any party for purposes of discovery or for obtaining documents, papers, books, or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person.

(c) *Application for Subpoenas for Nonparty Department Records or Personnel or for Records or Personnel of Other Government Agencies.* (1) An application for issuance of a subpoena requiring the production of nonparty documents, papers, books, physical exhibits, or other material in the records of the Department, or requiring the appearance of an official or employee of the Department, or requiring the production of records or personnel of other Government agencies shall specify as precisely as possible the material to be produced, the nature of the information to be disclosed, or the expected testimony of the official or employee, and shall contain a statement showing the general relevancy of the material, information, or testimony and the reasonableness of the scope of the application, together with a showing that such material, information, or testimony or their substantial equivalent could not be obtained without undue hardship by alternative means.

(2) Such applications shall be ruled upon by the administrative law judge. To the extent that the motion is granted, the administrative law judge shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the official or employee as may appear necessary and appropriate for the protection of the public interest.

(3) No application for a subpoena for production of documents grounded upon the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge.

(d) *Motion to Limit or Quash.* Any motion to limit or quash a subpoena shall be filed within 10 days after service thereof, or within such other time as the administrative law judge may allow.

(e) *Ex Parte Rulings on Applications for Subpoenas.* Applications for the issuance of subpoenas pursuant to this section may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the administrative law judge.

(f) *Role of the Under Secretary.* If a hearing has not been requested, the party seeking enforcement will ask the Under Secretary to appoint an administrative law judge to rule on applications for issuance of a subpoena under this section.

#### § 356.22 Prehearing conference.

(a)(1) If an administrative hearing has been requested, the administrative law judge will direct the parties to attend a prehearing conference to consider:

(i) Simplification of issues;

(ii) Obtaining stipulations of fact and of documents to avoid unnecessary proof;

(iii) Settlement of the matter;

(iv) Discovery; and

(v) Such other matters as may expedite the disposition of the proceedings.

(2) Any relevant and significant stipulations or admissions will be incorporated into the initial decision.

(b) If a prehearing conference is impractical, the administrative law judge will direct the parties to correspond with each other or to confer by telephone or otherwise to achieve the purposes of such a conference.

#### § 356.23 Hearing.

(a) *Scheduling of Hearing.* The administrative law judge will schedule the hearing at a reasonable time, date, and place, which will be in Washington, DC, unless the administrative law judge determines otherwise based upon good cause shown, that another location would better serve the interests of justice. In setting the date, the administrative law judge will give due regard to the need for the parties adequately to prepare for the hearing and the importance of expeditiously resolving the matter.

(b) *Joinder or Consolidation.* The administrative law judge may order joinder or consolidation if sanctions are proposed against more than one party or if violations of more than one protective order or disclosure undertaking are alleged if to do so would expedite processing of the cases and not adversely affect the interests of the parties.

(c) *Hearing Procedures.* Hearings will be conducted in a fair and impartial manner by the administrative law judge, who may limit attendance at any

hearing or portion thereof if necessary or advisable in order to protect proprietary information from improper disclosure. The rules of evidence prevailing in courts of law shall not apply, and all evidentiary material the administrative law judge determines to be relevant and material to the proceeding and not unduly repetitious may be received into evidence and given appropriate weight. The administrative law judge may make such orders and determinations regarding the admissibility of evidence, conduct of examination and cross-examination, and similar matters as are necessary or appropriate to ensure orderliness in the proceedings. The administrative law judge will ensure that a record of the hearing will be taken by reporter or by electronic recording, and will order such part of the record to be sealed as is necessary to protect proprietary information.

(d) *Rights of Parties.* At a hearing each party shall have the right to:

(1) Introduce and examine witnesses and submit physical evidence,

(2) Confront and cross-examine adverse witnesses,

(3) Present oral argument, and

(4) Receive a transcript recording of the proceedings, upon request, subject to the administrative law judge's orders regarding sealing the record.

(e) *Representation.* Each charged or affected party has a right to represent himself or herself or to retain private counsel for that purpose. The Chief Counsel will represent the Department, unless the General Counsel of the Department determines otherwise. The administrative law judge may disallow a representative if such representation constitutes a conflict of interest or is otherwise not in the interests of justice and may debar a representative for contumacious conduct relating to the proceedings.

(f) *Ex Parte Communications.* The parties and their representatives may not make any *ex parte* communications to the administrative law judge concerning the merits of the allegations or any matters at issue, except as provided in § 356.18(j) regarding emergency interim sanctions.

#### § 356.24 Proceeding without a hearing.

If no party has requested a hearing, the Deputy Under Secretary, within 40 days after the date of service of a charging letter, will submit for inclusion into the record and provide each charged or affected party information supporting the allegations in the charging letter. Each charged or affected party has the right to file a written



response to the information and supporting documentation within 30 days after the date of service of the information provided by the Deputy Under Secretary unless the Deputy Under Secretary alters the time period for good cause. The Deputy Under Secretary may allow the parties to submit further information and argument.

#### § 356.25 Witnesses.

Witnesses summoned before the Department shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

#### § 356.26 Initial decision.

(a) *Initial Decision.* The administrative law judge, if a hearing was requested, or the Deputy Under Secretary will submit an initial decision to the APO Sanctions Board, providing copies to the parties. The administrative law judge or the Deputy Under Secretary will ordinarily issue the decision within 20 days of the conclusion of the hearing, if one was held, or within 15 days of the date of service of final written submissions. The initial decision will be based solely on evidence received into the record and the pleadings of the parties.

(b) *Findings and conclusions.* The initial decision will state findings and conclusions as to whether a person has violated a protective order or an undertaking; the basis for those findings and conclusions; and whether the sanctions proposed in the charging letter, or lesser included sanctions, should be imposed against the charged or affected party. The administrative law judge or the Deputy Under Secretary may impose sanctions only upon determining that the preponderance of the evidence supports a finding of violation of a protective order or an undertaking and that the sanctions are warranted against the charged or affected party.

(c) *Finality of Decision.* If the APO Sanctions Board has not issued a decision on the matter within 60 days after issuance of the initial decision, the initial decision becomes the final decision of the Department.

#### § 356.27 Final decision.

(a) *APO Sanctions Board.* Upon request of a party, the initial decision will be reviewed by the members of the APO Sanctions Board. The Board consists of the Under Secretary for International Trade, who shall serve as

Chairperson, the Under Secretary for Economic Affairs, and the General Counsel.

(b) *Comments on Initial Decision.* Within 30 days after issuance of the initial decision, a party may submit written comments to the APO Sanctions Board on the initial decision, which the Board will consider when reviewing the initial decision. The parties have no right to an oral presentation, although the Board may allow oral argument in its discretion.

(c) *Final Decision by the APO Sanctions Board.* Within 60 days but not sooner than 30 days after issuance of an initial decision, the APO Sanctions Board may issue a final decision which adopts the initial decision in its entirety; differs in whole or in part from the initial decision, including the imposition of lesser included sanctions; or remands the matter to the administrative law judge or the Deputy Under Secretary for further consideration. The only sanctions that the Board can impose are those sanctions proposed in the charging letter or lesser included sanctions.

(d) *Contents of Final Decision.* If the final decision of the APO Sanctions Board does not remand the matter and differs from the initial decision, it will state findings and conclusions which differ from the initial decision, if any, the basis for those findings and conclusions, and the sanctions which are to be imposed, to the extent they differ from the sanctions in the initial decision.

(e) *Public Notice of Sanctions.* If the final decision is that there has been a violation of a protective order or an undertaking and that sanctions are to be imposed, notice of the decision will be published in the *Federal Register* and forwarded to the Secretariat. Such publication will be no sooner than 30 days after issuance of a final decision or after a motion to reconsider has been denied, if such a motion was filed. The Deputy Under Secretary will also provide such information to the ethics panel or other disciplinary body of the appropriate bar associations or other professional associations whenever the Deputy Under Secretary subjects a charged or affected party to a sanction under paragraph (a)(2) of § 356.12 and to any Federal agency likely to have an interest in the matter and will cooperate in any disciplinary actions by any association or agency.

#### § 356.28 Reconsideration.

Any party may file a motion for reconsideration with the APO Sanctions Board. The party must state with particularity the grounds for the motion, including any facts or points of law which the party claims the APO Sanctions Board has overlooked or misapplied. The party may file the motion within 30 days of the issuance of the final decision or the adoption of the initial decision as the final decision, except that if the motion is based on the discovery of new and material evidence which was not known, and could not reasonably have been discovered through due diligence prior to the close of the record, the party shall file the motion within 15 days of the discovery of the new and material evidence. The party shall provide a copy of the motion to all other parties. Opposing parties may file a response within 30 days of the date of service of the motion. The response shall be considered as part of the record. The parties have no right to an oral presentation on a motion for reconsideration, but the Board may permit oral argument at its discretion. If the motion to reconsider is granted, the Board will review the record and affirm, modify, or reverse the original decision or remand the matter for further consideration to an administrative law judge or the Deputy Under Secretary, as warranted.

#### § 356.29 Confidentiality.

(a) All proceedings involving allegations of a violation of a protective order or a disclosure undertaking shall be kept confidential until such time as the Department makes a final decision under these regulations, which is no longer subject to reconsideration, imposing a sanction.

(b) The charged party or counsel for the charged party will be, to the extent possible, granted access to proprietary information in these proceedings, as necessary, under administrative protective order, consistent with the provisions of § 356.10.

#### § 356.30 Sanctions For Violations of a Protective Order for Privileged Information.

The provisions of this Subpart shall apply to persons who are alleged to have violated a Protective Order for Privileged Information.

Date: December 20, 1988.

Allen Moore,  
Under Secretary for International Trade.  
[FR Doc. 88-29906 Filed 12-29-88; 8:45 am]  
BILLING CODE 3510-05-M

Friday  
December 30, 1988

## Part VI

# International Trade Commission

19 CFR Part 207

Panel Review Under Article 1904 of the United States-Canada Free-Trade Agreement; Interim Final Rule With Request for Comments

Federal Register



## INTERNATIONAL TRADE COMMISSION

## 19 CFR Part 207

## Panel Review Under Article 1904 of the United States-Canada Free-Trade Agreement

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Interim-final rules with request for comments.

**SUMMARY:** Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449 (September 28, 1988) ("FTA Act") establishes procedures for review by a binational panel of United States antidumping and countervailing duty final determinations involving Canadian products and for requesting panel review of Canadian antidumping and countervailing duty final determinations involving products of the United States. Title IV implements Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement"). As authorized by section 405(d) of the FTA Act, these regulations are intended to implement certain administrative procedures required by Article 1904 of the Agreement and the FTA Act.

**DATES:** These interim rules take effect on the date that the Agreement enters into force. Written comments must be received not later than 60 days after the Agreement enters into force. It is anticipated that the Agreement will enter into force on January 1, 1989. The Office of the United States Trade Representative will confirm in a Federal Register notice the precise date of the Agreement's entry into force. The International Trade Commission will publish notice confirming the effective date of these interim rules in the Federal Register.

**ADDRESS:** A signed original and fourteen (14) copies of each set of comments, along with a cover letter addressed to Kenneth R. Mason, Secretary, should be sent to the U.S. International Trade Commission, Office of the Secretary, 500 E Street, SW., Room 112, Washington, DC 20436.

**FOR FURTHER INFORMATION CONTACT:** Andrea C. Casson, Esq., 202-252-1105, or Elizabeth C. Hafner, Esq., 202-252-1113. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-252-1810.

## SUPPLEMENTARY INFORMATION:

## Background

Chapter 19 of the Agreement establishes a mechanism for resolving disputes between the United States and Canada with respect to antidumping and countervailing duty cases. The central feature of the mechanism is the replacement of domestic judicial review of determinations in antidumping and countervailing duty cases involving imports from the other country with review by binational panels. The United States and Canada will continue to apply their own national antidumping and countervailing duty laws to goods imported from the other country. In such cases, binational panels acting in place of national courts will expeditiously review final determinations under these laws to decide whether they are consistent with the antidumping or countervailing duty law of the country that made the determination. These determinations include final determinations of sales at less than fair value and subsidization by the Department of Commerce ("Commerce") and final determinations by the U.S. International Trade Commission ("Commission") as to whether a United States industry has been materially injured.

The Agreement provides that only the two governments may invoke the panel review process; however, the government of the United States will automatically trigger panel review in response to a timely request from any person who otherwise could have challenged the determination in court. Counsel for the participants will argue their position before the panel, as they would before a court. Each panel will consist of two panelists chosen from a United States roster, two panelists from a Canadian roster, and a fifth United States or Canadian panelist chosen by agreement or by lot. The Agreement also requires that the United States and Canada protect sensitive business information against unlawful disclosure in the panel review process.

The Agreement also provides for review of a panel decision by an extraordinary challenge committee ("committee") when either the United States Government or the Canadian Government alleges that a panelist materially violated the rules of conduct, or that the panel seriously departed from a fundamental procedural rule or exceeded its powers, authority or jurisdiction. The Committee will consist of three members, all of whom will be sitting or retired United States or Canadian judges, with at least one member from each country.

The administrative operations of panel and extraordinary challenge committee proceedings will be carried out by a Secretariat. The Secretariat will consist of a United States Secretary, located in Washington, DC and a Canadian Secretary located in the National Capital Region of Canada. By Executive Order, the United States Secretary will be located in the Department of Commerce.

Section 405 of the FTA Act establishes an interagency group, chaired by the United States Trade Representative, which will be responsible for preparing the United States rosters of potential panelists and potential committee members, and for evaluating whether the United States should seek extraordinary challenge committee reviews.

Title IV of the FTA Act amends U.S. law to implement Chapter 19 of the Agreement by limiting judicial review in cases involving Canadian merchandise, establishing procedures whereby private parties may appeal for binational panel review, providing organizational structure for administering U.S. responsibilities under Chapter 19 and making other conforming amendments to U.S. law. More specifically, section 405(d) of the FTA Act authorizes the Commission to issue regulations to implement Chapter 19 of the Agreement.

The procedures for binational panels are being implemented through Rules of Procedure issued jointly by the United States and Canada, and published elsewhere in this issue of the Federal Register. These regulations are intended to implement certain administrative procedures required by Chapter 19 of the Agreement involving administrative responsibilities of the Commission that continue during and after panel review. Specifically, the regulations address release of business proprietary and privileged information under administrative protective order during a panel review, and sanctions for violations of the provisions of such protective orders. The regulations complement, and should be used in conjunction with the Rules of Procedure.

This interim rule is exempt from the requirements of section 553 of the Administrative Procedure Act (5 U.S.C. 553), because it implements Chapter 19 of the Agreement and thus relates to a foreign affairs function of the United States.

The Commission has determined that this rule does not constitute a major rule for the purposes of Executive Order 12291 (40 FR 13193, Feb. 17, 1981), because it does not meet the criteria described in section 1(b) of the EO.

Moreover, because this rule concerns a foreign affairs function of the United States, it is not a rule within the meaning of section 1(a) of the EO. Since these regulations are being adopted as interim rules they are not subject to the filing requirement of section 3(c)(3) of the EO.

The Regulatory Flexibility Act does not apply to this rule because it does not affect a large number of small entities, and because the rule was not required by section 553 of the Administrative Procedure Act or by any other law to be promulgated as a proposed rule before issuance as a final rule.

## Explanation of Interim-Final Rules

**Section 207.90.** This section provides the scope of Subpart G, which is to implement Article 1904 of the Agreement.

**Section 207.91.** This section provides definitions of terms used in Subpart G.

**Section 207.92.** There are two types of documents that put the Commission on notice that an antidumping or countervailing duty final determination involving Canadian products may be subject to review. These documents are a Notice to Commence Judicial Review ("Notice") and a Request for Panel Review ("Request"). The Tariff Act of 1930 ("Tariff Act"), as amended by section 401 of the FTA Act, provides that Commerce, in consultation with the Commission, shall by regulation prescribe the form, manner and style of Notices and Requests. 19 U.S.C. 1516a (g)(3)(B). (8)(A). The relevant regulations will be contained in Part 356 of Title 19 of the Code of Federal Regulations, which Part will contain Commerce's regulations for implementation of Article 1904 of the Agreement. Section 207.92 of the Commission's regulations refer to Commerce's regulations for the requirements for Notices and Requests.

**Section 207.93.** The Tariff Act, as amended by section 403 of the FTA Act, provides for certain persons to have access to business proprietary information contained in the Commission's administrative record before the panel, but only if these persons obtain an administrative protective order issued by the Commission. 19 U.S.C. 1877(d). Section 207.93 implements this provision. The persons who are eligible for access are: The panelists and committee members, and any staff whom they employ, such as law clerks and secretaries; counsel for participants in the panel review, and their staff; other professionals retained by or under the direction or control of that counsel; the Secretaries of the Canadian and United States sections of the Secretariat and Secretaries

personnel; and United States government officials, or their delegates, who are members of the interagency group designated to consider whether the United States should convene an extraordinary challenge committee. The persons who have access to proprietary information without protective orders are: The participant that submitted the information; that participant's counsel; and officials and employees of the Commission who are directly involved in the panel review or were involved in the underlying administrative proceeding.

Subsection (b) outlines the procedures for applying for a protective order. Panelists, committee members, counsel, professionals retained by counsel, the Secretaries and their personnel, and interagency group members must apply for a protective order in order to receive access. Nonprofessionals employed by panelists or by counsel, such as law clerks, paralegals, secretaries, and clericals would not submit protective order applications but, under paragraph (b)(5) would have access to the proprietary information at issue under the terms of any protective order issued to the person who employs them.

Paragraph (b)(6) explains that a counsel, or a professional retained by or under the direction or control of such counsel, previously granted access to proprietary information pursuant to an administrative protective order issued during the underlying Commission proceedings, provided the original protective order contains additional terms applicable to cases before a binational panel, shall, upon the filing by the counsel of a Complaint or a Notice of Appearance, become subject to additional terms applicable during panel review. Thus, such persons may retain the proprietary information but under similar terms and subject to the same sanctions as those who have been newly issued a protective order following the commencement of the panel review process. Paragraph (b)(6) also provides for the service of necessary documentation on other participants in the panel review, the Commission and the Secretariat.

Subsection (c) requires that upon the application for a protective order by a panelist, a committee member, any member of the Secretariat personnel, or a designated member of the interagency group, the Commission shall issue a protective order.

Subsection (d) provides for consideration of protective order applications by the Commission. Any objections to an application for a protective order to counsel or professionals working for counsel must

be filed with the Commission within ten days of the date of filing of the application and shall state the reasons why the application should not be granted. After consideration, the Commission may either grant or deny the application.

Subsection (e) requires that persons who are newly granted protective orders during panel review, other than members of the interagency group, must serve copies on the Secretariat and participants. The Commission will retain in a public file copies of protective orders issued to panelists, committee members, Secretariat and its staff, interagency group members and counsel whether issued under the administrative proceeding or during the panel review process.

Subsection (f) provides for Commission revocation or modification of a protective order, either upon motion or *sua sponte*.

**Section 207.94.** This section deals with the release of privileged documents under protective order. The administrative record under review may contain documents for which the Commission claims attorney-client, attorney work product, or government pre-decisional privileges. One reason for classifying documents as privileged is to permit a free and frank exchange between attorney and client, and within an agency. Candor between the Commission and its counsel should be encouraged, but could be constrained by the risk of disclosure to a judge or panelist who subsequently reviews the ultimate administrative decision, particularly if the document may contain recommendations at odds with that decision. The Court of International Trade, in reviewing Commission determinations under title VII, has held that other litigants may not have access to privileged portions of the record. Both Annex 1901.2 of the Free-Trade Agreement and the Statement of Administrative Action for implementation of the FTA Act specifically contemplate that the Rules of Procedure would make provision for the treatment of privileged information.

Under the Rules of Procedure for binational panel review under Article 1904 of the Agreement, the Commission would not include privileged documents in the copy of the administrative record that is transmitted to the Secretariat for the panel's use, although the documents for which privilege is claimed would be listed in the index of the record. If there were any challenge to the privilege claim, the panel would first examine the affidavits in support of the claim of privilege to determine whether there



was a question as to the validity of the claim or if the privilege was qualified and whether the challenger's need for access outweighed the Commission's need to withhold the document from scrutiny. If the affidavits were not dispositive, then the panelists would select from among themselves two lawyers, one from Canada and one from the United States, to examine *in camera* and under protective order any document at issue. Only if the two representatives could not agree whether the document should be disclosed, either as not privileged, or if privileged, under a protective order, would the full panel be granted access under protective order to examine the document and decide whether it should be disclosed under protective order to counsel for participants specifically for use in the panel review.

The Rules of Procedure provide that at each stage of consideration of privileged documents, those documents will be protected by protective orders. In accordance with the process prescribed by the Rules of Procedure, the regulation at § 207.94 provides the mechanics of applications for and issuance of protective orders for privileged information subject to panel review. This regulation provides for the issuance of such protective orders upon appropriate application. The filing and service requirements are similar to those described in section 207.83 regarding protective orders for proprietary information.

**Sections 207.100-207.121.** The Tariff Act, as amended by section 403(c) of the FTA Act, declares it unlawful for any person to violate, or to induce the violation of, any provision of an administrative protective order issued during panel or committee review. 19 U.S.C. 1677f (d)(3). The Commission is authorized to impose sanctions against any person who is found by the Commission to have violated or induced violation of the terms of a protective order issued by the Commission for FTA purposes. These sanctions may include a civil penalty of up to \$100,000 for each violation, and other administrative sanctions, including but not limited to debarment from practice before the Commission, as the Commission determines to be appropriate. *Id.* at (d)(4). Before imposing such sanctions, the Commission must provide notice and an opportunity for a hearing in accordance with section 554 of Title 5 of the U.S. Code. *Id.* Any person against whom sanctions are imposed may appeal the Commission's determination to the U.S. Court of International Trade. *Id.* at (d)(5). The Commission may file an

action in that court to enforce sanctions assessed. *Id.* at (d)(6).

The regulations contained in §§ 207.100-207.121 address the Commission's procedures for imposing sanctions against persons who have violated, or induced violation of, the provisions of a protective order issued during panel and committee proceedings. For the purposes of the sanctions regulations the term "person", as defined in § 207.61(r) (the definition section for this subpart), means not only an individual, but also any entity such as a partnership, corporation, association or organization.

In deciding whether to initiate sanctions proceedings and whether to impose sanctions, the Commission will interpret the legislative prohibition against violation or inducement of a violation in a manner that best carries out the spirit of the legislation. Thus, a disclosure can be unintentional and still constitute a violation for which sanctions could be imposed. For example, the failure to delete proprietary information from the public version of a brief or the disclosure of proprietary information during a public hearing would constitute violations, and could subject the responsible person to sanctions, even if the disclosure was unintentional.

Nor is actual disclosure of protected proprietary information necessary to support assessment of sanctions. For example, the provisions of a protective order could be deemed violated by carelessness in handling the protected information, as evidenced by loss of the information or by failure to follow the procedures required by the protective order for safeguarding proprietary information.

Likewise, initiation of a violation is not a necessary element of inducement. A person who has accepted information knowing it is being disclosed in violation of a protective order will be regarded as having induced violation of the provisions of the protective order. For example, if counsel for a client breaches a protective order by relaying a competitor's protected proprietary information to the client, and the client accepts the information, having reason to know that counsel's action is in breach of the protective order, the client could be subject to sanctions for inducing violation of the protective order provisions.

The examples contained in the above discussion are intended to serve as guidelines, and do not represent an exhaustive list of circumstance under which the Commission could determine that a person has violated or induced

violation of the provisions of a protective order.

**Section 207.100.** This regulation lists the types of sanctions that can be imposed upon a person who is found to have violated or induced the violation of any provision of a protective order. The sanctions include those specifically mentioned in the FTA Act, i.e., civil penalties of up to \$100,000 for each violation and debarment from practice before the Commission, as well as some other sanctions that the Commission believes constitute other appropriate administrative sanctions. Also tracking the statutory language, the regulation notes that each day of a continuing violation constitutes a separate violation for the purposes of assessing civil penalties. Sanctions may be imposed against persons other than the one who violated the protective order, such as the firm, partner, associate, employee, employer, or client of that person.

**Section 207.101.** This regulation sets out the procedures for setting in motion an inquiry into an allegation of violation. Any person who has information indicating that there has been a violation shall report the information to the Commission Secretary. Any such information should be reported immediately upon learning of the possible violation. Upon receipt of the information, the Commission may forward it to the Commission's Office of Unfair Import Investigations ("OUII"). OUII will then conduct an inquiry to determine whether there is reasonable cause to believe that a person or persons have violated or induced the violation of any provisions of a protective order.

**Section 207.102.** Upon completion of the inquiry, OUII may conclude (1) that there is reasonable cause to believe that there has been an actionable violation of the provisions of a protective order; (2) that a person has technically violated or induced violation of protective order provisions, but that a private reprimand would be a sufficient response to the violation; (3) that there has been no violation or inducement of violation; or (4) that there has been an actionable violation, but that the responsible person is outside the Commission's jurisdiction but within the jurisdiction of Canada. If OUII concludes that there has been no violation or inducement of violation, the file will be closed, unless otherwise ordered by the Commission. If OUII reaches another of the possible conclusions, this regulation requires that OUII make a recommendation to the Commission based upon that conclusion. The Commission may take

appropriate action regarding the initiation of sanctions proceedings, including rejecting, approving, or approving and amending any recommendation made by OUII. If the Commission determines that initiation of sanctions proceedings is appropriate, the Commission will direct the Commission Secretary to issue a "charging letter" as defined in § 207.103. Issuance of the charging letter will initiate proceedings before a Commission administrative law judge.

If appropriate, the Commission will take the necessary steps to request the authorized agency of Canada to initiate proceedings under Canadian law on the basis of an alleged violation of the protective order. It will be appropriate to take such steps if it is determined that (1) the charged party, while not subject to any of the sanctions set forth under § 207.100, could be subjected to sanctions imposed by the authorized agency of Canada; or (2) an authorized agency of Canada would otherwise be the more appropriate forum for the initiation of a proceeding.

Because an inquiry into, and a proceeding involving, an alleged breach of a protective order is a sensitive subject that could harm a person's reputation, the Commission has endeavored to provide to the extent possible for confidentiality at the various stages of sanctions proceedings. References to confidentiality occur in several of these sanctions regulations. The Commission is concerned about avoiding the detrimental effects on the reputations of persons that may arise from publicity relating to allegations of protective order violations, and about the impact upon the binational panel process of unsubstantiated allegations against panelists, committee members or the Secretariat personnel. At the same time, the Commission recognizes that some disclosures concerning the proceedings and underlying allegations and facts are necessary to the gathering of evidence. Accordingly, these regulations are designed to allow the Office of Unfair Import Investigations, charged parties and the administrative law judges to develop means in particular cases for accommodating these competing concerns.

At the inquiry stage, the Commission expects that the need for confidentiality will be respected, but will be balanced against the need to gather information in order to conduct an adequate inquiry. Subsection (d) of § 207.102 reflects this concern, by providing that all aspects of the inquiry will be kept confidential, except as needed to gather relevant evidence. The Office of Unfair Import

Investigations in the conduct of its inquiry preliminary to its recommendation to the Commission will endeavor to keep the nature of the allegations and facts gathered confidential. The Office shall not, however, regard this instruction as so restrictive as to limit its investigative efforts insofar as disclosures of such allegations or facts may be necessary for the obtaining of information.

**Section 207.103.** A person against whom sanctions are proposed will be notified in a charging letter, which will include the allegations, proposed sanctions, and procedures for challenging imposition of sanctions. In order to protect the charged party's privacy, the charging letter will be served in a double envelope, with the inner envelope marked for opening by the addressee only. For good cause, the administrative law judge may amend the charging letter at any time, but an amendment that adds an additional charged party must be approved by the Commission. Nothing in this regulation precludes the Office of Unfair Import Investigations from seeking a separate charging letter to initiate separate proceedings against another person whom it believes should be charged with a violation under this Subpart.

Consistent with state bar disciplinary proceedings, the person whose information is alleged to have been released is not a party to the proceedings. The interest being vindicated is that of the Commission in ensuring that all provisions of its protective orders are honored.

**Section 207.104.** This regulation sets forth the filing time, form and content for a response to a charging letter. If the Commission issues a charging letter, it will transmit the letter confidentially to the charged party and provide for notice of the proceedings to become public pending the charged party's submission of a response to the charging letter. If the charged party desires that confidentiality restrictions be placed on the proceedings, the charged party must so state in the response to the charging letter.

**Section 207.105.** This regulation addresses the Commission's confidentiality concerns with respect to the actual sanctions proceedings. The provisions of the regulation are twofold. First, with respect to proprietary and certain privileged information that is necessary for the defense of the allegations, counsel for the charged party may be granted access to this information under administrative protective order. The only privileged information that can be released under

this section is privileged information the disclosure of which is the subject of the sanctions proceedings. Second, upon the request (in the response to the charging letter) of any charged party, the proceedings will be kept confidential to the extent practical and permitted by law. If a request for confidentiality appears in the response, the administrative law judge shall enter an order to maintain the confidentiality of information relating to allegations of violation of a protective order to the extent practicable consistent with the needs of the parties in conducting the proceedings. The regulations leave the form of such an order to the sound discretion of the administrative law judges, who may for example take into account whether certain facts are particularly sensitive to the charged party and who shall assure that confidentiality orders do not unnecessarily impede efforts to conduct discovery or to gather relevant information.

**Section 207.106.** Interim measures may be imposed by the Commission if necessary. For example, a person whom the Commission has reason to believe is continuing to unlawfully disclose protected proprietary information may still have access to proprietary information pursuant to an outstanding protective order. In order to curtail possible further unlawful disclosure by that person, the Commission may determine that it is necessary to revoke the outstanding protective order without waiting for the completion of the sanctions proceedings, by which time irreparable damage may have been caused by continued disclosure of proprietary information.

As another example, in some circumstances, it may be appropriate not to make efforts to maintain the confidentiality of allegations and facts concerning alleged protective order violations or to allow some disclosures of such allegations that would otherwise not be permitted. For instance, in some cases it may be possible that the inquiry or discovery has not required OUII to contact the company whose proprietary information allegedly has been disclosed unlawfully, or that OUII has not had to notify the company of details about the allegations. Nevertheless, the alleged disclosure may be such that it could lead to such serious consequences that prevention or mitigation of harm to the company whose information has been put at risk may outweigh the interests of confidentiality. The regulations specify that disclosure of information that would otherwise be kept confidential during the proceedings



is among the interim measures that the administrative law judge may recommend to the Commission.

Notice and an opportunity to respond will be provided to a party against whom interim measures are proposed. The administrative law judge will issue a recommended determination (RD) as expeditiously as possible, generally within twenty days of the filing of the motion. The Commission will review the RD and issue its determination on interim measures usually within twenty days from issuance of the RD. Interim measures may be revoked at any time.

**Section 207.107.** This regulation sets forth the requirements for motions and responses to motions.

**Section 207.108.** This regulation provides for a preliminary conference to consider such matters as a discovery schedule and the confidentiality of the proceedings.

**Section 207.109.** This regulation provides for discovery under such terms as the administrative law judge may order. Voluntary discovery is encouraged.

A party desiring to depose or obtain nonprivileged documents from a Commission employee can file a motion requesting the administrative law judge to recommend that the Commission direct that employee to testify or produce the requested materials. A party desiring to depose or obtain nonprivileged information from an employee of another U.S. agency or of a Canadian agency, can file a motion requesting the administrative law judge to recommend that the Commission seek the testimony or production of requested material from that person.

**Section 207.110.** This regulation provides for issuance of a subpoena by the administrative law judge, upon the application of a party. Subpoenas issued under this subpart will be enforced by the Commission. The authority to issue and enforce subpoenas for these proceedings is provided by paragraphs 7(A) and 7(B) of section 777(d) of the Tariff Act (19 U.S.C. 1677f(7)(a)), as amended by section 403(d) of the FTA Act. If a party files a motion for enforcement of a subpoena, the regulation provides for the administrative law judge to recommend to the Commission in favor of or against enforcement, and in the recommendation to address each of the criteria necessary for enforcement of an administrative subpoena. Criteria that the Commission must meet in order to enforce a subpoena have been set out in *United States International Trade Commission v. E. & J. Gallo Winery*, 637 F.Supp. 1282 (D.D.C. 1985).

**Section 207.111.** This regulation provides for a pre-hearing conference.

**Section 207.112.** Under this regulation, an opportunity for a hearing must be provided for all sanctions proceedings. Consistent with the legislative mandate of the Tariff Act as amended by the FTA Act (19 U.S.C. 1677f(4)), the administrative law judge is directed to conduct a hearing that complies with section 554 of the Administrative Protective Act.

**Section 207.113.** This regulation defines the administrative record for sanctions proceedings.

**Section 207.114.** Within the time frame established by this regulation, the administrative law judge will issue an initial determination, which contains his findings and conclusions necessary to the factual and legal issues presented. In the usual case, the initial determination will be issued within ninety days of issuance of the charging letter. If the judge determines that the case is complicated, he may issue his initial determination within 120 days of the charging letter.

The Commission anticipates that the deadlines set out in this regulation can be met in most sanctions proceedings. If necessary, however, the administrative law judge may request the Commission to extend the time for issuance of an initial determination when discovery has been delayed as a result of the Commission's efforts to compel an employee or official of another United States agency, or of a Canadian agency, to respond to a deposition, or as a result of the Commission's efforts to enforce a subpoena, or when more time is needed to assure a complete record or to avoid manifest injustice.

**Section 207.115.** A party may request the Commission to review the administrative law judge's initial determination by filing a petition for review within fourteen days after the date the initial determination is served upon the charged party. This regulation sets out the requirements for such petition and any response. The Commission will rule on the petition within forty-five days of the date the initial determination is served.

**Section 207.116.** Absent a petition for review, the Commission may decide *sua sponte* to review an initial determination. This regulation provides for such review if one less than a majority of the participating Commissioners votes for ordering review *sua sponte* within forty-five days of the date the initial determination is served.

**Section 207.117.** Only the issues for which review is ordered will be considered by the Commission. The

Commission may take any appropriate action in reviewing the initial determination, including remand.

**Section 207.118.** In panel review proceedings in which a final antidumping or countervailing duty determination issued by the Commission is being challenged, the Commission will be represented by the Commission's General Counsel. In the usual case, three attorneys from the General Counsel's Office will participate in the representation of the Commission before the panel—the General Counsel; the Assistant General Counsel for Litigation; and a staff attorney. In some instances, a sanctions proceeding will be initiated while the panel review for which the protection order was issued is still pending. If a participant, counsel for a participant, or a panelist involved in an ongoing panel review is charged with breaching a protective order issued during that panel review, the outcome of the sanctions proceeding, as well as the issuance of interim measures (such as revocation of the protective order) during the sanctions proceeding, could affect the ongoing panel review. In order to avoid the appearance of impropriety in such instances, the General Counsel and any other attorneys in the General Counsel's office who are participating in the panel review will not play a role in advising the Commission in matters regarding the relevant sanctions proceedings. Nor will the Assistant Counsel for title VII cases or any other attorney who participated in the underlying administrative proceedings advise the Commission in sanctions proceedings involving breach of a protective order involving ongoing panel review of the Commission's determination in those proceedings. In such instances, the Assistant Counsel for Section 337 investigations, who will have played no role in the panel review or underlying investigation, will serve as Acting General Counsel for the purpose of advising the Commission in regard to the sanctions proceedings, and will work with General Counsel staff attorneys who have not so participated.

**Section 207.119.** This regulation provides for the filing of a petition for reconsideration of a Commission determination. Any such petition must be filed within fourteen days after service of the determination. No responses will be accepted unless requested by the Commission, but the Commission will not grant a petition for reconsideration without first providing an opportunity for response.

**Section 207.120.** If the Commission's final determination, after the period for reconsideration has run, is that public

sanctions are to be imposed, the Commission will publish such determination in the Federal Register. The Commission will also notify whichever departments and agencies of the Canadian and United States governments are likely to have an interest in the matter, for example, the U.S. Commerce Department and the U.S. Trade Representative.

**Section 207.121.** This regulation provides that no interlocutory appeals will be entertained. Any material objections to the administrative law judge's rulings on motions may be raised in a petition for review of the initial determination. This regulation conforms to the Commission's intent that sanctions proceedings be concluded as expeditiously as possible.

#### List of Subjects in 19 CFR Part 207

Administrative practice and procedure, Antidumping, Canada, Countervailing duty, Imports, Trade agreements.

For the reasons set forth in the preamble, 19 CFR Part 207, Subpart G is added to read as follows:

#### Subpart G—Implementing Regulations for the United States-Canada Free-Trade Agreement

- Sec. 207.90 Scope.
- 207.91 Definitions.
- 207.92 Procedures for commencing review of final determinations.
- 207.93 Protection of proprietary information during panel and committee proceedings.
- 207.94 Protection of privileged information during panel and committee proceedings.

#### Procedures for Imposing Sanctions for Violation of Provisions of a Protective Order Issued During Panel and Committee Proceedings

- 207.100 Sanctions.
- 207.101 Reporting of violation and commencement of investigation.
- 207.102 Initiation of proceedings.
- 207.103 Charging letter.
- 207.104 Response to charging letter.
- 207.105 Confidentiality.
- 207.106 Interim measures.
- 207.107 Motions.
- 207.108 Preliminary conference.
- 207.109 Discovery.
- 207.110 Subpoenas.
- 207.111 Prehearing conference.
- 207.112 Hearings.
- 207.113 The record.
- 207.114 Initial determination.
- 207.115 Petition for review.
- 207.116 Commission review on its own motion.
- 207.117 Review by Commission.
- 207.118 Role of the General Counsel in advising the Commission.
- 207.119 Reconsideration.
- 207.120 Public notice of sanctions.
- 207.121 Interlocutory appeals.

#### Subpart G—Implementing Regulations for the United States-Canada Free-Trade Agreement

Authority: Sec. 777(d) of the Tariff Act of 1930 (19 U.S.C. 1677f(d)); secs. 403, 405(d) of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (102 Stat. 1851, Pub. L. No. 100-449, Sept. 28, 1988).

##### § 207.90 Scope.

This subpart sets forth the procedures and regulations for implementation of Article 1904 of the United States-Canada Free Trade Agreement under the Tariff Act of 1930, as amended by Title IV of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 1516a and 1677f(d)). These regulations are authorized by section 405(d) of the United States-Canada Free-Trade Implementation Act of 1988.

##### § 207.91 Definitions.

As used in this Subpart—

(a) "Administrative Law Judge" means the United States International Trade Commission employee appointed under section 3105 of Title 5 of the United States Code to preside over the taking of evidence under this part;

(b) "Agreement" means the Free Trade Agreement between Canada and the United States of America entered into between the Government of Canada and the Government of the United States of America and signed on January 2, 1988.

(c) "Article 1904 Rules" means the Rules of Procedure for Article 1904 Binational Panel Reviews adopted by the United States of America and Canada pursuant to the Agreement.

(d) "Canadian Secretary" means the Secretary of the Canadian section of the Secretariat and includes any person authorized to act on his behalf;

(e) "Charged party" means, for the purposes of §§ 207.100 through 207.121, means a person who is charged by the United States International Trade Commission with violating or inducing violation of a provision of a protective order;

(f) "Commission" means the United States International Trade Commission;

(g) "Commission Secretary" means the Secretary to the Commission;

(h) "Complaint" means the complaint referred to in the Article 1904 Rules;

(i) "Date of Service" means, for the purposes of §§ 207.100 through 207.121 only, the day a document is deposited in the mail or delivered in person;

(j) "Days" means calendar days, except that a deadline which falls on a weekend or United States federal holiday shall be extended to the next working day;

(k) "Extraordinary challenge committee" means the committee

established pursuant to Annex 1904.13 of the Agreement and section 407 of the FTA Act to review decisions of a panel or conduct of a panelist;

(l) "Final determination", for the purposes of § 207.82, shall have the meaning assigned to the term "final determination" by Article 1811 of the Agreement;

(m) "FTA Act" means the United States-Canada Free-Trade Implementation Act of 1988, Pub. L. No. 100-449 (Sept. 28, 1988);

(n) "Investigative attorney" means the attorney(s) designated by the Office of Unfair Import Investigations to engage in inquiries and investigatory activities with respect to investigations and proceedings under §§ 207.100 through 207.121 of Title 19 of the Code of Federal Regulations;

(o) "Notice of Appearance" means the notice of appearance provided for by the Article 1904 Rules;

(p) "Panel review" means review of a final determination pursuant to chapter 19 of the Agreement, including review by an extraordinary challenge committee;

(q) "Parties", for the purposes of § 207.100, means the investigative attorney and the persons charged in an action under § 207.100 of this subpart;

(r) "Person" means, for the purposes of § 207.100, an individual, partnership, corporation, association, organization, or other entity;

(s) "Privileged information" means all information as to which the Commission has reserved a claim of privilege in accordance with Article 1904.14 of the Agreement and the Article 1904 Rules;

(t) "Proprietary information" means all information designated or treated by the United States International Trade Commission as confidential or business proprietary under 19 U.S.C. 1677f and 19 CFR 201.6.

(u) "Protective Order" means an administrative protective order issued by the Commission;

(v) "Secretariat" means the Secretariat established pursuant to article 1909 of the Agreement and includes the Secretariat sections located in both Canada and the United States.

(w) "United States Secretary" means the Secretary of the United States section of the Secretariat and includes any person authorized to act on his behalf;

(x) Except as otherwise provided in this subpart, the definitions set forth in the Article 1904 Rules are applicable to this subpart and to any protective orders issued pursuant to this subpart.

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**§ 207.92 Procedures for commencing review of final determinations.**

(a) *Notice of Intent to Commence Judicial Review.* A Notice of Intent to Commence Judicial Review shall contain such information, and be in such form, manner, and style, including service requirements, as prescribed by the Department of Commerce in its regulations at 19 CFR Part 356.

(b) *Request for Panel Review.* A Request for Panel Review shall contain such information, and be in such form, manner, and style, including service requirements, as prescribed by the Department of Commerce in its regulations at 19 CFR Part 356.

**§ 207.93 Protection of proprietary information during panel and committee proceedings.**

(a) *Persons Authorized to Receive Proprietary Information.* The following persons may be authorized by the Commission to receive access to proprietary information if they comply with these regulations and such other conditions imposed upon them by the Commission:

(1) The members of a binational panel or an extraordinary challenge committee, and their assistants;

(2) Counsel for participants to panel reviews, provided that the counsel do not participate in competitive decision-making activity for the participant represented or for any entity that would gain a competitive advantage through knowledge of the proprietary information sought;

(3) Professionals retained by or under the direction or control of counsel for the participant;

(4) Other persons who are employed as support staff by and under the direction or control of a representative, panelist, or committee member who have been issued a protective order, such as paralegals, law clerks, and secretaries, if such other persons

(i) Are not involved in the competitive decision-making, or the support functions for the competitive decision-making, of a participant to the proceeding or of any entity that would gain a competitive advantage through knowledge of the proprietary information sought, and

(ii) Have agreed to be bound by the terms set forth in the application for protective order of the counsel, panelist, or committee member;

(5) The Secretaries of the United States and Canadian sections of the Secretariat and persons retained or employed by the Secretaries, including court reporters hired by the Secretariat to transcribe panel reviews;

(6) Such persons who the United States Trade Representative informs the Commission require access to proprietary information solely for the purpose of evaluating whether the United States should seek an extraordinary challenge committee review of a panel decision.

(b) *Procedures for Obtaining Access to Proprietary Information—(1) Persons Who Must File An Application for Release Under Protective Order.* In order to be permitted access to proprietary information in the administrative record of a determination under review by a panel, all persons described in paragraphs (a) (1), (2), (3), (5) or (6), unless described in (b)(6), of this section shall file an application for release under a protective order.

(2) *Contents of Applications for Release Under Protective Order.* (i) The Secretary of the Commission shall adopt from time to time forms for submitting requests for release pursuant to a protective order that incorporate the terms of this rule.

(ii) Such forms shall require the applicant for release of proprietary information under protective order to submit a personal sworn statement that, in addition to such other conditions as the Secretary of the Commission may require, that the applicant will:

(A) Not disclose any proprietary information obtained under protective order and not otherwise available to him, to any person other than

(1) Personnel of the Commission involved in the particular panel review in which the proprietary information is part of the administrative record,

(2) The person from whom the information was obtained,

(3) A person who has been issued a protective order covering the same proprietary information in the panel review, and

(4) A person retained or employed by and under the direction or control of a counsel, panelist, or committee member who has been issued a protective order, such as a paralegal, law clerk, or secretary, if such person (A) is not involved in the competitive decision-making, or the support functions for the competitive decision-making, of a participant to the proceeding or of any entity that would gain a competitive advantage through knowledge of the proprietary information sought, and (B) has agreed to be bound by the terms set forth in the application for protective order of the counsel, panelist, or committee member.

(B) Not use any of the proprietary information released under this protective order for purposes other than

the particular proceedings under Article 1904 of the Agreement;

(C) Upon completion of the panel review, or at such earlier date as may be determined by the Commission, return to the Commission or certify to the Commission the destruction of (1) all documents released under the protective order, and (2) all other documents, such as notes or charts, based on or containing any proprietary information released under the protective order; and

(D) Acknowledge that the person becomes subject to the provisions of 19 U.S.C. 1677f(d)(4) and 19 CFR 207.100 as well as section 77.26 of Canada's Special Import Measures Act, with respect to the imposition of sanctions for violation of the protective order.

(3) *Timing of Applications.* The United States and Canadian Secretaries and any person retained or employed by them may file an application at any time. Any panelist, committee member, assistant, counsel, or professional retained by or under the direction or control of counsel, may file an application for disclosure under protective order after a Notice of Request for Panel Review has been filed with the Secretariat. A person who the United States Trade Representative notifies the Commission requires access to the proprietary information may file an application when United States Representative so notifies the Commission.

(4) *Service of Applications.* (i) If a panelist, committee member, counsel for a participant or a professional retained by or under the direction or control of counsel files an application for a protective order before the date on which notices of appearance must be filed in the panel review, such person shall concurrently serve one (1) copy of such application upon each person listed on the service list maintained by the Commission during the administrative proceeding. If the application is filed after the deadline for notice of appearance, such person shall serve the application upon each person who files a complaint or notice of appearance in the panel review.

(ii) Upon receipt of an application filed by counsel or a professional retained by or under the direction or control of counsel, the Commission Secretary shall serve a copy of such application upon the person who submitted the proprietary information to the Commission.

(iii) Upon receipt of an application filed by Secretaries of the United States or Canadian sections of the Secretariat any person retained employed by the Secretaries, including court reporters

hired by the Secretariat to transcribe panel reviews, the Commission shall cause a copy of the application to be placed immediately in the public file of the Commission.

(iv) *Method of Service.* Service of an application may be effected by (1) personal service, or (2) sending a copy of the document by facsimile, Express Mail, or expedited courier service.

(5) *Release to Employees of Panelists, Committee Members and Counsel.* A person employed by and under the direction or control of a panelist, committee member, or counsel, such as a paralegal, law clerk, or secretary, may be provided with access to proprietary information disclosed under protective order to the panelist, committee member, or counsel who retains or employs such person, if such person has agreed to the terms of the protective order issued to the panelist, committee member, or counsel, by signing and dating a completed copy of the application of the panelist, committee member or counsel for protective order where indicated in that application. That person shall file a copy of that signed and dated application with the Commission Secretary.

(6) *Persons who retain access to proprietary information under a protective order issued during the administrative proceeding.* (i) If counsel or a professional (but only if that professional is retained by or under the direction or control of counsel) has been granted access in an administrative proceeding to proprietary information under a protective order that contains a provision governing continued access to that information during panel review, and that counsel files a complaint or a notice of appearance in a binational panel review of that administrative proceeding without having first certified to having relinquished or destroyed all documents containing the proprietary information, the provisions of the administrative protective order relating to continued access during panel review shall become immediately effective upon the filing of the complaint or notice of appearance. Such additional provisions shall assure that the protective order effective during panel review encompasses the conditions set forth in paragraph (b)(2)(ii) of this section.

(ii) Any person described in paragraph (b)(2)(i) of this section who, upon the filing of the complaint or notice of appearance, discovers that the representations made by him in the application for a protective order have changed or are no longer complete and correct, shall update the original

application under which the protective order was granted.

(iii) Any person described in paragraph (b)(2)(i) of this section, upon the filing of the complaint or notice of appearance, shall

(A) Serve a copy of the original application and any updates to that application on each person on the service list maintained by the Commission during the administrative proceeding;

(B) File four (4) copies of the original application, any updates to that application, and the protective order with the United States Secretary; and

(C) Serve two copies of the protective order, together with a copy of the complaint or notice of appearance, upon the Commission.

(1) The Commission Secretary shall place one copy of each of these documents in the Commission's public inspection file.

(2) The Commission Secretary shall serve one copy of each of these documents upon each person who submitted the proprietary information to the Commission.

(c) *Issuance of protective order upon application by panelist, committee member, Secretariat personnel, or designated U.S. Government employee.*

(1) The Commission shall issue a protective order permitting the release of proprietary information to a panelist, committee member, Secretary, other person employed or retained by the Secretariat, or designated U.S. Government employee, who has filed an application for protective order under this subpart.

(2) A panelist or committee member shall be issued two (2) copies of any protective order authorizing access to proprietary information. The applicant shall sign both copies of the order and return one to the Commission. He shall assure that copies of the signed protective order are filed with the Secretariat, as required by the Article 1904 Rules.

(d) *Issuance of protective order to applicant other than a panelist, committee member, Secretariat personnel, or designated U.S. Government employee.*—(1) *Opportunity to object.* The Commission shall not rule on an application until ten (10) days after the request is filed unless there is a compelling need to rule more expeditiously. Unless the Commission has indicated otherwise, any person may file an objection to the application within seven (7) days of the application's filing date. Any such objection shall state the specific reasons why the application should not be

granted. One (1) copy of the objection shall be served on the applicant and on all persons who were served with the application. Service shall be by facsimile, Express Mail or by any expedited courier service. Any reply to an objection will be considered if it is filed before the Commission renders a decision.

(2) *Approval of the Application.*—If appropriate, the Commission shall issue a protective order permitting the release of proprietary information to an applicant. At the same time the protective order is issued, the Commission Secretary shall serve a copy of the protective order upon each person who submitted the proprietary information to the Commission.

(3) *Denial of the Application.*—If the Commission denies an application, it shall issue a letter notifying the applicant of its decision and the reasons therefor.

(3) *Filing of a protective order.*—(1) Except as required by paragraph (b)(6)(iii) of this section, any applicant, except a person described in paragraph (a)(6) of this section, who has been issued a protective order for release of proprietary information shall immediately cause a copy of that order to be placed in the public inspection files of the Secretariat, as required by the Article 1904 Rules.

(2) The Commission Secretary shall retain, in a public inspection file, copies of applications granted and protective orders issued under this section, and of any documents filed in accordance with paragraph (b)(6)(iii)(C) of this section.

(f) *Modification or Revocation of Protective Orders.*—(1) If any person believes that changed conditions of fact or law, or the public interest, may require that a protective order effective under this section be modified or revoked, in whole or in part, such person may file with the Commission a request for such relief. The Commission may consider such action *suo sponte*. The request shall state the changes desired and the changed circumstances warranting such action, and shall include materials and argument in support thereof. Unless the request is self-initiated, the person filing the request shall serve a copy of the request upon the person to whom the protective order was issued.

(2) Upon receiving a request, the Commission shall either provisionally accept the request or reject the request. The Commission shall treat a self-initiated action as a provisionally accepted request. Unless the notice of provisional acceptance states otherwise, any person may file a response to the



request within twenty (20) days after the request is filed. After consideration of the request and any responses thereto, the Commission shall take such action as it deems appropriate.

(3) If a request filed under this paragraph alleges that a person is violating the terms of a protective order, the Commission may, in addition to, or in lieu of, provisional acceptance or rejection under the subparagraph, treat the request as a report of violation under § 207.100-2 of this subpart.

**§ 207.94 Protection of privileged information during panel and committee proceedings.**

(a) *Persons Who May Apply for Access to Privileged Information Under Protective Order.*—(1) *Panelists.* If a panel determines that, pursuant to the Article 1904 Rules, *in camera* examination of a document containing privileged information in an administrative record is necessary in order for the panel to determine whether the document, or portions thereof, should be disclosed under a Protective Order for Privileged Information to counsel for participants or others, the Commission shall, upon application, issue a protective order authorizing the release of the privileged information to authorized panelists.

(2) *Persons Designated by the Panel.*—If a decision is made in accordance with the Article 1904 Rules that disclosure of a document containing privileged information is appropriate, any person identified in such a decision as entitled to release under Protective Order for Privileged Information, e.g., panelists, their assistants, and counsel for participants, may file with the Commission an application for release under Protective Order for Privileged Information with the Commission. Upon such application, the Commission shall issue the protective order.

(3) *Designated Officers or Employees of the United States Government.*—If, in the course of a panel review, the panel has reviewed privileged information under a Protective Order for Privileged Information and the privileged information related to issues the resolution of which is the subject of the request for an Extraordinary Challenge Committee, the Commission may, upon application, issue a protective order and release such privileged information to those officials of the United States Government designated by the United States Trade Representative as being necessary for the evaluation of whether the United States should, pursuant to the Agreement, convene an extraordinary challenge committee.

(4) *Members of an Extraordinary Challenge Committee.* The Commission shall issue a protective order to members of an extraordinary challenge committee authorizing the release of privileged information that:

(i) Is part of the extraordinary challenge committee record, as defined in the Rules of Procedure for Article 1904 Extraordinary Challenge Committees; and

(ii) Was covered under a Protective Order for Privileged Information issued by the Commission to participants during panel review.

(5) Other persons who are retained or employed by and under the direction or control of a counsel, panelist, or committee member who has been issued a protective order, such as paralegals, law clerks, and secretaries, may obtain access to privileged information if such other persons have agreed to be bound by the terms set forth in the application for protective order of the counsel, panelist, or committee member.

(b) *Contents of Applications for Release Under Protective Order for Privileged Information.* (1) The Commission Secretary shall adopt from time to time forms for submitting requests for release pursuant to a Protective Order for Privileged Information that incorporates the terms of this rule.

(2) Such forms shall require the applicant for release of privileged information under Protective Order for Privileged Information to submit a personal sworn statement stating, in addition to such other conditions as the Secretary of the Commission may require, that the applicant will:

(i) Not disclose any privileged information obtained under protective order to any person other than

(A) Personnel of the Commission involved in the particular panel review in which the privileged information is part of the record;

(B) A person who has been issued a similar Protective Order for Privileged Information concerning the privileged information at issue; and

(C) A person retained or employed by or under the direction or control of a counsel, panelist, or committee member who has been issued a Protective Order for Privileged Information, such as a paralegal, law clerk, or secretary, if such person has agreed to be bound by the terms set forth in the application for Protective Order for Privileged Information of the counsel, panelist, or committee member by signing and dating the completed application of the counsel or panelist where indicated in that application.

(ii) Use such information solely for the purposes of proceedings under Article 1904 of the Agreement;

(iii) Upon completion of panel review, or at such earlier date as may be determined by the Commission, return to the Commission or certify to the Commission the destruction of all documents released under the Protective Order for Privileged Information and all other documents containing the privileged information (such as notes or charts based on any such information received under the Protective Order for Privileged Information); and

(iv) Acknowledge that sanctions, under 19 CFR 207.100 or under § 77.26 of Canada's Special Import Measures Act, may be imposed for violation of the protective order.

(c) *Filing of a protective order.* (1) Any applicant who has been issued a Protective Order for Privileged Information shall immediately cause copies of that order to be placed in the public inspection files of the Secretariat, as required by the Article 1904 Rules.

**Procedures for Imposing Sanctions for Violation of Provisions of a Protective Order Issued During Panel and Committee Proceedings**

**§ 207.100 Sanctions.**

(a) A person who is determined under this subpart to have violated or induced the violation of any provision of a protective order issued pursuant to this Subpart, may be subject to one or more of the following sanctions:

(1) A civil penalty not to exceed \$100,000 for each violation. Each day of a continuing violation shall constitute a separate violation;

(2) Debarment from practice in any capacity before the Commission for a designated time period following publication of a determination that the protective order has been breached;

(3) Denial of further access to proprietary or privileged information covered by the breached protective order or to proprietary information in future Commission proceedings;

(4) An official reprimand by the Commission, either confidential or public;

(5) In the case of an attorney, accountant, or other professional, referral of the facts underlying the violation to the ethics panel or other disciplinary body of the appropriate professional association or licensing authority;

(6) When appropriate, referral of the facts underlying the violation to the United States Trade Representative or

his designees, or to another government agency; and

(7) Any other administrative sanctions as the Commission determines to be appropriate.

(b) The partners, associates, employer, and employees of any person who has violated or induced the violation of any provision of a protective order issued pursuant to this subpart, may be subject to any sanctions included in paragraph (a) of this section as the Commission determines to be appropriate.

**§ 207.101 Reporting of violation and commencement of investigation.**

(a) Any person who has information indicating that the terms of a protective order have been violated shall immediately report all pertinent facts relating to the possible violation to the Commission Secretary.

(b) Upon receipt of information indicating breach of a protective order, the Commission Secretary shall record the information and assign an investigation number, and shall then forward all information he has received to the Office of Unfair Import Investigations.

(c) As expeditiously as possible, the Office of Unfair Import Investigations shall conduct an inquiry to determine whether there is reasonable cause to believe that a person or persons have violated any provision of a protective order. At the conclusion of the inquiry, the Office of Unfair Import Investigations shall assess whether or not the available information is sufficient to provide reasonable cause to believe that a person or persons have violated or induced violation of the provisions of a protective order.

**§ 207.102 Initiation of proceedings.**

(a) Upon completion of the inquiry,

(1) If the Office of Unfair Import Investigations concludes that there is not reasonable cause to believe that a person or persons have violated or induced violation of the provisions of a protective order,

(i) The Office of Unfair Import Investigations shall submit a notice and report of his findings to the Commission; and

(ii) Unless the Commission directs otherwise, the file shall be closed and returned to the Commission Secretary.

(2) If the Office of Unfair Import Investigations concludes that there is reasonable cause to believe that a person or persons have violated or induced violation of the provisions of a protective order, the Office of Unfair Import Investigations shall

(i) Recommend that the Commission issue a charging letter as defined in § 207.103 of this subpart; or

(ii) If the facts do not warrant action beyond a private reprimand, recommend that the Commission issue a private letter, but not a charging letter, to the appropriate person; or

(iii) If the Office of Unfair Import Investigations concludes that the party to be charged is beyond the jurisdiction of the Commission but within the jurisdiction of Canada, recommend that the Commission take the necessary steps for issuance of a letter requesting the authorized agency of Canada to initiate proceedings under Canadian law on the basis of an alleged violation of the protective order.

(b) The Commission may make any appropriate determination regarding the initiation of sanctions proceedings, including rejecting, approving, or approving and amending any recommendation made by OUII.

(c) If the Commission determines that it is appropriate to issue a charging letter, the Commission Secretary shall initiate a proceeding under this Subpart by issuing a charging letter as set forth in § 207.103.

(d) If the Commission determines that it is not appropriate to issue a charging letter or to refer the facts to the authorized agency of Canada, the file shall be closed and returned to the Commission Secretary, unless the Commission directs otherwise.

(e) *Confidentiality.* Except as necessary to gather relevant evidence, all aspects of the inquiry shall remain confidential. Except as the Commission may otherwise order, the Commission Secretary shall maintain all closed investigatory files in confidence to the extent permitted by law, and shall destroy each such file one year after it is closed.

**§ 207.103 Charging letter.**

(a) *Contents of charging letter.* Each charged party shall be served by the Commission with a copy of a charging letter and any accompanying motion for interim measures, as provided for in § 207.106. The charging letter shall include:

(1) A statement of the allegation(s) that the provisions of a protective order has been violated and the basis thereof;

(2) A citation to § 207.100 of this subpart, for a listing of sanctions that may be imposed for breach of a protective order;

(3) A statement that official proceedings have been initiated and that the charge will be referred for a hearing and other appropriate proceedings before an administrative law judge;

(4) A statement that, upon issuance of an appropriate administrative protective order, the charged party may obtain access to the documents or other physical evidence upon which the charge is based, except for privileged material;

(5) A statement that the charged party will have the right to submit oral and written evidence and to conduct cross-examination;

(6) A statement that the charged party has a right to retain counsel at the charged party's own expense for purposes of representation; and

(7) A statement that the charged party has the right to request in the response described in § 207.104 of this subpart that the proceedings remain confidential to the extent practicable.

(b) *Service of charging letter.* (1) The charging letter will be served in a double envelope. The inner envelope will indicate that it is to be opened only by the addressee. Service of a charging letter will be made by one of the following methods:

(i) Mailing a copy by registered or certified mail addressed to the charged party at the party's last known address;

(ii) Hand delivery of a copy to the charged party or to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service for the party; or

(iii) Hand delivery of a copy to a person of suitable age and discretion who resides at the party's last known dwelling.

(2) Service shall be evidenced by a certificate of service signed by the person making such service.

(c) *Confidentiality of charging letter.* Prior to entry of an order by the administrative law judge under § 207.100-6, the charging letter will be confidential and disclosed only to necessary Commission staff and the charged parties.

(d) *Amendment of charging letter.* (1) At any time after proceedings have been initiated, the investigative attorney may request leave to amend, supplement, or withdraw the charging letter.

(2) Upon motion, the administrative law judge may grant leave to amend the charging letter for good cause shown upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the originally-charged parties or parties added to the charging letter.

(3) If the administrative law judge determines that the charging letter should be amended to include additional parties, he shall issue a recommended determination to that effect. The Commission shall review the



recommended determination, and issue a determination granting or denying the motion to amend the charging letter to include additional parties.

(4) Any amended charging letter shall be served upon all charged parties in the form and manner set forth in paragraphs (a) and (b) of this section.

#### § 207.104 Response to charging letter.

(a) *Time for filing.* A charged party shall have twenty (20) days from the date of service of the charging letter within which to respond, in writing, to the allegations made in the charging letter.

(b) *Form and content.* Each response shall be under oath and signed by the charged party or its duly authorized officer, attorney, or agent, with the name, address, and telephone number of the same. Each charged party shall respond to each allegation in the charging letter, and may set forth a concise statement of the facts constituting each ground of defense. There shall be a specific admission or denial of each fact alleged in the charging letter, or if the charged party is without knowledge of any such fact, a statement to that effect.

(c) *Request for confidentiality.* The response shall contain a statement as to whether the charged party seeks an order to maintain the confidentiality of all or part of the proceedings to the extent practicable, pursuant to § 207.105 of this subpart.

#### § 207.105 Confidentiality.

(a) *Protection of proprietary and privileged information.* As necessary for the preparation of a defense, counsel for the charged party may be granted access in these proceedings to proprietary information or to the privileged information the disclosure of which is the subject of the proceedings. Any such access shall be under protective order consistent with the provisions of §§ 207.63 and 207.64 of this Subpart.

(b) *Confidentiality of proceedings.* Upon the request of any charged party pursuant to § 207.104 of this subpart, the administrative law judge will issue an appropriate order providing for the confidentiality, to the extent practicable and permissible by law, of information relating to allegations of violations of a protective order, consistent with the needs of the parties in conducting of the sanctions proceedings. The order will provide that all proceedings under this provision shall be kept confidential except to the extent incorporated into a published final decision of the Commission. Any confidential

information not revealed in such decision will remain protected.

#### § 207.106 Interim measures.

(a) At any time after proceedings are initiated, the administrative law judge, upon motion by the investigative attorney, or on his own initiative, may issue a recommended determination to revoke the allegedly-violated protective order, to disclose information about the proceedings that would otherwise be kept confidential, or to take other appropriate interim measures.

(b) Before issuing a determination recommending interim sanctions, the administrative law judge shall afford a party against whom such measures are proposed the opportunity to oppose the motion for interim sanctions. The administrative law judge will notify the parties of the determination on interim measures as expeditiously as possible, usually within no more than twenty (20) days from the date the motion was filed.

(c) The Commission shall review any recommended determination regarding the imposition of interim measures, and within twenty (20) days from issuance of the recommended determination, or within such other time as the Commission may order, the Commission shall issue its determination regarding interim measures. The Commission may impose any appropriate interim measures.

(d) The administrative law judge may at any time recommend to the Commission that interim measures be revoked. Within ten days after issuance of any such recommendation, or within such other time as the Commission may order, the Commission shall rule on such recommendation.

(e) If the Commission takes interim measures that revoke or modify an outstanding protective order issued in the course of an ongoing panel review, the Commission Secretary shall immediately notify the Secretariat of these measures. If any such measures are revoked, the Commission Secretary shall immediately notify the Secretariat of such change.

#### § 207.107 Motions.

(a) *Presentation and disposition.* (1) During the period after issuance of the charging letter and before issuance of the initial determination, all motions shall be addressed to the administrative law judge. If no administrative law judge has yet been assigned, all motions shall be addressed to the Chief Administrative Law Judge.

(2) When a proceeding is before the Commission, all motions shall be addressed to the Chairman of the Commission. All written motions shall

be filed with the Commission Secretary and served upon all parties.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) *Responses.* Any response to a motion shall be filed within ten (10) days after service of the motions, or within such longer or shorter time as may be designated by the administrative law judge or the Commission. The moving party shall have no right to reply, except as permitted by the administrative law judge or the Commission.

(d) *Service.* All motions, responses, replies, briefs, petitions, and other documents filed in sanctions proceedings under this subpart shall be served by the party filing the document upon each other party. Service shall be made upon counsel for the party unless the administrative law judge or the Commission orders otherwise.

#### § 207.108 Preliminary conference.

As soon as practicable after the response to the charging letter is filed, unless the administrative law judge determines that such a conference is not necessary, the administrative law judge shall direct counsel or other representatives for the parties to meet with him at a preliminary conference. At such conference, he shall consider the issuance of such orders as he deems necessary for the conduct of the proceedings. Such orders may include, as appropriate under these regulations, the establishment of a discovery schedule or the issuance of an order, if requested, to provide for maintaining the confidentiality of the proceedings pursuant to § 207.105(b) of this subpart.

#### § 207.109 Discovery.

(a) *Discovery methods.* All parties may obtain discovery under such terms and limitations as the administrative law judge may order. Discovery may be by one or more of the following methods: Depositions upon oral examination or written questions; interrogatories; production of documents or things for inspection and other purposes; and requests for admissions. If a party or an officer or agent of a party fails to comply with a discovery order, the administrative law judge may take such action as he deems reasonable and appropriate. The attendance of witnesses at a deposition may be compelled by subpoena as provided in § 207.110 of this subpart.

(b) *Depositions of nonparty officers or employees of the United States or Canadian government—(1) Depositions of Commission officers or employees.* A

party desiring to take the deposition of an officer or employee of the Commission (other than a member of the Office of Unfair Import Investigations or of the Office of the Administrative Law Judges), or to obtain nonprivileged documents or other physical exhibits in the custody, control, and possession of such officer or employee, may file a written motion requesting the administrative law judge to recommend that the Commission direct that officer or employee to testify or produce the requested materials.

(2) *Depositions of officers or employees of other United States agencies, or of the Canadian government.* A party desiring to take the deposition of an officer or employee of another agency, or of the Canadian government, or to obtain nonprivileged documents or other physical exhibits in the custody, control, and possession of such officer or employee, may file a written motion requesting the administrative law judge to recommend that the Commission seek the testimony or production of requested material from the officer or employee.

#### § 207.110 Subpoenas.

(a) *Application for issuance of a subpoena.* Except as provided in § 207.108(b) of this subpart, an application for issuance of a subpoena requiring a person to appear and depose or testify at the taking of a deposition or at a hearing shall be made to the administrative law judge. The application shall be made in writing, and shall specify the material to be produced as precisely as possible, showing the relevancy of the material and the reasonableness of the scope of the subpoena. The application shall be ruled upon by the administrative law judge.

(b) *Enforcement of a subpoena.* A motion for enforcement of a subpoena shall be made to the administrative law judge. Upon consideration of the motion and any response thereto, the administrative law judge shall recommend to the Commission in favor of or against enforcement. The administrative law judge's recommendation shall provide the basis therefor, and shall address each of the criteria necessary for enforcement of an administrative subpoena. After consideration of the administrative law judge's recommendation, the Commission shall determine whether initiation of enforcement proceedings is appropriate.

(c) *Application for subpoena grounded upon the Freedom of Information Act.* No application for subpoena for production of documents grounded upon

the Freedom of Information Act (5 U.S.C. 552) shall be entertained by the administrative law judge or the Commission.

#### § 207.111 Prehearing conference.

The administrative law judge may direct counsel or other representatives for the parties to meet with him to consider any or all of the following:

- Simplification and clarification of the issues;
- Scope of the hearing;
- Stipulations and admissions of either fact or the content and authenticity of documents;
- Disclosure of the names of witnesses and the exchange of documents or other physical evidence that will be introduced in the course of the hearing; and
- Such other matters as may aid in the orderly and expeditious disposition of the proceedings.

#### § 207.112 Hearings.

(a) *Purpose of the scheduling of hearings.* An opportunity for a hearing before an administrative law judge shall be provided for each action initiated under this subpart. The purpose of such hearing shall be to take evidence and hear argument in order to determine whether a party has violated or induced violation of the provisions of a protective order, and if so, what sanctions are appropriate. Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place, continuing until completed unless otherwise ordered by the administrative law judge.

(b) *Joinder or consolidation.* The administrative law judge may order joinder or consolidation if sanctions are proposed against more than one party or if violations of more than one protective order are alleged, if such joinder or consolidation would expedite processing of the cases and would not adversely affect the interests of the parties.

(c) *Compliance with Administrative Procedure Act.* The administrative law judge shall conduct a hearing that complies with the requirements of section 554 of Title 5 of the United States Code.

(d) *Reporting and transcription.* Hearings shall be reported and transcribed by the official reporter of the Commission under the supervision of the administrative law judge.

#### § 207.113 The Record.

(a) *Definition of the record.* The record shall consist of—

- All pleadings, the charging letter and response thereto, motions and

responses, and other documents and exhibits properly filed with the Commission Secretary;

- All orders, notices, and the recommended or initial determinations of the administrative law judge;
- Orders, notices, and any final determination of the Commission;
- Hearing transcripts, and evidence admitted at the hearing; and
- Any other items certified into the record by the administrative law judge.

(b) *Certification of the Record.* The record shall be certified to the Commission by the administrative law judge upon this filing of the initial determination.

#### § 207.114 Initial determination.

(a) *Time for filing of initial determination.* (1) Except as may otherwise be ordered by the Commission, within ninety days, or within 120 days in a complicated case, of the date of issuance of the charging letter, the administrative law judge shall certify the record to the Commission and shall file with the Commission an initial determination as to whether each charged party has violated or induced violation of the provisions of a protective order, and as to appropriate sanctions. Any party may request the administrative law judge to treat the proceeding as a complicated case requiring 120 days for completion.

(2) The administrative law judge may request the Commission to extend the time period for issuance of the initial determination as necessary—

- Pending the Commission's efforts to obtain discovery pursuant to § 207.109(b)(2) of this subpart, or
- Pending the Commission's efforts to enforce a subpoena pursuant to § 207.110(b) of this subpart, or
- To assure adequate development of the factual record or avoid manifest injustice.

(b) *Contents of the initial determination.* The initial determination shall include the following:

- An opinion stating findings and conclusions necessary for the disposition of all material issues of fact, law, or discretion, and the reasons or bases therefor.

(2) A statement that the initial determination shall become the determination of the Commission unless a party files a petition for review of the determination pursuant to § 207.114 or the Commission pursuant to § 207.115 orders on its own motion a review of the initial determination or certain issues therein.

(c) *Effect of initial determination.* The initial determination shall become the



determination of the Commission forty-five (45) days after the date of the initial determination, unless the Commission within such time orders review of the initial determination or certain issues therein pursuant to § 207.114 or § 207.115 or by order shall have changed the effective date of the initial determination. In the event an initial determination becomes the determination of the Commission, the parties shall be notified thereof by the Commission Secretary.

#### § 207.115 Petition for review.

(a) *The petition and responses.* (1) Any party may request a review by the Commission of the initial determination by filing with the Commission Secretary a petition for review, except that a party who has defaulted may not petition for review of any issue regarding which the party is in default. Any petition for review must be filed within fourteen (14) days after service of the initial determination on the charged party.

The petition shall:

- (i) Identify the party seeking review;
- (ii) Specify the issues upon which review is sought, including a statement as to whether review is sought of the initial determination regarding the existence of a violation, or of the initial determination regarding sanctions;
- (iii) Set forth a concise statement of the relevant law or material facts necessary for consideration of the stated issues; and
- (iv) Present a concise argument setting forth the reasons why review is necessary or appropriate.

(2) Any issue not raised in the petition for review filed under this section will be deemed to have been abandoned and may be disregarded by the Commission in determining whether to review, and in reviewing, an initial determination.

(3) Any party may file a response to the petition within seven (7) days after service of the petition, except that a party who has defaulted may not file a response to any issue regarding which the party is in default.

(b) *Grant or denial of review.* (1) The Commission shall decide whether to grant a petition for review, in whole or in part, within forty-five days of the service of the initial determination on the parties, or by such other time as the Commission may order.

(2) The Commission shall base its decision whether to grant a petition for review upon the petition and response

thereto, without oral argument or further written submissions, unless the Commission shall order otherwise.

(3) The Commission shall grant a petition for review of an initial determination or certain issues therein when at least one of the participating Commissioners votes for ordering review. In its notice, the Commission shall establish the scope of the review and the issues that will be considered and make provisions for the filing of briefs and oral argument if deemed appropriate by the Commission. The notice that the Commission has granted the petition shall be served by the Commission Secretary on all parties.

#### § 207.116 Commission review on its own motion.

Within forty-five (45) days of the date of service of the initial determination, the Commission on its own initiative may order review of an initial determination or certain issues therein when at least one less than a majority of the participating Commissioners votes for ordering review.

#### § 207.117 Review by Commission.

Only the issues set forth in the notice of review will be considered by the Commission. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.

#### § 207.118 Role of the General Counsel in advising the Commission.

When the allegedly-violated protective order was issued in connection with a panel review which was not completed as of the date the charging letter was issued, and in other appropriate circumstances, the General Counsel and any other Commission attorneys who have participated in the panel review, shall not participate in advising the Commission as to the sanctions proceedings brought under this subpart. In such cases, the Assistant General Counsel for Section 337 Investigations, who shall have had no role in the panel review or underlying investigation, shall be designated Acting General Counsel.

#### § 207.119 Reconsideration.

(a) *Petition for reconsideration.* Within fourteen (14) days after service of a Commission determination, any party may file with the Commission a petition for reconsideration, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the determination of action ordered to be taken thereunder and upon which the petitioner had no opportunity to submit arguments.

(b) *Disposition of petition for reconsideration.* The Commission shall grant or deny the petition for reconsideration. No response to a petition for reconsideration will be received unless requested by the Commission, but a petition for reconsideration will not be granted in the absence of such a request. If the motion to reconsider is granted, the Commission may affirm, set aside, or modify its determination, including any action ordered by it to be taken thereunder. When appropriate, the Commission may order the administrative law judge to take additional evidence.

#### § 207.120 Public notice of sanctions.

If the final Commission decision is that there has been a violation of a protective order, and that public sanctions are to be imposed, notice of the decision will be published in the Federal Register and forwarded to the Secretariat. Such publication will occur no sooner than fourteen (14) days after issuance of a final decision or after any petition for reconsideration has been denied. The Commission Secretary shall also serve notice of the Commission decision upon such departments and agencies of the United States and Canadian governments as the Commission deems appropriate.

#### § 207.121 Interlocutory appeals.

Rulings by the administrative law judge on motions may not be appealed to the Commission prior to the administrative law judge's issuance of his initial determination.

By order of the Commission.

Kenneth R. Mason,  
Secretary.

Issued: December 22, 1988.

[FR Doc. 88-29877 Filed 12-29-88; 8:45 am]

BILLING CODE 7020-02-M

Friday  
December 30, 1988

## Part VII

# Department of Health and Human Services

National Institutes of Health

Recombinant DNA Advisory Committee  
Meeting; Notice

Recombinant DNA Research; Proposed  
Actions Under Guidelines; Notice

federal register



# DEPARTMENT OF HEALTH AND HUMAN SERVICES

## National Institutes of Health

### Recombinant DNA Advisory Committee; Meeting

Pursuant to Pub. L. 92-463, notice is hereby given of a meeting of the Recombinant DNA Advisory Committee at the National Institutes of Health (NIH), Building 31C, Conference Room 8, 9000 Rockville Pike, Bethesda, Maryland 20892, on January 30, 1989, from approximately 9 a.m. to adjournment at approximately 5 p.m. This meeting will be open to the public to discuss:

Proposed amendment to the Recombinant DNA Advisory Committee Charter;

Proposed revision of NIH Guidelines to refer specifically to research with plants and animals;

Request for permission to perform certain experiments;

Public information brochure on human gene therapy;

Amendment of NIH Guidelines; and  
Other matters to be considered by the committee.

Attendance by the public will be limited to space available. Members of the public wishing to speak at the meeting may be given such opportunity at the discretion of the Chair.

Ms. Rachel E. Levinson, Office of Recombinant DNA Activities, National Institutes of Health, Building 31, Room B1C34, Bethesda, Maryland 20892, telephone (301) 496-9838, will provide materials to be discussed at the meeting, rosters of committee members, and substantive program information. A summary of the meeting will be available at a later date.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the *Catalog of Federal Domestic Assistance*. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private

organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the *Catalog of Federal Domestic Assistance* are affected.

Dated: December 27, 1988.  
Betty J. Beveridge,  
Committee Management Officer, NIH.  
[FR Doc. 88-30075 Filed 12-29-88; 8:45 am]  
BILLING CODE 4140-01-M

### Recombinant DNA Research; Proposed Actions Under Guidelines

**AGENCY:** National Institutes of Health, PHS, DHHS.

**ACTION:** Notice of proposed action under NIH Guidelines for Research Involving Recombinant DNA Molecules.

**SUMMARY:** This notice sets forth proposed actions to be taken under the National Institutes of Health (NIH) Guidelines for Research Involving Recombinant DNA Molecules. Interested parties are invited to submit comments concerning these proposals. These proposals will be considered by the Recombinant DNA Advisory Committee (RAC) at its meeting on January 30, 1989. After consideration of these proposals and comments by the RAC, the Director of the National Institutes of Health will issue decisions on these proposals in accordance and with the Guidelines.

**DATES:** Comments received by January 20, 1989, will be reproduced and distributed to the RAC for consideration at its January 30, 1989, meeting.

**ADDRESS:** Written comments and recommendations should be submitted to Rachel E. Levinson, Office of Recombinant DNA Activities, Building 31, Room B1C34, National Institutes of Health, Bethesda, Maryland 20892. All comments received in timely response to this notice will be considered and will be available for public inspection in the above office on weekdays between the hours of 8:30 a.m. and 5:00 p.m.

**FOR FURTHER INFORMATION CONTACT:** Background documentation and additional information can be obtained from the Office of Recombinant DNA Activities, Building 31, Room B1C34, National Institutes of Health, Bethesda, Maryland 20892, (301) 496-9838.

**SUPPLEMENTARY INFORMATION:** The NIH will consider the following actions

under the NIH Guidelines for Research Involving Recombinant DNA Molecules:

### I. Proposal To Recommend Amending the Recombinant DNA Advisory Committee Charter

The Recombinant DNA Advisory Committee (RAC) is governed by the provisions of Pub. L. 92-463, the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees. The RAC operates under terms described in a charter that is approved by the Secretary, Department of Health and Human Services. The Director, National Institutes of Health, has asked the Recombinant DNA Advisory Committee (RAC) to discuss and comment on a proposed amendment to the RAC charter prior to asking the Secretary to consider such an amendment.

The pertinent section of the Charter is as follows:

There shall be four standing subcommittees and *ad hoc* subcommittees as needed. . . . Subcommittees shall be composed of committee members and, as required, of *ad hoc* consultants with expertise in the particular areas addressed by each subcommittee. All subcommittees shall report to the parent committee.

The proposed amendment would be inserted after the paragraph above, as follows:

All proposals referred to a subcommittee for formal review must be approved by a majority of subcommittee members before being submitted to the parent committee. If a proposal is rejected by a subcommittee, the investigator may appeal this decision by application to the Director, NIH.

### II. Proposed Changes in Appendices P and Q of the NIH Guidelines

On August 11, 1987, a "Proposal to Modify and Amend the 'Guidelines for Research Involving Recombinant DNA Molecules' to Refer Specifically to Research with Plants and Animals," was published in the *Federal Register* (52 FR 29800). These amendments would provide containment levels for plants in Appendix P and for animals in Appendix Q. On September 21, 1987, the Recombinant DNA Advisory Committee approved the amendments with certain changes. These changes are summarized here. Paragraph numbers refer to the August 11, 1987, *Federal Register* announcement (52 FR 29800).

4. The second sentence is revised to read as follows:

"Biosafety Level 1 for plants (BL1-P) is designed to provide a moderate level of containment for specific recombinant DNA research involving plants and is

recommended for experiments for which there is convincing biological evidence that precludes the possibility of survival, transfer, or dissemination of the recombinant DNA molecules into the environment, or for which there is no recognizable and predictable risk to the environment in the event of accidental release."

5. The following words in the second sentence are deleted:

"sexual and vegetative reproduction and minimizes."

37. The second sentence is revised to read as follows:

"Animals containing sequences from viral vectors, if the sequences do not lead to transmissible infection either directly or indirectly as a result of complementation or recombination in animals, may be propagated under conditions of physical containment comparable to BL1 or BL1-N and appropriate to the organism under study."

46. Revise by adding "or BL2-P + BC" after "BL3-P."

48a. This paragraph is revised to read as follows:

"III-B-5-d. BL3-P containment is recommended for experiments involving sequences encoding potent vertebrate toxins introduced into plants or associated organisms. Recombinant DNAs containing genes for the biosynthesis of toxic molecules lethal for vertebrates at an LD<sub>50</sub> of less than 100 nanograms per kilogram body weight fall under Section III-A-1 and require RAC review and NIH and IBC approval before initiation."

50. The second sentence of this paragraph is amended to read as follows:

"Determination of whether or not a pathogen has a potential for serious detrimental impact on managed (agricultural, forest, grassland) or natural ecosystems should be made by the PI and IBC, in consultation with scientists knowledgeable of plant diseases, crops and ecosystems in the geographic area of the research."

70. The third sentence of this paragraph is amended as follows:

"For certain work with plants, Appendix P replaces Appendix C; it defines Biosafety Level 1-Plants to Biosafety Level 4-Plants (BL1-P to BL4-P)."

75. Substitute the word "arthropods" for "insects."

87. This sentence is amended to correct a typographical error, as follows:

"Personnel are required to read instructions on BL1-P greenhouse practices and procedures and to follow them."

88. The second sentence of this paragraph is deleted.

89. This sentence is revised to read as follows:

"A record is kept of experiments in progress in the facility."

91a. Substitute the word "arthropod" for "insect."

91b. Substitute the word "arthropods" for both occurrences of the word "insects."

91c. This sentence is deleted.

93a. Delete the word "permanent" in the first sentence.

93c. Substitute the word "arthropods" for "insects."

98. The third sentence of this paragraph is revised to read as follows:

"It should advise personnel of potential consequences if practices are not followed and outline contingency plans in the event containment loss results in release of organisms."

100. The second sentence is amended to read:

"Decontamination of run-off water is not necessarily required."

101. Substitute the word "arthropods" for both occurrences of the word "insects." Change "microorganisms" to "macroorganisms" to correct a typographical error.

103a. This paragraph is deleted.

105. Delete the word "permanent" in the first sentence.

106a. A new sentence is added at the end of this paragraph to read as follows:

"Soil beds are also acceptable unless propagules of experimental organisms are readily disseminated through soil."

106b. The following words are deleted from this paragraph:

"No. 30 mesh (or finer)." The word "insects" is replaced with "arthropods."

108. This sentence is revised to read as follows:

"An autoclave for treatment of contaminated greenhouse materials is available."

114. This first sentence of this paragraph is revised to read as follows:

"All experimental materials, except those that are to remain in a viable or intact state for experimental purposes, are sterilized in an autoclave or rendered biologically inactive before disposal."

115. The word "insect" is replaced with "arthropod."

116. The word "insect" is replaced with "Arthropods."

122. The word "permanent" is deleted from the first sentence.

125. The word "permanent" is deleted from the first sentence.

147. The word "Insects" is replaced with "Arthropods."

153. The word "insect" is replaced with "arthropod."

160. The following sentence is deleted from this paragraph:

"A backup source of electricity is provided to run the air handling equipment if the main power source should fail."

171. This sentence is revised to read as follows:

"Ensuring that no organism that can serve as a host promote the transmission of the virus or microorganism is present within a farthest distance that the airborne virus or microorganism may be expected to be effectively disseminated."

173. Replace the word "insect" with "arthropod."

176. Replace the word "insects" with "arthropods."

177. Replace the word "insects" with "arthropods" in both occurrences.

184. The first sentence of this paragraph is amended to read as follows:

"This appendix of the NIH Guidelines specifies containment and confinement practices for research involving whole animals, both those in which the animal's genome has been altered by recombinant DNA techniques and experiments involving recombinant-DNA-modified microorganisms tested on whole animals."

241. This paragraph is amended to read as follows:

"Appendix Q-II-C-1-f. Animals holding areas shall be cleaned at least once a day and decontaminated immediately following any spill of viable materials."

283. This paragraph is amended to read as follows:

"Appendix Q-II-D-1-f. Animal holding areas shall be cleaned at least once a day and decontaminated immediately following any spill of viable materials."

285. Change "18" to "16" in this paragraph.

301. The fourth sentence of this paragraph is amended to read as follows:

"The air pressure within the suit area is to be less than that of any adjacent area."

308. This paragraph is amended to read as follows:

"Appendix Q-II-D-2-u. Respirators shall be worn in rooms containing experimental animals."

328. The third sentence of this paragraph is amended to read as follows:

"It is universally accepted if bacterial spores are used to challenge and verify that the equipment is capable of killing spores then assurance is provided that all other known agents will also be



inactivated by the parameters established to operate the equipment."

After review for consistency with U.S. Department of Agriculture practices, the Agricultural Research Service has recommended the following additional changes. Again, paragraph numbers refer to the original Federal Register announcement.

39. Add: "The containment decision should be consistent with the APHIS Regulations identifying plant pests. 7 CFR Parts 330 and 340, "Plant Pests, Introduction of Genetically Engineered Organisms or Products, Final Rule."

70. Change to read Biosafety Level 4 Plants (BL1-P to BL4-P)."

100. Replace sentence reading "Decontamination of run-off water is not required." with "Run-off water which may contain organisms from the work tray must be appropriately decontaminated."

106b. Insert after "pollen"—"normally 10–20 um in size"

133a. Insert sentence, "A HEPA filter may be used instead of the 80–85% filters and dampers."

227. Insert after "director"—"and IBCs at the sending and receiving institution."

233. Add additional sections: "Appendix Q-II-3-B-f. Floor drains must be permanently capped or screened."

"Appendix Q-II-3-B-g. All perimeter joints and openings must be sealed to form an insect-proof structure."

"Appendix Q-II-3-B-h. All access control door(s) to interior work zone(s) must be appropriately screened (52 mesh)."

"Appendix Q-II-3-B-i. If a forced air ventilation system is provided, vents must be appropriately screened (52 mesh)."

251. Add after "laundered."—"Personnel will shower before exiting the BL3-N area and donning of personal street clothing."

255. Insert after "laboratory director"—"and IBC chairman."

261. Replace "Molded surgical masks or respirators" with "Appropriate respirator protection"

268. Add—"Liquid wastes from shower rooms and toilets may be decontaminated with chemical disinfectants by methods shown to be effective."

270. Add—"if arthropods are used in the experiment or the agent under study can be transmitted by an arthropod, the doors will be appropriately screened."

271. Delete the last half of paragraph, beginning with "The exhaust air from"

275. Add new paragraphs—"Appendix Q-II-C-3-n. Exhaust air from BL3-N containment zone must be appropriately

treated by filtering through a single HEPA filter or incinerated before release to the atmosphere. Double HEPA filtration is required if a recombinant DNA-containing organism is excreted in animals and is capable of contaminating the room air at a level to exceed  $1 \times 10^4$  organisms per cubic foot of exhausted air. A single HEPA filter must be installed in the inlet air ventilation system. Double HEPA filters are required in the supply air system when a need is identified to equip the exhaust system with double HEPA filters. Heating Ventilation Air Conditioning (HVAC) supply and exhaust ducts and filter housing must have minimal air loss in 20 minutes at 4" of water gauge pressure, or pass a halogen test with a leak rate less than 0.00001 cc/sec at 4" water gauge pressure.

"Appendix Q-II-C-3-o. The integrity of the animal room must have an air leak rate (decay rate) not to exceed 7% per minute (logarithm of pressure against time) over a 20-minute period at 2" of water gauge pressure (rate of decrease is 0.05" wgp/min.)."

308. Replace "Molded surgical masks or respirators" with "Appropriate respirator protection"

325. Delete sentence "Heating Ventilation"

### III. Proposal To Clone the Gene Coding for Vancomycin Resistance into *Streptococcus Sanguis*

Sandra Handwerger, M.D., Beth Israel Medical Center, New York, has requested permission to clone the gene coding for vancomycin resistance from *leuconostoc* species into *streptococcus sanguis* via a helper plasmid system. These experiments are covered under Section III-A-2 of the NIH Guidelines which reads: "Deliberate transfer of a drug resistance trait to microorganisms that are not known to acquire it naturally, if such acquisition could compromise the use of the drug to control disease agents in humans or veterinary medicine or agriculture."

### IV. Proposal To Amend Appendix H of the NIH Guidelines

The Federal Register of June 24, 1988 (53 FR 23775), contained a proposal by the Postal Service to ban the shipment of all etiologic agents, or materials believed to contain etiologic agents, as defined by the Department of Transportation and the Department of Health and Human Services regulations. Under Appendix H of the current NIH Guidelines for Research Involving Recombinant DNA Molecules of May 7, 1986 (52 FR 18976), this ban could apply to all shipments of recombinant molecules contained within an organism

or virus, regardless of whether they are potentially hazardous to human health. Such a ban could inhibit the exchange of scientific information. It could also affect the terms and conditions under which commercial shippers would transport recombinant DNA products. The RAC recognized the potential significance of this issue and referred it to the Definitions Subcommittee of the RAC, which met on December 5, 1988.

### A. Proposed Replacement of Appendix H

On December 5, 1988, the Definitions Subcommittee of the RAC unanimously recommended the following replacement of Appendix H of the NIH Guidelines for Research Involving Recombinant DNA Molecules.

#### "Preamble:

"Recombinant DNA molecules contained in an organism or in a viral genome shall be shipped under the appropriate requirements of the U.S. Public Health Service (42 CFR, Part 72), U.S. Department of Agriculture (9 CFR, subchapters D&E; 7 CFR, Part 340) and/or the U.S. Department of Transportation (49 CFR, Part 173). For purposes of these Guidelines the following recombinant DNA molecules contained in an organism or in a viral genome shall be shipped as etiologic agents: (1) Those listed as class 2, 3, or 4 agents in Appendix B; and/or (2) those contained in reference G-III-2<sup>1</sup>; and/or (3) those regulated as animal or plant pathogens or pests under titles 7 and 9 CFR; or (4) host organisms containing recombinant DNA derived from those organisms or viral genomes.

#### "Appendix H-I:

"An illustration of one method of packaging and labeling of recombinant DNA-containing microorganisms and viral genomes defined as etiologic agents in the Preamble is shown in Figures 1, 2, and 3. Additional information on packaging and shipping is given in the "Laboratory Safety Monograph-A Supplement to the NIH Guidelines for Recombinant DNA Research," available from the Office of Recombinant DNA Activities and in the Biosafety in Microbiological and Biomedical Laboratories.<sup>1</sup>

"Appendix H-II—Footnote and References of Appendix H 1. Biosafety in Microbial and Biomedical Laboratories, 2nd Edition, (May 1988), U.S. Department of Health and Human Services, Centers for Disease Control, Atlanta, Georgia 30333, and National Institutes of Health, Bethesda, Maryland 20892."

### B. Proposed Replacement of the Illustration in Appendix H

The heading changes and the replacement paragraph were written by NIH staff on December 12, 1988, to reflect the intent of the Definitions Subcommittee of the RAC.

The replacement paragraph will read:

"Figures 1, 2, and 3 depict one method for the packaging and labeling of those recombinant DNA-containing organisms and viral genomes defined as etiologic agents in the Preamble of Appendix H. The key features are identified in Figure 1. It is the responsibility of the shipper to comply with the applicable requirements of 42 CFR Part 72 and 49

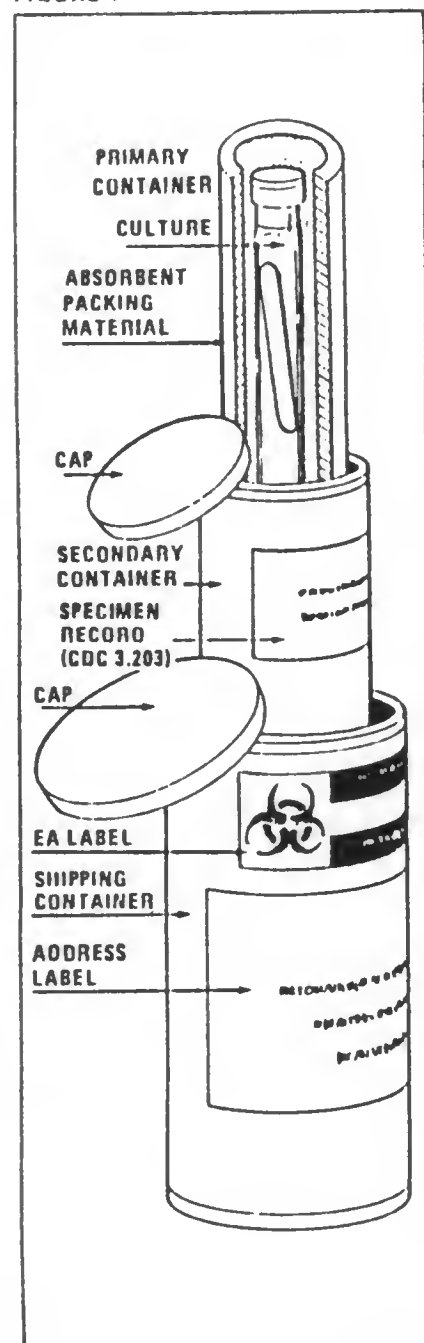
CFR Part 173 when shipping biological materials or etiologic agents. It is recommended that all organisms containing recombinant molecules, which are exempt and/or class 1 agents, should be shipped in secure, leak-proof containers."

See illustration attached.

BILLING CODE 4140-01-M



FIGURE 1

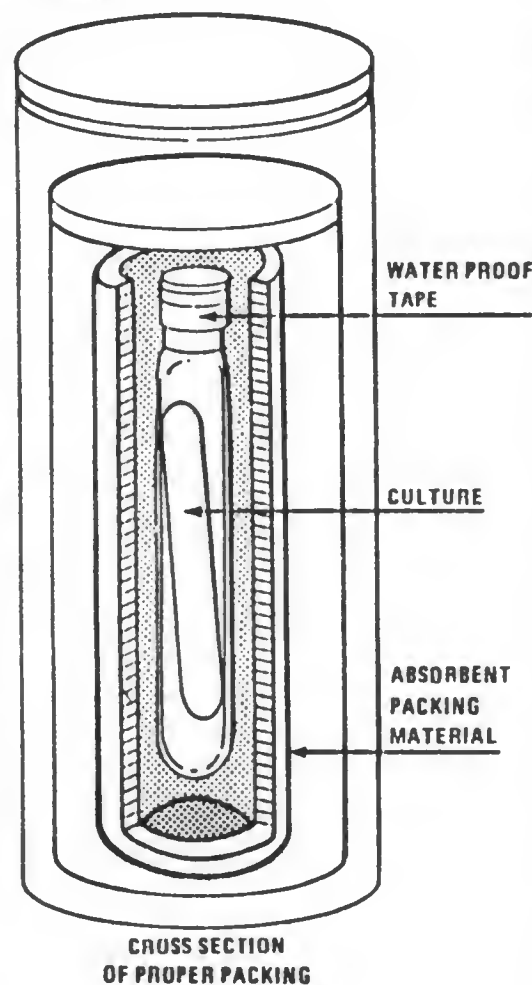


BILLING CODE 4140-01-C

One Method for

# PACKAGING AND LABELING OF ETIOLOGIC AGENTS

FIGURE 2



Replacement paragraph is on attached sheet.

The Interstate Shipment of Etiologic Agents (42 CFR, Part 72) was revised July 21, 1980 to provide for packaging and labeling requirements for etiologic agents and certain other materials shipped in interstate traffic.

Figures 1 and 2 diagram the packaging and labeling of etiologic agents in volumes of less than 50 ml. in accordance with the provisions of subparagraph 72.3 (a) of the cited regulation. Figure illustrates the color and size of the label, described in subparagraph 72.3 (d) (1 - 5) of the regulations, which shall be affixed to all shipments of etiologic agents.

For further information on shipping of etiologic agents contact:

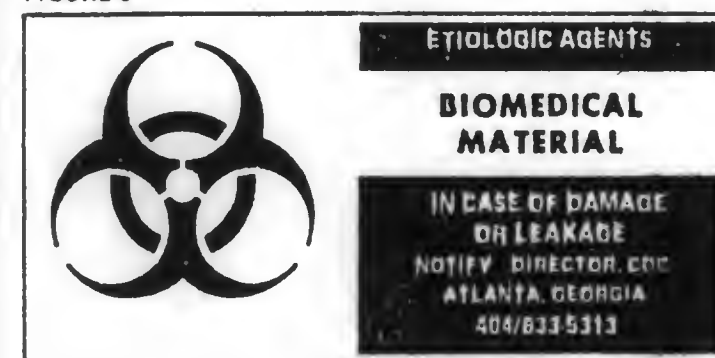
Centers for Disease Control  
Attn: Biohazards Control Office  
1600 Clifton Road  
Atlanta, Georgia 30333

Telephone: 404-639-3883  
FTS-236-3883

or Department of Transportation  
ATTN: Off. of Hazardous Materials Transp.  
400 7th Street, SW  
Washington, D.C. 20590  
(202) 366-4493

or Department of Agriculture  
ATTN: Animal & Plant Hlth. Insp. Serv.  
6505 Belcrest Road  
Hyattsville, MD 20782  
(301) 436-7908

FIGURE 3





#### V. Review of Public Information Brochure—"Gene Therapy for Human Patients"

The Human Gene Therapy Subcommittee of the Recombinant DNA Advisory Committee has developed a document to be used in educating the nonscientific public about human gene therapy. The information brochure includes background material about the purposes and potential of research in gene therapy, about its supervision, and about why and how the public is involved. The RAC will review the document.

#### VI. Proposal To Amend Section IV-C—Responsibilities of NIH

The Foundation on Economic Trends and Jeremy Rifkin have submitted a petition to the NIH Office of Recombinant DNA Activities to amend the NIH Guidelines to establish a Human Eugenics Advisory Committee. The proposed amendment is as follows:

**Proposed Amendment to the National Institutes of Health Guidelines for Research Involving Recombinant DNA Molecules To Establish a Human Eugenics Advisory Committee by the Foundation on Economic Trends**

November 4, 1988.

Amend Section IV-C-2 as follows: At the end of Section IV-C-2, add the following:

IV-C-2-a. *Human Eugenics Advisory Committee.* The Human Eugenics Advisory Committee (HEAC) is responsible for carrying out specified functions described below as well as others assigned under its charter or by the Secretary, HHS, the Assistant Secretary for Health, and the Director, NIH.

The committee shall consist of eighteen members, including the chair, appointed by the Secretary or his or her designee, as follows:

- (1) Three members who are experienced and knowledgeable in protecting the health, safety, and welfare of workers.
- (2) Three members who are experienced and knowledgeable in the protection of privacy and civil liberties.
- (3) Three members who are experienced and knowledgeable in protecting the rights of the handicapped.
- (4) Three members who are experienced and knowledgeable in the abuses and ethical problems in the field of ante-natal and neo-natal testing.
- (5) Three members who are experienced in the protection of the interests of consumers, especially in the medical and insurance fields.

(6) Three members who are experienced and knowledgeable in molecular biology and one or more of the following fields: Discrimination in education, bio-ethics, and public affairs.

Groups which have been the traditional victims of past discrimination, including minorities, women, and the disabled shall be well represented on the committee.

All meetings of the HEAC shall be announced in the Federal Register, including tentative agenda items, 30 days in advance of the meeting with final agendas (if modified) available at least 72 hours before the meeting.

The HEAC shall be responsible for advising the Director, NIH, on each and every proposal that involves any human gene therapy, including both somatic cell and germ line therapy. The term "major actions" in Section IV-C-1-b of these Guidelines includes all such proposals. The HEAC chairperson shall be notified of all final decisions by the Director, NIH, on all such proposals in the same manner as the RAC and IBC chairpersons are notified of certain final decisions under Section IV-C-1-b(1).

Amend Section IV-C-1 to read as follows: Amend the second sentence to read as follows:

The Director has responsibilities under the Guidelines that involve ORDA, the RAC and the HEAC.

After the third sentence of section IV-C-1, add:

Advice from the HEAC is primarily on the ethical, philosophical, social, economic, and eugenic implications and impacts of human genetic therapy.

Amend Section IV-C-1-b by striking all of the language after "Guidelines" and inserting language thereafter so that the text of the provision reads as follows:

In carrying out the responsibilities set forth in this section, the director or a designee shall weigh each proposed action through appropriate analysis and consultation to determine that it complies with the Guidelines, presents no significant risk to health or the environment, and presents no significant risk of (i) adverse impacts on the civil liberties or on the social or economic status of those persons who may be the subject of proposed actions involving gene therapy, (ii) creating undue ethical or philosophical dilemmas or problems for such persons, and (iii) encouraging unsound, undesirable or frivolous human eugenics practices by either public or private institutions or individual practitioners. The term "significant risk" herein includes adverse implications for the interest to be protected.

Amend Section IV-C-1-b(1) by adding "and the HEAC" after "the RAC" wherever it appears in that provision.

Amend Section IV-C-3-b(1) by adding "and HEAC" after "RAC" where it appears in the text. In the note that follows the text, add "or a HEAC" before "meeting".

Amend Section IV-C-3-b(2) by adding "and HEAC" after "RAC" and change "meeting" to "meetings".

Amend Sections IV-C-3-b(3) and IV-C-3-d by adding "the HEAC" after "RAC".

The reasons for these proposed revisions are set forth in the Petition to the Director accompanying these proposals.

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## VII. Proposed Amendment of Section I-B—Definition of Recombinant DNA Molecules

Section I-B of the NIH Guidelines currently reads as follows:

"I-B—Definition of Recombinant DNA Molecules

"In the context of these Guidelines, recombinant DNA molecules are defined as either (i) molecules which are constructed outside living cells by joining natural or synthetic DNA segments to DNA molecules that can replicate in a living cell, or (ii) DNA molecules that result from the replication of those described in (i) above.

"Synthetic DNA segments likely to yield a potentially harmful polynucleotide or polypeptide (e.g., a toxin or a pharmacologically active agent) shall be considered as equivalent to their natural DNA counterpart. If the synthetic DNA segment is not expressed in vivo as a biologically active polynucleotide or polypeptide product, it is exempt from the Guidelines."

The National Wildlife Federation has submitted a request that the NIH Guidelines "be expanded to encompass research involving organisms engineered by techniques other than recombinant DNA."

The letter proposing this change is as follows:

The NWF requests that the National Institutes of Health (NIH) Recombinant DNA Advisory Committee (RAC) recommend to the NIH Director that the Guidelines for Research Involving Recombinant DNA Molecules ("Guidelines") be expanded to encompass research involving organisms engineered by techniques other than recombinant DNA.

Expanding the scope of the Guidelines is necessary because recent advances in science have added to the list of techniques capable of producing genetically novel organisms. A growing number of such organisms are not subject to the current Guidelines, which provide oversight only of those organisms formed by narrowly defined recombinant DNA techniques. Like recombinant DNA, these new techniques will produce organisms that may pose human health and environmental risks.

We readily acknowledge the difficulty of defining the scope of NIH guidelines in an era of rapid technological change. Although there may be other approaches, to begin the discussion, we propose that Section I-B of the NIH Guidelines, Definition of Recombinant DNA Molecules, be replaced by a new section bringing within the scope of the guidelines all organisms into which foreign DNA has been stably integrated, regardless of technique. We do not propose particular language because we believe that the precise

contours of the Guidelines would benefit from thorough discussion by the RAC.

## Background

The Guidelines were developed in 1976 to provide standards of safety in research with recombinant DNA techniques. The purpose of the Guidelines was to protect researchers and the public from potential hazards to human health and the environment posed by genetically novel organisms.<sup>1</sup>

The central concern of the NIH was the genetic novelty of the organisms created by recombinant DNA techniques. As the NIH stated in its 1977 Environmental Impact Statement on the Guidelines (2), "[c]oncern over the potential for hazard in organisms containing recombinant DNA develops from the central idea that such recombinants will be unique types of organisms, not normally arising in nature, and that their properties will therefore be unknown and unpredictable."

As there was only one technique capable of providing transgenic organisms in 1976, the Guidelines are written to cover only that technique. Current Guidelines (3) apply only to recombinant DNA molecules, which they define "as either (i) molecules which are constructed outside living cells by joining natural or synthetic DNA segments to DNA molecules that can replicate in a living cell, or (ii) DNA molecules that result from the replication of those described in (i) above." This definition captured most genetically novel organisms for review because the recombinant DNA technique depends on joining the foreign DNA to be transferred to vector DNA outside of living cells.

## The New Transgenic Techniques

Since that time, scientists have developed other gene transfer techniques (e.g., electroporation, microprojectile techniques, microinjection, chemical poration, cell fusion) that can produce genetically novel organisms but will not necessarily involve "a joining of natural or synthetic segments to DNA molecules" outside living cells. References 4-13 provide a sample of techniques currently capable of producing so-called transgenic organisms—those with DNA from dissimilar parent organisms.

The key to these new transgenic techniques is that they are not dependent upon vectors to transfer the foreign DNA. Although these techniques are not yet well understood, it is known that small pieces of foreign DNA introduced into a cell without vectors can become incorporated into the chromosomes and be expressed.

As a result of these advances, transgenic organisms may be produced by a number of techniques, including, but not limited to recombinant DNA. Transgenic techniques that do not require "recombinant DNA" procedures produce organisms that can be

<sup>1</sup> The 1976 "Decision of the Director, NIH, to Release Guidelines for Research on Recombinant DNA Molecules" (1, p. 27904) declared that "[t]he object of these guidelines is to ensure that experimental DNA recombination will have no ill effects on those engaged in the work, on the general public, or on the environment".

identical to organisms created with recombinant DNA techniques.

RAC members acknowledged the deficiencies in the current Guidelines at June 3, 1988, meeting in a discussion of amendments to the Guidelines regarding transgenic animals (14, 15, 16). Certain experiments with transgenic animals are not subject to the Guidelines because the DNA added to the animals is not "recombinant DNA" as defined by the Guidelines. According to meeting participants,

- "there is a serious and significant loophole that needed to be addressed . . ."
- (16, p. 18);
- the technology exists to create non-recombinant transgenic organisms (" . . . the technology is moving fast enough that by the time this [transgenic animal amendment] went anyplace that there will be such things", (16, p. 28);
- some transgenic organisms pose hazards (" . . . if you're injecting DNA into an animal . . . you've potentially created something that might be harmful, so you shouldn't let it wild. You couldn't let it out into the wild." (16, p. 39).

## Summary

Gene transfer technology has now moved beyond recombinant DNA techniques. The NIH should delay no longer in developing Guidelines that reflect current scientific knowledge so that the public and the environment are protected from potential hazards of the new gene transfer technologies. There is no scientific rationale for limiting oversight to one subset of genetically novel organisms.

We urge the RAC to recommend to the NIH Director that the Guidelines be updated and expanded to encompass all organisms possessing the same degree of genetic novelty as organisms produced by recombinant DNA techniques as currently defined.

We look forward to the RAC's consideration of this request at the January, 1989, meeting. Please call (797-6892) if you have any questions.

Sincerely,

Jane Rissler,

National Biotechnology Policy Center.

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14. U.S. Department of Health and Human Services, National Institutes of Health. 1988. Recombinant DNA Research Guidelines and Advisory Committee Meeting; Notices. *Federal Register* 53:12753-4.

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OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the Catalog of Federal Domestic Assistance. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the Catalog of Federal Domestic Assistance are affected.

Dated: December 23, 1988.

William F. Raub,

Acting Director, National Institutes of Health.  
[FR Doc. 88-30076 Filed 12-29-88; 8:45 am]

BILLING CODE 4140-01-M



# **federal register**

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Friday  
December 30, 1988

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## **Part VIII**

### **Department of Transportation**

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**Federal Aviation Administration**

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**14 CFR Part 71  
Proposed Establishment of an Airport  
Radar Service Area; San Jose, CA;  
Notice of Proposed Rulemaking**



## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

[Airspace Docket No. 88-AWA-3]

## Proposed Establishment of an Airport Radar Service Area; San Jose, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

**SUMMARY:** This notice proposes to establish an Airport Radar Service Area (ARSA) at San Jose International Airport, CA. This location is a public airport with an operating control tower served by a Level V Radar Approach Control Facility and a Level III Limited Terminal Radar Approach Control in a Tower Cab (TRACAB). Establishment of this ARSA would require that pilots maintain two-way radio communication with air traffic control (ATC) while in the ARSA. Implementation of ARSA procedures at this affected location would promote the efficient control of air traffic and reduce the risk of midair collision in terminal areas.

**DATE:** Comments must be received on or before February 13, 1989.

**ADDRESSES:** Send comments on the proposal in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket [AGC-204], Airspace Docket No. 88-AWA-3, 800 Independence Avenue, SW., Washington, DC 20591.

The official docket may be examined in the Rules Docket, weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m. The FAA Rules Docket is located in the Office of the Chief Counsel, Room 916, 800 Independence Avenue, SW., Washington, DC.

The informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division.

**FOR FURTHER INFORMATION CONTACT:** Betty Harrison, Airspace Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9254.

## SUPPLEMENTARY INFORMATION:

## Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions

presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposal. Communications should identify the airspace docket and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Airspace Docket No. 88-AWA-3." The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in the light of comments received. All comments submitted will be available for examination in the Rules Docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

## Availability of NPRM's

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Inquiry Center, APA-230, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 11-2A which describes the application procedure.

## Background

On April 22, 1982, the National Airspace Review (NAR) plan was published in the Federal Register (47 FR 17448). The plan encompassed a review of airspace use and procedural aspects of the ATC system. Among the main objectives of the NAR was the improvement of the ATC system by increasing efficiency and reducing complexity. In its review of terminal airspace, NAR Task Group 1-2 concluded that TRSA's should be replaced. Four types of airspace configurations were considered as replacement candidates. Model B, subsequently redesignated ARSA, became the recommendation by a consensus.

In response, the FAA published NAR Recommendation 1-2.2.1, "Replace Terminal Radar Service Areas with Model B Airspace and Service" in Notice 83-9 (July 28, 1983; 48 FR 34286) proposing the establishment of ARSA's at the Robert Mueller Municipal Airport, Austin, TX, and the Port of Columbus International Airport, Columbus, OH. ARSA's were designated at these airports on a temporary basis by SFAR No. 45 (October 28, 1983; 48 FR 50038) in order to provide an operational confirmation of the ARSA concept for potential application on a national basis.

Following a confirmation period of more than a year, the FAA adopted the NAR recommendation and, on February 27, 1985, issued a final rule (50 FR 9252; March 6, 1985) defining an ARSA and establishing air traffic rules for operation within such an area. Concurrently, by separate rulemaking action, ARSA's were permanently established at the Austin, TX, and Columbus, OH, airports and also at the Baltimore/Washington International Airport, Baltimore, MD, (50 FR 9250; March 6, 1985). The FAA has stated that future notices would propose ARSA's for other airports at which TRSA procedures were in effect.

Additionally, the NAR Task Group recommended that the FAA develop quantitative criteria for proposing to establish ARSA's at locations other than those which are included in the TRSA replacement program. The task group recommended that these criteria take into account, among other things, traffic mix, flow and density, airport configuration, geographical features, collision risk assessment, and ATC capabilities to provide service to users. This criteria has been developed and is being published via the FAA directives system.

The FAA has established ARSA's at 125 locations under a paced implementation plan to replace TRSA's with ARSA's. This is one of a series of notices to implement ARSA's at locations with TRSA's or locations without TRSA's which warrant implementation of an ARSA.

## Related rulemaking

This notice proposes an ARSA designation at a location not identified as a candidate for an ARSA in the preamble to Amendment No. 71-10 (50 FR 9252). Other candidate locations will be proposed in future notices published in the Federal Register.

## The Current Situation at the Proposed ARSA Locations

San Jose International Airport is a public airport with an operating control tower served by a Level V Radar Approach Control Facility and a Level III Limited Terminal Radar Approach Control in a Tower Cab (TRACAB). The airport operations at this airport are quite varied as to the mix of aircraft. Speeds range from the extremely slow to the maximum speed allowed under regulations, with maneuverability varying from the extremely maneuverable to the slower maneuvering aircraft. Although most aircraft landing at San Jose International Airport are sequenced with the aid of radar, airspace and operating rules are not established by regulation. Participation by pilots operating under visual flight rules (VFR) is voluntary, although pilots are urged to participate. This level of service is known as Stage II and is provided at some locations not identified as TRSA's. The NAR Task Group recommended and the FAA adopted the establishment of numerical criteria to allow airports such as San Jose International with safety, traffic and other needs to become candidates for ARSA's regardless of the presence of a TRSA.

San Jose International Airport is rapidly becoming more heavily used by numerous air carriers and air taxis. The 2,843,698 passengers boarded annually far surpasses that of 250,000 annually adopted as being necessary for ARSA candidacy.

The NAR Task Group stated that, because there are different levels of service offered in terminal areas such as San Jose International Airport, users are not always sure of what restrictions or privileges exist, or how to cope with them. Stage II services offered at San Jose International Airport include traffic advisories and sequencing to the runway but do not include conflict resolution in the terminal airspace. Participation in this program is strictly voluntary. The only service available outside the airport traffic area is separation for instrument flight rule (IFR) traffic and VFR traffic advisories as an additional service. Some believe that the voluntary nature of Stage II at airports with moderate activity levels does not adequately address the problems associated with nonparticipating aircraft operating in relative proximity to the airport and associated approach and departure courses. There is strong advocacy among user organizations that terminal radar facilities should provide all pilots the same service in the same way, to the

extent feasible, within standard size airspace designations.

Certain provisions of FAR § 91.87 add to the problem identified by the task group. For example, aircraft operating under VFR to or from a satellite airport and within the airport traffic area (ATA) of the primary airport are excluded from the two-way radio communications requirement of § 91.87. This condition is acceptable until the volume and density of traffic at the primary airport dictates further action.

## The Proposal

The FAA is considering an amendment to § 71.501 of Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish an ARSA at San Jose International Airport, CA, which is a public airport with an operating control tower served by a Level V Radar Approach Control Facility and a Level III Limited Radar Approach Control in a tower cab (TRACAB). The proposed location is depicted on a chart in Appendix 1 of this notice.

Section 91.88 of the Federal Aviation Regulations (14 CFR Part 91) defines an ARSA and prescribes operating rules for aircraft, ultralight vehicles, and parachute jump operations in airspace designated as an ARSA. The ARSA rule provides in part that, prior to entering the ARSA, any aircraft arriving at any airport in an ARSA or flying through an ARSA must: (1) Establish two-way radio communications with the ATC facility having jurisdiction over the area; and (2) while in the ARSA, maintain two-way radio communications with that ATC facility. For aircraft departing from the primary airport within the ARSA, two-way radio communications must be maintained with the ATC facility having jurisdiction over the area as soon as practicable after takeoff and thereafter maintained while operating within the ARSA.

All aircraft operating within an ARSA are required to comply with all ATC clearances and instructions and any FAA arrival or departure traffic pattern for the airport of intended operation. However, the rule permits ATC to authorize appropriate deviations from any of the operating requirements of the rule when safety considerations justify the deviation or more efficient utilization of the airspace can be attained through such deviations. Ultralight vehicle operations and parachute jumps in an ARSA may only be conducted under the terms of an ATC authorization.

The FAA adopted the NAR task group recommendation that each ARSA be of the same airspace configuration insofar as is practicable. The standard ARSA consists of airspace within 5 nautical miles of the primary airport extending from the surface to an altitude of 4,000 feet above that airport's elevation, and that airspace between 5 and 10 nautical miles from the primary airport, from 1,200 feet above the surface to an altitude of 4,000 feet above that airport's elevation. Proposed deviation from the standard has been necessary at some airports due to adjacent regulatory airspace, international boundaries, topography, or unusual operational requirements.

Definitions, operating requirements, and specific airspace designations applicable to ARSA's may be found in Federal Aviation Regulations § 71.14 and § 71.501 (14 CFR Part 71), and § 91.1 and § 91.88 (14 CFR Part 91).

For the reasons discussed under "Regulatory Evaluation," the FAA has determined that this proposed regulation is not a "major rule" under Executive Order 12291 and is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979).

## Regulatory Evaluation

The FAA has conducted a Regulatory Evaluation of the proposed establishment of this additional ARSA site. The major findings of that evaluation are summarized below, and the evaluation is available in the regulatory docket.

## a. Costs

Costs which potentially could result from the establishment of an additional ARSA site fall into the following categories:

- (1) Air traffic controller staffing, controller training, and facility equipment costs incurred by the FAA.
- (2) Costs associated with the revision of charts, notification of the public, and pilot education.
- (3) Additional operating costs for circumnavigating or flying over the ARSA.
- (4) Potential delay costs resulting from operations within an ARSA.
- (5) The need for some operators to purchase radio transceivers.
- (6) Miscellaneous costs.

It has been the FAA's experience, however, that these potential costs do not materialize to any appreciable degree, and when they do occur, they are transitional, relatively low in magnitude, or attributable to specific implementation problems that have been experienced at a very small

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minority of ARSA sites. The reasons for these conclusions are presented below.

The FAA expects that the additional ARSA site proposed in this notice can be implemented without requiring additional controller personnel above current authorized staffing levels, because participation in radar services at this location is already quite high, and the separation standards permitted in the ARSA will allow controllers to absorb the slight increase in participating traffic by handling all traffic much more efficiently. Further, because controller training will be conducted during normal working hours and these facilities already operate the necessary radar equipment, the FAA does not expect to incur any appreciable implementation costs. Essentially, the FAA will modify its terminal radar procedures at the proposed ARSA site in a manner that will make more efficient use of existing resources.

No additional costs are expected to be incurred because of the need to revise sectional charts to incorporate the new ARSA airspace boundaries. Changes of this nature are routinely made during charting cycles, and the planned effective dates for newly established ARSA's are scheduled to coincide with the regular 6-month chart publication intervals.

This rulemaking proceeding and process will satisfy much of the need to notify the public and educate pilots about ARSA operations. The informal public meetings being held at each location where an ARSA is being proposed provides pilots with the best opportunity to learn both how an ARSA works and how it will affect their local operations. The expenses associated with these public meetings are considered costs attributable to the rulemaking process; however, any public information costs following establishment of a new ARSA are strictly attributable to the ARSA. The FAA expects to distribute a Letter to Airmen to all pilots residing within 50 miles of an ARSA site explaining the operation and configuration of the ARSA finally adopted. The FAA also has issued an Advisory Circular on ARSA's. The combined Letter to Airmen and prorated Advisory Circular costs have been estimated to be approximately \$500 for each ARSA site. This cost is incurred only once upon the initial establishment of an ARSA.

Information on ARSA's following the establishment of additional sites will also be disseminated at aviation safety seminars conducted throughout the country by various district offices. These seminars are regularly provided by the FAA to discuss a variety of aviation

safety issues and, therefore, will not involve additional costs strictly as a result of the ARSA program. Additionally, no significant costs are expected to be incurred as a result of the follow-on user meetings that will be held at each site following implementation of the ARSA. These meetings, which will allow users to provide feedback to the FAA on local ARSA operations, are being held at public or other facilities which are being provided free of charge or at nominal cost. Further, because these meetings are being conducted by local FAA facility personnel, no travel, per diem, or overtime costs will be incurred by regional or headquarters personnel.

The FAA anticipates that some pilots who currently transit a TRSA without establishing radio communications or participating in radar services may choose to circumnavigate the mandatory participation airspace of an ARSA rather than participate. Some minor delay costs will be incurred by these pilots because of the additional aircraft variable operating cost and lost crew and passenger time resulting from the deviation. Other pilots may elect to overfly the ARSA or transit below the 1,200 feet above ground level (AGL) floor between the 5- and 10-nautical-mile rings. Although this will not result in any appreciable delay, a small additional fuel burn will result from the climb portion of the altitude adjustment, which will be offset somewhat by the descent.

The FAA recognizes that the potential exists for delays to develop at some locations following establishment of an ARSA. The additional traffic that the radar facilities will be handling as a result of the mandatory participation requirement may, in some instances, result in minor delays to aircraft operations. The FAA does not expect such delay to be appreciable. The FAA expects that the greater flexibility afforded controllers in handling traffic as a result of the separation standards allowed in an ARSA will keep delay problems to a minimum. Those that do occur will be transitional in nature, diminishing as facilities gain operating experience with ARSA's and learn how to tailor procedures and allocate resources to take fullest advantage of the efficiencies that an ARSA will permit. This has been the experience at most of the locations where ARSA's have been in effect for the longest period of time and is the recurring trend at the locations that have been more recently designated.

The FAA does not expect that any operator will find it necessary to install radio transceivers as a result of

establishing the ARSA proposed in this notice. Aircraft operating to and from primary airports already are required to have two-way radio communications capability because of existing airport traffic areas and, therefore, will not incur any additional costs as a result of the proposed ARSA. Further, the FAA has made an effort to minimize these potential costs throughout the ARSA program by providing airspace exclusions, or cutouts, for satellite airports located within 5 nautical miles of the ARSA center where the ARSA would otherwise have extended down to the surface. Procedural agreements between the local ATC facility and the affected airports have also been used to avoid radio installation costs.

At some proposed ARSA locations, special situations might exist where establishment of an ARSA could impose certain costs on users of that airspace. However, exclusions, cutouts, and special procedures have been used extensively throughout the ARSA program to alleviate adverse impacts on local fixed base and airport operators. Similarly, the FAA has eliminated potential adverse impacts on existing flight training practice areas, as well as on soaring, ballooning, parachuting, ultralight and banner towing activities, by developing special procedures to accommodate these activities through local agreements between ATC facilities and the affected organizations. For these reasons, the FAA does not expect that any such adverse impact will occur at the candidate ARSA site proposed in this notice.

#### b. Benefits

Much of the benefit that will result from ARSA's is nonquantifiable and is attributable to simplification and standardization of ARSA configurations and procedures. Further, once experience is gained in ARSA operations, the flexibility allowed air traffic controllers in handling traffic within an ARSA will enable them to move traffic efficiently and with increased safety.

Some of the benefits of the ARSA cannot be specifically attributed to individual candidate airports, but rather will result from the overall improvements in terminal area ATC procedures realized as ARSA's are implemented throughout the country. ARSA's have the potential of reducing both near and actual midair collisions at the airports where they are established. Based upon the experience at the Austin and Columbus ARSA confirmation sites, the FAA estimates that near midair collisions may be reduced by approximately 35 to 40 percent. Further,

the FAA estimates that implementation of the ARSA program nationally may prevent approximately one midair collision every 1 to 2 years throughout the United States. The quantifiable benefits of preventing a midair collision can range from less than \$100,000, resulting from the prevention of a minor nonfatal accident between general aviation aircraft, to \$300 million or more, resulting from the prevention of a midair collision involving a large air carrier aircraft and numerous fatalities. Establishment of an ARSA at the site proposed in this notice will contribute to these improvements in safety.

#### c. Comparison of Costs and Benefits

A direct comparison of the costs and benefits of this proposal is difficult for a number of reasons. Many of the benefits of the rule are nonquantifiable, and it is difficult to specifically attribute the standardization benefits, as well as the safety benefits, to individual candidate ARSA sites.

The FAA expects that any adjustment problems that may be experienced at the ARSA location proposed in this notice will only be temporary, and that once established, the ARSA will result in an overall improvement in efficiency in terminal area operations. This has been the experience at the vast majority of ARSA sites that have already been implemented. In addition to these operational efficiency improvements, establishment of the proposed ARSA site will contribute to a reduction in near and actual midair collisions. For these reasons, the FAA expects that establishment of the ARSA site proposed in this notice will produce long term, ongoing benefits that will far exceed the costs, which are essentially transitional in nature.

#### International Trade Impact Analysis

This proposed regulation will only affect terminal airspace operating procedures at selected airports within the United States. As such, it will have no effect on the sale of foreign aviation products or services in the United States, nor will it affect the sale of United States aviation products or services in foreign countries.

#### Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. Small entities are independently owned and operated small businesses and

small not-for-profit organizations. The RFA requires agencies to review rules that may have a significant economic impact on a substantial number of small entities.

The small entities that potentially could be affected by implementation of the ARSA program include the fixed-base operators, flight schools, agricultural operators and other small aviation businesses located at satellite airports within 5 nautical miles of the ARSA center. If the mandatory participation requirement were to extend down to the surface at these airports, where under current regulations participation in radar services and radio communication with ATC is voluntary, operations at these airports might be altered, and some business could be lost to airports outside of the ARSA core. The FAA has proposed to exclude many satellite airports located within 5 nautical miles of the primary airport at candidate ARSA sites to avoid adversely impacting their operations and to simplify coordinating ATC responsibilities between the primary and satellite airports. In some cases, the same purposes will be achieved through Letters of Agreement between ATC and the affected airports that establish special procedures for operating to and from these airports. In this manner, the FAA expects to eliminate any adverse impact on the operations of small satellite airports that potentially could result from the ARSA program. Similarly, the FAA expects to eliminate potentially adverse impacts on existing flight training practice areas, as well as soaring, ballooning, parachuting, ultralight, and banner towing activities, by developing special procedures that will accommodate these activities through local agreements between ATC facilities and the affected organizations. The FAA has utilized such arrangements extensively in implementing the ARSA's that have been established to date.

Further, because the FAA expects that any delay problems that may initially develop following implementation of an ARSA will be transitory, and because the airports that will be affected by the ARSA program represent only a small proportion of all the public use airports in operation within the United States, small entities of any type that use aircraft in the course of their business will not be adversely impacted.

For these reasons, the FAA certifies that the proposed regulation, if adopted,

will not result in a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required under the terms of the RFA.

#### List of Subjects in 14 CFR Part 71

Aviation Safety, Airport Radar Service Areas.

#### The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as follows:

#### PART 71—DESIGNATION OF FEDERAL AIRWAYS, AREA LOW ROUTES, CONTROLLED AIRSPACE AND REPORTING POINTS

##### 1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 1348(e), 1354(a), 1510; Executive Order 10454; 49 U.S.C. 100(g) (Revised Pub. L. 97-448, January 12, 1983); 14 CFR 11.68.

##### § 71.501 [Amended]

##### 2. § 71.501 is amended as follows:

##### San Jose, CA [Revised]

That airspace extending upward from the surface to and including 4,000 feet MSL within a 5-mile radius of the San Jose International Airport (lat. 37°21'41"N., long. 121°55'36"W.), excluding that airspace below 2,000 feet MSL on the 025° bearing from the airport at 5 miles extending southeastbound until intercepting a point on the 142° bearing from Oakland at 30 miles (interchange of U.S. Interstate 101 and 280) then via the 142° bearing from Oakland until intersecting the 5-mile radius of the airport; and that airspace within a 10-mile radius of the airport extending upward from 1,500 feet MSL to and including 4,000 feet MSL on the 142° bearing from the airport clockwise to the 303° bearing from the airport extending upward from 2,000 feet MSL to and including 4,000 feet MSL, excluding that airspace west of the 161° bearing from Oakland, and that airspace within a 10-mile radius of the airport on the 303° bearing clockwise to U.S. Highway 680 extending upward from 1,500 feet MSL to and including 4,000 feet MSL, excluding that airspace beyond 7 miles on the 341° bearing from the airport extending clockwise until U.S. Highway 680.

Issued in Washington, DC, on December 27, 1988.

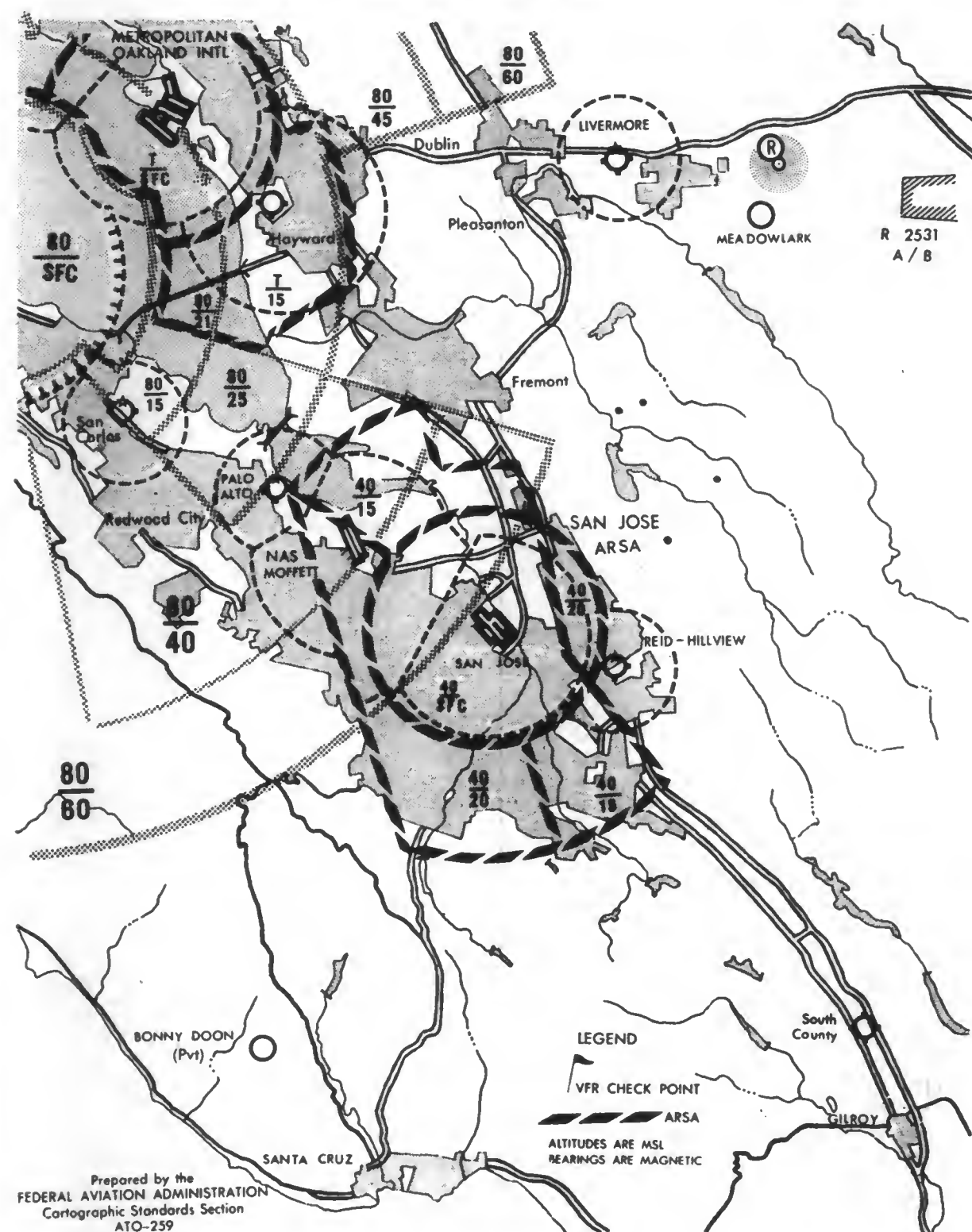
Harold W. Becker,  
Manager, Airspace-Rules and Aeronautical Information Division.



# AIRPORT RADAR SERVICE AREA

(NOT TO BE USED FOR NAVIGATION)

**SAN JOSE, CALIFORNIA**  
**SAN JOSE INTERNATIONAL AIRPORT**  
 FIELD ELEV. 56' MSL



Prepared by the  
 FEDERAL AVIATION ADMINISTRATION  
 Cartographic Standards Section  
 ATO-259

[FR Doc. 88-30090 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-13-C

Friday  
 December 30, 1988

## Part IX

**Department of Defense**  
**General Services**  
**Administration**  
**National Aeronautics and**  
**Space Administration**

48 CFR Part 28  
 Federal Acquisition Regulation (FAR);  
 Requirements for Bid Guarantees;  
 Proposed Rule

**federal register**



## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Part 28

Federal Acquisition Regulation (FAR);  
Requirements for Bid Guarantees

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to FAR 28.101 to clarify existing policy regarding the requirement for bid guarantees.

**COMMENTS:** Comments should be submitted to the FAR Secretariat at the address shown below on or before February 28, 1989, to be considered in the formulation of a final rule.

**ADDRESS:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405.

Please cite FAR Case 88-61 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755.

## SUPPLEMENTARY INFORMATION:

## A. Regulatory Flexibility Act

The proposed rule does not appear to have a significant impact on a substantial number of small entities and analysis of the proposed revision indicates that it is not a "significant revision" as defined in FAR 1.501, i.e., it does not alter the substantive meaning of any coverage in the FAR having a significant cost or administrative impact on contractors or offerors, or have significant effect beyond the internal operating procedures of the issuing agencies.

Accordingly, and consistent with section 1212 of Pub. L. 98-525 and section 302 of Pub. L. 98-577 pertaining to publication of proposed regulations (as implemented in FAR Subpart 1.5, Agency and Public Participation) solicitation of agency and public views on the proposed revision is not required. Since such solicitation is not required, the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) does not apply.

## B. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed change does not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

## List of Subjects in 48 CFR Part 28

Government procurement.

Dated: December 22, 1988.

Harry S. Rosinski,  
Acting Director, Office of Federal Acquisition  
and Regulatory Policy.

Therefore, it is proposed that 48 CFR Part 28 be amended as set forth below:

## PART 28—BONDS AND INSURANCE

1. The authority citation for 48 CFR Part 28 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

2. Section 28.101-1 is amended by revising paragraphs (a) and (c) to read as follows:

## 28.101-1 Policy on use.

(a) A contracting officer shall not require a bid guarantee unless a performance bond or a performance and payment bond is also required (see 28.101 and 28.103). Except as provided in paragraph (c) of this subsection, bid guarantees shall be required whenever a performance bond or a performance and payment bond is required.

(c) The chief of the contracting office may waive the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required if it is determined that a bid guarantee is not in the best interest of the Government for a specific acquisition (e.g., overseas construction, emergency acquisitions).

[FR Doc. 88-30067 Filed 12-29-88; 8:45 am]

BILLING CODE 6820-61-M



# **federal register**

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Friday  
December 30, 1988

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## **Part X**

### **Environmental Protection Agency**

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40 CFR Part 260 et al.

Hazardous Waste Management System;  
Identification and Listing; Proposed Rule  
and Request for Comments

40 CFR Part 261

Hazardous Waste Management System;  
Identification and Listing; Tentative  
Petition Denial



**ENVIRONMENTAL PROTECTION AGENCY**

40 CFR Parts 260, 261, 262, 264, 265, 270, 271, and 302

[FRL-3448-2]

**Hazardous Waste Management System: Identification and Listing of Hazardous Waste; Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities; Requirements for Authorization of State Hazardous Waste Programs; and Designation, Reportable Quantities, and Notification**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule and request for comments.

**SUMMARY:** The Environmental Protection Agency (EPA) is today proposing to amend its regulations under the Resource Conservation and Recovery Act (RCRA) by listing as hazardous three additional wastes from wood preserving operations that use chlorophenolic, creosote, and/or inorganic (arsenical and chromium) preservatives, and by listing as hazardous one waste from surface protection processes that use chlorophenolics. Wastes from wood preserving and surface protection processes at facilities that previously used chlorophenolics are also included within the scope of the new listings. Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol is already listed as a hazardous waste (EPA waste K001). K001 wastes are not included in today's proposed listings. Comments are not solicited regarding K001 wastes. Comments received that address such wastes will not receive any response.

As stated above, the proposed listings would regulate as hazardous wastes generated from wood preserving and surface protection processes at facilities that previously used chlorophenolics and have changed to another preservative. These wastes are included due to the potential for them to be contaminated by hazardous constituents from chlorophenolic wastes. The Agency recognizes that facilities exhibiting cross-contamination can be cleaned or can have equipment replaced, resulting in the removal of any contamination. Consequently, the Agency is proposing an equipment cleaning or replacement performance standard for wood preserving and surface protection

facilities that have changed formulations. Once the standard is met, the waste generated at that facility from processes that do not use chlorophenolic formulations will no longer meet the listing description. However, the waste may meet the description of another listing or it may exhibit a hazardous waste characteristic.

The Agency is proposing to add three compounds to the list of hazardous constituents in Appendix VIII of Part 261. Finally, EPA is proposing amendments to regulations promulgated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) at 40 CFR Part 302 that would designate the wastes proposed for listing as CERCLA hazardous substances and would establish the reportable quantities applicable to these wastes.

The effect of listing these four wastes will be to subject them to the hazardous waste regulations of 40 CFR Parts 262 through 266, 270, 271, and 124 of this chapter; the notification requirements of section 3010 of RCRA; and the notification requirements under CERCLA section 103.

**DATES:** EPA will accept public comments on this proposed rule until February 28, 1989. Comments received after the close of the comment period will be marked "late" and may not be considered. Any person may request a public hearing on this proposed amendment by filing a written request with EPA, to be received no later than January 17, 1989.

**ADDRESSES:** Comments on the RCRA proposal should be sent in triplicate to: EPA RCRA Docket Clerk (OS-332), 401 M Street, SW., Room S-205, Washington, DC 20460.

All comments must be marked "Docket Number F-88-WPWP-FFFF." Comments on the CERCLA proposal should be sent in triplicate to:

Emergency Response Division, Docket Clerk, ATTN: Docket No. RQ, Room LG-100, U.S. EPA, 401 M Street, SW., Washington, DC 20460.

Copies of materials relevant to this proposed rulemaking are located at U.S. EPA, 401 M Street, SW., Washington, DC 20460. The RCRA portions are located in the sub-basement; the public must make an appointment in order to review them by calling (202) 475-9327. The CERCLA portions are contained in Room LG-100; for an appointment call (202) 382-3046. Both dockets are available for inspection from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding holidays. The public may

copy 100 pages from the docket at no charge; additional copies are \$0.15 per page.

Requests for a public hearing should be addressed to Mr. Devereaux Barnes, Director, Characterization and Assessment Division (OS-300), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** The RCRA/CERCLA Hotline at (800) 424-9346 or, in the Washington, DC area, (202) 382-3000. For technical information on the RCRA portion of the proposal, contact Mr. Edwin F. Abrams, Listing Section, Office of Solid Waste (OS-333) at (202) 382-4787. For technical information on the CERCLA portion of the proposal, contact Ms. Ivette Vega, Response Standards and Criteria Branch, Emergency Response Division (OS-210) at (202) 475-7369. Both are available at U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:** The contents of today's preamble are listed in the following outline:

- I. Background
- II. Summary of the Regulation
  - A. Overview of the Proposal
  - B. Description of the Industry
    1. Wood Preservatives and Surface Protectants
    2. Wood Preserving and Surface Protection Processes
      - a. Wood Preserving Processes
      - b. Surface Protection Processes
    - C. Description of Wastes
      1. Types of Waste Included in Today's Proposed Listing
        - a. Wastewaters
        - b. Process Residuals
        - c. Drillage and Drillage Residuals
      2. Quantities of Waste Generated
      3. Waste Management Practices
      - D. Basis for Listing
        1. Summary of Basis for Listing
        2. Waste Characterization and Constituents of Concern
          - a. Wastes from Chlorophenolic Wood Preserving Processes (F032)
          - b. Wastes from Chlorophenolic Surface Protection Processes (F033)
          - c. Wastes from Creosote Wood Preserving Processes (F034)
          - d. Wastes from Inorganic Wood Preserving Processes (F035)
        3. Health Effects of Concern
        4. Constituents Proposed for Addition to Appendix VIII
        5. Mobility and Persistence of Wastes from Wood Preserving and Surface Protection Processes
        - E. Basis for Designating F032 and F033 as Toxic (T) Rather than Acute Hazardous (H)
        - F. Technical Standards for Drip Pads
          1. Part 264 Technical Standards for Drip Pads

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**I. Background**

Pursuant to section 3001 of Subtitle C of the Resource Conservation and Recovery Act (RCRA), this notice proposes to list as hazardous three wastes generated from wood preserving processes that use either chlorophenolic, creosote, and/or inorganic (chromium and arsenical) preservatives. In addition, the Agency is also proposing to list as hazardous one waste that is generated from surface protection processes using chlorophenolic formulations. Certain wastes from the wood preserving industry are currently regulated as hazardous or have been proposed for regulation under RCRA previously. The following discussion provides a brief overview of prior regulatory actions affecting wastes from the wood preserving and surface protection industries. Also provided is a brief summary of the Agency's basis for listing as hazardous the wastes covered by this proposed rule.

On May 19, 1980, EPA promulgated an interim final rule which listed as hazardous numerous wastes from specific and non-specific sources (see 45 FR 33084). Among others, EPA listed as hazardous one waste that is generated by wood preserving processes: EPA hazardous waste number K001—bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol.

The Agency concurrently proposed to add wastewaters from wood preserving processes to the list of hazardous wastes from specific sources (see 45 FR 33137). Later that year, EPA decided to reopen the comment period on both the K001 listing and the proposed listing for wastewaters from wood preserving processes that use creosote and/or pentachlorophenol, after receiving additional information about those wastes (see 45 FR 77435, November 12, 1980). EPA provided a notice announcing the extended comment period on November 24, 1980 (see 45 FR 77466). While the Agency reopened the comment period on K001, the K001 listing remained in effect and was not suspended.

Also, on May 19, 1980, EPA promulgated final regulations for identifying hazardous wastes by their characteristics (i.e., the hazardous waste

characteristics rules). These rules included the Extraction Procedure (EP) Toxicity Characteristic (see 45 FR 33137). Wastes exhibiting this characteristic are subject to regulation under Subtitle C of RCRA. Wastes from wood preserving processes that use inorganic preservatives can contain significant concentrations of arsenic and chromium which may cause solid wastes to be considered characteristically hazardous pursuant to 40 CFR 261.24. Consequently, the EP Toxicity Characteristic caused many wood preserving wastes to be subject to the hazardous waste regulations.

On June 13, 1986, as part of its regulations implementing the Hazardous and Solid Waste Amendments of 1984, the Agency proposed to amend the Extraction Procedure (EP) Toxicity Characteristic (40 CFR 261.24) by adding 38 additional organic compounds and introducing a new leaching procedure: The Toxicity Characteristic Leaching Procedure (51 FR 21648). Among these 38 organics are cresols and pentachlorophenol. If the proposed toxicity characteristic is made final, it may cause a number of wastes generated by the wood preserving and surface protection processes to be designated as characteristically hazardous because these toxicants—namely cresols and pentachlorophenol—are commonly present in wastes generated from wood treatment processes using creosote and chlorophenolic preservatives.

This proposed rule complies with a consent decree filed July 27, 1988, which settled several elements of a civil action filed on March 25, 1985 in U.S. District Court for the District of Columbia (Environmental Defense Fund and National Wildlife Federation v. Thomas et al. No. 85-0974). One portion of this consent decree reads as follows:

On or before December 31, 1988, EPA will take the following action with respect to pentachlorophenol wastes from the wood preserving industry:

*Either*

(A) EPA will issue a Notice of Proposed Rulemaking in the Federal Register proposing regulations with regard to such wastes (with such Notice of Proposed Rulemaking stating that the Agency shall use its best efforts either to promulgate these regulations in final form or to withdraw the proposed regulations by June 30, 1990);

*Or*

(B) EPA will publish in the Federal Register a notice announcing that the Agency has made a determination not to



propose such regulations. Such a determination shall constitute final agency action.

Although EPA believes that the rule proposed today appropriately responds to the consent decree, the Agency acknowledges that the consent decree neither requires that EPA regulate nor mandates a specific statutory framework under which any regulations must be promulgated. The Agency will continue to evaluate the benefits of using other statutes, including FIFRA, to control the wastes proposed today for listing as hazardous. The Agency specifically solicits comments on the use of FIFRA or other statutes.

Furthermore, while EPA also believes that similar risks ascribe to creosote and inorganic preservatives, thereby justifying their inclusion in the proposed rule, the consent decree is silent with respect to them.

Today, EPA is proposing to amend Part 261.31 by adding four waste streams from wood preserving and surface protection processes that use organic and/or inorganic preservatives to the list of hazardous wastes from non-specific sources. The wastes (which are more fully described later) include wastewaters (including those proposed for listing on May 19, 1980, i.e., wastewaters from pentachlorophenol and creosote processes), process residuals, spent preservative formulations, and drippage from treated wood. Table 1 lists the constituents of concern that are present in the proposed listed wastes. The proposed listings do not include wastes already listed as K001, but would supplement the existing K001 listing and increase the quantity of waste from wood preserving processes regulated under Subtitle C of RCRA.

TABLE 1.—CONSTITUENTS OF CONCERN

	F032	F033	F034	F035
Chlorophenols:				
2,4,6-Trichlorophenol		X		
2,3,4,6-Tetrachlorophenol		X		
Pentachlorophenol	X	X		
PAHs:				
Benzo(a)anthracene	X		X	
Benzo(a)pyrene	X		X	
Benzo(k)fluoranthene	X		X	
Dibenz(a,h)anthracene	X		X	
Indeno(1,2,3-c,d)pyrene	X		X	
Naphthalene			X	
Dioxins and Furans:				
Tetrachlorodibenzo-P-dioxins	X	X		
Pentachlorodibenzo-P-dioxins	X	X		
Hexachlorodibenzo-P-dioxins	X	X		
Heptachlorodibenzo-P-dioxins	X	X		
Tetrachlorodibenzofurans	X	X		
Pentachlorodibenzofurans	X	X		
Hexachlorodibenzofurans	X	X		
Heptachlorodibenzofurans	X	X		
Inorganics:				
Arsenic	X		X	X
Chromium	X		X	X
Lead				X

Note: X indicates that constituents have been found to be present at levels of regulatory concern in individual waste numbers.

The Agency notes that the scope of K001 is not affected in any way by today's proposal. EPA is not soliciting comments in the K001 listing and will not respond to any such comments received. In a separate notice, also published today, EPA has responded to a petition from the American Wood Preservers Institute (published elsewhere in this issue) requesting that the Agency reconsider its interpretation that K001 waste may form from application of certain wood preserving wastewaters to spray irrigation fields and that the Agency more clearly define K001 sludge. (If the Agency finds that K001 sludges can form on spray irrigation fields, the petition further requests a suspension of the

management standards of 40 CFR Part 264 in order to permit affected facilities to assess for the presence of K001 and to come into compliance or obtain an exclusion pursuant to CFR 260.22).

The use of chlorophenolic formulations in processes that preserve or protect wood has caused environmental contamination. Wastes generated from these processes contain high concentrations of chlorinated phenols that are contaminated with polychlorinated dibenzo-P-dioxins (PCDDs) and polychlorinated dibenzofurans (PCDFs). While only one chlorophenol is a known carcinogen, the Agency has data confirming the systemic toxicity of at least three others.

All of the PCDDs and PCDFs, except for octahomologues, are carcinogenic in low doses. The toxicity of these and other compounds found in wastes from wood preserving and surface protection processes that use chlorophenolics is discussed later in this preamble. Past mismanagement of these wastes has resulted in off-site contamination of soils and ground water with PCDFs, PCDDs, and chlorinated phenols. Such contamination is evidence that these substances are sufficiently persistent and mobile in the environment to meet the listing criteria of 40 CFR 261.11 (the basis for listing these wastes is described below).

Creosote is an oily distillate of coal that contains a mixture of compounds including aromatic hydrocarbons, phenolics, and other organics. Wastes from the preservation of wood with creosote contain high concentrations of polynuclear hydrocarbons (PAHs). Four PAHs commonly found in creosote wastes are known carcinogens while four others are known to be systemic toxicants. Past mismanagement of these wastes has led to off-site contamination of ground water, surface water, and soils. Such contamination is evidence that PAHs are sufficiently persistent and mobile to present a substantial hazard to human health and the environment and meet the listing criteria of 40 CFR 261.11 (the basis for listing these wastes is described below).

Wastes from the preservation of wood with inorganic formulations of arsenic and/or chromium typically contain high concentrations of these toxic metals, as well as lead. Lead is believed to be a contaminant of the arsenic component. Because of the known toxicity and/or carcinogenicity of these metals, the EPA has previously promulgated drinking water standards for them. Contamination of ground water and soils with arsenic, chromium, and lead from past mismanagement of those wastes is evidence that these toxic constituents are sufficiently persistent and mobile to meet the listing criteria of 40 CFR 261.11 (the basis for listing these wastes is described below).

Because wastes from wood preserving and surface protection are capable of posing a threat to human health and the environment when improperly treated, stored, transported, disposed, or otherwise handled, the Agency is proposing that these wastes be listed as hazardous and subject to the requirements of 40 CFR Parts 124, 260 through 266, 268, 270, and 271.

## II. Summary of The Regulation

### A. Overview of the Proposal

This notice proposes to add four wastes from wood preserving and surface protection processes to the list of hazardous wastes from non-specific sources (40 CFR 261.31). The four wastes are:

**F032—Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).** This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.

**F033—Wastewaters, process residuals, protectant drippage, and discarded spent formulations from wood surface protection processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).**

**F034—Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes that currently use creosote formulations. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.**

**F035—Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes that currently use inorganic preservatives containing arsenic or chromium. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.<sup>1</sup>**

<sup>1</sup> While wood preserving processes that currently use inorganic preservatives do not generate K001 sludges per se, EPA believes that there may be numerous facilities that previously used chlorophenolic and/or creosote preservatives and have changed to inorganic preservatives in recent years without thoroughly cleaning process equipment. At such facilities there may be K001 wastes that were generated prior to changing preservatives, but that have not yet been actively managed. These sludges are K001 waste and are not included in the F035 listing.

EPA has found that these wastes typically and frequently contain toxic constituents, including some that are carcinogenic, that, when mismanaged, pose a substantial present or potential threat to human health and the environment. In addition, the Agency has compiled evidence to demonstrate that the toxic constituents are mobile and persistent in the environment and are capable of reaching receptors in harmful concentrations. The information that supports these findings is summarized in this preamble and is presented, in detail, in the Background Document and other materials which are available in the RCRA Docket for this proposal.

Upon promulgation of these proposed listings, all wastes meeting the descriptions would become hazardous waste. Waste generated prior to promulgation, however, would not be subject to numerous Subtitle C requirements until they are actively managed.

The scope of the F032 listing covers wastes from pressure and non-pressure processes using pentachlorophenol (PCP) as well as other chlorophenolic formulations. In addition, this listing covers wastes from creosote and inorganic processes at facilities that currently use or previously used pentachlorophenol (or other chlorophenolic formulations) because the wastes may be cross-contaminated with chlorinated dioxins and/or dibenzofurans.

Note.—This listing excludes, as do F034 and F035, those wastes already covered by K001.

The agency has concluded that cross-contamination is highly likely to occur under two circumstances: First, when creosote or inorganic processes are located at a facility where chlorophenolic processes are or were employed; and second, when creosote processes or inorganic processes use the equipment previously used for chlorophenolic processes. A discussion on the extent of cross-contamination at facilities which use chlorophenolics (or which previously used chlorophenolics) is presented later in this preamble.

The Agency is proposing equipment cleaning or replacement procedures for generators of F032 wastes which no longer use chlorophenolic preservatives. These procedures are designed to decontaminate and remove the dioxin and dibenzofuran contaminants from process equipment. Once the procedures are carried out to the specified standard, wastes generated in processes using non-chlorophenolic formulations will no longer meet the listing description of

F032; however, these wastes may still be hazardous (i.e., they may still meet the listing description of F034 or F035 or exhibit one or more of the characteristics). Notification, recordkeeping, and reporting requirements are also included in the proposed rule and would have to be met. Generators should note that residues from the decontamination process will be regulated hazardous wastes and must be managed as F032.

The scope of the F033 listing would cover wastes from wood surface protection processes that currently use or previously used chlorophenolics, including those processes presently using a preservative that is not among those addressed by today's proposal. Surface protection facilities that currently use chlorophenolic formulations may be able to change to surface protection chemicals that are not regulated by this proposed listing. Wastes from these processes, however, would continue to be regulated under RCRA due to the cross-contamination resulting from residues that remain on-site (e.g., in process equipment) after the change in formulation is made. The Agency recognizes that cross-contamination of wastes may be avoided and is therefore proposing to apply the same equipment cleaning or replacement procedures and recordkeeping, notification, and reporting requirements to F033 wastes as would be applicable to F032 wastes. If these procedures are employed, wastes from surface protection facilities generated in processes that use non-chlorophenolic formulations may no longer meet the listing description. (EPA notes that this provision would not prevent the Agency from taking action to list wastes from surface protection processes using non-chlorophenolic formulations in the future, if such a listing is deemed necessary). In addition, wastes from non-chlorophenolic surface protection processes may also be regulated under RCRA as hazardous wastes if they exhibit any of the characteristics of a hazardous waste.

The scope of the F034 listing would cover all wastes generated by pressure and non-pressure wood preserving processes currently using creosote that are not contaminated by constituents from processes using chlorophenolic preservatives. This listing would not include wastes that are included in the K001 or F032 listings.

The scope of the F035 listing would cover all wastes generated by pressure and non-pressure wood preserving processes currently using inorganic preservatives containing arsenic or



chromium that are not contaminated by constituents from processes using chlorophenolic preservatives. This listing would not include wastes that are included in the K001 or F032 listings.

Each listing includes excess preservative or protectant that drips or exudes from treated wood while it is stored or held at the wood preserving or surface protection facility after treatment (this includes long- and short-term storage areas, such as "kick-back" areas). This residual has been included in the listings because of its high concentrations of toxic constituents and the documented incidence of mismanagement by the industry. EPA has found many cases where such drippage or "kick-back" has been disposed of directly on the ground, resulting in widespread soil, surface water, and ground water contamination. Drillage may be washed off treated wood or may be carried away by rainwater and spread to nearby streams or other surface water bodies.

As a result of the proposed listing, generators of treated wood drippage would be subject to applicable hazardous waste requirements. Because information on waste management practices for treated wood drippage indicates that drip pads are often being installed at new wood preserving and surface protection facilities for purposes of drippage management, today's proposal includes provisions for establishing a new type of hazardous waste management unit: drip pads at wood preserving and our surface protection facilities.

Of course, generators may choose to install other types of waste management units to handle drippage (i.e., tanks or surface impoundments). In all anticipated cases, generators would become owners and operators of hazardous waste treatment, storage, and disposal facilities as a result of the proposed listing. Today's rule also includes a proposed amendment to the 90-day accumulation rule for generators that operate drip pads at wood preserving and surface protection facilities. Under this proposed amendment, generators who remove drippage from drip pads within 90 days would not be required to obtain RCRA Part B permits for their drip pads, provided that the pads comply with the proposed Part 365 technical standards for drip pads and certain other requirements (this aspect of the proposal is discussed in detail later in this preamble).

Residuals from the treatment, storage, or disposal of wood preserving and surface protection wastes that are included in today's proposed listing

would also be classified as hazardous wastes by the "derived from" rule (40 CFR 261.3(c)(2)(i)). These "derived-from" wastes would include any treatment residual other than K001 bottom sediment sludges because the listing definition specifically excludes K001. For example, oil skimmings, oil absorbent materials, and ash or other residuals from treatment are subject to today's proposed listings.

In response to suggestions made by representatives of the wood preserving industry, EPA considered regulating wastes from wood preserving and surface protection processes under authorities provided by other statutes such as the Clean Water Act, the Toxic Substances Control Act (TSCA), and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Agency chose however, to propose regulating wastes from wood preserving and surface protection under RCRA. We are soliciting comment today supporting that decision, presenting contrary views, or presenting any pertinent information.

#### B. Description of the Industry

A wide variety of chemicals are currently used to preserve wood. Those most commonly used are pentachlorophenol, creosote, and inorganic arsenical and/or chromate salts (inorganics). Wood preservatives are used to delay deterioration and decay of wood caused by organisms such as insects, fungi, and marine borers. Surface discoloration (sapstaining) during short-term storage can be adequately controlled by a superficial application of preservative but, for long-lasting effectiveness, penetration of preservative to a uniform depth is required. This deep penetration is usually accomplished by forcing preservative into the wood under pressure, so that "pressure treated" is often used as a synonym for "preserved."

Preserved wood production and treatment chemical consumption are summarized in Table 2. In 1985, three major product groups accounted for 89 percent of the total production of preserved wood in the United States: (1) Lumber and timbers, mostly preserved with inorganic preservatives; (2) railroad cross ties, switch ties and bridge ties, almost all preserved with creosote; and (3) poles, 60 percent preserved with pentachlorophenol, 23 percent with creosote, and 17 percent with inorganic preservatives. The remainder of 1985 production consisted of fence posts, piling, plywood, crossarms, and other products (Mickelwright, 1987).

TABLE 2.—PRESERVED WOOD PRODUCTION AND TREATMENT CHEMICAL CONSUMPTION, 1985

	Preservative type		
	Creosote solutions	Pentachlorophenol	Inorganics
Number of plants.....	122	113	448
Products treated:			
Crossties, switch and bridge ties (million cubic meters).....	2.7	0.008	0
Lumber and timbers (million cubic meters).....	0.21	0.08	7.7
Poles (million cubic meters).....	0.5	1.3	0.38
Other (million cubic meters).....	0.27	0.1	1.2
Total volume of wood preserved (million cubic meters).....	3.7	1.5	9.3
Treating chemical consumed:			
Creosote and creosote/coal tar (million liters).....	390		
Petroleum solvent (million liters).....	49	153	
Pentachlorophenol (million kg).....		11	
Inorganic salts (million kg).....			56

Source: Mickelwright (1987).

The distribution of preservative use by the wood preserving industry is summarized in Table 3. Seventeen percent of the plants treat with more than one preservative. Wastes generated at these plants can be contaminated with constituents of all preservatives used at the plant.

TABLE 3.—DISTRIBUTION OF PRESERVATIVE USE, 1985

Plants treating with	No. of plants
Creosote.....	53
Creosote/Pentachlorophenol.....	24
Creosote/Inorganics.....	21
Pentachlorophenol/Inorganics.....	24
Pentachlorophenol.....	25
Inorganics.....	379
Creosote/Pentachlorophenol/Inorganics.....	24
Total.....	550

<sup>1</sup> An additional 17 plants treated wood using non-pressure processes.  
Source: Mickelwright (1987).

The American Wood Preservers Institute (AWPI) reported 567 plants that produced preserved wood in 1985 (14 additional wood preserving facilities have recently been identified by AWPI). Approximately 60 percent of these plants are in the southeast and southcentral portions of the United States and account for 64 percent of the production of treated wood. Most plants that treat with creosote and/or pentachlorophenol are more than 25 years old; several operating plants are more than 75 years old.

Most surface protection takes place at sawmills, where cut lumber is dip- or spray-treated to prevent sapstain formation during short-term storage. The distinction between wood preservation and surface protection is not only the process used, but also the depth to which the preservation penetrates and the duration of the protection.

In 1983, lumber production in sawmills was approximately 87 million cubic meters or 36.8 billion board feet (Lumber Production and Mill Stocks, 1983, as cited in DPRA, 1986). Approximately 10 percent of this production, or 8.7 million cubic meters (3.7 billion board feet), was surface protected, the majority with aqueous solutions of sodium pentachlorophenate. The Agency believes that there may be up to 500 sawmills currently surface protecting wood with chlorophenolate formulations and a total of 1,500 sawmills that have protected wood with chlorophenates within the past ten years.

#### 1. Wood Preservatives and Surface Protectants

Pentachlorophenol is one of a group of synthetic organic compounds called chlorophenols that are commercially manufactured by reacting chlorine with phenol. Standard petroleum oils, similar to #2 heating oil, are most frequently used as solvents in preparing formulations of pentachlorophenol. Kerosene, mineral spirits, butane, alcohols, and liquefied petroleum gas (LPG) are also used as solvents by a small number of facilities.

Pentachlorophenol formulations applied to wood typically contain 5 percent total pentachlorophenol; however, concentrations may range from 2 to 9 percent. Pentachlorophenol has been found to be contaminated with all PCDD and PCDF homologues except tetrachlorodibenzo-p-dioxins (TCDDs) (Palmer, 1986 and USEPA, 1987).

Tetrachlorophenol in its water soluble chlorophenolate form is often used in sapstain control formulations. Commercial tetrachlorophenol has been found to be contaminated with all ten

homologues of polychlorinated dibenzo-p-dioxins (PCDDs) and dibenzofurans (PCDFs).

Creosote generically refers to mixtures of relatively heavy residual oils (liquid and solid aromatic hydrocarbons) obtained from the distillation of wood, coal tar, or crude petroleum. Only creosotes from coal tars are accepted for use as wood preservatives. The majority of creosote-based formulations consist of coal tar creosote or blends of creosote and crude coal tar.

The inorganic preservatives of concern in this listing consist of arsenical and chromate salts dissolved in water. The most commonly used inorganic preservatives include chromated copper arsenate (CCA), ammoniacal copper arsenate (ACA), acid copper chromate (ACC), chromated zinc chloride (CZC), and fluor-chrome-arsenate-phenol (FCAP). In a 1984 survey of the wood preserving industry (USEPA, 1987), 83 percent of wood preserved with inorganic preservatives was reportedly preserved with CCA. For treatment purposes, CCA is typically diluted in water to 1 to 2 percent total CCA concentration, but treatment concentrations can range from 0.9 to 8 percent total CCA in various treating solutions (USEPA, 1987).

Production of wood treated with inorganic preservatives has more than doubled since 1980. This increase is due to the increased use of treated lumber for decks, porches, and other exterior, weather-exposed structures. The use of inorganic preservatives, particularly CCA, is increasing; as a result, most new wood preserving plants are CCA plants and facilities that treat exclusively with inorganic preservatives are (on average) only 10 years old.

Water solutions of the sodium or potassium salts of pentachlorophenol (pentachlorophenates) are used extensively in the sawmill industry for surface protection. Chlorophenolate formulations are produced by dissolving chlorophenols in a slightly alkaline (above pH 7) sodium hydroxide solution. Commercial chlorophenates have been found to contain PCDDs and PCDFs. Generally, these commercial concentrates are diluted to 0.5 to 1 percent total pentachlorophenate and applied to the wood by dipping or spraying.

An estimated 300 to 500 sawmills use an approximate total of 680 kkg (1.5 million pounds) of sodium pentachlorophenate to prevent sapstaining of approximately 8.7 million cubic meters (3.7 billion board feet) of lumber annually.

#### 2. Wood Preserving and Surface Protection Processes

*a. Wood preserving processes.* Creosote, pentachlorophenol, and inorganic wood preservatives are all applied to wood by similar processes. More than 99 percent of the wood preserved in the United States is produced by pressure treatment processes, which employ a combination of air pressure, hydrostatic pressure, and vacuum (Mickelwright, 1987). Pressure treatment takes place in sealed pressure vessels known as cylinders or retorts. A limited quantity of wood is preserved using non-pressure treatment processes in which the preservative is allowed to diffuse into the wood; typical non-pressure processes involve soaking the wood in open tanks at ambient pressure.

The preservative penetration required to preserve wood adequately can only be achieved if the wood has been properly conditioned; that is, if the moisture content of the freshly-cut wood is reduced to a point where the preservative can penetrate and be retained by the wood. Conditioning is required before pressure and non-pressure preservation processes, but is not used for surface protection in which a superficial application of preservative is adequate. Conditioning is the major source of wastewater in the wood preserving industry.

Moisture reduction methods include drying wood in yards, at ambient temperatures (air seasoning); kiln drying; steaming the wood at elevated pressure in a retort followed by application of a vacuum; heating the stock in a preservative bath under reduced pressure in a retort (Boulton process); and heating of the unseasoned wood in a solvent under pressure (vapor drying).

Air seasoning and kiln drying generate minimal amounts of wastewater. Thus, facilities that use these conditioning methods, principally non-pressure treaters and facilities that use inorganic preservatives, generate little wastewater. Wastewater from air seasoning and kiln drying is often contaminated with preservative by mixing the wastewater with other wastes later in the process. Boultonizing, steam conditioning, and vapor drying (conditioning methods used by pressure treaters) produce wastewater consisting of the water that is driven out of the wood in the same cylinder or retort that is later used for preserving the wood. Steam conditioning also produces a considerable volume of steam condensate. The volume of wood



conditioning water varies according to wood type, preservative formulation, conditioning method, and other factors. In general, from 64 to 1,200 liters of water may be generated per cubic meter (0.5 to 9 gallons per cubic foot) of wood (USEPA, 1987).

After the moisture content of the wood has been reduced by conditioning, the wood is preserved either by simple non-pressure methods or by pressure processes. Non-pressure processes include brushing, spraying, dipping, soaking, and thermal processes. These processes involve the repeated use of preservative in a treatment tank with fresh preservative solution added to replace consumptive loss. The continual reuse of preservative leads to the accumulation of wood chips, sand, stones, and other debris contaminated with various hazardous constituents in the bottom of the treating tanks. This contaminated debris is the major source of process waste for non-pressure processes.

There are two basic types of pressure treatment processes, distinguished by the sequence in which vacuum and pressure are applied. The first method is referred to in the industry as the "empty-cell" process. It is used to obtain relatively deep penetration with limited absorption of preservative. There are a number of empty-cell processes; generally, air pressure is applied to the wood as preservative is pumped into the treating cylinder or retort. Once the desired level of retention has been achieved, the unused preservative is drained off and the excess preservative is vacuum pumped away from the wood.

The second method, known as the "full-cell" process, results in higher retention of preservative but limited penetration compared to the empty-cell process. A high vacuum is created in the treating cylinder and preservative is pumped in without breaking the vacuum. Once full, pressure is applied until the wood will retain no more preservative. There is no difference in the types of wastes generated by full- and empty-cell processes, although wood treated by the full-cell process may produce more drippage than wood treated by the empty cell process. (The terms "empty" and "full" are measures of the level of preservative retained by the wood cells.)

Typical pressure processes involve recycling of preservatives from work, storage, and mixing tanks to the pressure treating vessel. Fresh preservative solution is added to replace consumptive loss. Preservative formulation lost with wastewater or through drippage into the door sumps is also sometimes collected and fed back

into the process. The continual reuse of preservative formulation leads to accumulation of contaminated sawdust, wood chips, sand, dirt, stones, tar, and polymerized oils. This material comprises the bulk of wood preserving process residuals (not including wastewater) and is collected in treating cylinders and tanks; in holding, work, storage, and mixing tanks; in door sumps; and in filters and separators used to prepare preservative solutions for reuse.

After both pressure and non-pressure treatment, some unabsorbed preservative formulation adheres to the treated wood surface. Eventually, this liquid drips from the wood or is washed off by precipitation. If the wood has been pressure treated, excess preservative will also exude slowly from the wood as it gradually returns to atmospheric pressure (a phenomenon commonly called kick-back). Preservative formulation (especially pentachlorophenol and creosote formulations) may continue to exude ("bleed") from pressure and non-pressure treated wood for long periods, even after the wood is shipped off-site and installed for its intended end use (Arsenault, 1976). Dripping from pressure treated wood may be minimized by steaming the wood after treatment to wash off adhering preservative or by applying a final vacuum to the wood charge before it is removed from the retort.

Management of drippage varies from facility to facility and often depends on the production schedule. A facility producing near its capacity generally removes a charge from the treating cylinder and transfers it to storage quickly. In these cases, most drippage and kick-back will occur in the treated wood storage yard. At facilities operating on slower schedules, a charge may be allowed to drip in the retort for an extended period. Other facilities have drip pads over which trams of freshly-treated wood are allowed to sit for one to three days. Dripping may be routed to a sump and reused in the treatment process or may be discarded.

*b. Surface protection processes.* The surface protection of wood involves the application by spraying or dipping of sapstain control agents to wood. Spraying can be performed manually or with a continuous conveyor belt system where the wood passes through a spray box. The chlorophenolic spray is often contained by means of flexible brushes or curtains positioned at either end of the box. The boxes may be kept at a negative pressure with an exhaust vent to remove the chlorophenolic aerosols. After spraying or dipping, the excess or

free liquid is drained from the wood into a catch basin, where it is routed to a screen or filter to remove sawdust and other particles before it is returned to the supply tank for reuse. As the freshly-treated wood is moved from the treatment area to the storage area it continues to drip.

Dip tanks may also be used to apply surface protection chemicals to large bundles of wood or to individual pieces of wood in the production line. The wood can be dipped using transport chains, forklift mechanisms for large jobs, or sequential submerging techniques. Solution used in the dip tanks for sapstain control is occasionally recycled, otherwise it is continually replenished. Recycled solution is pumped through a filter or screening device to remove sawdust and debris before it is returned to the storage/mixing tanks. At smaller-scale facilities, sawdust and other debris simply accumulate on the tank bottom.

#### C. Description of Wastes

Wastes from wood preserving and surface protection processes consist of wastewaters, process residuals (including discarded preservative) and drippage.

##### 1. Types of Waste Included in Today's Proposed Listing

*a. Wastewaters.* Wastewaters include wastewater generated from steam conditioning the wood in treatment cylinders prior to applying the preservative. Other sources of wastewater include, but are not limited to, preservative formulation recovery and regeneration wastewater, water used to wash excess preservative from the surface of preserved wood (especially poles), and condensate from drying kilns used to dry preserved or surface protected wood. Operations that involve the rinsing of drums, storage tanks, the process area, and equipment also generate wastewater. Finally, water, including rainwater, that accumulates in door and retort sumps and rainwater falling on or in the immediate vicinity of the treating cylinder and work tank area is also included in the proposed listing. (Storage area rainwater is not included in the listing definition. However, it may become subject to regulation when it is disposed together with drippage covered by the listing). Water from the process area is often collected and treated with other process wastewaters and hence, may become a process waste, subjecting mixtures of rainwater and other wastes or wastewaters to the "mixture" rule (see 40 CFR 261.3(a)(2)). Collected

rainwater is included in the effluent guidelines definition of wood preserving process wastewater. Wastewaters are not already covered under the scope of the K001 listing.

Wastewaters from wood preserving and surface protection processes are currently subject to permitting requirements under the National Pollutant Discharge Elimination System (NPDES) or the national pretreatment regulations, both promulgated under authority of the Clean Water Act, as amended. Upon promulgation of today's proposed listing, wastewaters from wood preserving and surface protection would also be subject to regulation under Subtitle C of RCRA, except as excluded under 40 CFR 261.4.

Section 261.4 provides exemptions from treatment as a RCRA solid waste for several types of materials, including wastes that are mixed with domestic sewage as they pass through a sewer system to a Publicly Owned Treatment Works—POTW—(see 40 CFR 261.4(a)(1)) and wastes that constitute industrial wastewater discharges subject to regulations under section 402 of the Clean Water Act (see 40 CFR 261.4(a)(2)). Wastewaters discharged to sewers and eventually to POTWs by wood preserving and surface protection facilities would therefore be exempt from regulations under Subtitle C of RCRA once discharged. They may be subject to RCRA requirements prior to discharge however, and they would be subject to applicable Clean Water Act pretreatment regulations. Similarly, treated effluent from wastewater treatment plants discharged from NPDES-permitted wood preserving and surface protection facilities would qualify for exemption under § 261.4(a)(2) (but would remain subject to all NPDES permit provisions). The exemption would not extend to activities that occur prior to wastewater discharge at NPDES-permitted facilities. Hence,

tanks and other units in which listed wastewaters are collected, stored, accumulated, treated, and/or disposed at wood preserving and surface protection facilities would be subject to regulation under Subtitle C of RCRA. Under 40 CFR 261.4, however, tanks that constitute wastewater treatment tanks (in accordance with the definition of "wastewater treatment units" of 40 CFR 260.10) are exempt from RCRA Subtitle C requirements.

*b. Process residuals.* Materials such as sawdust, wood chips, sand, dirt, and stones that are attached to the wood when it enters the retort (in the case of pressurized preservation processes), the dip tank, or the spray booth (for surface protection processes) can be washed off the wood during the process. These materials will form a residue in the retort or dip tank. They may also settle out of the preservative solution elsewhere in the process (e.g., in work tanks or sumps) or be removed during filtration of the preservative prior to its reuse. Tar and emulsified or polymerized oils may also settle out in the treating cylinder, treating tank, or dip tank during wood preserving operations using creosote or pentachlorophenol. All of these wastes are considered process residuals. Specifically, process residuals include, but are not limited to: Precipitated preservative solution; tar; emulsified polymerized oils; spent or discarded formulation; treating cylinder, treating tank, and dip tank sediments; filter, screening, or exhaust residuals from spray booths; hand spraying residuals; residuals from drying kilns used to dry preserved or surface protected wood; residuals from holdings, work, storage, mixing, or other tanks; residuals that accumulate in secondary containment surrounding tanks; door or cylinder sump residuals; residuals from recycling and regeneration of preservative; leaks from process equipment; and residuals

from maintenance and cleaning of process equipment. Process residuals are not already covered under the scope of the K001 listing.

*c. Dripping and drippage residuals.* Dripping and drippage residuals may accumulate on designated drip areas, on pathways over which treated wood is transported, and in treated wood storage yards. Dripping and drippage residuals include free drippage of preservative from treated wood, preservative that is washed off treated wood by precipitation, and residuals from collecting and recycling preservative that drips off or is washed off treated wood. Dripping and drippage residuals are not already covered under the scope of K001 listing.

##### 2. Quantities of Waste Generated

Table 4 presents estimates of the quantities of waste generated annually by wood preserving and surface protection processes. These estimates were prepared using production normalized waste generation rates and estimates of production of preserved and surface protected wood. The waste generation rates were derived from data collected in the 1984 survey of the wood preserving industry conducted by EPA (USEPA, 1987), from data supplied independently by the industry, and from data collected in a sampling effort carried out jointly by EPA and the State of Oregon at four Oregon sawmills. Production estimates, in terms of preservative used at a given facility, were obtained from the AWPI Wood Preserving statistics report for 1985 (Micklewright, 1987). In addition, the production of surface protected wood was estimated to be 8.7 million cubic meters per year (3.7 billion board feet per year). The assumptions and data used to generate this estimate are provided in detail in the Background Document for this proposed listing.

TABLE 4.—ESTIMATED NATIONWIDE WASTE QUANTITIES (M<sup>3</sup>/YR.)

Waste	F032	F033	F034	F035
Wastewater <sup>1</sup>	351,000	* 500,000	348,100	( <sup>2</sup> )
Process Residuals <sup>3</sup>	1,800	600	1,400	400
Dripping and drippage residuals	700	8,700	600	1,900
Total	353,500	8,300	350,100	2,300

<sup>1</sup> Wastewater treatment residuals covered under the K001 listing are not included in these estimates. Wastewaters from process area runoff and from contamination or mixing of nonprocess area runoff with listed wastes also are not included in these estimates.

<sup>2</sup> Surface protection processes do not usually generate process wastewater. Precipitation that falls in the process area is included in the F033 listing. Precipitation that falls in other areas of the facility (e.g., on storage yards) is not included in the F033 listing. However, it may become subject to regulation when mixed with other listed materials such as preservative drippage. Assuming a one-quarter acre process area per plant and 40 inches of rain fall per year, about 1,000 cubic meters per year per plant of surface protection wastewaters, consisting of run-off from process areas, are potentially generated. With 300 to 500 surface protection facilities nationwide, this amounts for 300 to 500,000 m<sup>3</sup>/yr of wastewaters.

<sup>3</sup> These wastewaters are often collected in catch basins and sumps and conveyed through ditches and conduits. Sediment and sludges collect in these devices at a rate of approximately 4.84 X 10<sup>-4</sup> m<sup>3</sup> of material per meter<sup>2</sup> surface-protected wood. Assuming production of 8.7 million m<sup>3</sup>/yr of surface-protected wood, 4,200 m<sup>3</sup> of sump, catch basin, and drainage ditch sediments are generated annually.



<sup>3</sup> Inorganic wood preserving processes typically have no net generation of process wastewater because the water is recycled back to the work tank and is used in mixing new preservative formulation. The wastewater, if disposed, would contain significant concentrations of the constituents of concern and is included in the proposed listing. The agency was unable to identify any reliable estimates of the quantity of wastewater recycled in inorganic processes annually.

<sup>4</sup> Estimates do not include quantities for spent discarded preservative. EPA anticipates that quantities of preservative discarded or spilled annually are small by comparison to other waste streams. Reliable quantitative estimates are not presently available to EPA.

Source: USEPA, 1987.

The waste estimate for F032 includes wastes from chlorophenolic wood preserving processes, and wastes from creosote, inorganic, and other processes at facilities that treat with chlorophenolics. Wastes from creosote and inorganic processes at facilities that formerly used chlorophenolics are not included in the volume estimates for F032 (they are instead included in either F034 or F035) because current EPA data on preservative use cannot be disaggregated by historical preservative use. To the extent that preservation facilities may have switched from chlorophenolics to other formulations,

the total quantity of F032 may be slightly underestimated and the quantities of F034 and F035 overestimated.

An estimated 699,000 cubic meters per year of wastewaters are generated by the wood preserving industry. Further, an estimated, 4,200 cubic meters of process residuals, and 11,900 cubic meters of drippage per year are generated. By comparison, wastewater treatment residuals covered under the K001 listing are generated at a rate of 10,000 cubic meters per year; these are not included in the estimates in Table 4.

### 3. Waste Management Practices

To support this proposed listing, EPA has compiled information on the waste management practices currently used by the industry. Two principal information sources were used: The 1984 survey conducted by EPA (USEPA, 1987) and a survey conducted by the American Wood Preservers Institute (AWPI) (Lindenheim, 1987). Management practices reported for wastewaters, wastewater treatment residuals, and process residuals are summarized in Table 5. Management practices reported for drippage at wood preserving facilities are summarized in Table 6.

TABLE 5—WASTE MANAGEMENT PRACTICES FOR WASTES PROPOSED FOR LISTING AS REPORTED BY SURVEYED FACILITIES (PERCENT) <sup>1</sup>

Waste management practice	Pentachlorophenol and creosote wastewaters <sup>2</sup> [Percent]	Pentachlorophenol wood preserving process residuals [Percent]	Creosote process residuals [Percent]	Inorganic process residuals [Percent]
Discharged to POTW.....	63			
Discharged to surface water.....	3			
Reuse, returned to process.....	10			
Removed by waste contractor <sup>3</sup> .....	3	70	63	84
Thermal evaporation in tanks.....	3			
Storage in surface impoundments.....	13	7	7	0
Storage in Tanks.....	0	3	7	5
Burned in boiler/wood burner.....		3	13	0
Landfill.....		13	7	7
Reclaimed for reuse.....			3	2
Land treatment.....			3	2
Not specified.....	8	10	3	2

<sup>1</sup> Totals may exceed 100 percent because many facilities reported more than one waste management practice.

<sup>2</sup> Wastewaters from inorganic processes are typically recycled and no other waste management practice data were reported.

<sup>3</sup> Ultimate management practice was not reported but is believed to be principally disposal in landfills.

<sup>4</sup> Includes wastes removed by preservative chemical suppliers.

Source: Background Document.

TABLE 6—MANAGEMENT PRACTICES FOR DRIPPAGE AT WOOD PRESERVING FACILITIES, BY PRESERVATIVE USED

	Pentachlorophenol only and creosote plus pentachlorophenol	Creosote only	Inorganics only	Creosote plus/or pentachlorophenol, plus inorganics
Number of plants surveyed.....	15	25	82	15
Percent with surfaced drip pad.....	47	40	91	73
Percent reusing drippage from surfaced drip pad.....	86	100	91	47
Percent with surfaced storage yard.....	13	12	38	13
Percent allowing drippage in storage yard directly to ground <sup>1</sup> .....	87	88	62	87

<sup>1</sup> Calculated by difference (100%—% with surfaced storage yard).

Source: (Lindenheim, 1987).

Sixty-three percent of the 86 facilities surveyed in 1984 by EPA that reported

managing wastewater discharged their wastewater to Publicly Owned

Treatment Works (POTWs). Typically, they also reported that wastewater

discharged to POTWs was pretreated by oil/water separation in tanks prior to discharge. Ten percent of the facilities reported using some type of aeration wastewater treatment process and 3 percent reported using both aeration and activated carbon filtration wastewater treatment processes. Thirteen percent of the facilities reported storage or disposal of process wastewater in land-based units (i.e., land treatment units, evaporation ponds, and surface impoundments).

Wood preserving facilities generally manage their process residuals by contracting with a commercial waste removal company for their disposal. Some suppliers of inorganic preservatives also provide this service for their customers. Residuals from pentachlorophenol and creosote treating processes are also managed by storage in surface impoundments or burning on-site in an industrial boiler or wood burner. These practices were not reported for inorganic process residuals.

Forty to 50 percent of the facilities that use pentachlorophenol and/or creosote have a surfaced drip pad, while 91 percent of the facilities that use inorganic preservatives have a surfaced drip pad. This larger fraction is believed to be due to the fact that inorganic plants are generally newer than other wood preserving facilities and are specifically designed for recovery and reuse of preservative drippage. Drip pads are used to route to collection areas or devices, excess preservative that drips from the treated wood when it is removed from the treating cylinder. Facilities that do not have surfaced drip pads generally allow excess preservative to drip directly onto the ground. Most of the facilities that have surfaced drip pads report reusing the collected drippage. AWPI did not report the management practices used by facilities that do not reuse collected drippage.

Only 12 to 13 percent of the facilities treating with pentachlorophenol and/or creosote have surfaced storage pads (i.e., long-term storage yards) while 38 percent of facilities treating with inorganic preservatives have some surfaced storage area. Thus, the Agency concludes that at the remainder of the facilities (about 88 percent of pentachlorophenol and creosote facilities and 62 percent of inorganic facilities), any preservative that drips off stored, treated wood (and any preservative that is washed off by precipitation) is disposed of on the ground.

No survey data were available to describe waste management practices at sawmills that surface-protect wood. Some data, however, were obtained from the facilities sampled by EPA in conjunction with the State of Oregon. Three of the four sawmills sampled by EPA reported their practices for managing process residuals. Two of the facilities contract with a commercial waste disposal company to transport their dip tank sludges and spray booth residuals to a solid waste landfill. The third sawmill reported that its dip tank sludge is burned in an on-site boiler with waste wood. Disposal in on- or off-site landfills, burning in on-site boilers, or incinerating off-site are believed to be common management practices for all surface protection process residuals (presumably, ash from boilers and incinerators is disposed in landfills).

In contrast, spills and releases of surface protection chemicals and drippage and drippage residuals are typically allowed to fall or remain on the ground. Some facilities have installed concrete pads contiguous to the dip tanks and sloping toward sumps that collect drippage. Alternatively, a charge of lumber may be suspended over the dip tank to allow excess preservative to drip back into the tank. However, surface-protected wood is generally stacked over the ground

during storage and air seasoning. Thus, the preservative that drips or is washed off the wood is disposed of on the ground.

### D. Basis for Listing

#### 1. Summary of Basis for Listing

Each of the four wastes from wood preserving and surface protection processes meet the criteria for listing as hazardous presented in 40 CFR 261.11(a)(3); consequently, EPA is proposing that they be added to the list of hazardous wastes from non-specific sources appearing at 40 CFR 261.31. The wastes contain high concentrations of toxic constituents. (As discussed later, all the constituents of concern are carcinogens and/or systemic toxicants, many of which appear on the list of hazardous waste constituents at 40 CFR Part 261, Appendix VIII. EPA is also proposing to add to Appendix VIII the three compounds that are constituents of concern in wood preserving wastes but do not already appear on Appendix VIII). Tables 7, 8, 9, and 10 list the constituents of concern in wood preserving wastes and the range of levels at which they are present in the wastes. Table 11, 12, 13, and 14 present the average waste concentrations (based on process residual and sludge data, which EPA believes are representative of all the listed wastes) and demonstrate that toxic constituents are present in wastes from wood preserving and surface protection processes at levels that far exceed the health-based levels of concern. From these waste concentrations, hypothetical ground water concentrations resulting from mismanagement of the wastes have been projected assuming three dilution and attenuation scenarios. For all three levels, nearly all constituents of concern exceed established Agency health-based numbers.

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TABLE 7  
F032 PENTACHLOROPHENOL WASTES FROM WOOD PRESERVING:  
CONSTITUENTS OF CONCERN AND  
RANGE OF DETECTED CONCENTRATIONS

	WASTEWATERS (PPM)	PROCESS SLUDGES OR RESIDUALS (PPM)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPM)
Pentachlorophenol	0.01-310	40-34,000	14,000-52,000
Benz(a)anthracene	0.03-10	5.1-2,800	75
Benzo(a)pyrene	0.007-10	54-1,100	50
Dibenz(a,h)anthracene	0.1-1	50-310	7
Indeno(1,2,3-c,d)- pyrene	0.006-10	16-130	4 T
Arsenic	0.003-33	NA	NA
Chromium	0.004-14	NA	NA

	WASTEWATERS (PPB)	PROCESS SLUDGES OR RESIDUALS (PPB)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPB)
TCDDs	0.001-8	0.001-5	1
PeCDDs	0.008-20	0.2-2	30-70
HxCDDs	0.03-200	0.06-5,000	100-5,000
HpCDDs	0.009-80	0.5-140,000	9,000-100,000
TCDFs	0.0006-2	0.01-35	1-30
PeCDFs	0.001-300	0.08-1,000	100-1,000
HxCDFs	0.001-10	0.01-13,000	200-10,000
HpCDFs	0.002-50	0.3-16,000	100-13,000

Source: Background Document.

NA - Not Analyzed (No Data Collected).

T - Trace. Analytical data support qualitative analysis (i.e., identification) but not quantitative analysis. Concentration cited is the detection limit of the analytical method used.

TABLE 8  
F033 PENTACHLOROPHENOL WASTES FROM SURFACE PROTECTION:  
CONSTITUENTS OF CONCERN AND  
RANGE OF DETECTED CONCENTRATIONS

	SUMP, CATCH BASIN AND DRAINAGE DITCH SEDIMENTS (PPM)	PROCESS SLUDGES OR RESIDUALS (PPM)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPM)
Pentachlorophenol <sup>1</sup>	1 - 310	880 - 160,000	40 - 1,900
2,3,4,6-Tetrachlorophenol	0.1 - 130	570 - 4,000	300 - 950
2,4,6-Trichlorophenol	0.1 U	3	0.4 - 1.0

	SUMP, CATCH BASIN AND DRAINAGE DITCH SEDIMENTS (PPB)	PROCESS SLUDGES OR RESIDUALS (PPB)	PRESERVATIVE FORMULATIONS (DRIPPAGE) (PPB)
TCDDs	0.007 - 0.01	6 - 30	0.4 - 3
PeCDDs	0.09 - 0.6	30 - 1,000	1 - 200
HxCDDs	0.2 - 400	400 - 7,000	10 - 10,000
HpCDDs	0.9 - 4,000	2,000 - 42,000	20 - 70,000
TCDFs	0.03 - 70	80 - 4,000	4 - 1,000
PeCDFs	0.07 - 20	400 - 11,000	30 - 8,000
HxCDFs	0.03 - 600	1,000 - 12,000	50 - 28,000
HpCDFs	0.4 - 600	800 - 9,000	4 - 50,000

<sup>1</sup> In the analysis, a pH adjustment causes all pentachlorophenolate to be converted to pentachlorophenol. The analysis measures pentachlorophenol.

<sup>2</sup> Wastewaters from surface protection with pentachlorophenolate consist essentially of the used preservative formulation. These data therefore also represent what EPA believes are the constituents and constituent concentrations for wastewaters from surface protection with pentachlorophenolate.

Source: Background Document.

U - Compound was analyzed for but not detected. Value listed is the lowest detection limit reported.



TABLE 9  
F034 CREOSOTE WASTES:  
CONSTITUENTS OF CONCERN AND  
RANGE OF DETECTED CONCENTRATIONS

	WASTEWATERS (PPM)	PROCESS SLUDGES OR RESIDUALS (PPM)	UNUSED FORMULATION (DRIPPAGE) PPM
Benz(a)anthracene	0.03 - 10	280 - 7,500	1,600 - 2,600
Benzo(a)pyrene	0.007 - 10	1,800 - 3,000	400 - 600
Benz(k)fluoranthene	0.02 - 4	2,300	21,400
Dibenz(a,h)anthracene	0.1 - 1	140 - 680	100 - 400
Indeno(1,2,3-c,d)pyrene	0.006 - 10	100 - 300	1,000
Naphthalene	0.1 - 400	700 - 64,000	13,000 - 180,000
Arsenic	0.003 - 30	NA	NA
Chromium	0.004 - 10	NA	NA

NA - Not analyzed (no data collected).

Source: Background Document.

TABLE 10  
F035 INORGANIC WASTES:  
CONSTITUENTS OF CONCERN AND RANGE  
OF DETECTED CONCENTRATION

	PROCESS SLUDGES OR RESIDUALS (ppm)	UNUSED PRESERVATIVE <sup>1</sup> (ppm)
Arsenic	5,300 - 760,000	5,500
Chromium	70 - 33,000	6,200
Lead	5 - 290	NR

<sup>1</sup> Presently, EPA does not have reliable waste characterization data for wastewaters from inorganic processes. The Agency believes that the data for unused preservative are representative of both drippage and process wastewaters from inorganic processes.

NR - Not reported.

Source: Background Document.

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TABLE 11  
BASIS FOR LISTING: HEALTH EFFECTS OF THE  
CONSTITUENTS OF CONCERN IN F032

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED <sup>1</sup> (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS <sup>2</sup>	ESTIMATED DRINKING WELL CONCENTRATIONS <sup>3</sup> (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS <sup>4</sup>		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Benz(a)anthracene	900	$1.1 \times 10^{-5}$	RSD (Class B <sub>2</sub> )	9	0.9	0.09	820,000	82,000	8,200
Benzo(a)pyrene	500	$3.0 \times 10^{-6}$	RSD (Class B <sub>2</sub> )	5	0.5	0.05	1,700,000	170,000	17,000
Dibenzo(a,h)anthracene	200	$7.1 \times 10^{-7}$	RSD (Class B <sub>2</sub> )	2	0.2	0.02	2,800,000	280,000	28,000
Indeno(1,2,3-c,d)pyrene	70	$2.0 \times 10^{-3}$	RSD (Class C)	0.07	$7 \times 10^{-3}$	$7 \times 10^{-4}$	350	35	3.5
Pentachlorophenol <sup>5</sup>	20,000	1	RfD	200	20	2	200	20	2
Arsenic	2,000	0.05	MCL	20	2	0.2	400	40	4
Chromium	3,000	0.05	MCL	30	3	0.3	600	60	6
<u>DIBENZO-P-DIOXINS<sup>6</sup></u>									
TCDDs	$3 \times 10^{-3}$	$2.3 \times 10^{-8}$	RSD (Class B <sub>2</sub> )	$3 \times 10^{-5}$	$3 \times 10^{-6}$	$3 \times 10^{-7}$	1,3000	130	13
PeCDDs	$1 \times 10^{-3}$	$4.5 \times 10^{-10}$	RSD (Class B <sub>2</sub> )	$1 \times 10^{-5}$	$1 \times 10^{-6}$	$1 \times 10^{-7}$	22,000	2,200	220
HxCDDs	2	$5.6 \times 10^{-9}$	RSD (Class B <sub>2</sub> )	0.02	0.002	$2 \times 10^{-3}$	3,600,000	360,000	36,000
HpCDDs	30	$2.3 \times 10^{-7}$	RSD (Class B <sub>2</sub> )	0.3	0.03	0.003	1,300,000	130,000	13,000
<u>DIBENZOFURANS<sup>6</sup></u>									
TCDFs	$2 \times 10^{-3}$	$2.3 \times 10^{-8}$	RSD (Class B <sub>2</sub> )	$2 \times 10^{-5}$	$2 \times 10^{-6}$	$2 \times 10^{-7}$	870	87	9
PeCDFs	0.5	$2.3 \times 10^{-9}$	RSD (Class B <sub>2</sub> )	$5 \times 10^{-3}$	$5 \times 10^{-5}$	$5 \times 10^{-5}$	2,200,000	220,000	22,000
HxCDFs	3	$2.3 \times 10^{-8}$	RSD (Class B <sub>2</sub> )	0.003	$3 \times 10^{-3}$	$3 \times 10^{-4}$	1,300,000	130,000	13,000
HpCDFs	4	$2.3 \times 10^{-7}$	RSD (Class B <sub>2</sub> )	0.004	$4 \times 10^{-3}$	$4 \times 10^{-4}$	170,000	17,000	1,700

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TABLE 11 (CONCLUDED)  
BASIS FOR LISTING: HEALTH EFFECTS OF THE  
CONSTITUENTS OF CONCERN IN F032

- <sup>1</sup> Average concentrations calculated from process residuals or process sludge data.
- <sup>2</sup> Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs. Class A, B, and C carcinogens are based on exposure limits at a  $10^{-6}$  risk level.
- <sup>3</sup> Calculated for three dilution/attention (DA) levels.
- <sup>4</sup> Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column, for all three dilution/attenuation (DA) levels.
- <sup>5</sup> This health-based water concentration limit may change following EPA review of the NTP carcinogen study.
- <sup>6</sup> Waste concentrations presented for dioxins and furans are for the total congener category specified (e.g., the concentration indicated for PeCDD is for all isomers of PeCDDs found). The health-based water concentration limit for each congener category is based on extrapolation using toxicity equivalency factors relative to the toxicity of 2,3,7,8-TCDD. (See Risk Assessment Forum, 1986).

Source: Background Document.



TABLE 12

BASIS FOR LISTING: HEALTH EFFECTS OF THE  
CONSTITUENTS OF CONCERN IN F033

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED <sup>1</sup> (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS <sup>2</sup>	ESTIMATED DRINKING WELL CONCENTRATIONS <sup>3</sup> (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS <sup>4</sup>		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Pentachlorophenol <sup>5</sup>	20,000	1	RfD	200	20	2	200	20	2
2,4,6-Trichlorophenol	3	$1.8 \times 10^{-3}$	RSD (Class B <sub>2</sub> )	0.03	0.003	$3 \times 10^{-4}$	20	2	0.2
2,3,4,6-Tetrachlorophenol	3,000	1	RfD	30	3	0.3	30	3	0.3
<u>DIBENZO-P-DIOXINS<sup>6</sup></u>									
TCDDs	$2 \times 10^{-2}$	$2.3 \times 10^{-8}$	RSD (Class B <sub>2</sub> )	$2 \times 10^{-4}$	$2 \times 10^{-5}$	$2 \times 10^{-6}$	8,700	870	87
PeCDDs	0.3	$4.5 \times 10^{-10}$	RSD (Class B <sub>2</sub> )	0.003	$3 \times 10^{-4}$	$3 \times 10^{-5}$	6,700,000	670,000	67,000
HxCDDs	3	$5.6 \times 10^{-9}$	RSD (Class B <sub>2</sub> )	0.03	0.003	$3 \times 10^{-4}$	5,400,000	540,000	54,000
HpCDDs	20	$2.3 \times 10^{-7}$	RSD (Class B <sub>2</sub> )	0.2	0.02	0.002	870,000	87,000	8,700
<u>DIBENZOFURANS<sup>6</sup></u>									
TCDFs	1	$2.3 \times 10^{-9}$	RSD (Class B <sub>2</sub> )	0.01	0.001	$1 \times 10^{-4}$	4,300,000	430,000	43,000
PeCDFs	3	$2.3 \times 10^{-9}$	RSD (Class B <sub>2</sub> )	0.03	0.003	$3 \times 10^{-4}$	4,300,000	430,000	43,000
HxCDFs	6	$2.3 \times 10^{-8}$	RSD (Class B <sub>2</sub> )	0.06	0.006	$6 \times 10^{-4}$	2,600,000	260,000	26,000
HpCDFs	3	$2.3 \times 10^{-7}$	RSD (Class B <sub>2</sub> )	0.03	0.003	$3 \times 10^{-4}$	130,000	13,000	1,300

<sup>1</sup> Average concentrations based on process sludge or process residual data.

<sup>2</sup> Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs. Class B carcinogens are based on exposure limits at a  $10^{-6}$  risk level.



TABLE 12 (CONCLUDED)

BASIS FOR LISTING: HEALTH EFFECTS OF THE  
CONSTITUENTS OF CONCERN IN F033

- <sup>3</sup> Calculated for three dilution/attenuation (DA) levels.
- <sup>4</sup> Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column for all three dilution/attenuation (DA) levels.
- <sup>5</sup> This level health-based water concentration limit may change following EPA review of the NTP carcinogen study.
- <sup>6</sup> Waste concentrations presented for dioxins and furans are for the total congener category specified (e.g., the concentration indicated for PeCDDs is for all isomers of PeCDDs found). The health-based water concentration limit for each congener category is based on extrapolation using toxicity equivalency factors relative to the toxicity of 2,3,7,8-TCDD. (See Risk Assessment Forum, 1986).

-37h- Source: Background Document.



TABLE 13  
BASIS FOR LISTING: HEALTH EFFECTS OF THE  
CONSTITUENTS OF CONCERN IN F034

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED <sup>1</sup> (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS <sup>2</sup>	ESTIMATED DRINKING WELL CONCENTRATIONS <sup>3</sup> (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS <sup>4</sup>		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Benz(a)anthracene	4,000	$1.1 \times 10^{-5}$	RSD (Class B <sub>2</sub> )	40	4	0.4	3,600,000	360,000	36,000
Benzo(k)fluoranthene	2,000	$4.0 \times 10^{-3}$	RSD (Class B <sub>2</sub> )	20	2	0.2	5,000	500	50
Benzo(a)pyrene	2,000	$3.0 \times 10^{-6}$	RSD (Class B <sub>2</sub> )	20	2	0.2	6,700,000	670,000	67,000
Dibenz(a,h)anthracene	400	$7.1 \times 10^{-7}$	RSD (Class B <sub>2</sub> )	4	0.4	0.04	5,600,000	560,000	56,000
Indeno(1,2,3-c,d)pyrene	200	$2.0 \times 10^{-3}$	RSD (Class C)	0.5	0.05	$5 \times 10^{-3}$	1,000	100	10
Naphthalene	40,000	14	RfD	400	40	4	30	3	0.3
Arsenic	2,000	0.05	MCL	20	2	0.2	40	4	0.4
Chromium	3,000	0.05	MCL	30	3	0.3	60	60	6

<sup>1</sup> Average concentrations based on process residuals or process sludge data.

<sup>2</sup> Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs. Class B and C carcinogens are based on exposure limits at a  $10^{-6}$  risk level.

<sup>3</sup> Calculated for three dilution/attenuation (DA) levels.

<sup>4</sup> Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column for all three dilution/attenuation levels.

Source: Background Document.



TABLE 14  
BASIS FOR LISTING: HEALTH EFFECTS OF THE  
CONSTITUENTS OF CONCERN IN F035

HAZARDOUS CONSTITUENT	AVERAGE WASTE CONC. DETECTED <sup>1</sup> (ppm)	HEALTH-BASED WATER CONCENTRATION LIMITS (ppm)	BASIS <sup>2</sup>	ESTIMATED DRINKING WELL CONCENTRATIONS <sup>3</sup> (ppm)			CALCULATED CONCENTRATION TO HEALTH-BASED LIMIT RATIOS <sup>4</sup>		
				DA 100	DA 1,000	DA 10,000	DA 100	DA 1,000	DA 10,000
Arsenic	100,000	0.05	MCL	1,000	100	10	2,000	200	20
Chromium	10,000	0.05	MCL	100	10	1	2,000	200	20
Lead <sup>5</sup>	80	0.05	MCL	0.8	0.08	0.008	20	2	0.2

<sup>1</sup> Concentrations based on process sludge or residual data.

<sup>2</sup> Reference Dose (RfD), Risk Specific Dose (RSD), and Maximum Contaminant Level (MCL) are explained later in the preamble, as are the classes of RSDs.

<sup>3</sup> Calculated for three different dilution/attenuation (DA) levels.

<sup>4</sup> Ratio obtained by dividing assumed drinking well concentration column by health-based water concentration limit column for all three dilution/attenuation (DA) levels.

<sup>5</sup> The MCL for lead is currently undergoing EPA review.

Source: Background Document

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In the past, EPA's selection of constituents of concern for listed hazardous wastes has relied on comparisons of maximum reported waste constituent concentrations with health-based levels of concern. In this case, the Agency has found, as is shown in Tables 11, 12, 13 and 14, that the concentrations of constituents of concern in wood preserving wastes are so high that even projections of ground water contamination levels based on average waste concentrations (rather than maximum concentrations) exceed health-based levels of concern.

Tables 11, 12, 13, and 14 summarize the Agency's analysis of the hazards posed by the constituents of concern. In this analysis, EPA examined projected ground water concentrations for the constituents of concern assuming three dilution and attenuation factors: 100, 1,000, and 10,000. These three levels encompass a broad range of dilution/attenuation factors. The drinking water well concentrations calculated for dilution/attenuation levels of 100, 1,000, and 10,000 assume that the concentration of each constituent of concern in the well water are 1 percent, 0.1 percent, and 0.01 percent, respectively. The tables show that, in the vast majority of cases, the constituents of concern are likely to appear in ground water at concentrations that exceed the health-based levels of concern by one to four orders of magnitude using the extremely liberal dilution and attenuation factor of 10,000. Thus, even if the Agency did not evaluate the hazard conservatively, these wastes clearly would contain concentrations of constituents of concern far in excess of safe levels.

Damage cases, described below and in an appendix to this preamble, further demonstrate that the constituents of concern in the wastes proposed for listing are sufficiently mobile and persistent for past mismanagement to have resulted in contamination of ground water, surface water, and soils.

After considering all of the factors of 40 CFR 261.11(a)(3), because these wastes contain high concentrations of highly toxic constituents that are mobile and persistent and are unlikely to degrade in the environment before reaching receptors, and because past mismanagement of these wastes has already resulted in serious environmental damage and risk to human health, EPA is proposing that F032, F033, F034, and F035 be added to the list of hazardous wastes from non-specific sources.

## 2. Waste Characterization and Constituents of Concern

The following section summarizes the information concerning waste characterization and constituents of concern that EPA has gathered to support this proposed listing. EPA has selected constituents of concern based on two principal factors: Their known toxicity and their relevant concentrations in the waste. Other constituents were detected in these waste streams but were not selected as constituents of concern; data on these can be found in the Background Document for today's proposal.

*a. Wastes from chlorophenolic wood preserving processes (F032).* Table 7 lists the constituents of concern found in wastes from wood preserving operations using chlorophenolic formulations as well as the concentration ranges of these constituents. Pentachlorophenol averaged 15 mg/l in wastewaters with a maximum concentration of 310 mg/l. Twenty-one different polynuclear aromatic hydrocarbon (PAH) compounds (only some of which are constituents of concern) were found in wastewaters from wood preserving operations using pentachlorophenol and/or creosote. The PAH contaminants are believed to be derived from the use of petroleum carrier solvents for the pentachlorophenol formulation and/or the current or past use of creosote wood preserving processes. Arsenic concentrations in wastewaters from facilities that are treated with pentachlorophenol and/or creosote and inorganic preservatives ranged from 0.003 to 33 mg/l, averaging 5 mg/l. Chromium concentrations ranged from 0.004 mg/l to 14 mg/l, averaging 2 mg/l. The Agency believes that pentachlorophenolate may be used to preserve wood, although its use is not extensive. Wastes from wood preservation processes that use pentachlorophenolate are expected to contain the same chlorophenolic constituents as wastes from pentachlorophenol processes.

The average pentachlorophenol concentration for process sludges was about 1.6 percent. No analyses were available of preservative formulation as it drips from treated wood. Instead, in-use pentachlorophenol wood preserving formulation was sampled to obtain data indicative of constituent concentrations in drippage because EPA believes that drippage either will be or will substantially resemble preserving formulations. The average pentachlorophenol concentration was 26,000 mg/l (2.6%); the maximum concentration was 52,000 mg/l (5.2%).

All ten PCDD/PCDF homologue groups were detected in non-wastewater-pentachlorophenol treating wastes. However, 2,3,7,8-TCDD was not detected in nine analyzed samples of F032 wastes (process residuals and preservative formulation believed typical of drippage). Total TCDDs were detected in eight of 20 analyzed samples. Calculated equivalent 2,3,7,8-TCDD concentrations for all cogener groups detected averaged 200 ppb for process sludges residuals and 300 ppb for in-use treating solutions.

Within hazardous waste listing F032, the Agency is proposing to include wastes generated at facilities that previously used chlorophenolic formulations and wastes generated from creosote, inorganic, and other processes located within the same facility as a chlorophenol process. Process sludges and wastewater residuals gradually accumulate in wood preserving, surface protection, and wastewater treatment equipment. Periodically (annually, semiannually, monthly, or perhaps more frequently, depending on the size and operating practices of the facility) the accumulated residuals are removed from the equipment and then disposed. The Agency has information (which is available in the docket to this rule making) that wood preserving facilities regularly change the preservatives used in a particular piece of process equipment without removing accumulated materials or in any way cleaning the equipment.

EPA has gathered considerable evidence that F032 waste (from inorganic and creosote processes that is either generated from equipment that has been previously used in chlorophenolic processes or generated at facilities that have used or currently use processes on the same site) is contaminated by the constituents of concern from the chlorophenolic processes. Such cross-contamination is documented by the waste characterization data available in the Background Document. These data show that constituents unique to chlorophenolic wastes from chlorophenolic processes were identified in wastes that came from creosote and inorganic processes. The Background Document for this listing presents many cases that describe cross-contamination. The cross-contamination is further documented by information on the wastes and their management practices collected by EPA through site visits and surveys. Based on this information, EPA has concluded that a serious and significant degree of cross-contamination exists due to



common practices in the industry. EPA has therefore included wastes from inorganic and creosote processes that may be cross-contaminated with chlorophenolic wastes in the F032 listing.

Following are a few examples identified by EPA where cross-contamination as a result of normal operating practices has occurred. More examples are provided in the Background Document.

At a U.S. Army depot in Memphis, Tennessee, wood products were dipped or steeped in a 5,000 gallon vat of pentachlorophenol solution. Treating solution was stored in a 3/4-inch steel underground storage tank which subsequently leaked. After a number of years, the wood treatment process was discontinued and an investigation of the site undertaken. Various surfaces in the treatment area were sampled and analyzed for PCDD and PCDF content. Chips from the treatment building cinderblock walls and concrete floor contained 24.7 ppb and 42.3 ppb of toxic equivalent 2,3,7,8-TCDD, respectively. The storage tank was emptied, cleaned and sandblasted. After sandblasting, a 100 cm<sup>2</sup> wipe of the inside of the storage tank showed 1.3 ppb toxic equivalent 2,3,7,8-TCDD. The tank was hydroblasted and retested. The toxic equivalent 2,3,7,8-TCDD concentration in a 100 cm<sup>2</sup> wipe was then 0.13 ppb. These data demonstrate that process equipment used for preserving wood with pentachlorophenol can be contaminated even after accumulated residuals are removed.

In addition, as part of EPA's general sampling and analysis effort, sediment was collected from a treating cylinder that had been used to treat wood with pentachlorophenol until 2 to 4 months prior to the sampling episode. At that time, the preservative used in the cylinder was replaced with creosote, but the cylinder was not cleaned. The sediment in this wood treating cylinder contained material that had accumulated during pentachlorophenol wood preserving operations and materials that had accumulated during creosote wood preserving operations. Analysis of the sediment showed 140 mg/kg of pentachlorophenol. Pentachlorophenol has never been found as a constituent of creosote or of creosote wood preserving formulations. Cross-contamination must therefore have occurred.

The major cause of cross-contamination at facilities using more than one type of preservative is mixing of the wastes generated from the various processes. Indeed, plants visited by EPA that use more than one type of

preservative comingled wastes, and all plants using both creosote and chlorophenolic formulations comingled wastewaters.

One facility surveyed by EPA reported that wastewater from its pentachlorophenol wood preserving operations was routed to an oil-water separator. The oil fraction was returned to the pentachlorophenol work tank while the separated water was used to make up CCA treating solution. In addition, this facility has one vacuum pump used to create a vacuum on both the CCA retort and the pentachlorophenol retort. Cooling and sealing water from the pump was also used to make up CCA treating solution. A second facility reported using the wastewater (after oil/water separation) from its pentachlorophenol treatment operation to make up its ACA treating solution. These practices resulted in cross-contamination of inorganic wood preserving wastes with chlorophenolic, PCDD, and PCDF constituents.

EPA has also obtained reports of other practices leading to cross-contamination of wastes, such as the use of common equipment for moving treated wood, untreated wood, and waste material and the use of common tramcars for holding wood in the treating cylinders. Also, creosote process wastes have become contaminated with chlorophenolic, PCDD, and PCDF constituents at facilities that use a common oil-water separator for chlorophenolic and creosote wastewaters when the recovered oil is recycled back to the creosote process.

Cross-contamination has occurred even when treating cylinders or tanks are dedicated to the application of one preservative formulation. For example, a California wood preserving facility that treated wood with pentachlorophenol and creosote in dedicated retorts measured wastewater contaminant concentrations of pentachlorophenol in the creosote wastewaters of 32 mg/l (Palmer, 1986). This cross-contamination is believed to be the result of using other equipment in common and interconnecting piping. Thus, cross-contamination may occur at facilities that attempt to segregate chlorophenolic from non-chlorophenolic wastes if the processes, process equipment, and process areas are not adequately segregated.

The Agency's principal concern regarding cross-contamination is that it may result in wastes from creosote and inorganic processes containing dioxins and dibenzofurans that are not normally present in wastes generated by these processes. EPA recognizes that the

presence of dioxin contaminants in a hazardous waste may reduce the availability of hazardous waste treatment, storage, or disposal facilities that can or will accept the waste.

Since cross-contamination can be eliminated through proper cleaning and replacement of contamination equipment, today's proposal includes standards for equipment cleaning and replacement. Generators of F032 who change to another preservative and who comply with the equipment cleaning and replacement standards will generate wastes that do not meet the F032 listing once cleaning and replacement is complete and provided that the generator does not resume using chlorophenolic formulations. Generators should note that after successful cleaning and replacement, their wastes may continue to be subject to regulation under Subtitle C of RCRA either because they meet the listing descriptions of F034 or F035 or because they exhibit one or more of the characteristics of hazardous waste. The equipment cleaning and replacement standards are discussed in detail elsewhere in this preamble.

*b. Wastes from chlorophenolic surface protection processes (F033).* Table 8 lists the constituents of concern found in wastes from surface protection operations using chlorophenates as well as the concentration ranges of these constituents. Although no wastewater is directly generated from surface protection processes, precipitation that comes into contact with process areas can become contaminated with surface protection chemicals. This contaminated precipitation is collected in sumps and catch basins and may be conveyed back to the process, to wastewater treatment (or, more commonly, to offsite discharge via natural drainage or earthen ditches).

No information quantifying the amount of wastewater generated at surface protection facilities was collected by the agency during its study of the industry. The quantity of precipitation falling on the process area at a surface protection facility is estimated to be approximately 1,000,000 liters (270,000 gallons) per year, assuming an annual rainfall of 100 cm (40 inches) and a process area of 1,000 m<sup>2</sup> (0.25 acre). For 300 to 500 surface protection facilities, this amounts to 300 to 500 million liters (80 to 130 million gallons) per year.

Limited data were available to characterize the concentration of constituents of concern in surface protection wastewater. One sample of water taken from a drain near a dip tank contained 14 ppm tetrachlorophenols

and 6 ppm pentachlorophenol. At another facility, a sample of wastewater collected from a ditch which drained the dip tank area to a creek contained 0.3 ppm pentachlorophenol. The complete data set, including all constituents detected, can be found in Appendix D of the Background Document.

In process sludges or residuals (such as working tank or retort sediments), the concentration of pentachlorophenol averaged 20,000 mg/kg (2.0 percent). Tetrachlorophenols are present in the preservative formulation, either as the active ingredient or a contaminant of pentachlorophenates. The average total isomer tetrachlorophenol concentration was 17,000 mg/kg (1.7 percent).

The pentachlorophenol concentration in sludges that accumulate in catch basins, sumps, and drainage ditches averaged 95 mg/kg while the concentration of 2,3,4,6-tetrachlorophenol averaged 40 mg/kg. No analyses of preservative formulation as it drips from surface-protected wood were available. Instead, in-use chlorophenolate surface protection formulation was sampled to obtain data representative of constituent concentrations in drippage. Wastewater from surface protection processes consists principally of used preservative formulation (i.e., the formulation in the dip tank). EPA, therefore, believes that in-use chlorophenolate surface protection characterization data are also representative of wastewaters from surface protection with chlorophenolate formulations. The average pentachlorophenol concentration was 810 mg/l with an average 2,3,4,6-tetrachlorophenol concentration of 520 mg/l.

All ten PCDD/PCDF homologue groups, including 2,3,7,8-TCDD, were detected in surface protection wastes. 2,3,7,8-TCDD was detected in 3 of 15 samples of F033 wastes analyzed for 2,3,7,8-TCDD (catch basin and drainage ditch sediments, process residuals and preservative formulation). Total TCDDs (including 2,3,7,8-TCDD and all other homologues) were detected in 7 of 16 samples of F033 wastes analyzed for TCDDs. The average 2,3,7,8-TCDD concentration in process sludges was 8 ug/l (ppb). The 2,3,7,8-TCDD concentration measured in one sample of sediment from a surface drainage ditch was 7 ppt. Total equivalent 2,3,7,8-TCDD concentrations were also calculated from sampling data for the various types of surface protection wastes. The equivalent concentration averaged 700 ppb for process sludges or residuals, 4 ppb for sludges that accumulate in sumps and catch basins

and 700 ppb for in-use surface protection solutions. The sampling data and Toxicity Equivalent Factors used to calculate these averages from sampling data are provided in the Background Document.

The Agency anticipates that as a result of today's proposed listings, many sawmills that generate no hazardous waste except the residuals from chlorophenolic surface protection processes will change preservative formulations to avoid becoming hazardous waste generators.

Generators of F033 wastes should note that the listing includes cross-contaminated wastes, similar to the F032 listing. Therefore, although a generator may change preservatives to one that has not been evaluated as part of this listing, the wastes from the new preservative would continue to be F033 wastes due to the potential for cross-contamination. As for F032 cross-contaminated wastes, in order to provide generators who are able to change preservatives with an opportunity to eliminate the potential for cross-contamination and hence, to have their wastes generated from processes using non-chlorophenolic formulations no longer be F033 waste, EPA is proposing standards for equipment cleaning and replacement as part of today's proposed rule. Generators who change to another preservative (that is, one not subject to the listing) and who comply with the equipment cleaning and replacement standards will generate wastes in these processes that are not F033-listed waste. Generators should note, however, that their wastes will remain subject to the hazardous waste characteristic rules and, should they exhibit one or more characteristics of hazardous waste, would continue to be subject to regulation under Subtitle C of RCRA. The Agency notes also that the equipment cleaning and replacement standard does not in any way affect any future listing determinations that EPA may make regarding other surface protection formulations not covered by today's listing. Should the agency promulgate a listing for such other preservatives in the future, wastes generated, although in compliance with the equipment cleaning and replacement standard could again be subject to Subtitle C regulations.

*c. Wastes from creosote wood preserving processes (F034).* Table 9 lists the constituents of concern found in wastes from wood preserving operations using creosote as well as the concentration ranges of these constituents. Pentachlorophenol, PCDDs, and PCDFs derive solely from wood

preserving operations using chlorophenolics and are not present in wastes at facilities that have never used chlorophenolic formulations. Twenty-five different PAH compounds (not all of which are defined as constituents of concern) were found in wastewaters from wood preserving operations using creosote. Naphthalene, the most frequently detected compound, averaged 56 mg/l in wastewaters. Phenanthrene, also frequently detected, averaged 54,000 mg/kg (5.4 percent), in process sludges or residuals.

No analyses of creosote preservative formulations were available, either as they drip from treated wood or as in-use formulations. However, initial free-dripping from creosote-treated wood is expected to have the same composition as unused creosote formulations (mixtures of creosote and coal tar). Literature data on creosote formulations, presented in the Background Document for today's proposal, were available for eleven PAH compounds with phenanthrene at 180,000 mg/kg (18 percent) present at the highest concentration.

Toxic metals concentrations in wastes from creosote processes are variable and depend on the extent of cross-contamination at a particular facility. Data describing the extent of cross-contamination between creosote and inorganic processes are provided in the Background Document developed in support of this proposed listing.

*d. Wastes from inorganic wood preserving processes (F035).* Table 10 lists the constituents of concern found in wastes from wood preserving processes using only inorganic formulations of arsenic and chromium. It also lists the concentration ranges of these metals in the wastes. Arsenic concentrations in process residuals averaged 150,000 mg/kg (15 percent); chromium concentrations averaged 14,000 mg/kg (1.4 percent). Lead was also present in samples of process sludges, at an average concentration of 80 mg/kg. Lead found in wood preserving wastes is believed to be a contaminant of the arsenic component of the preservative formulation. This listing applies only to wastes from facilities that presently use inorganic preservatives and are not using or have not previously used chlorophenolic preservatives as previously discussed (those wastes from inorganic facilities where chlorophenolics have been used are covered under the proposed F032 listing). Consequently, the constituents of concern for F035 do not include pentachlorophenol, PCDDs, or PCDFs. PAH compounds derive from creosote



and from petroleum oils used as pentachlorophenol carriers and may be present in residuals from inorganic treating facilities that have always previously used creosote preservatives or are presently using both inorganics and creosote preservatives on the same site.

Information available to EPA indicates that wastewaters from arsenical or chromium wood preserving processes are typically recycled. These wastewaters are proposed to be listed as hazardous waste and will be subject to regulation when they are not recycled (See generally, the Solid Waste Redefinition Rule, 50 FR 663, January 4, 1985).

No analyses of inorganic preservative formulations, either as they drip from treated wood or as in-use formulations, were available. However, initial drippage from wood treated with inorganic preservatives is expected to have the same composition as unused preservative solution, as specified by the American Wood Preservers Association. A 2.5 percent solution of CCA-C, the most commonly used inorganic preservative, has approximately 5,500 mg/1 arsenic and 6,200 mg/1 chromium. Data supporting these concentration estimates are provided in the Background Document developed to support this proposed listing.

### 3. Health Effects of Concern

The Agency has obtained data demonstrating that the constituents found in the wastes generated by the preservation and surface protection of wood with chlorophenolics, creosote, and inorganic formulations are systemic toxicants and/or carcinogens. These toxic constituents are present in concentrations capable of causing adverse health effects as shown by Tables 11, 12, 13 and 14. The tables demonstrate that even if only 0.01 percent of the average constituent levels in the waste reaches environmental receptors, the exposure concentrations are often four orders of magnitude higher than the health-based levels of concern. If the Agency assumes more conservative dilution and attenuation factors (projecting that a larger portion of the waste disposed would reach environmental receptors) the exposure concentrations would be even higher. Given such high concentrations in the waste, the potential for exposure to harmful concentrations of the constituents of concern is extremely high.

For the purpose of listing waste as hazardous under RCRA, the Agency routinely uses three basic methods to

indicate measures of toxicity: (1) Maximum Contaminant Levels (MCLs); (2) Risk Specific Doses (RSDs) for known carcinogens; and (3) Reference Doses (RfDs) for systemic toxicants. Based on different criteria, each of these methods give the maximum doses or levels of exposure that are acceptable.

MCLs are final Drinking Water Standards promulgated under Section 1412 of the Safe Drinking Water Act of 1974, as amended in 1984, for both carcinogenic and non-carcinogenic compounds. In setting MCLs, EPA considers a range of pertinent factors (for example, see 52 FR 25697-98, July 8, 1987).

For many carcinogenic constituents for which MCLs are not promulgated, the Agency has developed oral RSDs. The RSD is a dose that corresponds to a specified level of risk of an individual contracting cancer over a 70-year lifetime because of the presence of the toxicant in drinking water. To develop an RSD, a risk level must be specified. EPA specifies the risk level of concern on a weight-of-evidence scheme based on the quality and adequacy of experimental data and the kinds of responses induced by a suspect carcinogen. The carcinogenic constituents of concern in F032, F033, F034, and F035 for which no MCLs exist are either probable human carcinogens (Class B<sub>2</sub>), based on a combination of sufficient evidence in animals and inadequate data in humans, or possible human carcinogens (Class C), based on limited animal evidence in the absence of human data. (Details on the other classes of carcinogens are given in the Background Document.) The oral RSDs for carcinogenic agents are presented at the 10<sup>-6</sup> risk level for Class A and B carcinogens and the 10<sup>-5</sup> risk level for Class C carcinogens. This is consistent with the risk levels used to delist specific wastes.

Oral Reference Dose Numbers (RfDs) are established for non-carcinogenic constituents. An RfD is an estimate of a daily exposure to a substance for the human population (including sensitive subgroups) that appears to be without an appreciable risk of deleterious effects during a lifetime. If frequent exposures that exceed the RfD occur, the probability that adverse effects may be observed increases. The method for estimating the RfD for non-carcinogenic end points was described in the proposed rule for the Toxicity Characteristic (51 FR 21648, June 13, 1986).

The hazardous constituents of concern have carcinogenic or other chronic systemic effects on laboratory animals or humans and have been

determined to be present in the wastes from wood preserving and surface protection processes in sufficient concentrations to pose a substantial threat to human health and the environment. As outlined here, EPA has established RfDs, RSDs, or MCLs for all of the constituents of concern in wood preserving wastes. A brief summary of the toxicity of these constituents is presented in this preamble. A more detailed discussion is included in the Background Document to today's proposal.

The concentration limits for the constituents of concern in Tables 11, 12, 13, and 14 are based on two assumptions. First, that the average person has a mass of 70 kg and, second, that a person drinks, on average, 2 liters of water daily.

All the chlorophenols of concern (see Table 1) for F032, F033, and F034 are chronic systemic toxicants. One of them 2,4,6-trichlorophenol is also a Class B<sub>2</sub> carcinogen (based on animal toxicity data) with an RSD of  $1.8 \times 10^{-2}$  ppm; it has caused lymphomas, leukemias, and carcinomas in rats and mice, and has been determined to be mutagenic.

2,3,4,6-tetrachlorophenol is a systemic toxicant and has been assigned an RfD of 1 ppm. This is supported by subchronic oral and reproductive studies in animals; significant biochemical and clinical pathological changes have been reported.

Previous studies of pentachlorophenol have shown it to be highly toxic to humans. Based on available data, EPA has established an RfD for pentachlorophenol of 1 ppm. Pentachlorophenol causes contact dermatitis, damage to vision, and, on ingestion, lung, liver, and kidney damage. Inhalation of pentachlorophenol results in acute poisoning, centering on the circulatory system with accompanying heart failure. Oral doses of 29 ppm have been reported to be lethal to humans. Data from a recent National Toxicology Program bioassay (McConnell, 1988), however, provide evidence that pentachlorophenol is also a carcinogen.<sup>2</sup>

The polynuclear aromatic hydrocarbon constituents of concern in F032, F033, and F034 (see Table 1) are all chronic systemic toxicants; some are also carcinogenic. Naphthalene has an RfD of 14 ppm, pyrene an RfD of 4 ppm,

<sup>2</sup>The NTP bioassay would change the previously established health-based number of 1 ppm for pentachlorophenol. The final rule may be revised following Office of Solid Waste's review of the study.

and benzo(k)fluoranthene an RfD of 0.004 ppm.

Benz(a)anthracene is a Class B<sub>2</sub> carcinogen; various studies on mice have resulted in sarcomas, bladder carcinomas, and malignant skin tumors. The RSD, by ingestion, at the 10<sup>-6</sup> risk level, is  $1.1 \times 10^{-6}$  ppm.

Benzo(a)pyrene is also a Class B<sub>2</sub> carcinogen; its RSD, by ingestion, at the 10<sup>-6</sup> risk-level, is  $3 \times 10^{-6}$  ppm in drinking water. In animals, it has caused stomach, skin, and lung tumors, lung adenomas, and local tumors following direct injection. In humans, clear association between exposure and occurrence of lung cancer has been shown for several mixtures containing benzo(a)pyrene. Skin exposure has resulted in benign and reversible skin lesions.

Dibenz(a,h)anthracene is also a Class B<sub>2</sub> carcinogen. Its RSD, by ingestion, at the 10<sup>-6</sup> risk level is  $7 \times 10^{-7}$  ppm. Via various routes of exposure, dibenz(a,h)anthracene has increased the occurrence in mice of lung, skin, and mammary carcinomas, subcutaneous sarcomas, pulmonary adenomas, and hemangioendotheliomas. Indeno(1,2,3-cd)pyrene is a Class C carcinogen; it has an RSD of 0.002 ppm. Specifically, skin carcinomas and papillomas in mice have resulted from subcutaneous injection of and skin painting with indeno(1,2,3-cd)pyrene.

Each of the inorganic constituents of concern in F032, F033, F034, and F035 (arsenic, chromium, and lead) has an MCL of 0.05 ppm. Arsenic is a proven carcinogen (Class A), has caused skin and lung cancer in humans and, through occupational exposure, may cause precancerous lesions. Chromium compounds are acute systemic toxicants, mainly affecting the skin and mucous membranes. Lead is an accumulative poison; it can cause a number of human physiological effects including kidney damage and reproductive disorders. (The MCL for lead is currently being reviewed by the Agency.)

To date, EPA has established health-based numbers for only two of the PCDD constituents of concern: 2,3,7,8-tetrachlorodibenzo-p-dioxin and hexachlorodibenzodioxin. Only limited data exist on the other congeners. These congeners differ in the number of chlorine atoms they contain and the relative positions of these chlorine atoms on the dioxin or furan molecules. The similarity in structure that some of these congeners display indicates that

they are often present together as a complex mixture. The congener 2,3,7,8-TCDD is the most widely studied constituent of concern. It is a Class B<sub>2</sub> carcinogen, its RSD, at the 10<sup>-6</sup> risk level, corresponds to a water concentration limit of  $2.3 \times 10^{-10}$  ppm. Exceptionally low doses of this compound elicit a wide range of toxic responses in animals (e.g., adverse reproductive effects, thymic atrophy, and a wasting syndrome leading to death).

For those PCDD congeners and PCDFs that do not have established RSDs, EPA is proposing to use the health-based numbers for 2,3,7,8-TCDD as an indicator of their relative toxicity. This is determined by using the toxicity equivalence factors (TEFs) assigned to the relevant congener and applied to risk levels associated with 2,3,7,8-TCDD. Limited data suggest that other PCDD congeners have toxic effects similar to those of 2,3,7,8-TCDD. Further, data indicate that some PCDF congeners exhibit 2,3,7,8-TCDD-like toxicity.

Briefly, to determine TEFs, concentration data are first obtained on the PCDDs and PCDFs present in the mixture. Then, reasoning on the basis of the structure-activity relations and results of short-term tests, the toxicity of each of the components is estimated and expressed as an equivalent amount of 2,3,7,8-TCDD. Combined with estimates of exposure and known toxicity information on 2,3,7,8-TCDD, the risks associated with the mixture of PCDDs and PCDFs can be assessed. The Agency believes that, in the absence of toxicological data on all the PCDDs and PCDFs and, as an interim measure, this method provides a reasonable estimate of the toxicity (see Risk Assessment Forum, 1986).

### 4. Constituents Proposed for Addition to Appendix VIII

The majority of the constituents of concern present in the wood preserving and surface protection wastes already appear on the list of hazardous constituents (409 CFR Part 261, Appendix VIII). This action proposes to add three more constituents of concern from such wastes which are not presently listed on Appendix VIII to that appendix, specifically: benzo(k)-fluoranthene, heptachlorodibenzofurans, and heptachlorodibenzo-p-dioxins. The known health effects of these waste constituents are summarized in the following discussion.

Benzo(k)fluoranthene is classified by EPA as a Class B<sub>2</sub> carcinogen. Available toxicity data (USEPA, 1987) demonstrate that it is carcinogenic to animals and, according to the International Agency for Research on Cancer (IARC), benzo(k)fluoranthene is a probable human carcinogen.

Benzo(k)fluoranthene has been evaluated in dermal studies with mice, in mouse-skin initiation-promotion assays using TPA as a promoter, and in a subcutaneous injection study of mice. It has been shown to be active as an initiator and produced injection site sarcomas in the subcutaneous study. Benzo(k)fluoranthene has also been shown to be mutagenic in standard mutagenicity tests with *Salmonella typhimurium* strains TA100 and TA98.

Heptachlorodibenzo-p-dioxins and heptachlorodibenzofurans are members of the large family of chlorinated dioxins and furans. Certain of these chemicals, most notably, 2,3,7,8-TCDD, have been shown to be highly toxic. The Agency's Carcinogen Assessment Group (CAG) has completed quantitative analyses demonstrating that 2,3,7,8-TCDDs and 2,3,7,8-HxCDDs are among the most potent animal carcinogens ever evaluated by the Agency. Limited experimental data, supplemented by structure/activity analyses indicate other chlorinated dioxins and furans, such as heptachlorodibenzo-p-dioxin and heptachlorodibenzofuran may have toxic effects similar to 2,3,7,8-TCDD at very low doses (EPA, 1987). EPA has therefore concluded that there is sufficient evidence to conclude that heptachlorodibenzo-p-dioxin and heptachlorodibenzofuran are constituents of concern in hazardous wastes and should be added to 40 CFR 261 Appendix VIII.

### 5. Mobility and Persistence of Wastes from Wood Preserving and Surface Protection Processes

The toxic constituents from wood preserving and surface protection processes have been found to migrate from the wastes and, further, they have been found to have sufficient mobility and persistence in the environment to contaminate ground water (including drinking water), surface waters and sediments, and surface soils. The solubilities and projected ground water mobility of the selected organic constituents of wood preserving wastes are presented in Table 15.



TABLE 15.—GROUNDWATER MOBILITY AND PERSISTENCE OF CONSTITUENTS OF CONCERN

Constituents of concern	Water solubility (ppm)	Log <sup>1</sup> K <sub>ow</sub>	K <sub>oc</sub> <sup>2</sup>	Mobility <sup>3</sup>		Persistence <sup>4</sup>
				Slightly <sup>5</sup> contaminated medium	Highly <sup>6</sup> contaminated medium	
CHLOROPHENOLS						
2,4,6-Trichlorophenol.....	800	3.61	2,000	low	high	high.
2,3,4,6-Tetrachlorophenol.....	—	4.1	4,050	low	high	high.
Pentachlorophenol <sup>6</sup> .....	14	5.04	16,000	low	high	high.
POLYNUCLEAR AROMATIC HYDROCARBONS						
Benzo(a)anthracene.....	0.057	5.61	20,000	low	high	high.
Benzo(a)pyrene.....	0.036	6.06	550,000	low	high	high.
Benzo(k)fluoranthene.....	0.0043	6.06	550,000	low	high	high.
Dibenzo(a,h)anthracene.....	0.0005	6.84	3,300,000	low	high	high.
Indeno(1,2,3-c,d)pyrene.....	0.0005	6.50	1,800,000	low	high	high.
Naphthalene.....	31.7	3.29	940	low	high	high.
POLYCHLORINATED DIBENZO-P-DIOXINS AND DIBENZOFURANS						
Tetrachlorodibenzo-p-dioxins <sup>7</sup> .....	0.0002	6.84	3,300,000	low	high	high.
Pentachlorodibenzo-p-dioxins <sup>8</sup> .....	0.0001	8.65	1,700,000	low	high	high.
Hexachlorodibenzo-p-dioxins <sup>9</sup> .....	0.000004	10.44	11,500,000	low	high	high.
Heptachlorodibenzo-p-dioxins <sup>10</sup> .....	0.000002	11.50	17,000,000	low	high	high.

<sup>1</sup> K<sub>ow</sub> = Octanol-water partition coefficient; See Background Document for Data Sources.<sup>2</sup> K<sub>oc</sub> = Soil sorption coefficient; See Background Document for Data Sources.<sup>3</sup> Qualitative relative evaluation of mobility and persistence, based on water solubility, log K<sub>ow</sub>, and K<sub>oc</sub>.<sup>4</sup> Slightly contaminated medium represents a mismanagement scenario where release of hazardous constituents does not result in saturation of the underlying soil by organic hazardous constituents.<sup>5</sup> Highly contaminated medium represents a mismanagement scenario where release of hazardous constituents results in saturation of the underlying soil by organic hazardous constituents.<sup>6</sup> Solubility of pentachlorophenol is dependent on pH. Value indicated represents a pH of 4.74.<sup>7</sup> Data based on properties of 2,3,6,7-Tetrachlorodibenzo-p-dioxin.<sup>8</sup> Data based on properties of 1,2,3,4,7-Pentachlorodibenzo-p-dioxin.<sup>9</sup> Data based on properties of 1,2,3,4,7,8-Hexachlorodibenzo-p-dioxin.<sup>10</sup> Data based on properties of 1,2,3,4,6,7,8-Heptachlorodibenzo-p-dioxin.

Source: Background Document.

The subsurface transport of toxic constituents from their disposal site through the unsaturated soil zone to, and then within, ground water may take place by several mechanisms. The toxicants may exist as water soluble substances that are transported by advection (i.e., with the moving water phase), the least complex transport mechanism. Such aqueous-phase transport is believed to be the predominant mechanism for the metal constituents of wood preserving wastes.

A second mechanism for the transport of wood preserving wastes is migration in a discrete oil (or other nonaqueous solvent) phase. Subsurface investigations at many of the sites described in the damage cases (found in the docket supporting this listing) have revealed the presence of a discrete oil or creosote phase. These phases may exist as oil sludges, lenses, or a floating oil layer on the water table. Because the oil and creosote differ from ground water in their chemical and physical properties, including density, these nonaqueous phases may migrate in the subsurface independent of ground water flow. For example, dense materials will tend to migrate vertically through an aquifer until buoyancy is achieved or a vertical barrier is encountered. These materials may also migrate laterally faster or

slower than the rate of ground water flow because of the effects of differing chemical and physical properties on attenuation mechanisms.

Investigations of many wood preserving facilities have revealed that toxic organic constituents of wood preserving wastes are present in ground water at concentrations that far exceed their solubility. For example, in seven out of eight measurements of heptachlorodibenzo-p-dioxins (HpCDDs) in ground water from three different facilities, the measured HpCDD concentration exceeded its reported solubility (0.002 ppb) by many orders of magnitude. The HpCDD concentration at one site was 4.2 ppb; at a second site, ground water collected at a depth interval of 82 to 155 feet below the surface contained 2.6 ppb of HpCDD.

The reported solubility of pentachlorophenol is 14 ppm. Ground water samples from five sites contained over 20 ppm of pentachlorophenol. The concentration at one site was 210 ppm. Although exact reasons for these phenomena are not fully understood, they are believed primarily to result from the oily nature of these wastes and solvent-assisted transport.

Creosote constituents have also been measured in ground water at concentrations above their solubilities.

At one site, benz(a)anthracene and benzo(a)pyrene were all measured at concentrations about ten times their reported solubility (measured concentrations were 0.35 and 0.08 ppm, respectively). Again, this is believed primarily to be due to the oily nature of these wastes.

It should be stressed that these ground water samples did not contain a separate oil phase (contaminant concentrations in subsurface oil phases are, in general, much higher than those described above.) Clearly, the distinct aqueous phase and oil phase transport mechanisms do not fully explain the migration of toxic constituents of organic wood preserving wastes. The actual mechanism or mechanisms at work are not fully understood; hypotheses include transport of the organics as oil micelles (microdroplets) or emulsions suspended in water, transport of the organics sorbed onto humic acids or colloidal solids which are suspended in ground water, pH effects, and cosolvent effects, perhaps from lignins and terpenes that leach from wood during treatment. Although the exact transport mechanisms have not been fully elucidated, it is clear from available data that the toxic constituents in wood preserving wastes are highly mobile and can therefore

reach environmental receptors at hazardous concentrations.

The mobility parameters summarized in Table 15 distinguish between low- and high-contaminated soil medium. At low contamination levels, leaching of water soluble constituents from the waste to the ground water predominates with less water soluble constituents being adsorbed by the surrounding soil, or migrating through other less well-understood mechanisms. However, as the contamination level of the soil medium increases, the soil becomes saturated, eliminating further adsorption of the non-polar constituents and creating a separate organic phase. This organic phase dissolves the non-polar constituents and facilitates transport from the site.

The Agency considers a compound to be persistent if it persists in the environment long enough to be detected since, if a chemical can be detected in ground water, exposure to humans is possible. All the constituents of concern in waste streams, F032, F033, F034, F035 are adequately persistent to result in human exposure if they are released into ground water. The principal processes that limit the persistence (half-life) of chemicals in ground water are hydrolysis and biodegradation. None of the constituents are expected to hydrolyze in water between pH 2 and 12 at ambient temperature at a rate fast enough to be a factor in limiting human exposure. This is because none of the constituents of concern have structural components that would be expected to react with water under those conditions.

Biodegradation is probably the most important degradation mechanism for each of the organic constituents of concern. Under certain aerobic conditions (i.e., condition in which oxidizing microorganisms are capable of metabolism), organic hazardous constituents are expected to be biodegradable as shown under controlled laboratory conditions. Little is known, however, about the degradation of these compounds in the real world or in anaerobic environments. Under anaerobic conditions (i.e., those in which microorganisms capable only of oxidative metabolism, cannot survive), these compounds may persist for very long periods. In ground water therefore, where microbial life and oxygen are limited, to biodegradation of these constituents is expected to be slow or non-existent.

To substantiate the mobility and persistence of these compounds, over 100 cases of environmental contamination with wood preserving and surface protection wastes are

described in the docket supporting this proposed rulemaking. Selected cases describing environmental contamination with pentachlorophenol, creosote, and inorganic wood preserving wastes and pentachlorophenol surface protection wastes are presented in an appendix to this preamble.

#### E. Basis for Designating F032 and F033 As Toxic (T) Rather Than Acute Hazardous (H)

EPA has previously listed wastes from the manufacture of pentachlorophenol—namely, F021 (wastes from the production or manufacturing use of pentachlorophenol, or of intermediates used to produce its derivatives) and F027 (discarded unused formulations containing tri-, tetra-, or pentachlorophenol or discarded unused formulations containing compounds derived from these chlorophenols)—as acute hazardous waste. EPA promulgated the listing for F021 and F027 on January 14, 1985 (see 50 FR 1978), as part of an action that involved listing seven different acute dioxin-containing wastes.

Today's action proposes to designate wastes from wood preserving and surface protection processes that use or may be contaminated with pentachlorophenol (F032 and F033, respectively) as toxic (T) rather than as acute hazardous (H) waste. EPA's decision to designate F032 and F033 as toxic is based primarily on new information regarding the toxicity of commercial pentachlorophenol products contaminated with concentrations of hexachlorodibenzodioxin (HxCDD). This new information also may affect the Agency's basis for designating F021 and F027 as acute hazardous. Consequently, EPA may, in the future, consider changing the designation of F021 and F027 from acute hazardous to toxic. Any such action would be the subject of a separate rulemaking in the future. The agency is not soliciting comments on the basis for, or listing of, hazardous wastes F020 through F023, or F026 through F028 as part of this proposal, and will not respond to any comments received regarding these listings.

In the preamble that accompanied the January 14, 1985 rule, the Agency stated that "The principal basis for listing the pentachlorophenol wastes as acute hazardous is the presence of substantial concentrations of HxCDDs and HxCDFs (hexachlorodibenzofurans) \* \* \* (50 FR 1980). On the basis of the toxicity data available at the time of promulgation (i.e., that HxCDDs are about 4 percent as toxic as tetrachlorodibenzodioxins (TCDDs),

equal in potency to Aflatoxin B1, and 1,000 times more potent than ethylene dibromide), EPA concluded that HxCDD is one of the most potent carcinogens ever identified by the Agency. The Agency concluded therefore, that \* \* \* because these wastes contain the potent carcinogen HxCDD at levels of regulatory concern, they meet the criteria of 40 CFR 261.11(a)(2), and are properly listed as acute hazardous wastes \* \* \* (50 FR 1982). In making this finding, the Agency relied on toxicity data for HxCDD, provided by a bioassay conducted by the National Cancer Institute in 1983 as a surrogate for the toxicity of mixtures of pentachlorophenol and HxCDD found in pentachlorophenol wastes.

In April of this year, the National Toxicology Program (NTP) released a draft report on the results of a study of the toxicity of purified and technical grade pentachlorophenol containing measured levels of HxCDD as well as other dioxin homologues in lower concentrations (McConnell, 1988). EPA's Carcinogen Assessment Group (CAG) has reviewed the NTP report, found the study to be valid according to its established criteria, and concluded that the data from the study are valid for use in calculating Q1\* values for the mixtures studied.

The NTP draft report states that the purified pentachlorophenol tested was DOW EC-7 which contained 0.19 ppm HxCDD. The technical grade pentachlorophenol tested was a composite mixture of equal parts of products made by Monsanto, Reichhold, and Vulcan; it contained 10.1 ppm HxCDD. The DOW EC-7 was also reported to contain tetrachlorodibenzodioxin at greater than 0.04 ppm, heptachlorodibenzodioxin at 0.53 ppm, octachlorodibenzodioxin at 0.69 ppm, pentachlorodibenzofuran at 0.13 ppm, and octachlorodibenzofuran at 0.15 ppm. NTP reported that the technical grade mixture contained the following additional dioxins and furans: Heptachlorodibenzodioxin at 296 ppm, octachlorodibenzodioxin at 1,386 ppm, pentachlorodibenzofuran at 1.4 ppm, hexachlorodibenzofuran at 9.9 ppm, heptachlorodibenzofuran at 88 ppm, and octachlorodibenzofuran at 43 ppm (McConnell, 1988).

The results of the study demonstrate that both grades of pentachlorophenol tested show significant increases in liver and kidney tumors in male B6C3F1 mice and increases in vascular tumors in female mice of the same strain. Using linear low dose extrapolation, a report completed for Vulcan Materials Co. in May of 1988 finds that, using the Crump



Global 86 Multistage Procedure, the purified pentachlorophenol exhibits a  $Q1^*$  for humans of 0.245 (mg/kg/day)-1 and the technical grade pentachlorophenol exhibits a  $Q1^*$  of 0.788 (mg/kg/day)-1 (Litt, 1988). These values are approximately four to five orders of magnitude lower than the  $Q1^*$  of 11,000 (mg/kg/day)-1 for HxCDD calculated from the data in the NCI bioassay that served as EPA's basis for selecting HxCDD both as the basis for listing F021 and F027 and as the basis for designating F021 and F027 as acute hazardous waste.<sup>9</sup> The data also demonstrate that pentachlorophenol is itself carcinogenic.

Based on the recent data provided by NTP, EPA has concluded that the assumption that HxCDD can serve as a reasonable surrogate to indicate the toxicity of pentachlorophenol wastes may not be appropriate. The new data indicate that the purified and technical grades of pentachlorophenol (with concentrations of HxCDD and other dioxins and furans generally two orders of magnitude higher than the concentrations found in F032) exhibit significantly lower carcinogenic potency than EPA had anticipated when listing F021 and F027. Moreover, the  $Q1^*$  values generated from the liver tumor data reported by NTP are comparable to, or lower than, those exhibited by the constituents of other wastes that have been listed as toxic hazardous waste by EPA. For example, five waste streams from the production of inorganic pigments (K002, K003, K004, K005, and K006) are listed for their Chromium VI content. EPA's CRAVE presently reports a  $Q1^*$  for Chromium VI of 41 (mg/kg/day)<sup>-1</sup>. EPA Hazardous Waste No. K019, heavy ends from the distillation of ethylene dichloride in its production, is listed for a number of carcinogenic chlorinated organic chemicals. The most potent of these, ethylene dichloride has a  $Q1^*$  of 1.2 (mg/kg/day)<sup>-1</sup> for inhalation exposures and 0.6 (mg/kg/day)<sup>-1</sup> for oral exposures. As a third example, EPA Hazardous Waste No. K041 (wastewater treatment sludge from the production of toxaphene) is listed on the basis of its toxaphene concentration, which has an EPA CRAVE-calculated  $Q1^*$  of 1.1 (mg/kg/day)<sup>-1</sup> (Ratcliff, 1988). All of these wastes are listed as toxic on the basis of

carcinogens that are as potent as or more potent than the mixtures of pentachlorophenol studied by NTP.

Waste characterization data obtained by EPA for F032 wastes indicate that these wastes contain a median HxCDD concentration of 5,000 ppb (or 5 ppm), less than one-half the maximum concentration reported for the NTP composite. Other dioxin homologues, including tetrachlorodibenzodioxins, pentachlorodibenzodioxins, and heptachlorodibenzodioxins, are also typically present in F032 and F033 wastes at concentrations one to two orders of magnitude lower than the HxCDD concentrations. Pentachlorophenol concentrations in F032 and F033 wastes range from 0.01 ppm to 160,000 ppm (median: 80,000 ppm). EPA therefore believes it may be appropriate to assume that the toxicity of the mixtures tested by NTP is similar to the toxicity of F032 and F033 wastes. The Agency solicits comments on this assumption.

Although the NTP test mixtures differ from the typical make-up of F032 and F033 wastes, the concentrations of all of the dioxin homologues reported by NTP for their test materials are considerably higher than those documented for dioxin homologues in F032 and F033. Because the Agency has concluded that the new toxicity data indicate that mixtures of pentachlorophenol and dioxin homologues are dominated, in terms of their carcinogenic potency, by pentachlorophenol, EPA further concludes that a designation of toxic rather than acute hazardous is warranted for F032 and F033. Available data show that pentachlorophenol is likely to be the principal determinant of the relative toxicity of the waste. The cited references and further discussions of EPA's analyses appear in the docket.

In listing a waste as hazardous, EPA is not concerned solely with the toxicity of individual waste constituents. Rather, EPA must base listing decisions on a consideration of both the potential toxicity of a waste and the mobility and persistence of waste constituents (i.e., their probability of reaching environmental receptors in significant concentrations). The Agency does not now have data that demonstrate conclusively how pentachlorophenols or the dioxin and furan constituents of F032 and F033 would move in the environment and what their relative ground water concentrations would be in a representative environmental setting. EPA has noted, however, that considerable ground water contamination has been documented at wood preserving facilities. Data

reviewed by EPA show that both the pentachlorophenol and the dioxin and furan constituents eventually migrate to the ground water. EPA believes that exposures to ground water consumed as drinking water contaminated with F032 or F033 wastes would involve simultaneous ingestion of pentachlorophenol, dioxins, and dibenzofurans at relative concentrations similar to those present in the waste. EPA solicits comment on this assumption. The Agency believes that the health risks associated with such exposures are best represented by the data from the NTP study.

EPA specifically requests comment on the appropriate designation of F032 and F033 as toxic rather than acute hazardous. Information received on this issue may result in the Agency reevaluating its proposal to designate F032 and F033 as toxic. Again, the Agency is not soliciting comment regarding existing F listings; ample opportunity for public comment concerning the appropriate designation of F021 and F027 will be provided if and when a proposal to change the designation is deemed appropriate.

#### F. Technical Standards for Drip Pads

The amendments proposed today include additional standards applicable to drip pads in treated wood storage yards and in kick back areas used in managing hazardous waste at wood preserving and surface protection facilities. These standards are intended to provide for proper handling of treated wood drippage.

At many wood preserving facilities, treated wood is stored in open, unpaved storage yards where excess preservative drips from the wood or is washed away by rain. The drippage and contaminated rainwater are often allowed to run onto the ground and may be collected in ditches or ponds, or they are allowed to run into nearby surface water, thereby contributing to soil, surface water, and ground-water contamination. The hazards posed by contamination from drippage that mixes with other wastes or is contained in rainwater result from this practice of allowing excess preservative to drip or wash from treated wood to the ground in wood storage yards and are part of the basis for including treated wood drippage in the proposed listings.

Available data show that considerable surface water, soil, and ground water contamination presently exists at wood preserving and surface protection sites. These data show that soils and sediments from accumulated mixtures of drippage and waste or

rainwater may contain significant concentrations of the constituents of concern, including pentachlorophenol, PCDDs, and PCDFs. The data indicate that significant environmental contamination (and potential threat to human health and the environment) results where storage residuals (from drippage) from wood preserving and surface protection are allowed to accumulate in surface impoundments, ditches, or other collection units and they support EPA's decision to include drippage and drippage residual in the proposed listings.

Generators of F032, F033, and F035 drippage (and any water or wastes that become mixed with drippage) must manage it in accordance with Subtitle C requirements. Generators who dispose of drippage on the ground must conduct such disposal in accordance with Subtitle C requirements, including the prohibition on disposing liquids in landfills (see 40 CFR 264.314 and 265.314). Generators of treated wood drippage will therefore become owners and operators of hazardous waste treatment, storage, and/or disposal facilities subject to the 40 CFR Part 264 permitting standards, the 40 CFR Part 265 interim status standards, and associated standards for permit applications and other requirements. Under the existing Part 264 and 265 standards, generators may operate either tanks or land disposal units to manage their treated wood drippage. Today's proposal would add Part 264 permitting and Part 265 interim status standards for drip pads. In the event that drippage is collected and is moved from the drip pad within 90 days following generation, generators may avail themselves of the 90-day accumulation standards of 40 CFR 262.34, and would not need Part B permits for their drip pads or tanks (consistent with § 264.1(g)(3), 265.1(c)(7), and 270.1(c)(2)(i)) provided that they comply with the Part 265 standards, as required by 40 CFR 262.34.

EPA recognizes that, at some wood preserving facilities, concrete pads have been installed to route drippage in kick back and storage areas to collection areas or devices. EPA believes that most drip pads are constructed so that drippage runs off the pad, which is sloped, and collects in a sump or in some other depressed area (other than land) associated with (or part of) the pad. The drippage then accumulates in this collection area or device until removed for recycling, disposal, storage, or treatment.

These associated collection areas or devices generally will meet the

definition of a hazardous waste storage tank (see 40 CFR 260.10) and are therefore subject to applicable standards under 40 CFR Parts 264 and 265 Subparts J. EPA does not believe, however, that the drip pads themselves meet the definition of a tank. These pads resemble floors, which are neither tanks nor "ancillary equipment" for tanks, and are not currently subject to regulation.

Because no management standards currently apply to drip pads, EPA is proposing to designate drip pads as a new hazardous waste management unit and to impose standards for the operation of these pads. EPA is thus proposing to add a definition to § 260.10 for drip pads at wood preserving and surface protection facilities and add to Part 264 technical permitting standards and Part 265 interim status standards for drip pads at wood preserving and surface protection facilities. EPA is also proposing amendments to the 90-day accumulator rule of § 262.34 that will allow generators who operate drip pads at wood preserving and surface protection facilities to operate their drip pads without obtaining a RCRA Part B permit, provided that they: (1) Remove collected drippage from the drip pad and associated collection area or device within 90 days following generation, (2) comply with the Part 264 technical standards for drip pads at wood preserving and surface protection facilities, (3) label or mark each drip pad with the words "Hazardous Waste", (4) mark each drip pad with the date on which accumulation began in a manner that is visible for inspection, and (5) comply with the requirements for 40 CFR Part 265, Subparts C and D and § 265.15 for preparedness and prevention, contingency plan and emergency procedures, and inspections. EPA does not solicit, and will not respond to, any comments regarding the basis for, scope, or applicability of the existing regulation at 40 CFR 262.34.

The proposed Part 264 technical standards specify design and operating requirements for drip pads at wood preserving and surface protection facilities. The standards include requirements for containment systems, inspections, and for preventing trackage of drippage from kick back, drip, and storage areas. The standards would also require that generators operating drip pads at wood preserving and surface protection facilities comply with all of the general requirements of Part 264 Subparts A through H. The specific technical requirements are discussed in detail later in this section.

#### 1. Part 264 Technical Standards for Drip Pads (40 CFR Part 264, Subpart T)

The technical standards for drip pads have been designed to provide substantial protection, and resemble to a large degree the existing standards for hazardous waste tanks. The drip pad standards add a novel requirement to prevent the tracking of hazardous waste off the pad by equipment or personnel. The standard for preventing tracking of waste off of drip pads is included because information available to EPA shows that tracking can cause soil contamination and may be a significant mechanism by which cross-contamination occurs at facilities that use more than one preservative at a single location. The Agency requests comment on all aspects of the proposed technical standards.

a. *Requirements for containment systems (40 CFR 264.571).* The proposed standards for drip pads at wood preserving and surface protection facilities require that drip pads be constructed of a curbed, impervious base (e.g., concrete) that is sloped or otherwise designed to drain accumulated liquids resulting from drippage and precipitation. Drip pads and associated collection areas or devices (systems) that are exposed to rain must have sufficient capacity to contain the water from a 25-year/24-hour storm event. The pad must also be surrounded by a dike or berm to prevent water from running onto it. Accumulated materials must be removed from the associated collection system at intervals sufficient to prevent overflow onto the drip pad. The standards for containment systems further require that drip pads be maintained in good condition (i.e., without cracks or visible signs of leakage). Any pad that is visibly cracked or otherwise not capable of containing drippage must be repaired or promptly removed from service.

b. *General operating requirement (40 CFR 264.572).* In order to prevent hazardous waste or hazardous constituents from being tracked from treated wood drip pads, the proposed standards include a general operating requirement which specifies that drip pads must be operated and maintained such that tracking of drippage off-site is prevented. To comply with this requirement, generators must have equipment (e.g., forklifts, tram cars, etc.) that is dedicated for use on each drip pad and that does not leave the pad. Personnel working on drip pads should decontaminate any clothing or shoes before they are taken off a drip pad site. During the course of EPA's data and

<sup>9</sup> In its own evaluation of the NTP reports, EPA has calculated similar  $Q1^*$  values using the data reported for liver tumors. EPA has also calculated  $Q1^*$  values using the data for hemangiosarcomas reported by NTP and may determine that these data provide a more accurate estimate of the carcinogenicity of the two pentachlorophenol mixtures. EPA's calculations are available in the public docket for this rule.



information collection activities to support this proposal, Agency personnel received descriptions of and observed wood preserving facilities that have already initiated such practices in order to prevent releases of wood preserving chemicals (This information is available in the docket for this rulemaking). The Agency therefore anticipates that many wood preserving facilities are already using practices that meet this requirement.

c. *Inspection requirements (40 CFR 264.573)*. Today's proposed standards for drip pads require that owners and operators inspect their drip pads at least weekly for signs of cracking or deterioration that could lead to releases of hazardous waste. The inspection standard specifies that the entire surface of all drip pads be inspected weekly. This requirement is intended to ensure that portions of the drip pad that are covered by treated wood for extended periods of time are inspected regularly for signs of deterioration. At facilities where treated wood is held for more than one week, owners and operators may need to move wood periodically so that all parts of the drip pad can be inspected on schedule. Under the general requirements of Part 264, owners and operators would also be required to maintain records of their inspections.

d. *Closure requirements (40 CFR 264.574)*. At closure, owners and operators of drip pads would be required to remove all hazardous waste and hazardous waste residues from the drip pad. The base and any contaminated soil would also have to be decontaminated at closure.

## 2. Part 265 Interim Status Standards (40 CFR Part 265, Subpart T)

The interim status standards for drip pads at wood preserving and surface protection facilities include all of the same requirements as the proposed Part 264 standards.

## G. Equipment Cleaning or Replacement Standards for Wood Preserving and Surface Protection Facilities

### 1. Applicability

As stated previously, documented cases of cross-contamination following a changeover of wood preserving or surface protection formulations require that both past and current use of a formulation be included in the listing descriptions. The Agency realizes that generators can take measures following a changeover of formulation to abate cross-contamination. Consequently, the Agency is proposing equipment cleaning and replacement procedures that, if adhered to, would cause waste at these

facilities generated in processes that do not use chlorophenolic formulations to no longer meet the listing description of F032. Such wastes, however, may meet the description of the other wood preserving hazardous waste listings, such as F034 or F035 or exhibit one or more of the hazardous waste characteristics. Further, equipment cleaning or replacement procedures apply to facilities engaged in surface protection processes that currently use or previously used chlorophenolics. Once the procedures are adhered to, wastes from processes that do not use chlorophenolics would no longer meet the listing description of F032. Consequently, these wastes would only be regulated under Subtitle C of RCRA if they exhibit one or more of the characteristics of hazardous waste. Generators should note that the wastes generated from equipment cleaning and replacement, pursuant to this section, must be treated as listed F032 or F033 waste.

EPA believes that the cleaning procedures are necessary in order to allow wastes known not to contain PCDDs and PCOFs to be handled in accordance with their potential hazard. The Agency is concerned with these wastes in particular, because of the small number of permitted and interim status facilities (and hence low capacity) able to receive dioxin-containing wastes. The existing capacity shortage and the reported tendency of hazardous waste handlers to turn away any hazardous waste that may contain chlorinated dioxins, regardless of its regulatory status under RCRA, has raised concerns about growing quantities of waste for which there may be no viable treatment or disposal option. EPA is proposing the equipment cleaning and replacement standards for generators of F032 and F033 wastes as one measure that can be taken to avoid exacerbating the existing capacity shortage. Today's proposal does not include provisions for equipment cleaning and replacement to alleviate cross-contamination between creosote and inorganic preservative processes because the hazardous constituents of F034 and F035 do not raise the same concerns. F034 and F035 thus are listed by process rather than by facility. EPA solicits comment however, concerning the potential benefits of a facility-based listing description for F034 and F035 and of applying the equipment cleaning and replacement provisions to such listings.

### 2. Equipment Cleaning or Replacement Performance Standard

The performance standards require that the owner or operator of the facility

must clean or replace all equipment that may have come into contact with chlorophenolic formulations or constituents originally present in the formulations. This must be done in a manner that eliminates the release of hazardous waste, hazardous constituents, leachate, or hazardous waste decomposition products from prior use of chlorophenolics to the environment (as detailed in the cleaning and replacement requirements). If equipment cleaning and replacement procedures have been completed satisfactorily, it can be demonstrated that the wastes generated will no longer meet the listing description of F032 or F033 because there will be no cross-contamination from the previous use of chlorophenolics.

### 3. Equipment Cleaning or Replacement Requirements

Generators must follow the equipment cleaning or replacement standard according to a plan written by the generator or his representative. Once the plan is carried out, it must be signed by the generator and a copy of the certified plan must be submitted to the Regional Administrator along with other information, as explained below.

The plan must stipulate methods to remove all visible residues from equipment including, but not limited to, sumps, tanks, piping systems, drip pads, forklifts, and trams. Further, the plan must detail the use of solvent rinsing to remove non-visible contaminants. Rinsing must continue until no chlorophenolics or dioxins are detected in the final rinse using the testing method required. Alternatively, the plan may describe methods to replace all the process equipment that may have come into contact with chlorophenolic formulations. The standard requires that all residues from the cleaning operations and all discarded equipment that has not been decontaminated must be handled as either F032 or F033 depending upon the type of process for which the equipment was used.

### 4. Previous Equipment Cleaning or Replacement Provision

If it can be documented that previous equipment or replacement procedures have been conducted, and that they meet the proposed standards of § 261.35, this information, verified by the owner or operator, may be used to fulfill the equipment cleaning or replacement requirements. If this alternative is used, the generator must document (by providing records of all the formulations and existing processes used on-site) that no further cross-contamination could

have occurred following the cleaning or replacement. Further, generators must submit documentation of prior equipment cleaning or replacement and continued use of non-chlorophenolic formulations to the EPA Regional Administrator, along with a certification of its authenticity, and must receive the Regional Administrator's written approval before the generator can be considered to have complied with the equipment cleaning and replacement standards and the wastes can be considered to no longer meet the listing description of F032 or F033. The Regional Administrator will review the information submitted to determine whether all necessary equipment has been cleaned or replaced and that cleaning has been verified through adequate and appropriate testing, as required by § 261.35.

### 5. Testing Requirement

The procedure also specifies certain testing and recordkeeping requirements. Following equipment cleaning, SW-846 Method 8290 must be used to analyze for dioxins and dibenzofurans (Method 8290 has been proposed for addition to SW-846 but has not been added in final form. EPA expects that Method 8290 will be final before this proposed rule becomes effective. A description of Method 8290 is available in the docket for this rule). Once the contaminants are no longer detected in the solvent rinse using these methods, the equipment is judged clean and the equipment cleaning or replacement standard has been met.

### 6. Notification, Review, and Approval

Generators intending to use the equipment cleaning or replacement procedures so that their wastes will not meet the F032 or F033 listing description must submit a notification of their intent to clean and replace equipment to the Regional Administrator 30 days before cleaning and replacement activities commence. Within 30 days following completion of equipment cleaning and replacement activities, generators must submit copies of all records and the cleaning and replacement plan together with a signed certification to the Regional Administrator. Under the proposed rule, the Regional Administrator will review all documentation provided and make a determination concerning whether the generator has fully complied with the equipment cleaning and replacement standards.

In the event that the Regional Administrator notifies the generator of a tentative determination that the requirements for equipment cleaning and replacement have not been met, the

generator will be allowed 30 days to provide any additional information that would support a change in the determination. After receipt of any additional information, the Regional Administrator must notify the generator of the final determination within 30 days. A determination that all equipment cleaning and replacement requirements have been met becomes effective immediately and the subject wastes would then no longer meet the listing description of F032 or F033, provided that the generator does not resume or initiate use of chlorophenolic formulations. They may, however, continue to be RCRA hazardous waste either because they meet other listing descriptions (e.g., F034 or F035) or because they exhibit one or more of the characteristics of hazardous waste.

### H. Test Methods for Compounds Added to Appendices VII and VIII of 40 CFR Part 261

In order to analyze for the constituents of concern present in today's proposed listed wastes, appropriate analytical procedures must be specified. Tables 1 and 2, in 40 CFR Part 261, Appendix III list the analytical methods authorized by the Agency for organic and inorganic compounds. These procedures are described in EPA Publication SW-846: "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," (U.S. EPA, 1986), a copy of which is included in the docket for this proposal. The detection limits required for these analyses are those specified by SW-846.

The majority of the wood preserving and surface protection constituents of concern already have analytical methods assigned to them in Part 261. Today's proposal will add benzo(d)fluoranthene to Appendix III. Benzo(k)fluoranthene can be analyzed for using method numbers 8100, 8250, 8270, or 8310.

Today's proposal also adds heptachlorodibenzo-p-dioxins and heptachlorodibenzofurans to the list of hazardous constituents of 40 CFR Part 261, Appendix VIII. These two chemicals belong to the family of PCDDs and PCDFs already listed in Appendix III. Method 8290, listed on Appendix III as the method of analysis for PCDDs and PCDFs, should be used to analyze for heptachlorodibenzo-p-dioxins and heptachlorodibenzofurans. EPA notes that Method 8290 has been proposed for addition to SW-846. EPA expects that the method will be added in final form before the effective date of this proposed rule. A description of Method 8290 is available in the docket for this proposed rule.

The test methods are designed for use in detecting specified substances by applicants who wish to conduct waste evaluations in support of delisting petitions (40 CFR 260.22), and by owners or operators of hazardous waste management facilities who must conduct ground water or incinerator monitoring (See, e.g., 40 CFR 264.99 and 264.341).

### I. Applicability of RCRA Rules for Recycled or Reclaimed Hazardous Waste

EPA recognizes that certain wastes from wood preserving and surface protection processes are recycled or reused at the generating site. For example, information on waste management practices collected by EPA shows that drippage from wood preserving, particularly drippage collected in kick-back areas, is often recycled back to the process. Wastewaters generated by inorganic wood preserving processes also are commonly recycled on-site by return them to the process.

Secondary materials that are used or reused directly either as a feedstock or as an effective substitute for commercial chemical products are also not considered to be solid wastes provided that the reuse is not use constituting disposal or use as a fuel (See 50 FR 665, January 4, 1985).

On January 8, 1988, EPA proposed amendments to the Definition of Solid Waste (see 53 FR 519) regarding regulation of recycled materials under Subtitle C or RCRA. These proposed amendments constituted EPA's response to a ruling made by a panel of the District of Columbia Circuit Court of Appeals in the matter of *American Mining Congress v. EPA*, 824 F.2d 1177 (DC Cir. 1987). The amendments propose to exclude from being solid wastes certain in-process recycled materials from the petroleum refining industry and certain other sludges, by-products, and spent materials that are reclaimed as part of continuous, on-going manufacturing processes. Under the proposed amendment, secondary materials that are reclaimed and returned to the original processes in which they were generated are excluded from Subtitle C regulation if any storage that occurs before recycling takes place in tanks and the return process takes place through a "closed loop" that is "entirely connected with pipes or other comparable enclosed means of conveyance" (see 53 FR 529).

Information available to EPA regarding the manner in which process residuals are reclaimed in wood



preserving and surface protection processes indicates that these materials are not typically reused directly. In addition, recycling does not take place in closed-loop systems of the type anticipated by the proposed amendment. EPA therefore believes that most on-site recycling at wood preserving and surface protection facilities would not qualify for either the existing or the proposed exclusion.

Generators should note that, under 40 CFR 261.6 (b) and (c), any recyclable materials that are hazardous waste are subject to the applicable requirements of Parts 262 and 263 (standards for generators and transporters of hazardous wastes, respectively). Storage of recyclable materials also is subject to all of the applicable requirements of Part 264, and generators are required to comply with the notification requirements of section 3010 of RCRA and the requirements of 40 CFR 265.71 and 265.72 for use of the manifest and manifest discrepancies. While generation, storage, and transportation of recyclable materials are regulated the same as other hazardous waste, the actual recycling process does not need a RCRA permit.

Additionally, EPA has previously promulgated regulations for recyclable materials that are used in a manner constituting disposal (see 40 CFR 266.20 through 266.23) and standards for hazardous waste burned for energy recovery (see 40 CFR 266.30 through 266.35). Generators should note that, to the extent that the wastes proposed for listing today are recycled in ways that constitute disposal or are burned for energy recovery in boilers or industrial furnaces that are exempt from regulation under Subpart O of Part 264, the appropriate standards of Part 266 apply.

### III. State Authority

#### A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003 and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in the

State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State which the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law, however.

In contrast, under section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, the HSWA applies in authorized States in the interim.

Certain portions of today's rule are proposed pursuant to section 3001(e) of RCRA, a provision added by HSWA. Therefore, the Agency is proposing to add these requirements to Table 1 in 40 CFR 271.1(j), which identifies the Federal program requirements that are promulgated pursuant to HSWA and that take effect in all States, regardless of their authorization status. States may apply for either interim or final authorization for the HSWA provisions identified in Table 1, as discussed in the following section of this preamble.

#### B. Effect on State Authorization

As noted previously, certain portions of today's rule are being proposed pursuant to provisions added by HSWA, while others are being proposed pursuant to pre-HSWA authority. The addition of F032 and F033 to the list of hazardous wastes from non-specific sources and the equipment cleaning and replacement standards for F032 and F033 wastes are proposed pursuant to section 3001(e) of RCRA, a provision added by HSWA. These standard will therefore take effect in all States (authorized and non-authorized) on the effective date. Permitting and interim status drip pad standards associated with F032 and F033 wastes will take effect on the effective date pursuant to 40 CFR 264.1(f)(2) and proposed § 265.1(c)(4)(iii) (see below). The addition of F034 and F035 to the list of hazardous wastes from non-specific sources and the addition of test methods to Appendix III of Part 261 are not immediately effective in authorized

States since the requirements are not pursuant to the HSWA. The permitting and interim status standards for drip pads associated with F034 and F035 wastes will therefore only become effective in authorized States when F034 and F035 become hazardous waste in each authorized State and when the State is authorized for the drip pad standards.

#### 1. HSWA Provisions

As noted above, EPA will implement the addition of F032 and F033 to the list of hazardous wastes from non-specific sources (and the standards for equipment cleaning and replacement) in authorized States until the States modify their programs to adopt these rules and the modification is approved by EPA. Because this portion of the rule is proposed pursuant to HSWA, a State submitting a program modification may apply to receive either interim or final authorization under section 3006(g)(2) or 3006(b), respectively, on the basis of requirements that are substantially equivalent to or equivalent to EPA's. The procedures and schedule for State program modifications for either interim or final authorization are described in 40 CFR 271.21. It should be noted that all HSWA interim authorizations will expire January 1, 1993 (see § 271.24(c)).

40 CFR 271.21(e) requires that States having final authorization must modify their programs to reflect Federal program changes, and must subsequently submit the modifications to EPA for approval. The deadline by which States must modify their programs to adopt this proposed regulation will be determined by the date of promulgation of the final rule in accordance with § 271.21(e)(2). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those proposed in today's rule. Such State regulations have not been assessed against the Federal regulations being proposed today to determine whether they meet the tests for authorization. Thus, a State is not authorized to implement their regulations as RCRA requirements until the State program modification is submitted to EPA and approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under cooperative agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in

their efforts to implement their programs rather than take separate actions under Federal authority.

States that submit their official applications for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, States must modify their programs by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of these standards must include standards equivalent to these standards in their application. 40 CFR 271.3 sets forth the requirements States must meet when submitting final authorization applications.

#### 2. Non-HSWA Provisions

Other portions of today's proposed rule will not be effective in authorized States since the requirements will not be imposed pursuant to the Hazardous and Solid Waste Amendments of 1984. These portions include the addition of F034 and F035 to the list of wastes from non-specific sources, the permitting and interim standards for drip pads that handle F034 and F035 wastes, and the addition of test methods to 40 CFR Part 261, Appendix III. Just these requirements will be applicable in those States that do not have interim or final authorization. In authorized States, these requirements will not be applicable until the States revise their programs to adopt equivalent requirements under State law.

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes and must subsequently submit the modifications to EPA for approval. The deadline by which the States must modify their programs to adopt this proposed regulation will be determined by the date of promulgation of the final rule in accordance with § 271.21(e). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those proposed in today's rule. These State regulations have not been assessed against the Federal regulations being proposed today to determine whether they meet the tests for authorization. Thus, States are not authorized to carry out their regulations as RCRA requirements until State program modifications are submitted to EPA and approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law.

States that submit their official application for final authorization less than 12 months after the effective date of these standards are not required to include standards equivalent to these standards in their application. However, States must modify their programs by the deadlines set forth in § 271.21(e). States that submit official applications for final authorization 12 months after the effective date of those standards must include standards equivalent to these standards in their applications. 40 CFR 271.3 sets forth the requirements States must meet when submitting final authorization applications.

#### 3. Special Provision for Drip Pad Standards Applicable to F032 and F033

Under 40 CFR 264.1(f)(2), EPA may issue permits in authorized States if the subject regulated unit was not regulated under RCRA at the time of the State's authorization and the standards for permitting the unit were promulgated after the State received final authorization. At the time that today's rule is promulgated, EPA will therefore, under 40 CFR 264.1(f)(2), issue permits for drip pads used in association with F032 and F033 wastes in authorized States.

Similarly, EPA is proposing to add § 265.1(c)(4)(iii) to be able to impose Federal interim status standards on drip pads that handle F032 and F033 wastes. This section, which is an exact corollary to § 264.1(f)(2), would subject to interim status standards a waste listed under HSWA and therefore hazardous within the State until the State becomes authorized for the listed waste and for the management standards.

The standards for drip pads as they apply to F032 and F033 thus will become applicable in both authorized and unauthorized States upon promulgation. EPA will not implement the standards for permitting drip pads as they apply to F034 and F035 wastes in authorized States. These standards will become effective in authorized States when the State modifies its program in accordance with 40 CFR 271.21(e), presumably at the same time as the F034 and F035 listing become applicable in authorized States.

#### IV. CERCLA Designation and Reportable Quantities Adjustment

The wastes proposed to be listed as hazardous in today's notice will, on the effective date of the final rule, automatically become hazardous substances under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. CERCLA section 103(a) requires that

persons in charge of vessels or facilities from which a hazardous substance has been released in a quantity that is equal to or greater than its reportable quantity (RQ) immediately notify the National Response Center (at (800) 424-8802 or at (202) 426-2875) of the release.

Under section 102(b) of CERCLA, new RCRA hazardous waste listings with constituents that have not been previously designated as hazardous under CERCLA have the statutorily-imposed RQ of 1 pound unless or until adjusted by regulation. In order to coordinate the RCRA and CERCLA rulemakings with respect to new waste listing, the Agency today is proposing regulatory amendments under CERCLA authority in connection with the proposed listing of wastes F032, F033, F034, and F035. The Agency is jointly proposing with the waste listings to: (1) Designate wastes F032, F033, F034, and F035 as hazardous substances under section 102(a) of CERCLA; and (2) adjust the RQs of wastes F032, F033, F034, and F035 based on the application of a proposed RQ adjustment methodology.

The Agency is proposing adjustments from the statutory RQs established under CERCLA section 102 based upon the adjustment methodology described in previous final rules (50 FR 13456 (April 4, 1985), and 51 FR 34534 (September 29, 1986)) and a proposed rule (52 FR 8140, March 16, 1987). The proposed RQs for newly listed hazardous wastes are based on the RQs of the hazardous constituents of the newly listed hazardous wastes identified under RCRA. Thus, if a newly listed hazardous waste has only one constituent of concern, and that constituent is a CERCLA hazardous substance, the waste will have a proposed RQ that is the same as the RQ for the constituent (whether statutory or finally adjusted). If the hazardous waste has more than one constituent of concern and all constituents are CERCLA hazardous substances, the lowest RQ assigned to any of the constituents will be the proposed RQ for the hazardous waste.

If the waste has both CERCLA and non-CERCLA constituents, the proposed RQ for the waste will be the lowest RQ of any of the constituents. The non-CERCLA constituents will be evaluated and given an RQ value for the purpose of adjusting the RQ of the hazardous waste (however, constituents cannot be assigned RQs until they are designated as CERCLA hazardous substances). If the RQ value for any of the non-CERCLA constituents is lower than the RQ values for the CERCLA constituents, the waste will be proposed for



adjustment at this lower level. If the waste has only non-CERCLA constituents the RQ will be proposed for adjustment at the level of the lowest RQ value of any constituent.

EPA has previously adjusted RQs for wastes on the basis of hazardous constituents that are not CERCLA hazardous substances by attributing an RQ to such constituents in order to assign an appropriate RQ to the waste stream (see 48 FR 23565, May 25, 1983). In other words, the Agency derives the RQ for a waste stream based upon the lowest RQ of all of the hazardous constituents known to be in the waste, regardless of whether the constituents are CERCLA hazardous substances. EPA is proposing to use this adjustment methodology for the wastes proposed for listing today. The "RQ" developed for non-CERCLA substances is used for ranking purposes only; no releases of such constituents need be reported to the National Response Center.

The proposed RQs apply to the waste streams, not just to the CERCLA hazardous substances. CERCLA does not require persons in charge of vessels or facilities to analyze wastes to determine the concentrations of individual hazardous constituents in a mixture; however, if a person has completely analyzed the waste and determines that the amount released of each constituent is below its respective RQ, no notification is required (see 40 CFR 302.6(b)). (See also 50 FR 13463 dealing with mixtures of hazardous substances.) This does not mean that the hazardous waste stream will have an RQ other than the one listed on Table 302.4 of 40 CFR Part 302 for that hazardous waste stream. This has been a source of confusion for the regulated community and will be clarified in future rulemakings.

Table 16 lists the proposed RQs for hazardous wastes that are proposed to be designated as CERCLA hazardous substances as well as the RQs for each hazardous constituent of the hazardous wastes. Hazardous waste streams F032, F034, and F035 contain constituents with RQs of 1 pound. Therefore, the proposed RQ for each of these hazardous wastes is 1 pound. For hazardous waste stream F033, the lowest RQ for a constituent with an established RQ is 10 pounds. Therefore, the proposed RQ for waste stream F033 is 10 pounds.

TABLE 16.—PROPOSED RQs FOR CERCLA HAZARDOUS SUBSTANCES

Hazardous substance	Constituent	RQ (lbs)	Future final RQ (lbs)
Waste No. F032.		1	
	Arsenic	1	1
	Benz (a) anthracene	1	10
	Benzo (a) pyrene	1	1
	Chromium	1	5,000
	Dibenz (a,h) anthracene	1	1
	Indeno (1,2,3-cd) pyrene	1	100
	Lead	1	100
	Naphthalene	100	
	Pentachlorophenol	10	10
	Phenol	1,000	
	Tetrachlorodibenzo-p-dioxins	..	
	Pentachlorodibenzo-p-dioxins	..	
	Hexachlorodibenzo-p-dioxins	..	
	Heptachlorodibenzo-p-dioxins	..	
	Tetrachlorodibenzofurans	..	
Waste No. F033.		10	
	Pentachlorophenol	10	10
	2,3,4,6-Tetrachlorophenol	10	
	2,4,6-Trichlorophenol	10	10
	Tetrachlorodibenzo-p-dioxins	..	
	Pentachlorodibenzo-p-dioxins	..	
	Hexachlorodibenzo-p-dioxins	..	
	Heptachlorodibenzo-p-dioxins	..	
	Tetrachlorodibenzofurans	..	
	Pentachlorodibenzofurans	..	
Waste No. F034.		1	
	Arsenic	1	1
	Benz (a) anthracene	1	10
	Benzo (k) fluoranthene	1	5,000
	Benzo (a) pyrene	1	1
	Biphenyls	..	
	Chromium	1	5,000
	Dibenz (a,h) anthracene	1	1
	Indeno (1,2,3-cd) pyrene	1	100
	Lead	1	100
Waste No. F035.		100	
	Naphthalene	1	
	Arsenic	1	1
	Chromium	1	5,000

TABLE 16.—PROPOSED RQs FOR CERCLA HAZARDOUS SUBSTANCES—Continued

Hazardous substance	Constituent	RQ (lbs)	Future final RQ (lbs)
	Lead	1	100

\*\* Indicates that no RQ is being assigned to the generic broad class.

The Agency notes that only the proposed RQs for the waste streams are open to comment. Consequently, the Agency is not soliciting comments on the RQs for the constituents of concern, nor will it respond to any such comments received.

Each hazardous waste having the characteristics identified under or listed pursuant to section 3001 of RCRA meets the statutory definition of a hazardous substance contained in CERCLA section 101(14). Under CERCLA section 102(a), the EPA Administrator has the authority to designate a CERCLA hazardous substance any substance referred to in section 101(14). In order to clarify that the RCRA hazardous wastes proposed to be listed in today's rule are subject to CERCLA authority, EPA also proposes to designate hazardous wastes F032, F033, F034, and F035 as hazardous substances under CERCLA section 102(a).

#### V. Compliance Cost and Economic Impact Analysis

Executive Order No. 12291 requires EPA to prepare an analysis of the costs and economic impacts associated with a proposed regulation. The results of this analysis are used to determine whether the regulation will result in: (1) Incremental annual costs that exceed \$100 million, (2) significant increases in costs or prices for consumers or individual industries, or (3) significant adverse effects on competition, employment, investment, innovation, or international trade. If a proposed rule meets any of these criteria, it is a "major rule," as defined by Executive Order No. 12291 and a Regulatory Impact Analysis must be completed before the rule is promulgated.

Today's proposed regulation is not a "major" rule because it will not have an annual economic effect of more than \$100 million. This section of the preamble discusses the results of the cost and economic impact analyses undertaken to assess the effects of the proposed rule (DPR Inc., 1988b). The draft Cost and Economic Impact

Analysis is available in the public docket for this proposal.

#### A. Description of Affected Population

##### 1. The Wood Preserving Industry

Those facilities in the wood preserving industry that use chlorophenolic formulations, creosote formulations, or inorganic formulations containing arsenic and/or chromium are subject to the proposed rule. The wood preserving industry produces about 380 million cubic feet of preserved wood per year. Approximately 70 percent of the wood preserving production is treated with arsenical compounds; the balance is treated with creosote (21 percent) and pentachlorophenol (9 percent).

In 1985, 567 plants produced preserved wood in the U.S. The American Wood Preservers Institute reports that 14 additional plants have come into operation since 1985. Approximately 60 percent of all wood preserving plants are located in the southeast and southcentral portions of the U.S. These plants account for 64 percent of annual U.S. production. Most plants that treat with creosote and/or pentachlorophenol are more than 25 years old; several operating plants are more than 75 years old. The use of inorganic preservatives is presently increasing and, as a result, most new wood preserving plants are CCA plants. Facilities that treat with inorganic preservatives exclusively are, on average 10 years old.

##### 2. The Surface Protection Industry

The surface protection industry consists of approximately 6,000 sawmills. EPA estimates that approximately 1,500 sawmills have used sodium pentachlorophenate to control sapstain; these facilities are subject to the proposed rule. Of these 1,500 sawmills, the Agency estimates that approximately 250 to 300 sawmills currently use chlorophenolic solutions to control sapstain. Sapstain control (surface protection) can also be accomplished using: (1) Water storage of logs, (2) rapid processing of sawn lumber and kiln-drying, or (3) use of chemicals other than sodium pentachlorophenate. Surface protection facilities that have never used chlorophenolic solutions are not subject to the proposed rule.

#### B. Regulatory Assumptions Used in this Analysis

As described previously, today's proposed rule would add four wastes from the wood preserving and surface protection industries to the list of hazardous wastes from non-specific sources. Each of the hazardous waste

listings identifies four components: wastewaters, process residuals, preservative drippage, and discarded spent preservative formulations. Specific practices required for each component under the proposed rule are discussed below. These required practices form the regulatory basis for compliance cost and economic impact analysis.

#### 1. Compliance Practices that Contribute to Incremental Costs

As a result of the proposed rule, generators of F032, F033, F034, and F035 wastes will be required to collect and manage treated wood drippage. Generators may choose to use tanks or surface impoundments, as well as drip pads to manage drippage wherever it is generated at wood preserving and surface protection facilities, including kick-back areas and treated wood storage yards. EPA believes that because many wood preserving and surface protection plants have drip pads in kick-back areas and some have installed or are installing drip pads in treated wood storage yards, most generators will choose to maintain drip pads throughout their facilities. Drip pads are likely to be concrete pads. They must have berms that effectively prevent off-site migration of drippage and drippage residuals. Drip pads will likely have drainage systems with a sump for collecting drippage and runoff mixed with drippage. Drippage will be managed either by being disposed of or by being recycled.

Process residuals from plants using creosote and inorganic preservatives are assumed to be disposed of and managed in permitted RCRA facilities. Process residuals from facilities using pentachlorophenol are assumed to be incinerated in permitted RCRA incinerators.

Unlike wood preserving facilities, surface protection facilities may switch to alternative chemicals that are not hazardous to comply with the proposed rule, and thereby avoid all compliance costs except the cost of decontaminating their facilities and the incremental cost (if any) of using alternative methods to achieve sapstain control. Surface protection facilities that continue to use sodium pentachlorophenate or choose not to comply with the equipment cleaning and replacement standards must manage process residuals as Subtitle C hazardous wastes.

Surface protection facilities that do not currently use chlorophenolic solutions, but have used sodium pentachlorophenate in the past, will be required to decontaminate their facilities to prevent contamination of

sawed wood, production equipment, and wastes with pentachlorophenate residuals, or manage their waste in accordance with Subtitle C requirements. This analysis assumes that decontamination will be accomplished by solvent rinsing until no dioxins or dibenzofurans are detectable.

Wood preserving and surface protection facilities that continue to produce wastes subject to the proposed rule, but that do not already have RCRA permits, will be required to obtain them. The Agency has only identified 25 wood preserving facilities that do not already have a RCRA permit or that will be required to obtain a permit and to comply, for the first time, with interim status standards. Because RCRA-permitted and interim status facilities are subject to corrective action standards, these newly permitted facilities will be subject to corrective action as a result of the proposed rule. Accordingly, the potential cost of corrective action for these facilities is attributed to the proposed rule. However, corrective action costs for those wood preserving facilities that are already permitted or subject to interim status standards are attributable to the corrective action regulations, and not to this rule.

#### 2. Compliance Practices That Do Not Contribute to Incremental Costs

Some of the wastes defined in today's proposed rule are already regulated as characteristic hazardous waste under RCRA. Further, many of the facilities affected by today's proposal may already generate EPA waste K001. Because wood preserving and surface protection plants with these wastes already manage their wastes in regular units, this analysis does not include the costs associated with regulating these types of wastes under the proposed rule.

For example, the majority of wastewaters generated by wood preserving plants using creosote and pentachlorophenol are co-managed with K001 wastes in permitted RCRA units. Wastewaters from plants using only inorganic formulations are generally recycled with zero discharge. Generation of discarded spent preservative formulation is negligible for all segments of the wood preserving industry. Accordingly, this analysis did not include the incremental costs and benefits of managing these wood preserving waste stream components as hazardous wastes.

Surface protection facilities that currently use chlorophenolic solutions can curtail generation of listed wastes by switching to alternate chemicals or



methods of sapstain control and complying with the standards for equipment cleaning and replacement. This analysis assumes that affected surface protection plants will decontaminate their equipment and switch to didecyl dimethyl ammonium chloride (DDAC), residuals of which are not regulated as hazardous waste. Another option would be to replace contaminated equipment. Because the cost of decontamination is likely to be less than equipment replacement, this analysis assumes that in general, generators will prefer equipment decontamination to replacement.

### C. Costs and Economic Impacts

The cost and economic impact analysis has three components: (1) Estimation of compliance costs for model facilities that represent the affected industry; (2) estimation of national costs of the proposed rule on the basis of model facility costs; and (3) an assessment of effects on prices, employment, and the regulated industries.

#### 1. Facility Costs of Compliance

Facility costs were estimated using a three-step process. First, "model" small, medium, and large facilities were developed to represent segments of the industry expected to have different compliance costs. Criteria for small, medium, and large facilities were developed based on the distribution of firms by size (i.e., by numbers of employees) and the size at which the adverse economic impacts appear to rise and fall substantially. Small facilities were defined to be those having fewer than 10 employees; medium facilities were defined as those having more than 10 and fewer than 20 employees; and large facilities were defined as those having more than 20 employees. The model facilities are described in detail in the draft Cost and Economic Impact Analysis. In the second step of the analysis, compliance activities were determined for each of the model facilities and engineering estimates were prepared for each activity. Finally, in the third step of the analysis, the resources required to pay for the compliance practices resulting from the proposed rule were estimated.

Individual facility compliance costs were estimated based on an analysis of the cash flow and waste management practices of model plants. Each model facility is characterized by its annual

sales, the number of employees, the volume of waste generated, and its waste management practices. Both the size (annual production) of a facility and the preservatives used affect the cost of complying with the proposed rule.

Compliance cost estimates for each model facility include the cost of managing the residuals described above, plus initial administrative expenses, additional closure costs, and, for four model facilities which represent the estimated 25 facilities that do not currently have RCRA permits and are not subject to interim status standards, corrective action costs.

This analysis uses annual revenue requirements to measure the combined effects of different types of incremental costs attributable to the proposed rule. The annual revenue requirement (ARR) is the additional revenue required by a facility to cover the incremental costs of compliance with the proposed rule, assuming that these costs are financed and discounted over a set period of time. A 20-year period and an 11.3 percent nominal discount rate are used in this analysis.

Table 17 shows the ARR for each model wood preserving and surface protection facility. Individual wood preserving facilities are projected to incur total incremental annual costs ranging from \$24,000 to \$608,000 as a result of the proposed rule. In general, larger facilities will have higher total costs than small facilities. The ARR for model facilities subject to corrective action regulations as a result of the proposed rule are substantially higher than those for similar facilities that are already permitted or currently subject to interim status requirements, because the corrective action costs are substantially higher than compliance costs. The model plant with the highest ARR, \$608,000, is a medium-size creosote plant not presently subject to Subtitle C requirements. The Agency believes that there are six creosote plants (five small- and one medium-size) and 19 pentachlorophenol plants (18 small- and 1 medium-size) that would be subject to corrective action as a result of the proposed rule. Again, for purposes of this analysis, EPA has defined small plants as those with fewer than 10 employees, medium plants as those with at least 10 but fewer than 20 employees, and large plants as those with 20 or more employees.

TABLE 17—ANNUAL REVENUE REQUIREMENT FOR MODEL WOOD PRESERVING AND SURFACE PROTECTION FACILITIES AFFECTED BY THE PROPOSED RULE<sup>1,2</sup>

Model facility type (wood preserving)	Permitted ARR [Dollars]	No Permit ARR [Dollars]
<b>Creosote:</b>		
Small	24,000	369,000
Medium	46,000	608,000
Large	91,000	N/A
<b>Pentachlorophenol:</b>		
Small	30,000	375,000
Medium	41,000	368,000
Large	82,000	N/A
<b>Inorganic:</b>		
Small	25,000	N/A
Medium	45,000	N/A
Large	97,000	N/A
<b>Multiple preservatives (medium size assumed):</b>		
Creosote/		
pentachlorophenol	104,000	N/A
Pentachlorophenol/		
inorganic	56,000	N/A
Inorganic/creosote	45,000	N/A
All three preservatives	127,000	N/A
<b>Surface protection facilities currently using pentachlorophenol 12 months a year:</b>		
Small	9,000	N/A
Medium	32,000	N/A
Large	100,000	N/A
Large Northwest	360,000	N/A
<b>Surface protection facilities currently using pentachlorophenol 6 months a year:</b>		
Small	6,000	N/A
Medium	18,000	N/A
Large	51,000	N/A

<sup>1</sup> These costs include engineering, corrective action, administrative, and closure costs.

<sup>2</sup> The Annual Revenue Requirement (ARR) shown here does not reflect anticipated price increases that could offset the net revenue requirements for model facilities.

<sup>3</sup> ARRs for surface protection facilities are based on switching to a more expensive alternative chemical, DDAC.

NOTE.—N/A indicates that there are no unpermitted facilities in this preservative and facility size category.

Table 17 shows that the ARRs for eight model surface protection facilities range from \$6,000 to \$360,000, depending on the size of the facility and the number of months a year the facility uses sapstain-treating chlorophenolic solutions. In general, these costs are lower than compliance costs for wood preserving facilities of comparable size.

#### 2. National Costs of the Proposed Rule

**a. Methodology.** The national costs of today's proposed rule were estimated using a four-step approach. First, total compliance costs were estimated for each model facility type. Next, the universe of affected facilities was categorized into groups based on preservatives used and size. Third, for

each model facility type, per-facility compliance costs were multiplied by the number of facilities represented by each model plant type. Fourth, total costs were estimated for the affected facilities in the wood preserving and surface protection industries by adding the total costs for each facility category.

**b. Results.** The results of this analysis indicate that the aggregate annualized cost of the proposed rule to the wood preserving industry is estimated to be approximately \$43 million (1988 dollars). The aggregate annualized cost of compliance for the surface protection industry is estimated to be approximately \$11 million. The total estimated cost of compliance with the rule is approximately \$54 million (1988 dollars). Because the aggregate annual impact of the proposed rule is less than the \$100 million threshold set by Executive Order 12291, the Agency has determined that today's rule is not a major rule.

#### 3. Economic Impact Analysis

The economic impact analysis assesses the impact of the proposed rule on: (1) prices, (2) individual segments of the wood preserving and surface protection industries (including small entities), and (3) employment levels. The methodology used to assess these impacts is briefly described below. Readers requiring a more detailed understanding are referred to the draft Cost and Economic Impact Analysis.

**a. Methodology—(1) Price Impacts.** The price of treated wood products can be expected to change as a result of the proposed rule. Incremental potential price changes for preserved and surface protected wood products are estimated using a three-step methodology. First, the price increase required to maintain current profits is calculated for each of the model facilities. Second, the ability of each of the model facility categories to raise the price of their products is assessed using model plant estimates and existing market data. Third, the price of treated wood products is estimated based on the results of the first two steps.

**(2) Industry impacts.** The economic impact of the proposed rule on individual segments of the wood preserving industry were assessed using a three-step approach. First, the ratios of estimated annual compliance costs for model facilities to sales and pre-tax profits (following estimated price increases) were calculated. Second, these ratios were compared with two

economic impact test criteria. The first test is whether a model facility's incremental ARR exceeds one percent of annual sales. The second test is whether a model facility's reduction in profits exceeds 20 percent of projected pre-tax profits. If a model facility is projected to exceed both of these ratio thresholds, it is considered "significantly" impacted by the proposed rule. If a model facility is projected to exceed only one of these thresholds, it is not considered to be "significantly" affected by the proposed rule.

In the third step, the number of actual facilities represented by each of the affected model facilities were estimated. As part of this process, the number of small entities subject to substantial economic impacts was estimated.

**(3) Employment impacts.** Employment impacts were assumed to result from facility closures. Facility closures are difficult to predict for many reasons. For example, the Agency does not have information on the resources potentially available to individual firms that operate more than one wood preserving facility. The potential for facility closures was evaluated by subjecting each of the model plants identified in the industry impacts analysis to additional financial tests. The first test is whether the ratio of the ARR to the estimated cash from operations is greater than 0.5 for a model facility. The second test is whether the capital compliance costs exceed annual investment. These financial tests were designed for the Agency to assess the potential for firm closures as a result of implementation of the small quantity generator regulations (ICF Inc. and DPRA Inc., 1985). A range of potential employment effects, corresponding to the range of results of all of the financial tests for model facilities, was developed.

**b. Results—(1) Price impacts.** Industry data suggest that large facilities are the price leaders in the industry. Because of the large market share held by large wood preserving firms, this analysis assumes that prices could be increased to cover the estimated incremental compliance costs of the large inorganic and creosote plants. Thus, the wholesale price of creosote-preserved wood would rise 3 cents from \$7.20 per cubic foot to \$7.23. The wholesale price of inorganic-preserved wood would rise 5 cents from \$3.97 per cubic foot to \$4.02.

The Agency is not aware of any one large facility that uses pentachlorophenol exclusively; therefore, this analysis assumes that

medium-sized plants are the price leaders in this segment and that product prices would rise to cover the incremental costs of medium-sized pentachlorophenol plants. The wholesale price of pentachlorophenol-preserved wood would rise 12 cents from \$4.84 per cubic foot to \$4.96. For a number of reasons discussed in the Cost and Economic Impact Analysis, incremental costs of corrective action would not be transferred to customers in the form of higher prices. As a result, projected price increases will vary by the preservative that is used in each industry segment.

In contrast to the wood preserving industry, the surface protection industry is unlikely to transfer any of its incremental costs to consumers in the form of higher prices. This is principally because most surface protection facilities do not need to use any chemicals to prevent sapstain, and therefore could generally undersell facilities that attempted to increase their prices to recover incremental regulatory costs.

The price increases described above were not considered significant, and therefore the proposed rule will not have a major impact on prices for consumers or other industries using preserved or surface protected wood.

**(2) Industry impacts.** The effect of the proposed rule on different segments of the wood preserving and surface protection industries is examined by comparing the projected ARR/Sales ratio and the expected reduction in profits with the criteria for identifying "significantly affected facilities" that were presented earlier. ARR/Sales and revised reduction in profits (in percent) for each of the model plants (after projected price changes are taken into account) are shown in Table 18.

Table 18 shows that the unpermitted/non-interim status model facilities, assumed to incur corrective action costs as a result of the proposed rule, are projected to incur much greater adverse economic impacts than the other affected facilities. This analysis indicates that all small single preservative facilities are projected to incur significant adverse economic effects as a result of the proposed rule. Facilities using pentachlorophenol alone seem likely to sustain the greatest economic impact of all model facilities already subject to Subtitle C requirements.



TABLE 18.—ARR/SALES AND REDUCTION IN PROFITS FOR MODEL WOOD PRESERVING AND SURFACE PROTECTION PLANTS FOLLOWING EXPECTED PRICE INCREASES

(In percent)				
Model plant type (wood preserving)	Permitted ARR/sales	Facilities reduction in profit	Unpermitted ARR/sales	Facilities reduction in profit
Creosote:				
Small	1.3	37	20	820
Medium	0.8	4	8	130
Large	0.5	0	N/A	N/A
Pentachlorophenol:				
Small	3.8	52	45	1,870
Medium	2.3	0	22	390
Large	1.8	0	N/A	N/A
Inorganic <sup>1</sup> :				
Small	2.1	38	N/A	N/A
Medium	1.6	6	N/A	N/A
Large	1.3	0	N/A	N/A
Multiple preservatives:				
C/P Medium	1.4	4.4	N/A	N/A
P/I Medium	1.3	6.4	N/A	N/A
I/C Medium	0.8	2.7	N/A	N/A
P/I/C Medium	1.1	1.0	N/A	N/A
Surface protection facilities (that currently use chlorophenolics 12 months a year):				
Small	1.5	57	N/A	N/A
Medium	1.0	22	N/A	N/A
Large	1.0	29	N/A	N/A
Very Large	0.9	28	N/A	N/A
Surface protection facilities (that currently use chlorophenolics 8 months a year):				
Small	1.0	39	N/A	N/A
Medium	0.5	12	N/A	N/A
Large	0.5	15	N/A	N/A

<sup>1</sup> Impact based on model inorganic plants that may have previously used pentachlorophenol. Plants that have never used pentachlorophenol would incur slightly lower impacts.

<sup>2</sup> Multiple preservative plants were assumed to be medium-sized plants in this analysis.

Note.—N/A indicates that all facilities in this category have RCRA permits and would not require corrective action as a result of the proposed rule. Criteria: Model Plants are "significantly" affected if: ARR/Sales Exceeds 1% and ARR/Profit Exceeds 20%.

Table 18 also shows that the small surface protection model facility that treats for sapstain control throughout the year is significantly impacted by the proposed rule. The Agency estimates that approximately 50 to 75 small surface protection facilities use chlorophenolic solutions to control sapstain 12 months, a year, and would incur significant adverse economic effects as a result of the proposed rule.

Thus, the proposed rule will significantly impact all small, single preservative wood preserving facilities. Nevertheless, since large, medium and multiple preservative facilities produce the overwhelming majority of all types of preserved wood, the proposed rule is not expected to have a significant impact on the wood preserving industry. Because most sawmill production is not treated with any sapstain control agent, the proposed rule is also not expected to have a significant impact on the sawmilling industry.

(3) *Employment Impacts.* Two additional tests on model facilities identified as subject to "significant adverse impacts" in the Industry Impact section (above) are used to help assess the potential for facility closures and consequent employment impacts. The capital cost of compliance was

compared with annual investment to assess the potential for incremental capital requirements to contribute to firm closures. The annual revenue requirement was compared with the cash from operations to further assess the potential for incremental revenue requirements to contribute to firm closures. Table 19 shows the results of these tests.

Table 19 indicates that the 25 facilities represented by the model facilities incurring corrective action costs are judged to have a higher likelihood of closure than the other facilities. The number of employees in the 25 actual facilities represented by these model facilities is estimated to be between 150 and 200. The potential employment impacts could thus range as high as 200 jobs, if all of the facilities that fail all of these tests close as a result of the proposed rule. Even if that should happen, the balance of the industry is expected to absorb the loss of production from these facilities by expanding production at many other facilities currently operating at less than full capacity. New jobs that may be created at these larger facilities would partially offset the potential employment impact from possible plant closings. Based on these findings, the

employment impact of the proposed rule is not considered significant.

TABLE 19.—ADDITIONAL TESTS FOR ECONOMIC IMPACT OF PROPOSED RULE

Model plants	RCRA status	ARR/CFO	CCA/AI	No. plants
Small penta.	Permitted	0.2	9:1	1
Small creosote.	Permitted	0.1	4:1	23
Small penta.	No permit	3.1	9:1	18
Small creosote.	No permit	1.3	4:1	5
Medium creosote.	No permit	0.5	1.6:1	1
Medium penta.	No permit	1.3	5:1	1
Small inorganic.	Permitted	0.1	6:1	184

Criteria for Significantly Impacted: ARR/Cash from Operations (CFO) > 0.5 or Compliance Capital Cost/Annual Investment (CCA/AI) > 1:1.

#### 4. Limitations

An important limitation on the analysis of potential employment effects is the absence of information on firm assets. If firms have additional

resources that can be used to help cover compliance costs, this analysis may overestimate the potential economic impact of the proposed rule. The Agency requests additional information on the financial status of the wood preserving industry to refine its analysis of employment effects.

The economic impact analysis described above does not take into account the effects that other regulations may have on the economic performance of regulated entities. For example, corrective action costs for firms that already generate and manage K001 waste are not an incremental cost of today's proposed rule, but may adversely impact the economic performance of the industries. Many facilities that generate K001 could incur corrective action costs at the same time as they incur costs associated with today's proposed rule. The economic impact of corrective action on these firms could be substantial. The cumulative effect of these and other rules is outside the scope of the draft Cost and Economic Impact Analysis.

#### VI. Regulatory Flexibility Analysis

The Agency is required, under the regulatory Flexibility Act (RFA), to assess whether a substantial number of small businesses are significantly affected by a proposed rule. EPA determines whether a rule will have a "significant economic effect" on small entities based on: The ratio of incremental compliance costs to the value of sales, the ratio of compliance costs to profits, and the number of facility closures that could result from the proposed rule. Based on EPA's guidelines for conducting Regulatory Flexibility Analyses (RFAs), a "substantial number" of small entities was defined to be 20 percent or more of the small businesses in the regulated industry.

The wood preserving industry is characterized by the presence of many small companies. Approximately 45 percent of the companies in the wood preserving industry have fewer than 10 employees, approximately 20 percent have been 10 and 19 employees, and only approximately 35 percent have 20 or more employees. In 1982, nearly 60 percent of the approximately 6,000 domestic sawmills had fewer than 10 employees. Fifteen percent of these facilities had been ten and 19 employees, and approximately 25 percent of the sawmills had 20 or more employees.

EPA guidance for compliance with the RFA provides the Agency with some flexibility in selecting a quantitative cut-off point for defining small entities. In

accordance with Agency guidance, EPA based its small-entity definition on the distribution of firms by size in the affected industries, and the size at which the adverse economic impacts appear to rise or fall substantially (USEPA, 1982). As discussed below, EPA has examined several possible definitions for small businesses for purposes of the regulatory flexibility analysis and has consulted with the Small Business Administration concerning these definitions. The Agency specifically requests comments on the alternatives evaluated (or any others) for defining small business entities in the wood preserving and surface protection industries.

In accordance with the Regulatory Flexibility Act (RFA), the Agency undertook a preliminary analysis to determine whether the proposed rule will cause a significant impact on small businesses. This analysis has two principal components: (1) Determining whether any small business segments would incur significant impacts as a result of the rule, and (2) determining whether a significant number of small businesses would sustain a significant economic impact.<sup>4</sup> The analysis indicates that, based on the Agency's guidelines for Regulatory Flexibility Analysis, today's rule will significantly affect a substantial number of small entities in the wood preserving and surface protection industry.

#### A. Methodology

The first component of the RFA analysis is based on the financial performance criteria used in the Economic Impact Analysis reported above, and additional guidance provided in the Regulatory Flexibility Act and EPA policies on implementation of the RFA (Russell, 1982).

Second, the number of small entities projected to incur significant impacts was estimated by assuming that the distribution of small entities within the impacted industry segments is similar to the distribution of small entities in the regulated industries. Readers requiring a more detailed explanation of the methodology that was used are referred to the Cost and Economic Impact Analysis.

#### B. Results

The Industry Impact Analysis, provided previously, indicates that small wood preserving facilities using pentachlorophenol are expected to incur the greatest adverse economic impacts

<sup>4</sup> For this analysis, small businesses in the wood preserving and sawmilling industries were defined as those with fewer than ten employees.

as a result of the proposed rule. Small creosote and inorganic model wood preserving plants also exceed the ratio tests used in this analysis, and are projected to be significantly affected. Small surface protection facilities that currently use sodium pentachlorophenolate for 12 months a year, but are expected to switch to alternative chemicals, also exceed these ratio thresholds, and are expected to be significantly impacted. Accordingly, the Agency has determined that the proposed rule is likely to cause a significant economic impact for a significant fraction of small businesses in the wood preserving industry.

All of these plants, represented by the small model facilities, are susceptible to adverse economic impacts. The Agency's review of the wood preserving industry suggests that there are approximately 232 small wood preserving facilities that would be significantly affected. The Agency concludes that these facilities comprise at least 20 percent and up to 100 percent of the small businesses in the wood preserving industry. By contrast, the Agency estimates that there are 50 to 70 small surface protection plants that use chlorophenolic solutions for surface protection for 12 months a year. The Agency believes these comprise up to 5 percent of the small businesses in the surface protection industry.

#### C. Conclusions

Historically, the Agency has used a criterion of 20 percent for assessing whether a significant number of small businesses are affected. As a result of this analysis, the Agency has determined that a significant number of the small businesses in the wood preserving industry are likely to incur significant economic impacts as a result of the proposed rule. The 50 to 75 surface protection facilities that may be significantly affected by today's proposed rule represent less than 5 percent of the small businesses in that industry. The Agency has determined that a significant number of the small businesses in the surface protection industry are not likely to incur significant impacts as a result of the proposed rule.

#### D. Regulatory Options Considered by the Agency

The Agency has considered a number of regulatory options in light of the potential economic impacts of the proposed rule on small businesses. These options are based on the Cost and Economic Impact Analysis summarized in Section V. In particular, the Agency



solicits comments on the best approach to defining small businesses. The Agency is evaluating whether it is preferable to establish a small business cut-off based on an annual sales threshold or on number of employees. The goal of the annual sales threshold is to establish a true "economic" threshold; however, data upon which to establish such a threshold are not readily available. If alternative regulatory options were made available to small businesses, an employee-based cut-off has clear implications because it may create incentives for firms to lay-off employees in order to avoid compliance with regulatory standards. However, data on number of employees are more readily available. A secondary issue the Agency is considering is whether to establish thresholds for defining small businesses for the entire wood preserving industry, or whether to establish separate thresholds for specific sectors.

EPA conducted the option analysis in order to fulfill its obligation under the Regulatory Flexibility Act. Two of the options examined involve exempting certain small business entities from the requirements for operating hazardous waste drip pads in treated wood storage yards. These options were selected for examination because available information on waste management practices shows that most wood preserving and surface protection facilities already have drip pads in kick-back areas. Most do not have drip pads in treated wood storage yards. Moreover, treated wood storage yards are quite large (many acres) at most facilities. EPA therefore concluded that installation of drip pads in treated wood storage yards would account for a large portion of the compliance costs. The Agency notes that under RCRA, EPA does not normally make regulatory decisions on the basis of economic considerations. EPA therefore believes that options providing exemptions from certain requirements for small business entities in this case would be inconsistent with its statutory mandate under RCRA. As an alternative, EPA considered using a risk-based determination in conjunction with an exemption for small businesses. Under such an option the exemption would be granted based on a consideration of the relative hazard posed by an individual facility.

Of the remaining options, two involve a delay in the effective date of the regulations and the third involves no special provisions for small businesses. All six options are discussed briefly below.

Option 1 is full application of the proposed rule to all wood preserving and surface protection plants, regardless of size. Because this option has the same requirements for all wood preserving facilities, it will provide the greatest environmental benefits. However, this option is expected to cause adverse economic impacts for more small, single preservative wood preserving firms than the other regulatory options. Option 1 is consistent with EPA's RCRA mandate.

Option 2 involves allowing all small wood preserving and surface protection facilities to comply with the proposed rule on a delayed schedule. Under this option, small businesses would be allowed up to 5 years following the effective date of the rules to come into compliance. Although this option does not reduce the economic impact of the rules, EPA believes that the delay may provide time for small businesses to investigate a variety of compliance options and to seek any financial assistance required to fund compliance expenditures. Option 2 is also consistent with RCRA.

Option 3 involves allowing small businesses up to 10 years following the effective date of the rules to come into compliance. This option would provide an even longer period of time to investigate and select compliance alternatives. EPA believes that this 10-year period may be sufficient to allow for developing technological changes or chemical changes to the wood preserving process that may affect compliance costs. Option 3 is consistent with RCRA.

Option 4 would permit firms that use only arsenical formulations to obtain an exemption from the proposed requirement for operating drip pads in treated wood storage yards if they met the definition of small businesses. The agency is considering two approaches to defining small businesses under this option. The definition would apply either to firms with an annual sales of less than \$1,170,000 per year, the estimated annual sales level corresponding to the small model arsenical facility developed in the Cost and Economic Impact Analysis; or to firms with less than seven employees, the size of many small facilities that exclusively use arsenic. Option 4 is inconsistent with EPA's authority under RCRA.

Option 5 would permit any small wood preserving firm to obtain an exemption from the proposed requirements for operating drip pads in treated wood storage yards. Option 5 is also inconsistent with EPA's authority under RCRA.

Option 6 would allow small businesses to apply to EPA for an exemption based on a demonstration that the quantities of drippage generated at an individual facility do not exceed an established de minimis level. Under this option, the Agency would need to develop guidance concerning the establishment of de minimis levels, taking into consideration the constituent concentrations in drippage, the size of wood storage yards, the quantities and rates of treated wood production, and a variety of other site-specific factors. While this option has the advantage of being consistent with EPA's RCRA authority, it also has significant disadvantages. EPA would need to conduct studies to develop methods for evaluating drippage rates and establishing de minimis levels. Additionally because the determination would be site-specific, the cost of developing the information required to support an exemption may be prohibitive to small businesses.

There are a number of approaches that can be taken to define small businesses under Options 2, 3, 5, and 6. Approaches based on annual sales are briefly noted below:

a. An annual sales level of \$1,230,000, which is the weighted average of sales, for the proportion of small model plants that use each preservative.

b. Annual sales of less than \$4,000,000, which would encompass about 65 percent of the industry.

c. An annual sales level for small plants and for those using the specific preservatives, i.e., creosote firms with annual sales less than \$1,800,000, pentachlorophenol firms with annual sales less than \$810,000 and arsenical firms with annual sales less than \$1,170,000.

d. An annual sales level less than the sales level at which firms are projected to meet the criteria for incurring significant adverse economic impacts. Assuming that the economic impact criteria, ARR/Sales and ARR/Pretax Profits, are linearly related to the number of employees at a firm, the cut-off sales levels (at which significant economic impacts are accrued in each segment) would be \$3.6 million for firms using creosote, \$1.4 million for firms using pentachlorophenol, and \$2.0 million for firms using arsenic.

There are a number of factors to consider in evaluating these approaches. The first two approaches are easier to implement—they involve only one cut-off for the whole industry. The third and fourth approaches more reasonably take into account differences in average size and profitability between the three

segments of the wood preserving industry. In particular, the fourth approach would more equitably confer relief to specific segments of the industry at the point that they incur adverse economic impacts. However, this approach would also result in larger creosote facilities being eligible for an exemption than with the other regulatory options.

The Agency is also considering (solely for meeting the requirements of the Regulatory Flexibility Act) an employee-based cut-off to defining small business. For the most part, these options parallel those for annual sales thresholds and are described below:

a. Firms with ten or fewer employees.  
b. Firms with twenty or fewer employees, which would encompass about 65 percent of the industry.

c. Firms with fewer employees than the number of employees in the applicable model plant in the Cost and Economic Impact Analysis, i.e., creosote firms with fewer than ten employees, pentachlorophenol firms with fewer than eight employees, and arsenic firms with fewer than seven employees would be eligible for relief.

d. Firms with fewer employees than the number of employees at model facilities estimated to have economic impacts; i.e., creosote firms with fewer than 19 employees, pentachlorophenol firms with fewer than 12 employees, and arsenic firms with fewer than ten employees.

e. Firms with fewer than 500 employees, an exemption based on the Small Business Administration (SBA) definition of small business for the wood preserving industry (500 employees). The SBA definition is based on the size (in number of employees) at which firms can alter the price of preserved wood. This approach would result in over 99 percent of the firms in the industry being eligible for the exemption. This approach does not take into account differences in the typical size of firms in each segment of the industry; nor does it take into account differences in the significance of the economic impacts that may accrue to firms in different segments as a result of the proposed rule.

Similar considerations to those noted for the different sales thresholds also apply to approaches based on number of employees. The major exception is that an employee-based cut-off may create incentives to lay off employees. The Agency solicits comment on all the approaches described above or any others that may be more appropriate.

As noted previously, EPA believes that only Options 1, 2, 3, and 6 are consistent with its RCRA mandate and

therefore represent feasible regulatory options. As a result, the Agency anticipates that the only relief it can provide to small businesses is a delay in the effective date of the requirements for drip pads in treated wood storage yards. The Agency solicits comments on the options presented here and on any other options.

Based on a more detailed analysis of these options and on comments received, the Agency will continue to evaluate the impacts on the wood preserving industry.

## VII. Paperwork Reduction Act

The reporting, notification, or recordkeeping (information) provisions in this rule will be submitted for approval to the Office of Management and Budget (OMB) under section 3504(b) of the Paperwork Reduction Act of 1980, U.S.C. 3501 *et seq.* Any final rule will explain how its reporting, notification, or recordkeeping provisions respond to any OMB or public comments.

## VIII. Compliance Procedures and Deadlines

### A. Section 3010 Notification

Not later than 90 days from publication of the rule finalizing these listings, all persons who generate, transport, treat, store, or dispose of waste which are covered by today's proposed regulation will be required to notify EPA (for F032 and F033 wastes) or either EPA or a State authorized by EPA to operate the hazardous waste program (for F034 or F035 wastes) of their activities pursuant to section 3010 of RCRA. Persons who previously have notified EPA or an authorized State that they generate, transport, treat, store, or dispose of hazardous wastes and have received an identification number (see 40 CFR 262.12, 263.11, and 265.11) need not re-notify. Notification instructions are set forth in 45 FR 12746, February 26, 1980. Persons without EPA identification numbers are prohibited from generating, transporting, treating, storing, or disposing of hazardous wastes.

The Agency views the section 3010 notification requirement to be necessary in this case because it is believed that many persons that manage the wastes proposed for listing today have not previously notified EPA and received an EPA identification number.<sup>6</sup>

<sup>6</sup> Under Solid Waste Disposal Amendments of 1980, (Pub. L. 96-452) EPA was given the option of waiving the notification requirement under section 3010 of RCRA following revision of the section 3001 regulations, at the discretion of the Administrator. Notification is not being waived in this case.

## B. Compliance Dates

### 1. F032 and F033

Because HSWA requirements are applicable in authorized States at the same time as in unauthorized states, EPA will regulate F032 and F033 until States are authorized to regulate these wastes. Thus, once these regulations become effective in a final Agency rule, EPA will apply those Federal regulations to these wastes and to their management in both authorized and unauthorized States. Facilities that treat, store, or dispose of F032 and F033, but that have not received a permit pursuant to section 3005 of RCRA and are not operating pursuant to interim status, might be eligible for interim status under HSWA (see section 3005(e)(1)(A)(ii) of RCRA, as amended). In order to operate pursuant to interim status, the eligible facilities will be required to submit a section 3010 notice pursuant to 40 CFR 270.70(a) within 90 days from the publication of the rule finalizing these listings, and will be required to submit a Part A permit application within 6 months of such publication.

Under section 3005(e)(3), within 18 months of such publication, land disposal facilities qualifying for interim status under section 3005(e)(1)(A)(ii) also will be required to submit a Part B permit application and certify that the facility is in compliance with all applicable ground water monitoring and financial responsibility requirements. If the facility fails to do so, interim status will terminate on that date.

All existing hazardous waste management facilities (as defined in 40 CFR 270.2) that treat, store, or dispose of F032 and F033 and that are currently operating pursuant to interim status under section 3005(e) of RCRA, will be required to file with EPA an amended Part A permit application within 6 months of such publication.

Under current regulations, a hazardous waste management facility that has received a permit pursuant to section 3005 would not be able to treat, store, or dispose of F032 and F033 until a permit modification allowing such activity is approved in accordance with § 270.42. Note that EPA has recently amended the permit modification requirements for newly listed or identified wastes. See 53 FR 37912 *et seq.* (September 28, 1988).

### 2. F034 and F035

a. *Interim status in unauthorized states.* Facilities that treat, store, or dispose of F034 and F035 wastes in unauthorized States, but that have not received a permit pursuant to section



3005 of RCRA and are not operating pursuant to interim status, might be eligible for interim status under HSWA (see section 3005(e)(1)(A)(ii) of RCRA, as amended). In order to operate pursuant to interim status, the eligible facilities will be required to submit a section 3010 notice pursuant to 40 CFR 270.70(a) within 90 days from the publication of the rule finalizing these listings, and to submit a Part A permit application within 6 months of such publication. Within 18 months of such publication, under section 3005(e)(3), land disposal facilities qualifying for interim status under section 3005(e)(1)(A)(ii) also will be required to submit a Part B permit application and certify that the facility is in compliance with all applicable ground water monitoring and financial responsibility requirements. If the facility fails to do so, interim status will terminate on that date.

All existing hazardous waste management facilities (as defined in 40 CFR 270.2) that treat, store, or dispose of F034 and F035 and that are currently operating pursuant to interim status under section 3005(e) of RCRA, will be required to file with EPA an amended Part A permit application within 6 months of such publication.

Under current regulations, a hazardous waste management facility that has received a permit pursuant to section 3005 would not be able to treat, store, or dispose of F034 and F035 until a permit modification allowing such activity were approved in accordance with § 270.42. Note that EPA has recently finalized amendments to the permit modification requirements for newly listed or identified wastes. See 53 FR 37912 et seq. (September 28, 1988).

*b. Interim status in authorized states.* Until a State is authorized to regulate F034 and F035 (i.e., until F034 and F035 become hazardous waste under authorized State law), no permit requirements would apply and facilities would not need to seek RCRA interim status or a RCRA permit. Any facility treating, storing or disposing of these wastes on or before the effective date of authorization of the State to regulate these wastes under RCRA might qualify for interim status under applicable State law. Note that in order to be no less stringent than the Federal program, the State "in existence" date for determining interim status eligibility could not be after the effective date of EPA's authorization of the State to regulate these wastes. Any eligible existing facility also would be required to provide the required 3010 notification as described above and to provide the

State's equivalent of a Part A permit application as required by authorized State law.

Finally, RCRA section 3005(e)(3) or any authorized State analog would apply to land disposal facilities qualifying for State interim status.

### 3. Drip Pad Permitting and Interim Status Standards

*a. Unauthorized states.* The drip pad standards would apply in unauthorized States as of the effective date of EPA's final rule adopting these standards. The effective date for small businesses will depend on which, if any, of the regulatory options, discussed above in Section VI.E, is chosen.

*b. Authorized states.* The standards for permitting drip pads associated with F032 and F033 wastes would be applicable in authorized States in accordance with 40 CFR 264.1(f)(2) and proposed § 265.1(c)(4)(iii), as discussed previously. The standards, as they apply to F034 and F035 wastes, would not apply after Agency publication of rule, until the State is authorized to regulate these wastes as hazardous (and presumably to implement the drip pad requirements). States could not obtain authorization for these requirements prior to the effective date of EPA's regulations, which, for small businesses, will depend on the adoption of regulatory options specified in Section VI.E. However, States may impose requirements that are more stringent or broader in scope than EPA's regulations; States may choose to impose such standards prior to authorization as a matter of State law.

### 4. Application of Phasing of Regulations

If EPA selects to phase implementation in regard to small business entities and the Regulatory Flexibility Act, EPA will authorize States choosing not to delay regulation of small businesses but will make the effective date of authorization as it applies to small businesses consistent with the schedule selected for the Federal program.

### List of Subjects

#### 40 CFR Part 260

Administrative practice and procedure, Confidential business information, Hazardous materials, Recycling, Reporting and recordkeeping, Waste treatment and disposal.

#### 40 CFR Part 261

Hazardous materials, Waste treatment and disposal, Recycling.

#### 40 CFR Part 262

Administrative practice and procedures, Hazardous materials, Reporting and recordkeeping.

#### 40 CFR Part 264

Hazardous materials, Packing and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal.

#### 40 CFR Part 265

Air pollution control, Hazardous materials, Packaging and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal, Water supply.

#### 40 CFR Part 270

Administrative practice and procedures, Air pollution control, Hazardous materials, Reporting requirements, Waste treatment and disposal, Water pollution control, Water supply, Confidential Business Information.

#### 40 CFR Part 271

Administrative practice and procedure, Confidential Business Information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

#### 40 CFR Part 302

Air pollution control, Chemicals, Hazardous materials, Hazardous materials transportation, Hazardous substances, Intergovernmental relations, Natural resources, Nuclear materials, Pesticides and pests, Radioactive materials, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control.

Lee Thomas,  
Administrator.

Date: December 23, 1988.

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### Appendix—Environmental Contamination from Wood Preserving and Surface Protection Wastes

Past mismanagement of the wastes listed in today's notice (F02, F033, F034, and F035) has resulted in significant environmental damage which the Agency has documented extensively. As shown in Table 20, a total of 36 wood preserving and surface protection facilities representing all of the proposed listings are on the National Priority List.

The following examples typify the many cases that EPA has identified regarding environmental contamination. They demonstrate that wastes from wood preserving and surface protection processes are capable of persisting and moving in the environment to reach environmental receptors in potentially harmful concentrations. The Background Document to today's proposal contains further examples of damage cases.

#### A. Environmental Contamination with Wastes from Pentachlorophenol Wood Preserving Processes

At a facility located in southwestern Montana (that is included on the National Priorities List (NPL)) poles were pressure treated with pentachlorophenol dissolved in diesel oil. Untreated retort condensate was discharged through an unlined ditch to an unlined pit. Ground water approximately 15 feet below the surface has been found to be contaminated with a floating oil layer that contains 650 ppm pentachlorophenol and 200 ppb 2,3,7,8-TCDD toxic equivalents. This ground water is hydraulically connected to a creek 0.4 miles downgradient from the site. Approximately 49,000 gallons of oil has been recovered from interceptor trenches and recovery wells. The total 2,3,7,8-TCDD toxic equivalent concentration of the recovered oil was 700 ppb. Soils in the process area were contaminated at a depth of 12 to 24 inches with pentachlorophenol (5,250 ppm) and PCDDs and PCDFs (total 2,3,7,8-TCDD equivalent concentration was 20 ppb). Off-site soils were also contaminated, presumably by runoff carrying drippage from contaminated surface soils. Off-site surface soils contained a total 2,3,7,8-TCDD equivalent concentration of 26 ppb. This case clearly demonstrates that unless properly managed on-site, ground water and soil contamination can result from the wastes generated from wood preserving processes using pentachlorophenol.

Contamination of residential drinking water wells with pentachlorophenol, PCDDs, and PCDFs has also been demonstrated at a 50 acre site in southern Montana. Wood preserving operations at this facility began in the late 1940s. Pentachlorophenol dissolved in oil was applied to wood by pressure and non-pressure methods (the site was added to the NPL in 1984). In the past, the facility discharged pentachlorophenol-contaminated ground water to an adjacent creek through a ditch. Soils and shallow ground water were contaminated via leaking pipes and a deteriorated wastewater sump. Two contaminant plumes have been identified. The first plume consists of pentachlorophenol dissolved in oil that floats on top of the water

table. This plume oozed from the ground in a pasture downgradient from the facility. There is also a plume of pentachlorophenol dissolved in ground water that has contaminated two drinking water wells on neighboring property with PCDDs and PCDFs. One well contained 0.8 ppt and the other 2 ppt total 2,3,7,8-TCDD toxic equivalents.

#### B. Environmental Contamination with Wastes from Pentachlorophenol Surface Protection Processes

During 1986 and 1987, Environment Canada conducted a 4-month field study at five sawmills and two lumber export terminals (Krahn, Shrimpton, and Glue, 1987). The object of the study was to measure the extent to which rainfall could be contaminated with chlorophenols leached from treated lumber. The studied sites represented typical lumber handling and treatment methods including dip tanks and low pressure and high pressure spray systems. Leachate dripping directly from the wood and yard was analyzed for 2,3,4,6-tetrachlorophenol and pentachlorophenol.

It was found that leaching from treated lumber began after 1.0 to 1.5 mm of continuous rainfall. Dip treated lumber leached up to 160 mg/l and generated drippage averaging 0.3 to 0.5 mg/l total chlorophenols. Low pressure sprayed lumber leached up to 580 mg/l total chlorophenols. High pressure sprayed lumber leached up to 9.8 mg/l and generated average yard runoff with up to 2 mg/l total chlorophenols. Chlorophenols were found to leach from treated lumber under all conditions of exposure to rainfall. Conditions studied included up to 8 days of drying, 13 consecutive days of rainfall and 18 days of alternating wet and dry periods. This study documents that drippage of preservative formulation from surface protected wood and preservative is washed off treated wood by precipitation, and, thus, can migrate into the environment.

A sawmill located in northwest Oregon documents the contamination of on-site soils, ground water, and surface water sediments with chlorophenols, PCDDs, and PCDFs. In 1983, the Oregon Department of Environmental Quality detected chlorophenols in water samples collected near the mill. The chlorophenols apparently derived from the application of an anti-sapstain (surface protection) solution containing tetrachlorophenol and pentachlorophenol to lumber intended for export. At this mill, a continuous processing line is used to dip-treat cut lumber. A roller system moves bundles of lumber to the dip tank, the wood is submerged for less than a minute, then allowed to drip into the dip tank for a few minutes. Next, excess preservative is mechanically shaken off the lumber and the wood transported to a storage yard.

Soil samples collected in 1983 from the dip tank area were found to contain 940 ppm total chlorophenols (pentachlorophenol plus tetrachlorophenols) at the surface. In the path over which the treated lumber was transported to the storage yard, the total chlorophenols concentration was 2,520 ppm

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at a depth of 6 to 8 inches. Soil in the treated wood storage yard was also contaminated. At a depth of three feet the total chlorophenol concentration was 1.4 ppm.

Drainage from the dip tank area to an on-site creek contained 0.3 ppm pentachlorophenol. Ground water near the dip tank was found to contain 0.1 ppm total chlorophenol, demonstrating that drips and spills from surface protection processes can contaminate surface water and ground water.

Samples collected during 1985 were analyzed for PCDDs and PCDFs as well as chlorophenols. Sediment collected from the on-site creek near the dip tank contained 2 ppt 2,3,7,8-TCDD. The total 2,3,7,8-TCDD equivalent concentration was 500 ppt. The average toxic equivalent concentration found in three other creek sediment samples was 300 ppt. This contamination is attributed to runoff from spills and drips of chlorophenol preservative solution near the dip-treating area. Soil that received drippage from the paved treated wood storage yard was also contaminated. The concentration of total chlorophenols was 63 ppm. The total 2,3,7,8-TCDD equivalent concentration was 4,000 ppt (4 ppb).

Contamination of on-site soils with PCDDs and PCDFs was also documented in a study conducted by the California State Water Resources Control Board. Soil samples were collected in the area of treatment operations at three northern-California sawmills. Presumably, these soils were contaminated by spills, leaks and especially drippage from lumber dipping operations. Concentrations of up to 10,100 ppm total chlorophenols (pentachlorophenol and tetrachlorophenol) were measured in the soil. Tetrachlorodibenzo-p-dioxin was not measured above the analytical detection limits, but all other PCDD and PCDE homologues were detected. The maximum total 2,3,7,8-TCDD toxic equivalent concentration was 40 ppb.

#### C. Environmental Contamination with Wastes from Creosote Wood Preserving Processes

The contamination of ground water, surface water and sediments, and on-site soils with toxic constituents from creosote wood preserving wastes has been demonstrated by a facility located in southeastern Wyoming that was added to the NPL in 1982. The facility began operations in the 1880s, and has been treating railroad ties with creosote since 1928. The facility is located on the flood plain of a river used for irrigation and recreation. Wood preserving wastewaters were disposed of in unlined surface impoundments. Sludges that were cleaned out of the wood treating retorts were buried in the porous alluvial soils on which the facility was built.

As a result of past operating and waste disposal practices, it is estimated that 250,000 cubic yards of soil are saturated with 5 million gallons of oily material. The contamination has attained greatest depth around the treating area, surface impoundments and buried waste. The oily contamination in the alluvium is bordered by a fringe of contamination dissolved in ground water, which extends into the bebrock.

Measured ground water concentrations of contaminants include 100 ug/l fluoranthene and 1,400 ug/l pyrene, compounds that are major constituents of creosote. Free oil also was observed discharging from the saturated alluvium to the river and creosote constituents were measured in river water and sediments.

A facility located in northwestern Ohio also demonstrates the contamination of ground water and surface soils with creosote constituents. Wood has been treated with creosote at this facility since the early 1900s. Process wastes and wastewater treatment residuals (listed waste K001) were disposed of in at least one unlined sludge disposal pit, approximately 13 feet deep. At a depth of 25 feet, ground water in a monitoring well installed adjacent to this pit was contaminated with 71 mg/l anthracene, 58 mg/l naphthalene, 24 mg/l pyrene and other compounds which are major constituents of creosote. The depth at which this contamination was detected indicates that the creosote constituents are migrating through the blue-clay soil that underlies the sludge disposal pit. The volatile organic compounds benzene, toluene, and ethylbenzene were also measured in the ground water, at concentrations of 3 mg/l, 0.8 mg/l and 0.3 mg/l, respectively.

At this same facility, creosote-treated wood was stored on-site in a 7 acre storage yard. Soil from a low area in which drainage from the treated wood storage yard collected was sampled and analyzed. Pyrene (230 mg/kg), chrysene plus benz(a)anthracene (120 mg/l), and fluoranthene (110 mg/kg) were detected, along with other creosote constituents, indicating that creosote that had dripped from treated wood was carried out of the storage yard by surface runoff.

#### D. Environmental Contamination with Wastes from Inorganic Wood Preserving Processes

Contamination of ground water has been demonstrated at a California facility where on-site soils and surface drippage with arsenic and chromium from wood preserving wastes occurred (The facility was added to the NPL in 1982). Wood was treated on an 18 acre site in the San Joaquin Valley, California, since 1936. At various times, the facility used pentachlorophenol, FCAP, CCA, and copper-8-quinolate. Excess preservative that dripped from treated wood was allowed to run into drainage and percolation ditches. Wastewater was allowed to drain into dry wells, while retort sludges and other wastes were placed in a 50-foot diameter unlined pond and in a sludge pit with hydraulic conductivity with ground water. These waste management practices resulted in contamination of ground water and soils on-site. Arsenic and chromium have been measured in the ground water at concentrations of 0.05 and 9 mg/l, respectively, compared to maximum contamination levels (MCLs) of 0.05 mg/l for each metal. The contaminated aquifer is used as drinking water by 10,000 people. Surface soil concentrations range to 9,800 mg/kg arsenic and 10,100 mg/kg of total chromium. At a depth of 10 to 20 feet, both arsenic and chromium are present at up to 4

mp/kg. The arsenic concentration measured in standing water in the treatment area was 10 mg/l and chromium was present at 0.8 mg/l, demonstrating that soil contaminants can be transferred to the standing water. Vineyards that border two sides of the site have received runoff contaminated with drippage and other solid wastes.

Data from another case demonstrate that contaminated runoff from storage yards used to hold wood treated with CCA can be contaminated with drippage containing arsenic and chromium. The facility, located in northwestern Alabama, was sampled in 1985 when CCA was the only preservative used. Although no wastewater was generated from the actual CCA treating process, runoff from the yard used to store CCA-treated wood was collected in a drainage pond. No water from the tank or retort area, tracks in front of the retort or any wastewater treatment system drained into the pond. Water in the pond contained 4 mg/l arsenic and 0.79 mg/l chromium. Pond sediments contained 1,200 mg/kg arsenic and 1,900 mg/kg of chromium, demonstrating that metal contaminants can be washed off treated wood and/or the soil on which inorganic preservative has dripped. Ground water near the drainage pond was not sampled. However, ground water 71 feet below an evaporation pond that had been used to treat wastewater from a discontinued steam conditioning and pentachlorophenol treatment process, contained chromium at a concentration slightly higher than the drinking water standard of 0.05 mg/l. Presumably the metal contaminants originated from pentachlorophenol wastewater cross-contaminated with chromium and arsenic that had infiltrated into the ground water below the evaporation pond.

Several cases of off-site contamination of ground water have been documented. A surface impoundment (that had been used to store process wastes) was closed in 1977 by draining the pond, spreading its contents over the site, mixing the waste with soil and placing the waste mixture in the impoundment. A wet-weather spring sediment sample showed 2 mg/kg arsenic and 12 mg/kg chromium, further evidence of ground-water contamination.

At a facility located in central South Carolina (also on the NPL), FCAP and CCA wood preserving solutions dripped onto the ground in the loading yard and drip shed over 20 years of operation. The State reported that high levels of chromium were detected in many neighboring private wells, at concentrations up to 80 mg/l.

At a small site outside of Baltimore, Maryland, tank overflows have resulted in the overland flow of CCA treating solution. The facility had a surfaced drip pad which did not contain all preservative dripping from treated wood, and allowed drippage to overflow onto the ground. As a result, surface soils are contaminated with up to 5,700 mg/kg arsenic and 3,100 mg/kg chromium. Ground water on-site is also contaminated (800 mg/l arsenic, 130 mg/l chromium) and high chromium concentrations were reported in a neighbor's well.

As a 7.5 acre site one-half mile from the Russian River in northern California (added

to the NPL in 1982), soils and ground water on-site were severely contaminated as a result of past operating practices, including spills and leaks from the facility's CCA preservative and wastewater recycling system. Concentrations of chromium in ground water near the process area reached 120 mg/l. Ground water contamination migrated off-site. Contaminant levels in the plume were 0.5 mg/l arsenic and 0.6 mg/l chromium, compared to MCLs of 0.05 mg/l for both metals. Ground water in the area supplies domestic, agricultural, and industrial users.

Environmental contamination from wood preserving operations that use inorganic preservatives can be long-lasting. This is documented by a site in Texas on the Texas-Arkansas border. A wood preserving facility operated on this 61 acre site from 1939 to 1961 and used pentachlorophenol, creosote, and CCA. Wood preserving wastes were stored in a surface impoundment on the site where ground water is 10 feet below the surface. In 1984, a housing development and a sand and gravel pit occupied the site. A sediment sample from a creek adjacent to the site

contained 4 mg/kg arsenic and 3 mg/kg chromium, presumably contaminated by drippage carried by surface runoff. Ground water leachate collected in the quarry area contained 440 mg/l arsenic (chromium concentration was not reported), 23 years after wood preserving operations on the site were discontinued.

For the reasons set out in the preamble, 40 CFR Parts 260, 261, 262, 264, 265, 270, 271, and 302 are proposed to be amended as follows:

#### PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for Part 260 continues to read as follows:

Authority: 42 USC 6905, 6912(1), 6921 through 6927, 6930, 6934, 6935, 6937, 6938, and 6939.

2. Section 260.10 is amended by adding the definition of "Drip Pad", in alphabetical order, as follows:

#### § 260.10 Definitions.

"Drip Pad" is a curbed, impermeable base installed to assist collection of drippage and accumulated precipitation in drip or kick-back areas at wood preserving facilities or in treated wood storage yards.

#### PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

3. The authority citation for Part 261 continues to read as follows:

Authority: 42 USC 6905, 6912(a), 6921, 6922, and 6938.

4. Section 261.31 is amended by adding the following hazardous waste listing in alphanumeric order to read as follows:

#### § 261.31 Hazardous wastes from non-specific sources.

Industry and EPA hazardous waste No.	Hazardous waste	Hazard code
F032.....	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations). This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.	(T)
F033.....	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood surface protection processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).	(T)
F034.....	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes using creosote formulations. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.	(T)
F035.....	Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes using inorganic preservatives containing arsenic or chromium. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.	(T)

5. Section 261.35 is added to read as follows:

#### § 261.35 Equipment cleaning or replacement standards for hazardous wastes listed in §§ 261.31 and 261.32 of this chapter.

(a) *Applicability.* Equipment cleaning or replacement standards are applicable to generators of the listed hazardous wastes F032 and F033. Wastes from wood preserving and surface protection facilities generated in processes that do not resume or initiate use of chlorophenolic formulations will not meet the listing definition of F032 and F033, respectively, once the conditions

in § 261.35 (b) through (f) are met. These wastes may, however, continue to meet another hazardous waste listing description or may exhibit one or more of the hazardous waste characteristics.

(b) *Equipment cleaning or replacement performance standard.* The owner or operator must clean or replace all equipment that may have come into contact with chlorophenolic formulations or constituents thereof, in a manner that:

(1) Minimizes or eliminates the escape of hazardous waste, hazardous constituents, leachate, contaminated drippage, or hazardous waste

decomposition products to the ground and surface waters, and to the atmosphere, and

(2) Complies with the equipment cleaning or replacement requirements of this section.

(c) *Equipment cleaning or replacement requirements.* Generators must either clean or replace all process equipment that may have come into contact with chlorophenolic formulations or constituents thereof, including, but not limited to, treatment cylinders, sumps, tanks, piping systems, drip pads, fork lifts, and trams by conducting the following activities:



(1) The generator must prepare and sign a written equipment cleaning or replacement plan that describes the equipment to be cleaned or replaced, how the equipment will be cleaned or replaced in accordance with § 261.35(b) and (c), and the appropriate solvent chosen for use in § 261.35(c)(3);

(2) The generator must remove all visible residues, including free and attached residues, from process equipment;

(3) The generator must rinse the process equipment with an appropriate solvent until dioxins and dibenzofurans are not detected in the final solvent rinse when tested in accordance with the testing requirements of § 261.35(e); and

(4) The generator must manage all residues from the cleaning process and any discarded equipment as F032 (for wood preserving operations) or F033 (for surface protection operations).

(d) *Previous equipment cleaning or replacement provision.* Generators that can document previous equipment cleaning or replacement which was performed in accordance with the requirements in § 261.35(c) and which occurred after a change in preservative or surface protectant may use this documentation to fulfill the equipment cleaning or replacement requirements in § 261.35(c). Wastes from wood preserving and surface protection facilities generated in processes that do not resume or initiate use of chlorophenolic formulations, for which generators submit information from previous equipment cleaning or replacement activities, will no longer meet the listing definition of F032 or F033 provided that the conditions listed in paragraphs (d) (1), (2), and (3) of this section have been met and provided that the generator does not resume or initiate use of chlorophenolic formulations. The wastes may, however, continue to meet another hazardous waste listing description or may exhibit one or more of the hazardous waste characteristics.

(1) The generator must submit to the Regional Administrator the required documentation together with the following statement signed by the generator or his authorized representative:

I certify under penalty of law that all process equipment required to be cleaned or replaced under 40 CFR 261.35 was cleaned or replaced as represented in the accompanying materials. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

(2) The Regional Administrator finds, after a review of the material provided by the generator, that the procedures

used for equipment cleaning or replacement meet the requirements of § 261.35 (b) and (c), and

(3) The Regional Administrator notifies the generator, in writing, of this finding.

(e) *Testing and Documentation Requirements.*

(1) Any person seeking to meet the equipment cleaning requirements of § 261.35(c) must test the rinsate from the final solvent rinse and demonstrate that dioxins and furans are not detected when tested according to the method specified in § 261.35(e)(2).

(2) Dioxin and dibenzofuran concentrations must be determined using SW-846 Method 8290.

(3) Generators seeking to meet the equipment cleaning or replacement requirements of § 261.35 (c) and (d) must collect the following information for submission to the Regional Administrator:

(i) The name and address of the facility;

(ii) Formulations previously used and the date on which their use ceased in each process at the facility;

(iii) For F033, a statement certifying whether the facility currently uses a surface protection formulation that has no listed hazardous wastes associated with it;

(iv) Formulations currently used in each process at the facility;

(v) The equipment cleaning or replacement plan;

(vi) The name and address of the person conducting any cleaning operations required under § 261.35(c);

(vii) The dates of the cleaning or replacement;

(viii) The name and address of the laboratory facility performing the sampling and testing;

(ix) The dates of sampling and testing;

(x) A description of the sample handling and preparation techniques, including techniques used for extraction, containerization, preservation, and chain of custody of the samples;

(xi) A description of the tests performed, the date the tests were performed, and the results of those tests;

(xii) The name and model numbers of the instrument used in performing the tests; and

(xiii) QA/QC documentation.

(f) *Notification, Review, and Approval.*

(1) Generators intending to use the equipment cleaning or replacement procedures so that their wastes do not meet the listing description of F032 or F033 must notify the Regional Administrator 30 days prior to equipment cleaning or replacement.

(2) Within 30 days following completion of all equipment cleaning or

replacement activities, generators must submit to the Regional Administrator copies of all information required under § 261.35(e), a copy of the equipment cleaning and replacement plan required under § 261.35(c)(1), and the following statements signed by the generator or his authorized representative:

I certify under penalty of law that all process equipment required to be cleaned or replaced under 40 CFR 261.35 was cleaned or replaced in accordance with the requirements of 40 CFR 261.35. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

(3) The Regional Administrator will review the information provided to determine whether the generator has complied with the requirements of § 261.35 (b) and (c).

(4) In the event that the Regional Administrator provides written notification of a tentative determination that the requirements of § 261.35 (b) and (c) have not been met, the generator may provide any appropriate additional information addressing the basis for the tentative determination within 30 days of receipt of the written notification.

(5) Within 30 days following receipt of additional information from the generator, the Regional Administrator will provide written notification of his final determination.

(6) Upon issuance of a final determination that the requirements of § 261.35 (b) and (c) have been met, the subject wastes will be considered to no longer meet the listing descriptions of F032 or F033, provided that the generator does not resume or initiate use of chlorophenolic formulations. The waste will continue to be regulated hazardous waste if it meets another listing description or exhibits one or more of the characteristics of hazardous waste.

#### Appendix III—[Amended]

6. In Part 261, Appendix III, Table 1 is amended by adding the following compound in alphabetical order as follows:

TABLE 1—ANALYSIS METHODS FOR ORGANIC CHEMICALS CONTAINED IN SW-846

Compound	Method numbers
Benzo(k)fluoranthene	8100, 8250, 8270, 8310

7. In Part 261, Appendix VII is amended by adding the following waste streams in alphanumeric order as follows:

#### Appendix VII—Basis For Listing Hazardous Waste

EPA hazardous waste No.	Hazardous constituents for which listed
F032	Benzo(a)anthracene, benzo(a)pyrene, dibenz(a,h)anthracene, indeno(1,2,3-cd)pyrene, pentachlorophenol, arsenic, chromium, tetra-, penta-, hexa-, heptachlorodibenzo-p-dioxins, tetra-, penta-, hexa-, heptachlorodibenzofurans.
F033	Pentachlorophenol, 2,3,4,6-tetrachlorophenol, 2,4,6-trichlorophenol, tetra-, penta-, hexa-, heptachlorodibenzo-p-dioxins, tetra-, penta-, hexa-, heptachlorodibenzofurans.
F034	Benzo(a)anthracene, benzo(k)fluoranthene, benzo(a)pyrene, dibenz(a,h)anthracene, indeno(1,2,3-cd)pyrene, naphthalene, arsenic, chromium.
F035	Arsenic, chromium, lead.

8. In Part 261, Appendix VIII is amended by adding the following hazardous constituents in alphabetical order as follows:

#### Appendix VIII—Hazardous Constituents

Common name	Chemical abstracts name	Chemical abstracts No.
Benzo(k)fluoranthene	Same	207-08-9
Heptachlorodibenzofurans		
Heptachlorodibenzo-p-dioxins		

#### PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

9. The authority citation for Part 262 continues to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922, 6924, 6925, and 6937.

10. Section 262.34 paragraph (a)(1) is revised to read as follows:

#### § 262.34 Accumulation time.

(a) \* \* \*

(1) The waste is placed in containers and the generator complies with Subpart I of 40 CFR Part 265, or the waste is placed in tanks and the generator complies with Subpart J or 40 CFR Part 265, except § 265.197(c), and § 265.200, or the waste is placed on drip pads and the generator complies with Subpart T of 40 CFR Part 265. In addition, such a generator is exempt from all the requirements of Subparts G and H of 40 CFR Part 265, except for §§ 265.111 and 265.114.

#### PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

12. The authority citation for Part 264 continues to read as follows:

Authority: Secs. 1006, 2002, 3004, and 3005 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925).

13. The table of contents for Part 264 is amended to add Subpart T and §§ 264.570, 264.571, 264.572, 264.573, and 264.574 as follows:

#### Subpart T—Drip Pads

Sec.	
264.570	Applicability.
264.571	Containment.
264.572	General Operating Requirement.
264.573	Inspections.
264.574	Closure.

14. Part 264 is amended by adding Subpart T as follows:

#### Subpart T—Drip Pads

##### § 264.570 Applicability.

The requirements of this Subpart apply to owners and operators of facilities that use drip pads to assist collection, storage, or treatment of treated wood drippage that meets the listing description of Hazardous Waste Numbers F032, F033, F034, or F035 of 40 CFR 261.31.

##### § 264.571 Containment.

Drip pads must meet the following requirements:

(a) Drip pads must be constructed of a curbed base having an impermeable surface capable of containing drippage and accumulated precipitation while routed to an associated collection area or device (system);

(b) Drip pads must be maintained such that they remain free of cracks, corrosion, or other deterioration that could cause hazardous waste to leak from the drip pad;

(c) The drip pad and associated collection system must be designed and operated to collect and drain liquid resulting from drippage or precipitation in order to prevent run-off; and must be designed and maintained so as to be capable of containing precipitation from a 25-year/24-hour storm event if exposed to rainfall;

(d) Run-on onto the drip pad and associated collection system must be prevented unless the system has sufficient excess capacity to contain any run-on that might enter the system; and

(e) Drillage and accumulated precipitation must be removed from the associated collection system as necessary to prevent overflow onto the drip pad.

(f) As specified in the permit, if the owner or operator detects a condition that could lead to a release of hazardous waste, the condition must be repaired within a reasonably prompt period of time following discovery, or the pad must be removed from service.

(Note: See § 264.571(f) for remedial action required if deterioration or leakage is detected.)

##### § 264.572 General operating requirement.

Drip pads must be operated and maintained in a manner to prevent tracking of hazardous waste or hazardous waste constituents off the drip pad by personnel or equipment.

##### § 264.573 Inspections.

Drip pads must be inspected thoroughly for visual signs of deterioration or cracking. Facility inspection programs must involve inspection of the entire drip pad surface at least weekly.

(Note: See § 264.571(f) for remedial action required if deterioration or leakage is detected.)

##### § 264.574 Closure.

At closure, all hazardous waste and hazardous waste residues must be removed from the drip pad. The pad and any soil containing or contaminated with hazardous waste or hazardous waste residues must be decontaminated or removed.



# **PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES**

15. The authority citation for Part 265 remains as follows:

Authority: Secs. 1006, 2002(a), 3004, 3005, and 3015 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935).

15. The table of contents for Part 265 is amended by adding Subpart T consisting of §§ 265.440, 265.441, 265.442, 265.443 and 265.444 as follows:

## **Subpart T—Drip Pads**

Sec.	
265.440	Applicability.
265.441	Containment.
265.442	General operating requirement.
265.443	Inspections.
265.444	Closure.

16. Section 265.1 is amended to add paragraph (c)(4)(iii), to read as follows:

## **§ 265.1 Purpose, scope, and applicability.**

(c) \* \* \*

(4) \* \* \*

(iii) To a person who treats, stores, or disposes of hazardous waste in a State authorized under Subpart A or B of Part 271 of this chapter at a facility which was not covered by standards under this part when the State obtained authorization and for which EPA promulgates standards under this part after the State is authorized. This paragraph will apply only until the State is authorized to implement interim status standards for such facilities under Subpart A of Part 271 of this chapter.

17. Part 265 is amended by adding Subpart T as follows:

## **SUBPART T—DRIP PADS**

### **§ 265.440 Applicability.**

The requirements of this Subpart apply to owners and operators of facilities that use drip pads to assist collection, storage, or treatment of treated wood drippage that meets the listing description of Hazardous Waste Numbers F032, F033, F034, or F035, of § 261.32 of this chapter.

### **§ 265.441 Containment.**

Drip pads must meet the following requirements:

(a) Drip pads must be constructed of a curbed base having an impermeable surface capable of containing drippage and accumulated precipitation while routed to an associated collection area or device (system);

(b) Drip pads must be maintained such that they remain free of cracks,

corrosion, or other deterioration that could cause hazardous waste to leak from the drip pad;

(c) The drip pad and associated collection system must be designed and operated to collect and drain liquid resulting from drippage or precipitation in order to prevent run-off; and must be designed and maintained so as to be capable of containing precipitation from a 25-year/24-hour storm event if exposed to rainfall;

(d) Run-on onto the drip pad and associated collection system must be prevented unless the system has sufficient excess capacity to contain any run-on that might enter the system; and

(e) Drippage and accumulated precipitation must be removed from the associated collection system as necessary to prevent overflow onto the drip pad.

(f) If the owner or operator detects a condition that could lead to a release of hazardous waste, the condition must be repaired within a reasonably prompt period of time following discovery or the pad must be removed from service.

### **§ 265.442 General operating requirement.**

Drip pads must be operated and maintained in a manner to prevent tracking of hazardous waste or hazardous waste constituents off the drip pad by personnel or equipment.

### **§ 265.443 Inspections.**

Drip pads must be inspected thoroughly for visual signs of deterioration or cracking. Facility inspection programs must involve inspection of the entire drip pad surface at least weekly.

(Note: See § 265.342(f) for remedial action required if deterioration or leakage is detected.)

### **§ 265.444 Closure**

At closure, all hazardous waste and hazardous waste residues must be removed from the drip pad. The pad and any soil containing or contaminated with hazardous waste or hazardous waste residues must be decontaminated or removed.

## **PART 270—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM**

18. The authority citation for Part 270 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912, 6925, 6927, 6939, and 6974.

19. Subpart B of Part 270 is amended by adding § 270.22 to read as follows:

### **§ 270.22 Special Part B information requirements for drip pads.**

Except as otherwise provided by § 264.1 of this chapter, owners and operators of hazardous waste treatment, storage, or disposal facilities that collect, store, or treat hazardous waste on drip pads must provide the following additional information:

(a) A description of the drip pad and associated collection system sufficient to demonstrate compliance with the requirements of §§ 264.353 and 264.354. This information must include the following at a minimum:

(1) Basic design parameters, dimensions, and construction materials.

(2) How the design promotes collection and drainage of drippage and materials mixed with drippage to an associated collection area or device (system).

(3) The capacity of the drip pad and associated collection system.

(4) For drip pads and associated collection systems exposed to precipitation, a demonstration that the design capacity of the drip pad and associated collection system is capable of containing the precipitation from a 25 year/24 hour storm event.

(5) For drip pads and associated collection systems protected from precipitation, a description of the structures or structure that will provide protection from precipitation, including basic design parameters, dimensions, and construction materials.

(6) A description of structures that will prevent run-on to the drip pad and associated collection system or a demonstration that the capacity is sufficient to contain any run-on that might enter the drip pad or collection system.

(7) The interval at which drippage and other materials will be removed from the associated collection system and a statement demonstrating that the interval will be sufficient to prevent overflow onto the drip pad.

(b) A description of operating practices and procedures that will be followed to ensure that hazardous waste or waste constituents are not tracked off the drip pad by personnel or equipment.

(c) A plan demonstrating how the owner or operator will ensure that all portions of the drip pad are inspected weekly for signs of deterioration or cracking, including provisions for moving any treated wood that is stored on a pad for more than one week.

# **PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS**

20. The authority citation for Part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

## **§ 271.1 [Amended]**

21. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

**TABLE 1.—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984**

Promulgation date	Title regulation	Federal Register reference	Effective date
[Insert date of publication].	The listing of wastes from the wood preserving and surface protection processes. <sup>2</sup>	xx FR xx ..... [Insert effective date.]	

<sup>2</sup> These regulations implement HSWA only to the extent that they apply to the listing of Hazardous Wastes Nos. F032 and F033 and the equipment cleaning and replacement procedures. Listings of Hazardous Waste Nos. F034 and F035, test methods for benzo(k)fluoranthene, and technical standards for drip pads do not implement HSWA.

## **PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**

22. The authority citation for Part 302 continues to read as follows:

Authority: Sec. 102 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9602; secs. 311 and 501(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1321 and 1361.

## **§ 302.4 [Amended]**

23. In § 302.4, amend Table 302.4 by adding the waste streams F032, F033, F034, and F035:

(a) \* \* \*



TABLE 302.4—LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES

[See footnotes at end of table 302.4]

Hazardous substance	CASRN	Regulatory synonyms	Statutory		Final RQ		
			RQ	Code	RCRA waste number	Category	Pounds (Kg)
F032 Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations). This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.				4	F032	X	1 (0.454)
F033 Wastewaters, process residuals, protectant drippage, and discarded spent formulations from wood surface protection processes at facilities that currently use or have previously used chlorophenolic formulations (except wastes from processes that have complied with the cleaning or replacement procedures set forth in § 261.35 and do not resume or initiate use of chlorophenolic formulations).			10	4	F033	X	1 (0.454)
F034 Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes that currently use creosote formulations. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.			1 *	4	F034	X	1 (0.454)
F035 Wastewaters, process residuals, preservative drippage, and discarded spent formulations from wood preserving processes using inorganic preservatives containing arsenic or chromium. This listing does not include K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.			1 *	4	F035	X	1 (0.454)

[FR Doc. 88-30078 Filed 12-29-88; 8:45 am]  
BILLING CODE 6540-50-M

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 261

[SW-FRL-3500-6]

### Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Tentative Petition Denial

**AGENCY:** Environmental Protection Agency.

**ACTION:** Tentative determination to deny petition for rulemaking; request for comments.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA or Agency) today is issuing a tentative determination to deny a petition from the American Wood Preservers Institute (AWPI), to: (1) Reconsider the Agency's interpretation that EPA hazardous waste K001 may form from application of wood preserving wastewaters to spray irrigation fields and (2) more

clearly define K001 by specifying the concentrations of listing constituents that identify a wood preserving wastewater treatment sludge as K001. If EPA finds that K001 can form in spray irrigation fields, the petitioner requests that owners or operators of such facilities be given six months from the date of EPA's response to comply with the regulations. EPA also has determined tentatively to deny this request. The Agency has, however, provided in this *Federal Register* notice a description of how EPA Hazardous Waste K001 applies to spray irrigation fields. This guidance is intended to provide additional assistance to generators in identification of K001.

The Agency bases today's tentative determination to deny the petition on (1) the listing description, (2) the information provided in the docket supporting the K001 listing and (3) EPA's examination of the data submitted by the petitioner, to support their claim that spray irrigation fields used for the land treatment of wood preserving wastewaters do not generate wastewater treatment sludges and that any wastes that are so generated do not

contain significant concentrations of the constituents of concern specified for K001 in 40 CFR Part 261, Appendix VII. It is the Agency's tentative determination that the K001 Background Document and the data submitted by the petitioner support the conclusion that wastewater treatment sludges that meet the K001 listing description may be generated, treated or otherwise managed in spray irrigation fields. Therefore, the Agency believes that the K001 listing applies to sludge that forms in spray irrigation fields used for the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. Further, the Agency believes it provided adequate notice to wood preservers who use spray irrigation fields of the description of K001 by publication of a notice of the listing in the *Federal Register* and by providing opportunities for public comment on the listing. For this reason, the Agency does not propose to give these facilities additional time to come into compliance with RCRA regulations. Accordingly, the Agency tentatively denies the AWPI petition.

**DATES:** EPA is requesting public comments on today's tentative determination to deny the petition from AWPI. Comments will be accepted until February 28, 1989. Comments postmarked after this date will be stamped "late" and may not be considered.

Any person may request a hearing on this tentative determination by filing a request with Mr. Devereaux Barnes, whose address appears below, by January 17, 1989. The request must contain the information prescribed in 40 CFR 260.20(d).

**ADDRESSES:** Comments on this tentative determination should be sent in triplicate to the EPA RCRA Docket Clerk (WH-562), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. All comments must be marked "Docket Number F-88WPDP-FFFFF".

Requests for a hearing should be addressed to Mr. Devereaux Barnes, Director, Characterization and Assessment Division (OS-330), Office of Solid Waste, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

The RCRA regulatory docket for this tentative determination is located at the U.S. Environmental Protection Agency, 401 M Street, SW. (sub-basement), Washington, DC 20460. The public must make an appointment in order to review the docket by calling (202) 475-9327. The docket is available for viewing from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. The public may copy a maximum of 100 pages of material from any one regulatory docket at no cost. Additional copies cost 15 cents per page.

**FOR FURTHER INFORMATION CONTACT:** The RCRA Hotline, toll free at (800) 424-9346, or at (202) 382-3000. For technical information concerning this notice, contact Mr. Edwin F. Abrams, Listing Section, Office of Solid Waste (OS-333), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 382-4787.

**SUPPLEMENTARY INFORMATION:** The contents of today's notice are listed in the following outline:

- I. Background
  - A. Identification and listing of Hazardous Wastes
  - B. American Wood Preservers Institute Petition
  - C. RCRA Regulations Governing Petitions
- II. Summary of the Determination
- III. Analysis of EPA's Tentative Determination
  - A. Formation of EPA Hazardous Waste K001 as a Result of Spray Irrigation

- B. Guidance For Determining When EPA Hazardous Waste K001 Forms in Spray Irrigation Fields
- C. Six-Month Suspension.
- IV. References

## I. Background

### A. Identification and Listing of Hazardous Wastes

Section 3001 of RCRA directs EPA to promulgate criteria for identifying the characteristics of a solid waste that make the waste hazardous and to promulgate criteria listing specific wastes as hazardous. Following the identification of these criteria, the Agency is also required to promulgate regulations identifying the characteristics of hazardous wastes and listing particular hazardous wastes. Any wastes identified as hazardous are subject to regulation under Subtitle C.

On May 19, 1980, the Agency promulgated rules listing specific wastes that have been found to be hazardous based upon the criteria set out in 40 CFR 261.11(a). See 40 CFR Part 261, Subpart D. These criteria require EPA to evaluate a number of factors, including the waste's chemical constituents, whether those constituents that are hazardous are present in the waste in significant concentrations, and whether these constituents have the potential to migrate from the waste, persist in the environment, and cause substantial harm when they reach human or environmental receptors.

Under section 3001 of RCRA, EPA listed K001, and other wastes, as hazardous wastes. K001 is defined as bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. This listing was made effective pursuant to an interim final regulation, promulgated on May 19, 1980 (45 FR 33084). EPA concurrently proposed to regulate as hazardous the wastewaters from wood preserving processes using creosote and/or pentachlorophenol (45 FR 33136, May 19, 1980). The Agency, however, did not finalize the listing of wood preserving wastewater (45 FR 74884, November 12, 1980). (In a separate part of today's *Federal Register*, EPA is again proposing to regulate these wastewaters.)

### B. American Wood Preservers Institute Petition

AWPI is an industry trade association representing approximately 80 member companies in the wood preserving industry. Over half of its members use creosote and pentachlorophenol in their wood preserving processes. On January 10, 1985, AWPI sent a letter to John H.

Skinner, then the Director of the Office of Solid Waste at EPA, requesting reconsideration of EPA's interpretation that sludges generated in spray irrigation fields used to treat wood preserving wastewaters are bottom sediment sludges described as EPA Hazardous Waste No. K001.

Although the AWPI letter was not sent to the EPA Administrator (nor was it sent by certified mail) as prescribed by the rulemaking petition procedures in 40 CFR 260.20, the caption of the letter, "Petition for Reconsideration of Decision to Classify Wood Preserving Spray Irrigation Fields as Hazardous Waste Land Treatment Units and for Clear Definition of K001 Sludge," and information included in the request manifested AWPI's intent to have the letter serve as a petition for rulemaking under that section. The Agency has therefore treated the AWPI January 10, 1985 letter as a rulemaking petition.

In the petition, AWPI asserts that EPA has incorrectly interpreted the scope of the K001 listing. AWPI further alleges that this incorrect interpretation appears in a letter written in November of 1984, by John Skinner, then Director of the Office of Solid Waste (OSW), to James Scarbrough, a Region IV Branch Manager. In this November 1984 interpretation, the Director of OSW confirmed the regulatory status of land treatment units used to treat wastewaters by spray irrigation, plow injection, or flooding. Mr. Skinner concluded that such land treatment units used to treat wastewaters from wood preserving operations using creosote or pentachlorophenol can generate K001. Therefore, such units, when generating, treating, storing, or disposing of K001, are subject to the hazardous waste regulations, including appropriate permitting standards, found in 40 CFR Parts 262, 263, 264, 265, 268, 270, 271 and 124.

In its petition, AWPI argues that the application of wastewaters from wood preserving processes to spray irrigation fields does not result in the production of K001 or other sludge, and that the waste produced in a spray irrigation field is physically and chemically different than K001. AWPI further claims that the chemical and biological interactions between the wastewater and the soil in the spray irrigation field would result in a different material from the K001 produced from wastewater treatment by trickling filters or surface impoundments. AWPI also points out that the wastewater itself is not a listed waste and asserts that a properly designed and operated spray irrigation field does not allow migration of



constituents outside the unit and, therefore, cannot be a hazardous waste land management unit.

In addition, AWPI requested guidance regarding the K001 listing, including a description of the physical and chemical composition of K001, and an identification of the constituents of concern in K001 and of the levels of concern for the hazardous constituents of K001. AWPI believes this additional information is needed in order for wood treaters to determine if their spray irrigation fields produce a sludge and, if so, whether this sludge is indeed K001. Without this information, AWPI maintains its member facilities will be unable to prove to EPA that they do not generate K001 and will be unable to delist the waste if they do generate it.

Finally, if the petition to reinterpret the scope of the listing is denied, AWPI requests a six-month suspension of the effective date of the K001 listing and associated RCRA requirements for spray irrigation fields. AWPI argues that a suspension is necessary for their member facilities to come into compliance with RCRA because the Agency's interpretation of the K001 listing is analogous to a new or revised regulation. AWPI also requests that the Agency formally notify all facilities that use spray irrigation fields to treat wood preserving wastewaters of the Agency's final decision on AWPI's petition.

#### C. RCRA Regulations Governing Petitions

EPA's process for addressing rulemaking petitions under RCRA is specified in 40 CFR 260.20. Under 40 CFR 260.20, which implements section 7004(a) of RCRA, any person may petition the Administrator to modify or revoke any provision of Parts 260 through 265 and 268 or Title 40 of the Code of Federal Regulations. Persons submitting a rulemaking petition must include a statement of the need and justification for the proposed action, including supporting data, tests, studies, or other information.

Section 260.20 requires the Administrator to publish in the Federal Register a tentative determination on the petition and solicit public comment. The tentative determination may be in the form of an advance notice of proposed rulemaking, a proposed rule, or a tentative determination to deny the petition. Upon written request of any interested person, the Administrator may at his or her discretion, hold an informal public hearing to consider oral comments. After evaluating all public comments, EPA will make a final decision by publishing in the Federal

Register a regulatory amendment or a denial of the petition.

This notice constitutes EPA's tentative determination to deny AWPI's petition.

#### II. Summary of the Determination

EPA has tentatively determined to deny AWPI's requests (1) to consider its interpretation that K001 may form from application of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol to spray irrigation fields, (2) to define K001 in terms of the concentrations of listing constituents that cause it to be hazardous, and (3) to grant a six-month suspension of the effective date of the Subtitle C hazardous waste management regulations for wood preserving spray irrigation fields that contain K001 following formal notification to generating facilities of the petition denial. EPA believes that the existing information and the K001 listing description clearly indicate that K001 may form in spray irrigation fields, and this listing, which has been effective since 1980, already applies to facilities generating or managing K001.

EPA has, in this tentative determination, provided additional guidance for determining when EPA Hazardous Waste K001 forms in spray irrigation fields, so that wood preservers who generate this waste in spray irrigation fields may more easily identify it. This guidance is found in Section III. B. of this notice.

The K001 listing is a broad, generic listing and includes sludges generated in spray irrigation fields that treat wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. The listing description for K001 bottom sediment sludges is not based on a concentration criterion for hazardous constituents in the wastes. Instead, all bottom sediment sludges generated from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol are listed, regardless of the concentrations of constituents in the sludges. Under 40 CFR 261.11(b), the Agency has the authority to list classes or types of waste that typically or frequently are hazardous. A waste is not required to contain any minimum concentration of toxic constituents in order to meet the listing description.

Contrary to AWPI's allegation, the toxic constituents that are the basis for the K001 listing have been identified in 40 CFR Part 251, Appendix VII, since 1980. However, it is not necessary to show that a particular waste contains any or all of the listing constituents in order to establish that the waste is hazardous. The listing establishes a

presumption that a waste is hazardous based upon the constituents that typically are present in all wastes of this general category. The actual presence and concentrations of toxic constituents in wastes meeting the listing description are only relevant, however, as to whether EPA should grant petitions to delist specific wastes that already are considered hazardous waste K001. Delisting is the only means to refute the presumption that a waste meeting the listing description is hazardous and contains hazardous levels of particular constituents of concern. Accordingly, if any sludge is formed or managed in spray irrigation fields as a result of spray application of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol, then the sludge is K001 unless delisted. As explained in Section III. B. of this notice, the presence of listing constituents may be helpful, however, in demonstrating the presence of K001.

A six-month suspension of the effective date of the Subtitle C hazardous waste management regulations for K001 generated or managed in spray irrigation fields and the formal notification of affected facilities are not warranted. The sludge generated in spray irrigation fields treating wood preserving wastewaters has been listed as a hazardous waste since November 19, 1980. The November 1984 letter from John Skinner to James Scarbrough was not a new or revised regulation and did not impose any new requirements. Any facility generating or managing K001 as a result of treatment of wood preserving wastewaters in spray irrigation fields has been required to be in compliance with RCRA since November 19, 1980.

#### III. Analysis of EPA's Tentative Determination

##### A. Formation of EPA Hazardous Waste K001 as a Result of Spray Irrigation

EPA Hazardous Waste No. K001 is defined as "bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol." The RCRA definition of sludge, found at 40 CFR 260.10, is "any solid, semi-solid, or liquid waste generated from a municipal, commercial or industrial wastewater treatment plant . . . exclusive of the treated effluent from a wastewater treatment plant." The K001 listing is generic, i.e., it is intentionally broad enough to encompass any waste meeting the listing description. Bottom sediment sludge generated during the treatment of wastewaters from wood

preserving processes that use creosote and/or pentachlorophenol is encompassed by the listing wherever such sludge is formed.<sup>1</sup>

The Background Document describes typical treatment of wood preserving wastewaters as " . . . evaporation, combined biological and irrigation process (sic) or incineration." (Background Document at 37, emphasis added). The following specific wastewater treatment practices that generate K001 are also described in the Background Document:

- Sedimentation in the bottom of wastewater treatment ponds or lagoons (Background Document at 13, 36, 37);
- Flocculation (Background Document at 21, 24);
- Sand filtration (Background Document at 24);
- Primary oil water separation (Background Document at 24);
- Evaporation, with or without the addition of heat (Background Document at 2, 26);
- Adsorption of wood preserving oils by the addition of clays, resins, alum, lime, or polymer (Background Document at 21); and
- Adsorption of pentachlorophenol and high molecular weight toxic pollutants onto the biomass resulting from biological treatment (Background Document at 24).

K001 bottom sediment sludge, therefore, includes wastewater treatment residuals generated by any of these mechanisms in any wastewater treatment unit, including spray irrigation fields.

Wastewater treatment removes undesirable contaminants from wastewater, or destroys or inactivates contaminants contained in wastewater. The contaminants found in wood preserving wastewaters are: Large particles, such as sand and sawdust; fine particles, such as suspended clay; oil and grease, which may be present as a discrete floating or sinking layer or present as large or fine particles; and dissolved constituents, such as pentachlorophenol; polynuclear aromatic hydrocarbons (PAHs), which

<sup>1</sup> The K001 listing definition refers to wood preserving wastewater treatment sludges as "bottom sediment sludge," a reference to the fact that wood preserving wastes commonly accumulate by gravity sedimentation on the bottoms of wastewater surface impoundments and tanks. In the Background Document prepared in support of the K001 listing, the Agency did not limit the listing to the type of device or the physical mechanism by which bottom sediment sludges are generated. It is clear, as discussed below, that bottom sediment sludge produced from treating wood preserving wastewaters by spray irrigation is included in the scope of the K001 listing.

are creosote constituents; and wood sugars.

Wastewater treatment mechanisms that destroy or inactivate contaminants, such as ultraviolet photolysis and hydrolysis, have only limited application to wood preserving wastewater. All other physical/chemical mechanisms used to treat wood preserving wastewaters transfer the contaminants of the wastewater to another medium, thus forming a sludge. The mechanisms used to treat wood preserving wastewater and how each mechanism generates sludge are described below.

**Biological treatment** uses microorganisms to digest and degrade wastewater contaminants. While contaminants are removed from the wastewater, a sludge in the form of expended microorganisms (which may or may not be contaminated with toxicants) is generated.

**Sedimentation** is the separation from water, by gravitational settling, of suspended materials that are heavier than water. It is used to remove large particles and oils (e.g., creosote) that are heavier than water from wood preserving wastewater in devices such as sumps, holding tanks, and ponds.

**Granular bed filtration** is an operation used to remove fine particulates from water. In this operation, wastewater flows by gravity or pressure through a bed of granular material, such as sand, anthracite coal, and/or various types of gravel. The size of the granular material is much larger than the size of the particles captured by the filter. Particles that are larger than the pore space of the filtering medium are strained out of the wastewater mechanically. Smaller particles are captured in the depth of the filter bed by mechanisms such as sedimentation, impaction, and interception. Because the particles are captured in the spaces between the granules within the bed, there may be no visible sludge layer. However, the small particles captured within the bed do constitute sludges.

**Coagulation and flocculation** are two mechanisms used together to remove small dispersed particles from water. Coagulation refers to the addition of chemicals (lime, alum, ferric chloride, synthetic polyelectrolyte polymers) to an aqueous suspension of fine particles in order to change the electrical charge on the exterior of the particles, a process called destabilization. Once the particles are destabilized, they flocculate, or combine into large agglomerates. The flocculated particles can be removed from the wastewater by some other mechanism such as sedimentation, floatation, or filtration.

**Adsorption** used for wastewater treatment is the process of accumulating dissolved contaminants on a solid surface called an adsorbent. Activated carbon is an adsorbent used to remove dissolved pentachlorophenol and PAHs from wood preserving wastewaters. Activated carbon is effective because pentachlorophenol and PAHs have relatively low polarities, as does the activated carbon. Dissolved substances will adsorb to solid materials of similar polarity. Other solid surfaces of low polarity, such as waste biomass in a biological treatment system and organic matter in soil, also act as adsorbents for pentachlorophenol and PAHs in wood preserving wastewater. The dissolved constituents that sorb onto the activated carbon may not be visible but nevertheless constitute a sludge.

**Ion exchange** is a process in which ions held by electrostatic forces to charged functional groups on the surface of a solid (such as soil or a synthetic resin) are exchanged for ions of similar charge in a solution (such as wastewater) in which the solid is immersed (Weber, p. 261). An example of the use of ion exchange for wastewater treatment is the recovery of ionic forms of precious metals from plating wastes. Again, in ion exchange, the ions exchanged onto the solid surface may not be visible, but spent ion exchange resin is considered to contain a sludge.

**Evaporation** is a physical process in which water is removed from its contaminants and, thus, is distinguished from other wastewater treatment mechanisms that remove contaminants from water. Wastewater evaporation can be accomplished at ambient temperatures or heat may be added to speed up the process. Highly volatile dissolved constituents will evaporate with the water but other dissolved constituents, suspended solids, and oils will form a sludge in the evaporation unit as water is removed.

All of the mechanisms described above operate in spray irrigation fields that treat wood preserving wastewaters. The technical studies supplied by AWPI, in support of its argument that K001 does not form in spray irrigation fields, confirm the fact that these fields are used for the land treatment of wastewaters from pentachlorophenol and/or creosote wood preserving processes. In the context of these studies, it is clear that spray irrigation of wastewaters is not merely a means of disposal, but also a treatment method used to reduce the concentration of contaminants in the wastewater. Further, EPA believes this wastewater



treatment may generate sludge by the mechanisms described above. As previously explained, such sludge would meet the K001 listing description.

AWPI, however, claims that the application of wastewaters from wood preserving processes to spray fields does not result in the production of K001. AWPI states that K001 is precipitated solid or semisolid matter produced by wastewater treatment, and that: (1) The waste generated in a spray irrigation field and K001 are not physically and chemically alike and (2) spray irrigation field waste and K001 are produced by different "wastewater-soil chemical and biological interactions" (AWPI at 2).

The agency does not agree that the wastewater treatment mechanisms that occur in a spray irrigation field differ from the wastewater treatment mechanisms that form K001 in other wastewater treatment units. Additionally, the Agency does not agree that the waste generated in a spray irrigation field and K001 generated in other wastewater treatment units are physically and chemically different.<sup>2</sup> On the contrary, the Agency believes that the contaminants removed from wood preserving wastewater in surface impoundments, sand filters, and other wastewater treatment units that AWPI accepts as generating K001 are similar or identical to the contaminants removed from wood preserving wastewater in a spray irrigation field. The only issue is whether sludge in fact forms in the spray irrigation fields. The Agency believes that the same mechanisms that operate in surface impoundments and sand filters may operate in spray irrigation fields to produce sludges.

In one of the technical studies supplied by AWPI, Quagliotti presents detailed descriptions of the treatment mechanisms that he believes are occurring in spray irrigation fields (Quagliotti at 7-24). Under the scenario presented by Quagliotti, soil filtration (i.e., granular bed filtration) and adsorption act to retain wastewater contaminants "in the surface soil matrix for a long enough period to allow material decomposition" (Id. at 17). As described above, filtration and adsorption are wastewater treatment mechanisms that form bottom sediment sludge.

<sup>2</sup> The Agency recognizes, however, that biological treatment in spray irrigation fields may in some cases effectively degrade the constituents removed from the land-treated wastewaters. Thus, K001 formed in spray fields may in some instances contain lower concentrations of particular constituents than are typically present in other K001 sludges.

Other wastewater and sludge treatment mechanisms that Quagliotti believes occur in spray irrigation fields are: biological degradation, both aerobic and anaerobic; chemical degradation, including precipitation, hydrolysis and polymerization; photochemical degradation; evaporation; and volatilization (which plays a minor role in spray irrigation fields due to the adsorption of wastewater contaminants to soil). Two mechanisms Quagliotti considers to play a major role in wastewater treatment in spray irrigation fields, biological degradation and evaporation, are treatment mechanisms that generate bottom sediment sludge, as described above. Further, precipitation and polymerization, two of the mechanisms Quagliotti includes in the term chemical degradation, also form such sludge. It is clear that the treatment of wood preserving wastewaters by application to spray irrigation fields, as described by Quagliotti, can generate sludge meeting the K001 listing description.

In the other technical study supplied by AWPI, Koppers Company, a member facility of AWPI, evaluated the spray irrigation field at its Florence, South Carolina facility, as part of a wastewater treatability study. The conclusion of the evaluation was "the field appears to be quite adequate to serve as a wastewater treatment process." This conclusion was based on characteristics of the soil in the field, which were believed to be "generally sufficient to adsorb pentachlorophenol and PAHs \* \* \*."

Other studies performed by the wood preserving industry were also designed to show contaminant removal from wastewater by biological degradation, filtration, and adsorptive processes, all sludge-forming wastewater treatment mechanisms (see NCASI, 1985; Gaudy et al., 1971; and Fisher, 1971). Sludges formed by these methods from wood preserving wastewaters in spray irrigation fields meet the K001 bottom sediment sludge listing description.

Koppers Company, moreover, acknowledged in a Corrective Action Consent Order, dated June 4, 1986, that K001, bottom sediment sludge, in fact, is collected in spray irrigation fields as a result of wood preserving wastewater treatment. (See Findings of Fact, *In the Matter of Koppers Company, Inc.*, Docket No. VW-86-R-001 at 4.)

AWPI also asserts that K001 is solid or semi-solid material that "has some identifiable thickness on the bottom of collection unit" (AWPI petition, at 9, emphasis added). At the same time, AWPI asserts that no sludge, K001 or

other, forms in spray irrigation fields because it has never been observed (Id. at 2, 12). In short, AWPI claims that the criterion for the generation of a bottom sediment sludge in a spray irrigation field should be the generation of a distinct, visible layer of material on top of the soil.

The Agency disagrees that an observable sludge layer is a necessary criterion that must be used to establish the presence of bottom sediment sludge, although it would be a sufficient (and easily implemented) criterion. Using visible accumulation of matter from wastewater as a necessary criterion for sludge formation would preclude from regulation many wastewater treatment sludges that were included in the listing Background Document as specific examples of the sources of K001. For example, as described previously, no visible sludge is formed during granular bed filtration, such as sand filtration, because the fine particulate separated from wastewater in this process is captured in the depth of the filter bed. However, sand filtration units are specifically described in the K001 listing Background Document at 24). Also, dissolved constituents that have adsorbed to a solid material often are not visible, although saturated solid adsorbent (e.g., spent activated carbon) contains waste meeting the listing definition. (Adsorption is described on page 21 of the Background Document as a process that also generates the listed bottom sediment sludge, K001.)

The petitioner also argues that spray irrigation fields are not included in the definition of K001 because the concentration of 40 CFR Part 261, Appendix VII listing constituents are significantly reduced over time by the spray irrigation process.

The petitioner fails to recognize and to appreciate the difference between treating constituents in the wastewater and treating constituents in sludge that has formed from the wastewater, i.e., treating hazardous waste.

The Agency recognizes that land treatment of wastewaters is normally intended to remove constituents from wastewater, by processes such as adsorption, and to degrade such constituents before or after removal, by processes such as biological treatment. The petitioner has not attempted to demonstrate that all wastewater contaminants are destroyed in the wastewater, precluding the formation of sludge. Nor has the petitioner attempted to demonstrate that no treatment of sludge, once formed, occurs when constituents are destroyed. The Agency does not believe that any such

demonstration could be forthcoming. The Agency reminds the petitioner, however, that any destruction of hazardous constituents contained in K001, whether in spray irrigation fields or elsewhere, is treatment of a listed hazardous waste. As such, a treatment permit and compliance with Subtitle C treatment regulations are required.

Finally, the petitioner contends that a properly designed and operated spray irrigation unit does not allow migration of any hazardous constituents beyond the unit's boundaries (AWPI Petition at 10). Although proper design and operation of a spray irrigation unit may not allow migration of any hazardous constituents from the unit, wastes are evaluated and included on the RCRA hazardous waste lists based on several criteria, including the potential of the hazardous constituents to migrate from the waste if improperly managed. Therefore, the ideal or actual design and operation of wood preserving wastewater treatment units is irrelevant to whether the wastewater treatment sludge is hazardous and to whether the wastewater treatment unit is required to comply with the Subtitle C treatment regulations.<sup>3</sup>

#### B. Guidance for Determining When EPA Hazardous Waste K001 Forms in Spray Irrigation Fields

In its petition, AWPI claims that the Agency's definition of EPA Hazardous Waste K001 is so vague that it does not provide clear guidance to wood treaters as to whether their spray field contains a waste sludge and, if so, whether that sludge is Hazardous Waste K001. The petitioner argues that without clear guidance on the identity of K001, including identification of the concentration of those constituents in the sludge which cause the listing, wood preservers are not able to demonstrate that K001 is not formed in their spray irrigation units, nor are they able to delist the sludges in such units (AWPI petition at 10).

Bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol was listed as a hazardous waste because it typically and frequently meets the criterion for listing found at 40 CFR 261.11(a)(3). (Under Section 261.11(b), the Agency

<sup>3</sup> The fact that a particular waste might be managed properly does not mean that the waste does not meet the listing description and is not hazardous. The Agency has previously evaluated the potential hazards posed by the plausible mismanagement of the hazardous constituents found in K001, as described in the Background Document supporting the K001 listing, and found them to be significant.

has the authority to list classes or types of wastes that typically or frequently are hazardous.) K001 contains a number of the toxic constituents identified by EPA in 40 CFR Part 261, Appendix VIII. In addition, the Agency determined that this waste is capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed. This determination was not challenged during the public comment period following the proposed listing of EPA Hazardous Waste K001.

The presence, generally, of Appendix VIII hazardous constituents in wood preserving bottom sediment sludge is documented in the Background Document supporting the K001 listing. The concentrations of these constituents typically and frequently found in these sludges were sufficient to meet the § 261.11(a)(3) criterion and are described in the Background Document. Moreover, the 19 hazardous constituents for which K001 was listed are found in 40 CFR Part 261, Appendix VII, entitled "Basis for Listing Hazardous Waste." Appendix VII was published on November 12, 1980 (45 FR 74884, 74891) in the same Federal Register document as the publication of the Interim Final K001 listing. Therefore, the petitioner's request that the Agency identify the constituents of concern in K001 has been satisfied since 1980.

AWPI also requests that EPA clarify the concentrations of hazardous constituents that would cause waste generated in spray irrigation fields to be K001, presumably so wood preservers may test their fields to determine if they contain wastes meeting the K001 listing description. Again, the listing description for K001 wastewater treatment sludges, while based on the typical and frequent presence of constituents of concern at hazardous concentrations, does not contain particular concentrations of hazardous constituents in specific wastes. There are no minimum concentrations for the 19 toxic constituents for which K001 was listed below which the waste fails to meet the listing description. Instead, the entire class of bottom sediment sludges generated from wastewaters from wood preserving processes that use creosote and/or pentachlorophenol are listed as hazardous.

A waste, therefore, may meet a general listing description and accordingly be regulated as a hazardous waste without having the hazardous properties for which it was listed. It is precisely for this reason that the Agency developed procedures to exclude from the lists of hazardous wastes (or

"delist") specific wastes from particular facilities. See 40 CFR 260.20 and 260.22. Until a petition for exclusion is granted, however, wastes meeting the listing description are hazardous and must be treated as such pursuant to Subtitle C of RCRA.

In order to determine if their spray irrigation fields contain materials that meet the listing description of K001, wood preservers need only determine if "bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol" has been generated and stored, treated, or disposed of in their fields. Wood preservers need not measure the concentrations of hazardous constituents in their spray irrigation fields. For the purpose of clarity, however, EPA will explain how wood preservers may determine if K001 is forming in their spray irrigation fields.

Wastewater treatment consists of the removal of contaminants from wastewater. Bottom sediment sludges are generated during wastewater treatment as described above in Section III.A. Spray irrigation treatment of wood preserving wastewater may generate sludge by the following mechanisms: The simple evaporation of water; sedimentation and/or filtration of particulate matter; adsorption of dissolved constituents to solid or organic matter in the soil; in exchange of any dissolved cations in the wastewater with soil cations; conversion of dissolved constituents to biomass through the action of microorganisms; and sedimentation, filtration, adsorption, or biodegradation of free or emulsified oils contained in the wastewater. Therefore, if wood preservers test their wastewater from processes using creosote and/or pentachlorophenol (by methods specified in *Test Methods for Evaluating Solid Waste*, SW-846, 3rd Edition, 1987, or by other EPA-approved methods) and find particulate matter, dissolved constituents (such as chlorophenols, PAHs, or wood sugars) or oil and grease, they should presume that the wastewater will form bottom sediment sludge (K001) when applied to a field by spray irrigation. Alternatively, having found contaminants in the wastewater, the wood preserver could attempt to demonstrate why none of the sludge-generating mechanisms described above would occur in the particular field to which the wastewater is applied.

If the wastewater that is applied to a spray irrigation field is tested (by methods specified in SW-846 or by other EPA-approved methods) and



determined to contain no particulate matter, dissolved constituents, or oil and grease, a wood preserver may presume that no treatment of this wastewater will occur as a result of the spray irrigation process. No treatment will occur because there are no contaminants present that can be removed (*i.e.* treated) during spray application. If no wastewater treatment occurs, no bottom sediment sludge can be generated and the spray irrigation field can contain no waste materials that meet the listing description of Hazardous Waste K001.

Wood preservers may also identify the presence of K001 by testing their spray irrigation fields. If any of the K001 listing constituents found in 40 CFR Part 261, Appendix VII, are present above the background concentration of the soils before the wastewaters were first applied, and the presence of these constituents cannot be traced conclusively to sources other than treatment of wastewaters from processes using creosote and/or pentachlorophenol, the wood preserver should presume that the spray irrigation field contain bottom sediment sludge that meets the K001 listing description.

For example, EPA Region IV collected soil samples from a spray irrigation field used to treat wastewater from wood preserving processes using creosote and pentachlorophenol. At the same time, a background soil sample was collected from a location outside of the boundaries of the wood preserving facility. Nine K001 listing constituents were detected in the sprayfield soil, all at concentrations above the concentrations measured in the background soil. For example, pentachlorophenol was detected at 32 mg/kg in the sprayfield soil, but it was not detected in the background soil. Chrysene was present in the sprayfield soil at 210 mg/kg but the concentration in the background soil was only 0.33 mg/kg. (USEPA, Transmittal of RCRA Waste Sampling Investigation Report, December 1, 1986.) Because of these analytical results and the knowledge that the wastewater applied to the spray irrigation field is derived from wood preserving processes using pentachlorophenol and/or creosote, the wood preserver should presume that the field contains bottom sediment sludge that meets the K001 listing description.

If, however, a spray irrigation field is tested and no listing constituents are found to be present above background soil concentrations, the wood preserver cannot necessarily conclude that K001 does not form or has never formed in the spray irrigation field. The lack of such

concentrations may demonstrate successful treatment of the sludge (rather than the wastewater). In addition, the listing constituents may have been converted to different chemical species by biological degradation, chemical degradation, or photodegradation. Similarly, sludge may be present in the field, but may not be detectable, because of dilution with a large volume of soil. Sludge also may have been formed in the spray irrigation field but may have been washed off or washed through the soil.

Finally, testing a spray irrigation field and finding no listing constituents present above soil background concentrations may simply result from the presence of high background concentrations. This is a likely scenario at wood preserving facilities where preservative solutions drip or have dripped from treated wood as it is moved from the treatment area to storage yards or preservative is dispersed over the treating facility area by aerosols from pressure treating equipment. (See, e.g., Quagliotti at 58-59).

If a wood preserver tests a spray irrigation field and finds K001 listing constituents are not present above soil background concentrations, the wood preserver may believe that the spray irrigation field, although containing wastes that meet the listing description of K001, presents no risk to human health or the environment. The wood preserver may then petition EPA to exclude from regulation or "delist" the wastewater treatment sludge contained in their particular spray irrigation field. Under 40 CFR 260.20 and 260.22, the Agency must consider the factors for which the waste was originally listed; then, the Agency must examine factors other than those for which the waste was listed (including additional Appendix VIII constituents) in cases where the Administrator has a reasonable basis to believe that such other factors could cause the waste to be hazardous. Additional information is provided in a guidance document entitled, "Petitions to Delist Hazardous Waste, A Guidance Manual" (April 1985, Office of Solid Waste). Further information on delisting is available by contacting the Assistance Branch of the Permits and State Programs Division, Office of Solid Waste.

AWPI also claims that spray irrigation effectively would be banned if wood preservers were required to determine that no sludge forms in the irrigation fields or if they were required to delist any sludge that does form in order to avoid the need to comply with the

Subtitle C treatment and permit requirements (AWPI Petition at 11). AWPI is also concerned that wood preservers who treat and dispose of their wastewater by spray irrigation might lack alternative disposal options. Additionally, AWPI is concerned that spray irrigation fields operated by wood preservers might need alteration in order to comply with Subtitle C requirements and that, after modification, the disposal of the K001 that forms in the spray irrigation fields might be banned by the land disposal restrictions mandated by HSWA 1984 (*Id.* at 13; *see also id.* at 11).

The Agency agrees with many of these comments. Most treatment of hazardous sludge (not treatment of the wastewater) will, as a matter of law, subject the facility to the RCRA treatment standards and permit requirements. If K001 forms, the facility is required to obtain appropriate storage, treatment, or disposal permits (unless accumulated pursuant to 40 CFR Section 262.34).

With regard to the applicability of the land disposal restriction rules, EPA has developed treatment standards for K001 that must be met before K001 is land disposed (*i.e.*, placed into a land-based unit), unless placement occurs in a no-migration unit. All generators and treaters of K001 are subject to this standard, wherever K001 is generated, even if this makes spray irrigation more costly or less practicable.

As applied to spray irrigation fields, K001 generated in the fields prior to the effective date of the land disposal restrictions, August 8, 1988, will not be subject to the restriction unless the K001 in the field is managed so as to create an act of placement after the effective date (for example, if sprayfield soil containing K001 is excavated and removed to a landfill). Treatment *in situ* is not normally considered to trigger the land disposal restrictions, since it does not involve "placement." *See* RCRA section 3004(k). Generation on the land after the effective date, however, does constitute disposal, *see id.*, and the waste consequently must meet the treatment standard at the time of placement (or the irrigation field must satisfy the no-migration standard). The facility might be able to demonstrate, by measuring the concentrations of the constituents of the wastewater applied to the field, that spray irrigation sludges will not exceed BDAT levels when generated. EPA will consider any such demonstration on a case-by-case basis. Testing the sludges in the spray irrigation fields will not suffice, however, since subsequent treatment or

accumulation of sludges in the field may alter the concentrations originally present in the sludge when it is generated.

#### C. Six-Month Suspension

In the petition, AWPI requests that if the Agency does not reinterpret the scope of the K001 listing so as to exclude wood preserving spray irrigation fields, then EPA should suspend the applicability of the Subtitle C regulations for such units until six months after the Agency has responded to the AWPI petition and has formally notified all affected facilities of the petition denial. EPA believes that AWPI's arguments in support of such a request have no merit and, consequently, the Agency tentatively denies the request for a six-month suspension.

Bottom sediment sludge generated in spray irrigation fields treating wood preserving wastewaters has been EPA listed hazardous waste K001 since November 19, 1980. No modifications have been made to the K001 listing since that time. The "Skinner memo" was not a new or revised regulation and did not impose any new requirements on the regulated community. The memo merely provided interpretive guidance to Regional employees on the scope of the existing K001 listing. Accordingly, any facility generating or managing K001 as a result of treatment of wood preserving wastewaters in spray irrigation fields has been required to be in compliance with RCRA since November 19, 1980. EPA does not believe it is appropriate to

extend the compliance date for six months when these facilities may have been out of compliance for over eight years.

Date: December 23, 1988.

Lee M. Thomas,  
Administrator.

#### IV. References

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[FR Doc. 88-30077 Filed 12-29-88; 8:45 am]

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# **federal register**

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Friday  
December 30, 1988

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## **Part XI**

**Department of Defense  
General Services  
Administration**

**National Aeronautics and  
Space Administration**

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**48 CFR Parts 25 and 52  
Federal Acquisition Regulation (FAR);  
Implementation of the Procurement  
Provisions of the U.S.-Canada Free Trade  
Agreement; Interim Rule with Request for  
Comments**



## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Parts 25 and 52

[Federal Acquisition Circular 84-41]

Federal Acquisition Regulation (FAR);  
Implementation of the Procurement  
Provisions of the U.S.-Canada Free-  
Trade Agreement

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule with request for comment.

**SUMMARY:** Federal Acquisition Circular (FAC) 84-41 amends the Federal Acquisition Regulation (FAR) to revise Subpart 25.4, and sections 25.101, 25.105, and 52.225-3 concerning Canadian products.

**DATE:** Effective date: January 1, 1989.

**Comment date:** Comments should be submitted to the FAR Secretariat on or before February 28, 1989, to be considered in the formulation of a final rule. Please cite FAC 84-41, in all correspondence on this subject.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755.

## SUPPLEMENTARY INFORMATION:

## A. Background

The United States-Canada Free-Trade Agreement and the United States-Canada Free-Trade Implementation Act of 1988 necessitate changes to the Federal Acquisition Regulation.

## B. Determination To Issue an Interim Rule

A determination has been made under authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) to issue the regulations in FAC 84-41, as an interim rule. This action is necessary because of the approval of the United States-Canada Free-Trade Agreement which takes effect January 1, 1989.

DoD, GSA, and NASA have determined that compelling reasons exist to promulgate an interim rule without prior opportunity for public comment. However, pursuant to Pub. L. 98-577 and FAR 1.501, public comments

received in response to this interim rule will be considered in formulating a final rule.

## C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) does not apply because this interim rule does not impose any reporting or recordkeeping requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501, *et seq.*

## D. Regulatory Flexibility Act

This interim rule amends Parts 25 and 52 and may have a significant economic impact on a substantial number of small entities. The actual impact is not known. Publication of this rule will afford the public the opportunity to comment on its economic impact on small entities and such comments will be considered in the formulation of the final regulatory flexibility analysis and the final rule. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Initial Regulatory Flexibility Analysis may be obtained from the FAR Secretariat.

## List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: December 27, 1988.

Harry S. Rosinski,  
Acting Director, Office of Federal Acquisition  
and Regulatory Policy.

## Federal Acquisition Circular

[Number 84-41]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-41 is effective January 1, 1989.

Alfred G. Volkman,  
Acting Deputy Assistant Secretary of Defense  
for Procurement.

Richard G. Austin,  
Acting Administrator, GSA,  
December 20, 1988.

S.J. Evans,  
Assistant Administrator for Procurement  
(NASA).

Federal Acquisition Circular (FAC) 84-41 amends the Federal Acquisition Regulation (FAR) as specified below:

Implementation of the Procurement  
Provisions of the U.S.-Canada Free-  
Trade Agreement

FAR 25.105(e) is added and section 25.101, Subpart 25.4, and the clause at 52.225-3 are revised to include requirements with respect to acquisitions from Canada.

Therefore, 48 CFR Parts 25 and 52 are amended as set forth below:

## PART 25—FOREIGN ACQUISITION

1. The authority citation for 48 CFR Parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

2. Section 25.101 is amended in the definition "Domestic end product," by adding a sixth sentence to read as follows:

## 25.101 Definitions.

"Domestic end product," \* \* \* On acquisitions above \$25,000 in value, components of Canadian origin are treated as domestic.

3. Section 25.105 is amended by adding paragraph (e) to read as follows:

## 25.105 Evaluating offers.

(e) The evaluation in paragraph (a) of this section shall not be applied to offers of Canadian end products above \$25,000 (see 25.402(a)(3)). For the definition of "Canadian end product," see 25.401.

4. Section 25.400 is amended by removing the word "and" at the end of paragraph (a) and a period at the end of paragraph (b); by inserting at the end of paragraph (b) "; and"; and by adding paragraph (c) to read as follows:

## 25.400 Scope of subpart.

(c) Acquisitions involving offers of Canadian end products under the United States-Canada Free-Trade Agreement, as approved by Congress in the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note).

5. Section 25.401 is amended by alphabetically adding the definition "Canadian end product" to read as follows:

## 25.401 Definitions.

"Canadian end product," as used in this subpart, means (a) an unmanufactured end product mined or produced in the territory of Canada or other territories to which the customs laws of Canada apply; or (b) an end product manufactured in the territory of Canada or other territories to which the customs laws of Canada apply, if the cost of the components mined, produced or manufactured either in the territory of Canada, or other territories to which the customs laws of Canada apply, or in the

United States, exceeds 50 percent of the cost of all the components.

6. Section 25.402 is amended by revising the fourth sentence in paragraph (a)(1); by redesignating paragraphs (a)(3) and (a)(4) as (a)(4) and (a)(5); and by adding a new paragraph (a)(3) to read as follows:

## 25.402 Policy.

(a)(1) \* \* \* When the value of the proposed acquisition is estimated to be below the Trade Agreements Act threshold, the restrictions of the Buy American Act or the Balance of Payments Program shall be applied to foreign offers, except as noted in

subparagraphs (a)(2) and (a)(3) of this section (see 25.105).

(a)(3) As required by Section 306 of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note), agencies shall evaluate offers of Canadian end products above \$25,000 without regard to the restrictions of the Buy American Act (see Subpart 25.1) or the Balance of Payments Program (see Subpart 25.3).

PART 52—SOLICITATION  
PROVISIONS AND CONTRACT  
CLAUSES

7. Section 52.225-3 is amended by removing in the title of the clause the

date "(AUG 1988)" and inserting in its place "(JAN 1989)"; and by adding in paragraph (a) a fourth sentence to read as follows:

## 52.225-3 Buy American Act—Supplies.

"Domestic end product," \* \* \* On acquisitions above \$25,000 in value, components of Canadian origin are treated as domestic.

[FR Doc. 88-30111 Filed 12-29-88; 8:45 am]

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Friday  
December 30, 1988

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## Part XII

### Department of Labor

Employment Standards Administration,  
Wage and Hour Division

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#### 29 CFR Part 530

Employment of Homeworkers in Certain  
Industries; Advance Notice of Proposed  
Rulemaking; Notice of Hearings

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## DEPARTMENT OF LABOR

Employment Standards  
Administration, Wage and Hour  
Division

## 29 CFR Part 530

Employment of Homeworkers in  
Certain Industries

**AGENCY:** Wage and Hour Division,  
Employment Standards Administration,  
Department of Labor.

**ACTION:** Advance notice of proposed  
rulemaking; notice of hearings.

**SUMMARY:** The Wage and Hour Division is considering proposing revisions in Regulations, 29 CFR Part 530, which would modify the current prohibition on the employment of homeworkers in the women's apparel industry. Public hearings will be conducted to gain information about the characteristics of this industry and the kinds of enforcement mechanisms appropriate for a new regulation governing women's apparel homework.

The Department believes that changing workforce demographics indicate a demand by workers for increased workplace flexibility, including the option to work in one's own home, and that the current prohibition on homework in the women's apparel industry, because it forecloses such flexibility, should be modified. The Department believes that with the adoption of appropriate enforcement mechanisms it can effectively enforce the Fair Labor Standards Act in the women's apparel industry, and therefore seeks information regarding specific enforcement issues pertinent to this industry.

**DATES:** The public hearings will be held in Miami, Florida, on February 22-23, 1989, San Antonio, Texas, on March 2-3, 1989, and Chicago, Illinois, on March 8-9, 1989. The hearings will begin at 9:30 a.m. local time. Interested parties who wish to testify in person should so notify the Wage and Hour Administrator in writing no later than February 3, 1989. Oral testimony will be kept to a maximum of twenty minutes, unless different arrangements are made in advance with the Administrator. However, persons testifying are free to submit more extensive written statements for inclusion in the hearing record. Also, such persons are asked to advise the Administrator on their need, if any, for translators.

All interested parties are invited to submit written comments on this matter

to the Administrator on or before March 30, 1989.

**ADDRESSES:** The locations for the public hearings are as follows:  
Riverfront South Hall,  
City of Miami Riverfront Hall,  
Miami Convention Center,  
400 S.E. 2nd Avenue,  
Miami, Florida 33131.  
Institute of Texan Cultures,  
801 South Bowie,  
Hemisfair, Plaza,  
San Antonio, Texas 78206.  
2525 Ceremonial Courtroom,  
Everett McKinley Dirksen Federal  
Building,  
219 South Dearborn,  
Chicago, Illinois 60604.

**FOR FURTHER INFORMATION CONTACT:**  
Paula V. Smith, Administrator, Wage  
and Hour Division, U.S. Department of  
Labor, Room S-3502, 200 Constitution  
Avenue, NW., Washington, DC 20210,  
(202) 523-8305. This is not a toll-free  
number.

**SUPPLEMENTARY INFORMATION:** Section 11(d) of the Fair Labor Standards Act (FLSA) provides that the Secretary of Labor is "authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Pursuant to this authority, the Secretary has issued regulations, published as Part 530 of Title 29 of the Code of Federal Regulations. As originally issued in the 1940's, these regulations prohibited the employment of industrial homework in seven industries: Knitted outerwear; women's apparel; jewelry manufacturing; gloves and mittens; button and buckle manufacturing; handkerchief manufacturing; and embroideries. Homework in other industries has not been prohibited under the FLSA. These regulations essentially provided that the production of goods in these restricted industries could not be carried on by employees in or about a home, apartment, tenement, or room in a residential establishment except by a certified homeworker. Under specified conditions, an employer could obtain individual certificates for employees unable to adjust to factory work because of age or physical or mental disability or unable to leave home because their presence was required to care for an invalid there. Individuals could also be employed as industrial homeworkers in the restricted industries under the supervision of a sheltered workshop without obtaining a certificate under Part 530.

In 1984, the Department published a final rule implementing an employer certification system in the knitted outerwear industry. On August 21, 1988 (51 FR 30036), the Department proposed to extend this certification system to the remaining restricted industries. Based on its analysis of the comments submitted on that proposal and its review of enforcement experience in the knitted outerwear industry, the Department issued a new proposal on March 30, 1988 (53 FR 10342). That proposal noted that many commenters had submitted specific objections to the extension of the certification program to the women's apparel industry. It also stated that the Department would continue to study the issues with respect to this industry and that any further rulemaking in women's apparel would proceed by a separate rulemaking process. Finally, the proposal included a number of additional mechanisms for enforcement of the FLSA with respect to employers of homeworkers in these industries and improvements in the recordkeeping rules (29 CFR Part 516) for all covered homeworkers. The new enforcement mechanisms included provisions for civil money penalties, bonding of employers under certain conditions, the exclusion from the program of employers in States where homework is banned, and mandatory denial or revocation of certificates for certain types of violations.

After reviewing the comments submitted on the March 1988 proposal, a final rule was published on November 10, 1988 (53 FR 45708).

In developing a new rule for women's apparel, it is likely the Department will adopt some form of certification system which incorporates some or all of the enforcement mechanisms already in place for the other restricted industries. However, consideration will also be given to possible special enforcement mechanisms to address any particular characteristics of the women's apparel industry and the Department's enforcement resources needed to assure FLSA compliance. The Department believes the current prohibition on women's apparel homework is not necessary to assure FLSA compliance provided the alternative rule is carefully designed to meet enforcement needs in this industry. Thus, the current ban will be retained only if no practical alternative can be identified.

The public hearings are for the purpose of gathering information about the characteristics of the women's apparel industry to assist the Department in developing an effective homework rule for this industry. The

Department plans to develop a rule which will achieve maximum workplace flexibility consistent with its overall responsibility for enforcing the protective provisions of the FLSA. The hearings are not intended as forums for discussions of other issues, and the witnesses are asked to focus their testimony on providing specific data in this area. In preparing testimony or written comments, the public is asked to address the following questions:

1. What differences exist between the women's apparel industry and the other restricted industries? What if any additional enforcement mechanisms should be adopted to ensure FLSA compliance among employers of homeworkers in this industry?

2. What is the size of the homeworker workforce in the women's apparel industry today? What expansion of the use of homeworkers should be anticipated if homework is permitted?

3. What are the characteristics of homeworkers and factory workers in this industry?

4. How is work distributed by manufacturers in this industry? What role is played by contractors or jobbers? What controls do manufacturers maintain over who performs the work and how much they are paid?

5. What is the range of wages paid women's apparel homeworkers and factory workers? Are piece rate wages the predominant method of payment used in homework? Are other methods used?

6. When piece rates are used, how are those piece rates being established in this industry at present? Is it feasible to require that some objective standard be met in the fixing of those rates? If so, what standards should be adopted to assure that price rates, if used, are fixed in such a way as to minimize the need for "make-up" pay in assuring that all workers receive at least the statutorily required minimum wage and overtime?

Persons who have not previously advised the Administrator that they wish to testify at the hearings will be heard as time permits following those

who have been scheduled, but they may be limited to ten minutes each for their presentation.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor.

## List of Subjects in 29 CFR Part 530

Employment, Investigation, Labor,  
Law enforcement, Minimum wages,  
Wages, Licenses.

Signed at Washington, DC on this 28th day  
of December 1988.

Ann McLaughlin,  
Secretary of Labor.

Fred W. Alvarez,  
Assistant Secretary of Employment  
Standards.

Paula V. Smith,  
Administrator, Wage and Hour Division.  
[FR Doc. 88-30144 Filed 12-29-88; 8:45 am]

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**Friday**  
**December 30, 1988**

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## **Part XIII**

### **Department of Transportation**

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**Urban Mass Transportation  
Administration**

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**49 CFR Part 604**  
**Charter Service; Amendment; Final Rule**



## DEPARTMENT OF TRANSPORTATION

## Urban Mass Transportation Administration

## 49 CFR Part 604

[Docket No. 88-E]

## Charter Service; Amendment

AGENCY: Urban Mass Transportation Administration (UMTA), DOT.  
ACTION: Final rule.

**SUMMARY:** This final rule sets forth the Urban Mass Transportation Administration's ("UMTA") amendment to its Charter Service Regulation to provide additional exceptions to the general prohibition on the use of UMTA-funded equipment and facilities for charter service. This rule adds three exceptions to the regulation. The first exception would allow the incidental use of UMTA-funded equipment and facilities for direct charter service with non-profit social services agencies under certain conditions. The second exception provides an additional exception for non-urbanized areas by allowing UMTA-funded equipment and facilities operated by recipients in such areas to be used incidentally in direct charter service for certain social service agencies providing service for elderly persons. The third exception allows UMTA-funded equipment and facilities to be used on an incidental basis in any particular charter service for which the UMTA recipient and the local private operators have reached an agreement as part of the willing and able determination allowing the recipient to provide such service.

**EFFECTIVE DATE:** January 30, 1989.

**FOR FURTHER INFORMATION CONTACT:** Theodore A. Munter, Assistant Chief Counsel, Office of Chief Counsel, Room 9316, UMTA, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-1936; or, Jeanmarie Homan, Regional Counsel, Office of the Chief Counsel, Suite 100, Urban Mass Transportation Administration, 6301 Rockhill Road, Kansas City, Missouri 64131, (816) 926-5053.

## SUPPLEMENTARY INFORMATION:

## I. Background

## A. General

On April 13, 1987 UMTA promulgated a complete revision of the regulation that governs permissible charter service by UMTA recipients (49 CFR Part 604; hereafter the "1987 Regulation"). In implementing subsections 3(f) and 12(c)(6) of the Urban Mass Transportation Act, as amended ("UMT

Act"), (49 U.S.C. 1602(f) and 1606(c)(6)), the 1987 Regulation is designed to ensure that UMTA-funded equipment and facilities are used to meet mass transportation needs as intended by the UMT Act and to protect the private charter industry from subsidized and unfair competition by Federally assisted grantees.

The 1987 Regulation establishes a general prohibition on the use of UMTA-funded equipment and facilities in charter service operations but permits their incidental use where no private charter operator is determined to be willing or able to provide the service, or where additional equipment or equipment accessible to elderly or handicapped persons is needed by a private operator. Two additional exceptions exist, but only on approval by UMTA: one for hardship situations in non-urbanized areas, and the other for special events.

On December 22, 1987, the President signed the Department of Transportation and Related Agencies Appropriations Act, 1988 (Pub. L. 100-202, 101 Stat. 1329; hereafter the "FY 1988 Act"). In the conference report accompanying the FY 1988 Act, UMTA was directed to undertake a rulemaking to amend the charter service regulation to "permit non-profit social service agencies with clear needs for affordable and/or accessible equipment to seek bids for charter services from publicly funded operators." (H. Report 100-498, p. H 12787 as printed in the Congressional Record, 12/21/87). This Report suggests that "[t]hese non-profit agencies . . . be limited to government entities and those entities subject to sections 501(c) 1, 3, 8 (sic) and 19 of the Internal Revenue Code." The Report recommends, further, that "[i]n such cases, the public operator . . . be required to identify to the chartering organizations any private operator that has notified it of its willingness and ability to provide comparable charter service." UMTA notes, parenthetically, that the citation in the Report language to Internal Revenue Code 501(c)(5) was a misprint; the conferees intended to cite section 501(c)(4) of the Code.

The language of the Conference Report 100-498 (hereafter the "Conference Report") reflects a concern, shared by the Congress, UMTA, and various interested parties, that the 1987 Regulation may be adversely affecting persons who are "transportation disadvantaged" that is, persons of limited physical or financial means who depend heavily on publicly subsidized mass transportation services to meet their needs for travel.

## B. The NPRM

On May 25, 1988, UMTA published a notice of proposed rulemaking designed to carry out the directives in the Conference Report. (53 FR 18964; May 25, 1988, hereafter the "NPRM.") The final rule published today is essentially similar to the proposed rule.

In the preamble to the NPRM, UMTA discussed, at length, the Conference Report recommendations and invited the public to submit comment and data on numerous specific issues. The 60-day comment period closed on July 25, 1988.

UMTA held four public hearings during the comment period to solicit comments on the NPRM. A total of fifty-eight (58) witnesses commented at the hearings in Washington, DC; Kansas City, Missouri; Cincinnati, Ohio; and San Francisco, California. Additionally, UMTA received eighty-two (82) written comments plus one-hundred and thirty-four (134) responses to a survey conducted by the American Bus Association (ABA). The breakdown among commenter categories is as follows:

53	UMTA urban recipients and local governments
11	UMTA rural recipients
173	Private charter operators, including 134 responses to the ABA survey and 39 individual comments
4	Public Trade Associations
9	Private Trade Associations
10	State Governments
8	Nonprofit Social Service Agencies
4	Consumers
2	Public Employees and Labor Unions
274	Total

The comments describe local conditions and concerns, and reveal that the charter issues and problems vary in kind and degree in communities across the country. However, despite the diversity in local circumstances, recipients and private operators remain polarized in their view of the 1987 Regulation. Comments from most recipients and from their public trade associations, as well as from public employees, local governments, non-profit agencies, and consumers express continued opposition to the 1987 Regulation. These groups and individuals uniformly support the need for an exception to the regulation. Their evaluation of the NPRM, however, is mixed. While some recipients fully support the exception as proposed, many believe the proposed exception is too restrictive, and several considered the certification process burdensome. On the other side, the private operators

and the trade associations that represent them remain unified in their support of the 1987 Regulation and adamantly oppose the NPRM. They express concern that the proposed exception is too broad and that the certification process is unenforceable and may easily be abused.

Many commenters comment at length on the 1987 Regulation and on the proposed exception, some providing specific responses to the numerous questions UMTA posed in the NPRM. An issue-by-issue summary of the significant comments received and UMTA's response to them is set forth in the following section. A few specific comments are also noted and addressed in the Analysis of the Amendment.

## II. Specific Comments and UMTA's Response

This section is in two parts. The first part considers the comments on the NPRM. The second part discusses the final action UMTA is taking in this rulemaking published today.

## A. Comments on the NPRM

Comments from private operators uniformly support the 1987 Regulation and oppose any exceptions which would allow recipients to provide direct charter service. They argue that the regulation requires communication between recipients and private operators and that both the public and transit operators must be adequately educated and informed about the regulation. Generally, they indicate that communication is either good or improving, but state that the educational process is a gradual one and that the regulation must be given a chance to work before it is changed. Several commenters noted examples of private operators and recipients working together to accommodate the movement of large groups on local, short trips.

They argue that consumers need to be retrained to think of contacting the private sector when they need charter service, but emphasize that again, this is part of a gradual educational process. They suggest that giving any portion of the charter market back to recipients will undermine this educational process. These commenters also point out that as the private operators build their fleets and capitalize on the new opportunities afforded under the charter regulation, they will be able to serve the general public's total needs better as compared to recipients who are restricted to limited, incidental use of their equipment to provide charter services.

A few comments from local and state recipients express relief from the pressure to provide charter service that

as one states, detracts from their real objective, which is to provide mass transit services.

Although these few seem to support the 1987 Regulation, they also support the NPRM as proposed. Most comments from public operators oppose the existing regulation and support the NPRM, but complain that the NPRM is too restrictive to address their concerns. Their national trade association, the American Public Transit Association ("APTA"), notes that public operators need to be full service transportation providers to obtain local support, a comment echoed by a substantial number of recipients. Their transit systems, these commenters state, receive local funding and are viewed as a community service, and they must be available to serve the needs of local churches, schools and social organizations, local industry, local government and the Chamber of Commerce, as well as special community celebrations, conventions and other events. In sum, local charter services are viewed by recipients as a critical part of their public mandate and as a necessary component of their efforts to solicit the support of their local taxpayers.

Although UMTA acknowledges these concerns, UMTA believes that this perception is not consistent with the statutory definition of "mass transportation" and the directives of the UMT Act. Section 12(c)(8) of the UMT Act provides that UMTA funds may be used for mass transportation purposes, and specifically excludes charter service from the definition of mass transportation. The fact that a recipient's mass transportation services are partially supported by local funds has no effect on this provision, since these local funds, like the UMTA ones, are intended for mass transportation purposes.

UMTA therefore does not view local matching funding as a justification for expanding or bypassing the prohibition on the use of UMTA funds for purposes other than mass transportation. It should be noted in this connection that when equipment and facilities are purchased solely with local funds, the Charter Service Regulation does not apply. Moreover, while section 12(c)(6) defines "mass transportation" to include "special service," the only types of service that UMTA recognizes as such are the two specifically indicated by Congress in 1988 as falling under the "special service" definition of "mass transportation." These are, namely, service exclusively for all elderly and handicapped persons in the recipient's service area, or service for workers who

live in the inner city, but work in the suburbs. See, H.R. Rep. No. 1785, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. Ad. & News, 2941. These types of special service should not be confused with charter service for local non-profit or community groups, which are subject to the general prohibition of section 12(c)(6).

UMTA is nonetheless mindful of examples cited by commenters in which the April 1987 Regulation has resulted in a loss of charter services to the community. A typical example of these problems is that cited by an urban recipient, which states that it has been unable to provide a 45 minute charter trip for a Japanese business delegation which had come to look at a potential industrial building site. The recipient states that the group had gone without service, since the recipient was unable to provide the service, and local private operators were uninterested in doing so because of the short trip duration.

Another example of an unmet community need was that for a local program, which, according to the commenter, is funded by the local public and private sector, and designed to break the cycle of poverty through educational and social programs for young residents of a low-income neighborhood. The commenter states that there were many charter needs related to the program, which were not being met by the private sector, and would not be met by the amendment proposed in the NPRM. Another commenter cites the case of the organization for the developmentally disabled which, in preparing for a special event, might have a need to transport volunteers to the site of the event for a day of orientation or training. These commenters emphasize that the inability of UMTA recipients to provide charter services for these groups could have a detrimental economic and social impact on their communities.

UMTA believes that most of the problems cited may be solved through an understanding of the flexibility contained in the April 1987 Regulation. Accordingly, UMTA is including in this rulemaking the formal agreement process which has been used successfully to resolve the problems illustrated in the comments received. This process was set out in UMTA's "Charter Service Questions and Answers," 52 FR 42248, 42249, November 3, 1987. Under the process, an UMTA recipient may provide charter service when it has indicated in its public charter notice a desire to provide certain types of charter service, and concluded an agreement to this effect



with the local private operators. The mechanics of the process are discussed in detail below under the Analysis Of the Amendment. By using this process, the local public and private operators can adapt the Charter Service Regulation to local conditions and can assure full and appropriate service to the local community.

Although experience has now shown that the formal agreement process can be a successful solution to the concerns about the 1987 Regulation, UMTA is mindful of the Congressional directive to study and to promulgate additional exceptions to the Regulation. The directives in the Conference Report are threefold. They specifically direct UMTA to undertake a rulemaking to amend the Charter Service Regulation to "permit non-profit social service agencies with clear needs for affordable and/or handicapped-accessible equipment to seek bids for charter services from publicly funded operators." (H. Report 100-498, p. H 12787 as printed in the Congressional Record, 12/21/87). They also suggest that the agencies be limited to governmental entities and certain tax exempt organizations. Additionally, the Committee recommends that an "exemption" from the regulation "be provided to those public transit authorities which purchased charter rights entirely with non-federal funds prior to enactment of the Urban Mass Transportation Act of 1964." (Id.)

Third, the Committee asks UMTA to explore "the issue of whether public transit authorities that offer only standard transit buses for charter services should be permitted to compete against private operators." (Id.) In the NPRM, UMTA proposed the recommended exception, and sought public comment on each of the approaches suggested in the Conference Report.

#### 1. Charter Rights Purchased Before Enactment of the UMT Act in 1964

In the preamble discussion to the NPRM, UMTA discusses, at length, the Committees' directive to explore the possibility of creating a blanket exemption from the regulation for recipients who purchased charter rights entirely with non-Federal funds prior to enactment of the Urban Mass Transportation Act of 1964. In that discussion UMTA expresses its reluctance to propose such a blanket exemption because, in UMTA's view, such an exemption would contravene the statutory requirements of the UMT Act. UMTA specifically invited comment on whether recipients that purchased charter rights prior to the

enactment of the UMT Act should receive special treatment under the charter regulation. UMTA received fourteen (14) comments in response to its invitation. Three commenters who strongly advocate such an exemption offer little data on this issue other than their opinion that they would qualify for the exemption. Most recipients questioned at the hearings on this point state that they did not know whether they would qualify for the exemption, but admit that they are certainly looking into it. One public operator states that charter rights were an incidental part of the buy-out agreement of the private operators' business. Another recipient states that such an exemption is arbitrary and would be unfair to the public operators that may not qualify. Given the lack of data submitted on this issue, UMTA has determined that it has no legal basis to change its view that an exemption of this kind is contrary to the directives of the UMT Act.

#### 2. Suggested Exception based on Vehicle Characteristics

The Conference Report recommended that UMTA explore "the issue of whether public transit authorities that offer only standard transit buses for charter services should be permitted to compete against private operators." In making this recommendation, Congress was seeking to determine whether a distinction could be drawn between charter services provided by public transit authorities in standard transit buses, and those provided by private operators in over-the-road coaches. If it could be established that public transit authorities using standard buses to provide short, local trips were not in competition with private operators, an exemption could presumably be created on this basis. In the NPRM, UMTA specifically asks commenters to address this issue. UMTA received a total of one hundred and seventy-two (172) comments on this issue, including one hundred and thirty-two (132) responses to the ABA survey, and forty (40) written and oral comments. Of this number, one hundred and fifty-four (154), including one hundred and twenty-nine (129) ABA survey responses and twenty-five (25) written and oral comments, respond that the public and private operators are in competition for the local, short trip charter business regardless of the equipment used. The ABA survey responses indicate that local trips average 22.3% of the private charter operators' charter trips. Private operators note that the local, short trips are the "bread-and-butter" of their business and fear that an exemption for transit coaches would foreclose them

from a significant share of the charter market.

Although both private and public operators note the advantage of transit coaches as compared to the over-the-road coaches for moving large groups efficiently on short urban trips, a few private operators submit that they have been building or increasing their fleet of transit coaches and restructuring their rates and pricing policies for local, short trips since the 1987 Regulation opened this market to them. Given the substantial interest expressed on this issue and based upon the evidence submitted, UMTA has determined not to propose an exemption to the Charter Service Regulation for transit-type coaches.

In the NPRM discussion of an exemption for transit type vehicles, UMTA proposed to study recipients' charter services prior to the promulgation of the 1987 Regulation to determine whether there was an identifiable pattern of service based on vehicle comforts and amenities, trip lengths and trip durations. The evidence submitted by the private operators indicates that prior to the 1987 Regulation, UMTA recipients foreclosed the private operators from the local trip market in many areas. However, many of the private operators indicate in their comments that they welcome the opportunity to serve this market. Private operators note that short haul business is vital to them. The short, local trips often occur during the weekdays when long haul business is slow and vehicles may be idle. Further, they state that the short haul business is important to gain local recognition and to build a reputation for long haul business. Based upon these comments, UMTA has determined that a study of market data prior to the 1987 Regulation is irrelevant and inappropriate. Consequently, UMTA has chosen not to proceed with the study.

Although UMTA has determined not to propose this exception, UMTA recognizes that in some communities the local private operators may not be interested in restructuring their business to serve the local market. However, UMTA believes that an exception which would result in foreclosing all private operators from this market is not the appropriate way to address localized problems. Again, UMTA believes the existing regulation affords the flexibility needed to resolve these issues through an agreement between recipients and local private operators. Some recipients currently have formal agreements with the local private operators which specifically outline the types of charters

that the private operators cannot or do not wish to serve. One UMTA recipient, for example, has entered into an agreement with local private operators under which the recipient is allowed to provide charter service within a 50 mile radius of its service area, having a trip duration of less than three (3) hours, and for weddings, city and county agencies, and local college athletic events. By codifying the formal agreement process in this final rule, UMTA intends to emphasize its utility as an effective means of accommodating local conditions in implementing the Charter Service Regulation.

#### 3. Proposed Exception for Non-Profit Social Service Agencies

The exception proposed in the NPRM was issued in response to concerns that the April 1987 Regulation adversely affects the transportation disadvantaged. It appeared from these allegations that the transportation disadvantaged were dependent upon public operators to serve their charter needs and that private operators were not serving this market. While the NPRM is based on this basic assumption, the comments received on the NPRM do not provide sufficient data to make a conclusive finding on this point. Of some two hundred and seventy-four comments (274), only fourteen (14) state that the local private operators are not serving the needs of the community and only half of these commenters specifically mention the needs of the transportation disadvantaged.

Comments from disadvantaged consumers and groups representing their interests are noticeably few in number. Of the total of two hundred and seventy-four (274) comments received, only two are from organizations representing the disadvantaged. One of these two commenters urges UMTA to allow small groups in rural areas to charter vans instead of larger and more costly passenger coaches. The other, a consortium of 50 social service agencies benefiting the disabled, expressed some concern that the burdens of the process could have a "chilling effect" on the agencies attempting to serve the disabled and may discourage them from sponsoring activities requiring charter service. Consequently, although the apparent intent of Congress in directing UMTA to undertake this rulemaking was to meet the charter needs of the transportation disadvantaged, evidence submitted to the docket is insufficient to draw the conclusion that the needs of this group are not being met under the April 1987 Regulation.

A few comments were received from both public and private operators describing their local experiences relevant to charter trips for the handicapped. None of these commenters describes specific incidences where service has not been provided. These commenters note that the requests for service for handicapped trips are very infrequent, explaining that handicapped groups often have their own vehicles or are generally served by specialized providers. It is also noted that special lift equipped vehicles are not designed to carry large groups of handicapped individuals, since only one or two wheelchairs can be secured in these vehicles at one time. Additionally, public vehicles often are not available for incidental charter service because they are needed throughout the day for fixed-route service. The one comment received from an association of handicapped organizations does not complain of a lack of service for their organizations, but rather requests that a lift-equipped vehicle be available for every charter to enable the handicapped to be integrated into the normal community.

Comments were also received on the issue of the cost of a private versus public charter service, but again the data submitted are insufficient to determine whether the cost of private service adversely affects the transportation disadvantaged. There is comment from both recipients and private operators comments that school bus operators provide the most reasonable charter services. Comments from recipients also indicate that some recipients have little flexibility to reduce their charter rates to accommodate the needs of disadvantaged charter groups because the rates are set under State law or local policy. On the other hand, private operators comment that they have discount rates for certain groups and run *pro bono* trips. Both recipients and private operators indicate that the major cost difference between their respective rates is attributable to the recipients' lower minimum flat rates and not their hourly rates, except in the rural areas where deadhead miles also add significant cost to short, local trips performed by private operators who are located far from the area. Based upon the comments received, it appears that the transportation disadvantaged have not suffered widespread adverse impact since promulgation of the April 1987 Regulation, except, perhaps, in rural areas.

On the one hand, the data submitted do not provide sufficient information to contradict or fully to support the basic

assumption that the April 1987 Regulation may be adversely affecting the transportation disadvantaged by depriving them of access to affordable charter service. On the other hand, however, UMTA is mindful of the Congressional advice to assure that those with "clear needs" for charter service are adequately served. UMTA has therefore determined that it should amend the regulation, as proposed, with certain modifications in response to the comments received, as discussed in the following section.

#### B. UMTA's Final Action

In this final rule, UMTA is amending its Charter Service Regulation to provide three additional exceptions to the general prohibition on the use of UMTA-funded equipment and facilities for charter service. The first exception would allow the use of UMTA-funded equipment and facilities for direct charter service with non-profit social service agencies that are governmental entities or organizations exempt under Internal Revenue Code 501(c)(1), (3), (4) and (19), provided that the agency is contracting for service for handicapped persons; is a recipient of funds under certain U.S. Department of Health and Human Service ("USDHHS") programs; or has been State-certified according to the procedure set forth in subparagraph 604.9(b)(5)(iii) of the Charter Service Regulation. The second exception provides an additional exception for non-urbanized areas by allowing UMTA-funded equipment and facilities operated by recipients in such areas to be used incidentally in direct charter service for social service agencies that are governmental entities or organizations exempt under Internal Revenue Code 501(c)(1), (3), (4) and (19), provided that the agency is contracting for service for elderly persons. The third exception allows UMTA-funded equipment and facilities to be used on an incidental basis in any particular charter service for which the UMTA recipient and the local private operators have reached an agreement as part of the willing and able determination allowing the recipient to provide such service. The following subsections explain the basis and procedural requirements for these exceptions.

#### 1. Identifying the Transportation Disadvantaged

In framing this exception, it is necessary to identify the persons contemplated by the Conference Report recommendation—persons having "clear needs for affordable and/or handicapped-accessible equipment" and



to define these persons in a manner familiar to the transit industry and adaptable to the charter regulation. In the NPRM, UMTA proposes an exception allowing recipients to provide direct charter service to government entities and certain tax exempt organizations contracting for transportation for the elderly and handicapped or to certain USDHHS-funded social service agencies contracting for services consistent with the agency's function and purpose.

Commenters representing both public and private interests generally support the exception for the handicapped. However, comments on the other aspects of the exception are mixed. In general, the commenters representing the recipient's interest believe the proposed exception is too restrictive. These comments indicate a view that all organizations with a public or a charitable purpose, i.e. all government entities and entities exempt from taxation under 501(c)(1), (3), (4) and 19, have a "clear need" for affordable and/or handicapped accessible equipment. In contrast, the comments from private operators generally oppose the exception as too broad. Several note that the trips for the elderly represent a substantial percentage of their business and that many elderly are neither physically nor economically disadvantaged but, more importantly, they fear the exception for the elderly would be unenforceable and easily abused.

Several commenters criticize the scope of Appendix A, which, as proposed in the NPRM, lists the covered USDHHS programs and defines which social service agencies are eligible for the exception. They express the view that the limitation to USDHHS programs is arbitrary and unfair to agencies that are funded solely under State or local programs yet serve social needs similar to the Federal programs.

In response to these comments, UMTA has modified the exception proposed in the NPRM for the elderly, limiting it to recipients in non-urbanized areas and also adding an exception for State-certified agencies. UMTA believes this is an appropriate balance of the concerns and interests expressed by groups funded under State or local programs which meet the USDHHS eligibility guidelines and serve a clientele similar to that of the groups in Appendix A. As discussed in detail, above, UMTA believes that the 1987 Regulation provides the necessary flexibility through the formal agreement process to assure that affordable and adequate charter services are available

to the general public, including the transportation disadvantaged. The exception provides merely additional assurance, especially in non-urbanized areas, where implementation of the regulation has been more difficult.

UMTA is persuaded that the addition of an exception for State-certified agencies is reasonable and consistent with the intent of this amendment to the Charter Service Regulation, which is to ensure that the transportation needs of agencies serving the transportation disadvantaged are met. UMTA is also persuaded that the exception proposed in the NPRM for trips based on the eligibility standard of more than 50% elderly can be easily abused. Some of the comments from private operators described their fears of potential abuse and difficulty in implementing the proposed exception. It was noted that the population over 55 years of age is increasing annually and that many business and convention charters could carry a simple majority of passengers in this age group, thus technically qualifying for the exception, although inconsistent with its underlying intent. Private operators also noted that in the "real world" those wanting to contract with the public operator could easily claim that a trip was for elderly passengers and in many cases neither the public operator nor the private operator could confirm the veracity without checking individual identification. As enforcement of the process is largely dependent upon the compliant process, a violation of this standard cannot be determined by simple observation of a bus load of passengers and the private operators have no way to collect information necessary to provide an objective basis for making a complaint.

UMTA believes that in classifying a group of elderly persons as disadvantaged, one must take into account either adverse physical or economic circumstances. Accordingly, it is UMTA's view that elderly persons having a physical and economic disadvantage will be able to obtain charter service under the exception for the handicapped and for HHS-funded social service agencies, and that a separate exception for the elderly would be largely redundant. Further, UMTA believes that the additional assurance provided by a separate exception does not justify the risk and potential for abuse the exception affords, especially in the urban areas. In balancing the alternatives to ensure against abuse, UMTA has determined that this approach is less burdensome and more effective than increasing procedural and

administrative requirements to counter the potential abuse and enforcement difficulties of the exception for the elderly proposed in the NPRM. By recognizing that the elderly may be transportation disadvantaged not because of age alone but because of physical and economic conditions, the exception promulgated today ensures that their needs are met through a mechanism which can be readily verified and enforced.

## 2. Procedural Requirements

The exception proposed in the NPRM required that the governmental entity or tax-exempt organization which is contracting for charter service submit a certification to the UMTA recipient that the entity or organization, and the specific charter trip in question, meet the conditions of the exception to the UMTA charter regulation. In the text of the proposed amendment, UMTA provides the working of the certification process.

UMTA received a total of one hundred and seventy-six (176) comments on this process, including the one hundred and thirty-four (134) responses to the ABA survey. Of the five (5) comments received from State Transportation Departments on this issue, four (4) submit that the certification process would be easy to implement and support the approach. Of the eighteen (18) comments from recipients and those representing their interest, fourteen (14) indicate that the certification process would be administratively burdensome. Recipients also express concern that contracting organizations may not understand the requirements, may give false certifications, or may be too intimidated by the certification requirement to use the exception effectively. They express concern, also, that they may be held responsible in situations where a contracting agency intentionally or unknowingly make a false certification.

The overwhelming majority (147 of 150) of comments from private operators and those representing their interests indicate that the proposed process is unenforceable and easily abused. These commenters urge UMTA to require a process that assures private operators prior notice and opportunity to provide the service before recipients could contract for the trip. Most advocate a process similar to the petition process for the non-urbanized area hardship exception which requires documented notice to the private operators and UMTA approval before recipients can contact directly for charter services.

In this final rule, UMTA has decided not to alter the procedural requirements proposed. UMTA believes that a notice and petition process, as advocated by the private operators, creates an undue administrative burden on recipients and consumers, is impractical and costly to implement on a trip-by-trip basis, and would have a "chilling effect" which would undermine the assurance that UMTA intends to provide with the exception. In balancing these concerns against the legitimate fears of abuse, which focus primarily on the structure of the exception for the elderly, UMTA has determined that modifying the eligibility requirements of that exception achieves the same objective more efficiently and effectively without undermining the purpose of the exception.

Although UMTA's goal remains a simple and easily implemented exception, UMTA believes that the certification process is a necessary safeguard. However, UMTA notes the recipients' fears that they may be held responsible for ensuring that the conditions of eligibility are met by the contracting agencies, and has determined that it will not require a recipient to look beyond the certification unless the recipient has a "reasonable cause" to believe that the certification is falsified. UMTA considers an example of "reasonable cause" to be a past history of abuse, or a pattern of abuse of the certification by the contracting agency. UMTA expects that when it is brought to the attention of a recipient, either independently or through the UMTA complaint process, that a contracting agency has knowingly submitted a false certification, the recipient shall cease providing charter service to such agency. UMTA will take enforcement action against recipients which continue to provide charter service to contracting agencies that the recipients have reasonable cause to know have submitted false certifications.

In the discussion of the certification process in the NPRM, UMTA specifically requested comment on the element of the certification which requires assurance of compliance with Title VI of the Civil Rights Act of 1964 and implementing regulations thereunder. Very few commenters address this issue and while some suggest that it is perhaps unnecessary, none express objection or suggest alternatives. Consequently, UMTA has not altered the requirement in the final rule, except to add the regulatory citation application to the USDHHS funded programs.

## III. Analysis of the Amendment

### A. Subparagraph 604.9 (b)(5)

This exception allows all UMTA recipients to contract directly for charter services upon obtaining a certification that the contracting entity or organization and the specific charter trip in question meet the conditions of the exception. These conditions are set forth in subparagraphs (i), (ii) and (iii), which also provide the text of the certification. This exception is similar to that proposed in the NPRM, except that the condition in subparagraph (ii), allowing trips where more than 50% of the passengers on the trip will be elderly, has been removed. Moreover, subparagraph (iii) has been added to expand the exception to State-certified groups which meet the same eligibility requirements and serve a clientele similar to that of the USDHHS-funded programs listed in Appendix A.

In reviewing the comments we received to this NPRM, UMTA recognizes that there are entities that perform public welfare functions that receive no Federal assistance, but either receive, or are eligible to receive, State or local government public welfare assistance, comparable to the assistance provided by USDHHS to the programs listed in Appendix A. UMTA has therefore determined that in certain circumstances, it would be inequitable to deny the privileges of this exception to groups of persons who are transit-dependent or transportation-disadvantaged and who are participating in charter trips arranged by governmental entities or tax-exempt organizations that receive or are eligible to receive public welfare assistance from a State or local government, although those entities or organizations do not receive funding from the USDHHS.

Accordingly, UMTA has established a mechanism by which a State may petition UMTA for inclusion on Appendix A of a governmental entity or tax-exempt organization that receives no assistance from USDHHS. To be eligible for inclusion, a State must petition UMTA on behalf of the requesting entity or organization. Any tax-exempt organization that either receives or would be eligible to receive State or local public welfare assistance funding comparable to that provided by USDHHS may request the State to submit to UMTA a petition on its behalf. If the State determines it appropriate to petition UMTA on behalf of the entity or organization, the State should include with its petition the following information: (1) The name of the entity or organization, a description of its

membership and constituency, and the type of public welfare activities it performs; (2) in the case of a tax-exempt organization, evidence that the organization is exempt from taxation under subsection 501(c)(1), (3), (4), or (19) of the Internal Revenue Code; (3) a certification by the entity/organization that: (a) It is a government entity or an organization exempt from taxation under subsection 501(c)(1), (3), (4), or (19) of the Internal Revenue Code; (b) it either receives or is eligible to receive, directly or indirectly, from a State or local governmental body public welfare assistance funding comparable to that provided by USDHHS to the programs listed in Appendix A; and (c) in the course of carrying out the programs for which it has been organized, it arranges for travel of groups of persons who are transit-disadvantaged or transit-dependent. UMTA will review the materials submitted, and, at its discretion, request additional information from the State or applicant. In addition, UMTA reserves the right to seek information and advice from USDHHS or other appropriate sources. When UMTA makes its decision, UMTA will inform both the State and the applicant in writing. If UMTA approves the petition, UMTA will provide the State and the applicant a written statement to the effect that an UMTA recipient may execute a contract with the entity or organization to provide charter service directly to that entity or organization.

Two commenters ask whether the certification could be submitted as a one-time submission. It is UMTA's intent that the certification be made on a trip-by-trip basis, since the qualifying conditions are trip specific as to the passengers to be transported and the purpose of each trip. UMTA does recognize situations where one contract may cover more than one trip for the same passengers and the same purposes, such as a week-long day camp program for handicapped children. Under these situations, a single certification would be acceptable.

### B. Subparagraph 604.9 (b)(6)

This exception permits direct contracting to eligible entities and organizations when more than 50% of the passengers on the trip will be elderly and the other conditions of the certification are met. This exception applies only to recipients in non-urbanized areas, i.e. areas with populations of less than 50,000. Although these recipients generally receive funds under UMTA's Section 18 program, the exception applies to all recipients in



non-urbanized areas, regardless of the UMTA funding source. This procedure is consistent with the non-urbanized area hardship exception to the charter rule. This exception applies the same procedural requirements as do subparagraphs (5)(i) and (ii), which are discussed above.

In the NPRM, this exception was proposed for application to all recipients. The reasons for limiting the exception have been discussed above.

#### C. Subparagraph 604.9(b)(7)

This provision codifies the formal agreement process. UMTA discussed this process in its "Charter Service Question and Answers," published in the Federal Register, November 3, 1987, 42248, at 42249. UMTA has determined that it should codify the process as an exception in this final rule to emphasize its importance and utility in the proper implementation of the Charter Service Regulation. The exception as set forth in this final rule is consistent with this previously published guidance. Under these agreements, a recipient may operate particular charter trips contracting directly with the customer where there is a formal agreement to this effect between the recipient and all private operators responding to the recipient's notice and determined to be "willing and able". To take advantage of this exception, the recipient must complete the review process on all replies to its annual charter notice. Except for the limitations of incidental use, the recipient and the private operators may define the excepted charter service in any terms and conditions agreed to. UMTA is not a party to these agreements, nor is UMTA's concurrence or approval required. The only procedural requirement, in addition to conclusion of a formal agreement, is that notice of the agreement be published. The recipient's annual published notice must provide for this type of agreement or be subsequently amended to specifically refer to such agreement, before the recipient undertakes the charter trips described in the agreement.

#### D. Appendix A

In Appendix A, UMTA provides a list of the USDHHS programs referenced in exception (5)(ii). The scope and composition of Appendix A is identical to the listing proposed in the NPRM. In response to the comments submitted which questioned the rationale for limiting the exception to Federal programs, this final rule includes an additional provision to encompass State-certified agencies receiving

funding under local and State programs similar to the Federal programs.

#### E. Appendix B

In this final rule UMTA has added an Appendix B to clarify the definition of the terms "elderly" and "handicapped" as used in exceptions (5) and (6). In the NPRM, UMTA explains that for purposes of these exceptions, UMTA recipients should apply the same definitions they apply for eligibility for the UMT Act half-fare provisions. UMTA received comment from private operators seeking clarification of these definitions. This is understandable as private operators can not be expected to be entirely familiar with the UMTA program. Additionally, while Section 18 recipients are familiar with UMTA definitions of these terms, they are not specifically familiar with the guidelines for the half-fare provision as this requirement is not applicable to the section 18 program.

Consequently, UMTA has added an Appendix B which sets forth and explains the definitions of "elderly" and "handicapped". This guidance is consistent with the definitional requirements for the half-fare provision. It is expected that recipients governed by the half-fare requirement will apply the same definitions for eligibility for the charter exception.

#### IV. Regulatory Impacts

##### A. Executive Order 12291

This action has been reviewed under Executive Order 12291, and UMTA has determined it is not a major rule. This rule will not result in an annual effect on the economy of \$100 million or more.

##### B. Regulatory Evaluation

This rule is a significant rule under the Department of Transportation Regulatory Policies and Procedures because of the substantial public interest in this rulemaking. Accordingly, UMTA held four public hearings and a total of fifty-eight (58) witnesses commented at the hearings in Washington, DC; Kansas City, Missouri; Cincinnati, Ohio; and San Francisco, California. Additionally, UMTA received eighty-two (82) written comments plus one hundred and thirty-four (134) responses to a survey conducted by the American Bus Association (ABA). The breakdown among commenter categories is set forth in the Supplementary Information section of the text. The docket of these comments is available for public review.

Although this amendment is significant for its public interest, UMTA has determined that it will have very

little effect on the basic economic trends and projections identified in the Regulatory Analysis supporting the April 1987 Regulation. (April 13, 1987, at 52 FR 11932.)

At the outset of this rulemaking, UMTA did not have any empirical data on the number of charter trips this rule might affect or the cost associated with those trips. UMTA did know the transit operators revenues from all of their charter service amounted to only 1, 2, or 3 percent of their total revenue, whereas charter service revenue is the primary or only source of revenue for many private operators. (See the Regulatory Analysis, April 13, 1987, 52 FR 11932.) However, in the NPRM, UMTA stated that it believed that the population served by this rule, that is, the elderly, handicapped, transit dependent, and transit disadvantaged was but a small fraction of the universe of charter services. Comments to the docket from private operators indicated that charter services under the elderly exception, as proposed, may constitute anywhere from 25-90 percent of their business. However, in this final rule we have reduced the economic impact on private operators by limiting the exception for social service agencies serving the elderly to rural areas, and by subjecting the exception for other social service agencies to a test of "transportation dependency." Comments from recipients and public operators indicate that the other constituencies that would be served by the rule did constitute only a small portion of the charter business. Some commenters stated that their request for charter service for the handicapped were as few as one or two in a year.

##### C. Executive Order 12612

This action has been reviewed under Executive Order 12612 or Federalism and UMTA has determined that this action does not have implications for principles of federalism that warrant the preparation of a Federalism Assessment. This rule will not limit the policymaking and administrative discretion of the States, nor will it affect the States' abilities to discharge traditional State governmental functions or otherwise affect any aspect of State sovereignty.

Indeed, consistent with the fundamental principles of Federalism as described by Executive Order 12612, the programs and policies of the Urban Mass Transportation Administration are purposely structured to place primary responsibility on States and local governments for the provision of mass transportation services to their communities, and to encourage States

and local governments to achieve their objectives for mass transportation through cooperative effort. As is true for all UMTA programs and policies, this action grants maximum administrative discretion to States and local governments.

#### D. Regulatory Flexibility Act

In accordance with 5 U.S.C. 606(b), as added by the Regulatory Flexibility Act, Pub. L. 98-354, UMTA certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act.

#### E. Environmental Impacts

This proposed regulation would not adversely affect the environment.

#### F. Paperwork Reduction Act

This rule contains requirements regarding the collection of information and is subject to the Paperwork Reduction Act, Pub. L. 96-511, 44 U.S.C. Chapter 35. One requirement in the rule is for the protection of UMTA grantees that provide charter service under the exception provided by this rule. The rule requires that an agency wishing to take advantage of the exception must certify to the grantee that the agency is an eligible agency under the rule. The other requirement in the rule is for the benefit of State and locally funded agencies. The rule also requires that an agency receiving funding under State or local welfare programs wishing to take advantage of the exception must apply to the State and the State must certify to UMTA according to the requirements of eligibility set forth in the rule. Each of these paperwork requirements are being submitted to the Office of Management and Budget (OMB) for review as part of UMTA's request for extension of the existing operations under 49 CFR Part 604, OMB Control #2132-0543 which expires December 31, 1988.

#### List of Subjects in 49 CFR Part 604

Buses, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, Title 49, Code of Federal Regulations, Part 604, Charter Service, is amended as follows:

#### PART 604—[AMENDED]

1. The authority citation for Part 604 continues to read as follows:

Authority: Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1801 *et seq.*); 23 U.S.C. 103(e)(4), 142(a), and 142(c); and 49 CFR 1.51.

2. Section 604.9 is amended by adding paragraphs (b) (5), (6) and (7) to read as follows:

#### § 604.9 Charter service.

(b) . . .

(5) A recipient may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization which states that:

(i) [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; there will be a significant number of handicapped persons as passengers on this charter trip; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80;

(ii) [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; [the entity/organization] is a qualified social service agency under Appendix A of 49 CFR Part 604, as a recipient of funds, either directly or indirectly, under one or more of the Federal programs listed in Appendix A; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80.

(iii) [the entity/organization] certifies that it is a government entity or organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; [the entity/organization] either receives or is eligible to receive directly or indirectly, from a State or local governmental body public welfare assistance funds for purposes whose implementation may require the transportation of a group of transit-disadvantaged or transit-dependent persons; following a petition presented by the State in which the entity or organization resides, UMTA has determined in writing that an UMTA recipient may contract directly with the entity or organization for charter services; the requested charter trip is consistent with the functions and purposes of the entity or organization; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80.

(6) A recipient in a non-urbanized area may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization which states that:

[the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; more than 50% of the passengers on this charter trip will be elderly; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Urban Mass Transportation Act of 1964, as amended, and 49 CFR Part 27; or, 45 CFR Part 80.

(7) A recipient may provide charter service directly to the customer where a formal agreement has been executed between the recipient and all private charter operators it has determined to be willing and able in accordance with this part, provided that:

(i) The agreement specifically allows the recipient to provide the particular type of charter trip;

(ii) The recipient has provided for such an agreement in its annual public charter notice published pursuant to this part before undertaking any charter service pursuant to this exception; and

(iii) If a recipient has received several responses to its annual public charter notice but ceased its review process after determining that one private operator was willing and able, it must, before concluding a formal charter agreement under this section, complete the review process to ensure that all the willing and able private operators are valid parties to the agreement.

3. 49 CFR Part 604 is amended by adding at the end thereof the following appendices A and B:

#### Appendix A

The following is a list of Federal assistance programs administered under the United States Department of Health and Human Services (HHS). The financial assistance under each of these HHS programs includes funding for the transportation needs of the program beneficiaries.

Program title	Agency
Project Grant and Cooperative Agreements for Tuberculosis Control Programs.	Public Health Service, HHS.



Program title	Agency	Program title	Agency
Mental Health Service for Cuban Entrants.	Public Health Service, HHS.	Medical Assistance Program Title XIX.	Health Care Financing Medicaid; Administration, HHS.
Mental Health Planning and Demonstration Projects.	Public Health Service, HHS.	Medicare—Supplemental Medical Insurance.	Health Care Financing Administration, HHS.
Alcohol, Drug Abuse Treatment and Rehabilitation Block Grant.	Public Health Service, HHS.	Aid to Families with Dependent Children (AFDC)—Maintenance Assistance.	Family Support Administration, HHS.
Family Planning—Services.	Public Health Service, HHS.	Work Incentive Program...	Family Support Administration, HHS.
Community Health Centers.	Public Health Service, HHS.	Community Service Block Grant (CSBG).	Family Support Administration, HHS.
Indian Health Services—Health Management Development Program.	Public Health Service, HHS.	CSBG Discretionary Awards.	Family Support Administration, HHS.
Migrant Health Centers Grants.	Public Health Service, HHS.	CSBG Discretionary Awards—Community Food and Nutrition.	Family Support Administration, HHS.
Childhood Immunization Grants.	Public Health Service, HHS.	Social Security—Disability Insurance.	Social Security Administration, HHS.
Administration for Children, Youth and Families (ACYF)—Head Start.	Office of Human Development Services, HHS.	Supplemental Security Income.	Social Security Administration, HHS.
ACYF Child Welfare Research and Demonstration Program.	Office of Human Development Services, HHS.	Home Health Services and Training.	Public Health Service, HHS.
ACYF Runaway and Homeless Youth.	Office of Human Development Services, HHS.	Coal Miners Respiratory Impairment Treatment Clinics and Services.	Public Health Service, HHS.
ACYF Adoption Opportunities.	Office of Human Development Services, HHS.	Preventive Health Services—Sexually Transmitted Diseases Control Grants.	Public Health Service, HHS.
ACYF Child Abuse and Neglect (State Grants).	Office of Human Development Services, HHS.	Health Programs for Refugees.	Public Health Service, HHS.
ACYF Child Abuse and Neglect Discretionary.	Office of Human Development Services, HHS.		
Administration for Native Americans (ANA) Native American Programs—Financial Assistance Grants.	Office of Human Development Services, HHS.		
ANA Research, Demonstration and Evaluation.	Office of Human Development Services, HHS.		
ANA Training and Technical Assistance.	Office of Human Development Services, HHS.		
Administration of Developmental Disabilities (ADD)—Basic Support and Advocacy Grants.	Office of Human Development Services, HHS.		
ADD Special Projects.	Office of Human Development Services, HHS.		
ADD University Affiliated Facilities.	Office of Human Development Services, HHS.		
Administration on Aging (ADA) Special Programs for the Aging—Grants for Supportive Services and Senior Centers.	Office of Human Development Services, HHS.		
ADA Title III, Part C, Nutrition Services.	Office of Human Development Services, HHS.		
ADA Grants to Indian Tribes.	Office of Human Development Services, HHS.		
ADA Training, Research and Discretionary Projects and Programs.	Office of Human Development Services, HHS.		
Social Service Block Grant.	Office of Human Development Services, HHS.		

## Appendix B

## Elderly and Handicapped

The definitions of the term "elderly and handicapped" as applied under UMTA's elderly and handicapped half-fare program (49 CFR Part 609) shall apply to this rule. This permits a broader class of handicapped persons to take advantage of the exception than would be permitted under the more restrictive definition applied to the non-discrimination provisions of the Department's § 504 program (49 CFR Part 27.5), which includes only handicapped persons otherwise unable to use the recipient's bus service for the general public.

Accordingly, for the purposes of Section 604.9(b)(6), the definition of "elderly persons" may be determined by the UMTA recipient but must, at a minimum, include all persons 65 years of age or over.

Similarly, the definition of "handicapped persons" is derived from the existing regulations at 49 CFR Part 609.3 which provide that "Handicapped persons" means those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

To assist in understanding how the definitions might be applied to administration of the charter rule, the following questions and answers previously published by UMTA

for the half-fare program in UMTA C 9080.1, April 20, 1978, are reproduced:

1. *Question:* Can the definition of "elderly" or "handicapped" be restricted on the basis of residency, citizenship, income, employment status, or the ability to operate an automobile?

*Answer:* No. Section 5(m) is applicable to "elderly and handicapped persons." It is UMTA's policy that such categorical exceptions are not permitted under the Act.

2. *Question:* Can the eligibility of "temporary handicaps" be restricted on the basis of their duration?

*Answer:* Handicaps of less than 90 days duration may be excluded. Handicaps of more than 90 days duration must be included.

3. *Question:* Can the definition of "handicap" be limited in any way?

*Answer:* UMTA has allowed applicants to exclude some conditions which appear to meet the functional definition of "handicap" provided in Section 16 of the UMT Act. These include pregnancy, obesity, drug or alcohol addiction, and certain conditions which do not fall under the statutory definition (e.g., loss of a finger, some chronic heart or lung conditions, controlled epilepsy, etc.). Individuals may also be excluded whose handicap involves a contagious disease or poses a danger to the individual or other passengers. Other exceptions should be reviewed on a case-by-case basis.

4. *Question:* Is blindness considered a handicap under Section 5(m)?

*Answer:* Yes.

5. *Question:* Is deafness considered a handicap under Section 5(m)?

*Answer:* As a rule, no, because deafness, especially on buses, is not considered a disability which requires special planning, facilities, or design. However, deafness is recognized as a handicap in UMTA's elderly and handicapped regulation, and applicants for Section 5 assistance are encouraged to include the deaf as eligible for off-peak half-fares.

6. *Question:* Is mental illness considered a handicap under Section 5(m)?

*Answer:* As a rule, no, because of the difficulty in establishing criteria or guidelines for defining eligibility. However, UMTA encourages applicants to provide the broadest possible coverage in defining eligible handicaps, including mental illness.

7. *Question:* Can operators delegate the responsibility for certifying individuals as eligible to other agencies?

*Answer:* Yes, provided that such agencies administer the certification of individuals in an acceptable manner and are reasonably accessible to the elderly and handicapped. Many operators currently make extensive use of social service agencies (both public and private) to identify and certify eligible individuals.

8. *Question:* Can operators require elderly and handicapped individuals to be recognized by any existing agency (e.g., require that handicapped persons be receiving Social Service or Veterans' Administration benefits)?

*Answer:* Recognition by such agencies is commonly used to certify eligible individuals. However, such recognition should not be a

mandatory prerequisite for eligibility. For example, many persons with eligible temporary handicaps may not be recognized as handicapped by social service agencies.

9. *Question:* Can the operator require that elderly and handicapped persons come to a central office to register for an off-peak half-fare program?

*Answer:* UMTA strongly encourages operators to develop procedures which maximize the availability of off-peak half-fares to eligible individuals. Requiring individuals to travel to a single office which may be inconveniently located is not consistent with this policy, although it is not

strictly prohibited. UMTA reserves the right to review such local requirements on a case-by-case basis.

10. *Question:* Must ID cards issued by one operator be transferable to another?

*Answer:* No. However, UMTA encourages consistency among off-peak procedures and the maximizing of availability to eligible individuals, especially among operators within a single urban area. Nevertheless, each operator is permitted to require its own certification of individuals using its service.

11. *Question:* Can an operator require an elderly or handicapped person to submit to a procedure certifying their eligibility before

they can receive half-fare? For example, if an operator requires eligible individuals to have a special ID card, can the half-fare be denied to an individual who can otherwise give proof of age, etc. but does not have an ID card?

*Answer:* Yes, although UMTA does not endorse this practice.

Issued on December 23, 1988.

Alfred A. DelliBovi,  
Administrator.

[FR Doc. 88-30072 Filed 12-29-88; 8:45 am]

BILLING CODE 4910-57-M



# **federal register**

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Friday  
December 30, 1988

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## **Part XIV**

**Department of Defense  
General Services  
Administration  
National Aeronautics and  
Space Administration**

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**48 FR Parts 28, 52, and 53  
Federal Acquisition Regulation (FAR);  
Individual Sureties; Extension of  
Comment Period**



**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 28, 52, and 53****Federal Acquisition Regulation (FAR);  
Individual Sureties****AGENCIES:** Department of Defense  
(DoD), General Services Administration  
(GSA), and National Aeronautics and  
Space Administration (NASA).**ACTION:** Proposed rule (Extension of  
comment period).**SUMMARY:** The Civilian Agency

Acquisition Council and the Defense Acquisition Regulatory Council are considering a revision to the Federal Acquisition Regulation (FAR) Parts 28, 52, and 53, Individual Sureties. FAR coverage was published as a proposed rule for public comment on November 3, 1988 (53 FR 44564). The original date for submission of comments was January 3, 1989. The Councils have decided to extend the period for public comment on FAR coverage for Individual Sureties to accommodate the requests of interested parties.

**DATE:** Written comments on the proposed FAR coverage for Individual Sureties should be submitted to the FAR Secretariat by February 3, 1989, for consideration in the formulation of a final rule.

**ADDRESS:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405. Please cite FAR Case 88-57 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755. Please cite FAR Case 88-57.

Dated: December 23, 1988.

Harry S. Rosinski,  
Acting Director, Office of Federal Acquisition  
and Regulatory Policy.

[FR Doc. 88-30112 Filed 12-29-88; 8:45 am]

BILLING CODE 6820-61-M



# **federal register**

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Friday  
December 30, 1988

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## **Part XV**

**Department of Defense  
General Services  
Administration**

**National Aeronautics and  
Space Administration**

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**48 CFR Parts 32 and 52  
Federal Acquisition Regulation (FAR);  
Prompt Payment; Proposed Rule**

**BEST COPY AVAILABLE**



## DEPARTMENT OF DEFENSE

GENERAL SERVICES  
ADMINISTRATIONNATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION

## 48 CFR Parts 32 and 52

Federal Acquisition Regulation (FAR);  
Prompt Payment

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are incorporating Pub. L. 100-496, Prompt Payment Act Amendments of 1988, into Federal Acquisition Regulation Subpart 32.9 and into related contract clauses at 52.232-5, 52.232-8, 52.232-25, 52.232-28, 52.232-27.

**DATE:** Comments should be submitted to the FAR Secretariat at the address shown below on or before January 30, 1989 to be considered in the formulation of a final rule.

**ADDRESS:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW, Room 4041, Washington, DC 20405.

Please cite FAR Case 88-69 in all correspondence related to this issue.

**FOR FURTHER INFORMATION CONTACT:** Margaret A. Willis, FAR Secretariat, Room 4041, GS Building, Washington, DC 20405, (202) 523-4755. Please cite FAR Case 88-69.

**SUPPLEMENTARY INFORMATION:****A. Background**

Public Law 100-496, the Prompt Payment Act Amendments of 1988, significantly changes the bill paying practices of the Federal Government. The law provides that these proposed changes will apply to contracts awarded, contracts renewed, and contract options exercised after March 31, 1989. Further, it provides that these proposed regulations be published for public comment in the *Federal Register* by February 14, 1989. Even though these proposed rules are being published prior to the date mandated by the law, no more than 30 days can be allowed for public comments in order to allow adequate time to analyze the extensive comments that are expected, make necessary revisions, and promulgate the

rules in time to meet the statutory deadline.

This proposed rule contains changes to the Federal Acquisition Regulation to incorporate the required revisions. These revisions include (1) elimination of the 15-day grace period during which the Government was entitled to make invoice payments without incurring interest penalties; (2) establishment of an additional penalty if a contractor is not paid an interest penalty owed by the Government; (3) establishment of a 15-day payment period for contracts providing for "fast payment" procedures; (4) a requirement that construction contract progress payments generally be paid within 14 days; and (5) a requirement for specific provisions to be included in construction subcontracts.

**B. Regulatory Flexibility Act**

The revision of Parts 32 and 52 concerning Prompt Payment may have a significant economic impact on a substantial number of small entities because a significant number of small businesses are awarded prime contracts and subcontracts for construction. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be provided to the Chief Counsel for Advocacy for the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat, Attn: Margaret A. Willis, Room 4041, GS Bldg., 18th & F Streets, NW, Washington, DC 20405. Comments are invited. Comments from small entities concerning the affected FAR sections will also be considered in accordance with section 610 of the Act.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L. 96-511) is deemed to apply because the proposed rule contains information collection requirements. Accordingly, a request for approval of a new information collection requirement concerning Prompt Payment Act Amendments is being submitted to the Office of Management and Budget under 44 U.S.C. 3501, et seq. Public comments concerning this request will be invited through a subsequent *Federal Register* notice.

**List of Subjects in 48 CFR Parts 32 and 52**

Government procurement.

Dated: December 23, 1988.

Harry S. Rosinski,  
Acting Director, Office of Federal Acquisition  
and Regulatory Policy.

Therefore, 48 CFR Parts 32 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 32 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

**PART 32—CONTRACT FINANCING**

2. Section 32.900 is revised to read as follows:

**32.900 Scope of subpart.**

This subpart prescribes policies, procedures, and clauses for implementing Office of Management and Budget (OMB) Circular A-125, "Prompt Payment."

**32.902 [Amended]**

3. Section 32.902 is amended by revising the definitions, "Discount for prompt payment" and "Proper invoice" to read as follows:

"Discount for prompt payment" means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at 52.232-8, Discounts for Prompt Payment, if payment is made by the Government prior to the due date. The due date is calculated from the date of the contractor's invoice.

"Proper invoice" means a bill or written request for payment which meets the minimum standards specified in the clauses at 52.232-25, Prompt Payment, 52.232-28, Prompt Payment for Fixed-Price Architect-Engineer Contracts, and 52.232-27, Prompt Payment for Construction Contracts (also see 32.905(e)), and other terms and conditions contained in the contract for invoice submission.

4. Section 32.903 is revised to read as follows:

**32.903 Policy.**

All contracts subject to this subpart shall specify payment procedures, payment due dates, and interest penalties for late invoice payment. Invoice payments and contract financing payments will be made by the Government as close as possible to (or earlier as determined by the Agency head to be necessary on a case-by-case basis), but not later than the due dates specified in the clauses at 52.232-25, Prompt Payment, 52.232-28, Prompt Payment for Fixed-Price Architect-Engineer Contracts, and 52.232-27, Prompt Payment for Construction Contracts. Payment will be based on receipt of a proper invoice or contract financing request and satisfactory

contract performance. Agency procedures shall ensure that, when specifying due dates, full consideration is given to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract. Checks will be mailed and electronic funds transfers will be transmitted on or about the same day the payment action is dated. When appropriate, Government contracts should allow the contractor to be paid for partial deliveries that have been accepted by the Government (see 32.102(d)). Discounts for prompt payment offered by the contractor shall be taken only when payments are made within the discount period specified by the contractor. Agencies shall pay an interest penalty, without request from the contractor, for late invoice payments or improperly taken discounts for prompt payment. The interest penalty shall be absorbed within funds available for administration or operation of the program for which the penalty was incurred. The temporary unavailability of funds to make a timely payment does not relieve the obligation to pay interest penalties. For contracts awarded after October 1, 1989, if the interest penalty is not paid within 10 days after it is due and the contractor makes a written demand for payment within 40 days after payment of the principal amount due, agencies shall pay an additional penalty amount.

5. Section 32.905 is amended by removing the words "5th working" and inserting "7th" wherever they appear; by revising the introductory text in paragraph (a); by revising the fourth sentence in paragraph (a)(2)(ii); by revising the introductory text of paragraph (b); redesignating paragraph (c) as (d); by adding a new paragraph (e); by redesignating paragraph (f) as (g); and by revising the introductory text; and by redesignating paragraphs (e), (f), (g), and (h) as (f), (g), (h), and (i) and revising new paragraph (h) to read as follows:

**32.905 Invoice payments.**

(a) Except as prescribed in 32.905(b), 32.905(c), and 32.905(d), the due date for making an invoice payment by the designated payment office shall be the later of the two events described in subparagraph (a)(1) or (a)(2) of this section.

(2) . . .

(ii) . . . Except in the case of a contract for the procurement of a brand name commercial item for authorized resale (e.g., commissary items), the contracting officer may specify a longer period for constructive acceptance, if appropriate due to the nature of the

supplies or services to be received, inspected, tested, and accepted by the Government.

(b) The due date for making payments on contracts that contain the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, shall be as follows:

(c) The due date for making payments on construction contracts shall be as follows:

(1) The due date for making progress payments based on contracting officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project, shall be 14 days after receipt of a proper payment request by the designated billing office. The contracting officer may specify a longer period in the contract if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract. The contracting officer or his representative shall not approve progress payment requests unless the certification and substantiation of amounts requested are provided as required by the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(2) The due date for payment of any amounts retained by the contracting officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be 30 days after approval by the contracting officer for release to the contractor. This release of retained amounts shall be based on the contracting officer's determination that satisfactory progress has been made.

(3) The due date for final payments based on completion and acceptance of all work (including any retained amounts), and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract) shall be as follows:

(i) Either the 30th day after receipt by the designated billing office of a proper invoice from the contractor, or the 30th day after Government acceptance of the work or services completed by the contractor, whichever is later.

(ii) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of contractor claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(4) For the sole purpose of computing an interest penalty that might be due the contractor for payments described in subdivision (c)(3)(i) of this section, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also 32.905(c)(5)). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(5) The constructive acceptance and constructive approval requirements described in subparagraph (c)(4) of this section are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if appropriate, due to the nature of the work or services involved.

(d) The payment terms on contracts for meat and meat food products, contracts for perishable agricultural commodities, and contracts for dairy products, edible fats or oils, and food products prepared from edible fats or oils are as follows:

(1) The due date on contractor invoices for meat or meat food products, as defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), as further defined in Pub. L. 98-181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, will be as close as possible to, but not later than, the seventh day after product delivery.

(2) The due date of contractor invoices for perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), will be as close as possible to, but not later than, the tenth day after product delivery, unless another date is specified in the contract.

(3) The due date on contractor invoices for dairy products (as defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or



oils, will be as close as possible to, but not later than, the tenth day after the date on which a proper invoice has been received.

(e) A proper invoice must include the items listed in subparagraphs (e)(1) through (e)(8) of this section. If the invoice does not comply with these requirements, then the contractor must be notified of the defect within 7 days (3 days on contracts for meat and meat food products, and 5 days on contracts for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils) after receipt of the invoice at the designated billing office. The reason that the invoice is not a proper invoice must be specified. If such notice is not timely, then an adjusted due date for the purpose of determining an interest penalty, if any, will be established in accordance with 32.907-1(b):

(h) The designated billing office shall annotate each invoice with the date a proper invoice was received by the designated billing office. If the invoice is not so annotated, it shall be treated as if it was received on the date of the invoice.

6. Section 39.907-1 is amended by revising paragraphs (a)(4), (b), (c), (d), and by adding paragraph (g) to read as follows:

#### 32.907-1 Late invoice payment.

(a) \* \* \*

(4) The designated payment office paid the contractor after the due date.

(b) The interest penalty computation shall not include (1) the time taken by the Government to notify the contractor of a defective invoice, unless it exceeds the periods prescribed in 32.905(e), or (2) the time taken by the contractor to correct the invoice. If the designated billing office failed to notify the contractor of the defective invoice within the periods prescribed in 32.905(e), then the due date on the corrected invoice will be adjusted by the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the contractor will be based on this adjusted due date.

(c) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, if a discount for prompt payment is taken improperly. The interest penalty shall be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.

(d) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other Governmental authority (e.g., tariffs). The rate in effect on the day after the due date shall remain fixed during the period for which an interest penalty is calculated. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty will accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. The interest penalty amount, interest rate and the period for which the interest penalty was computed, will be separately stated by the designated payment office on the check or accompanying remittance advice. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the contractor.

(g) For contracts awarded on or after October 1, 1989, a penalty amount (calculated in accordance with regulations issued by the Office of Management and Budget) shall be paid, in addition to the interest penalty amount, if the contractor—

- (1) Is owed an interest penalty;
- (2) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and
- (3) Makes a written demand that the agency pay such a penalty not later than 40 days after the date the invoice amount is paid.

7. Section 32.908 is revised to read as follows:

#### 32.908 Contract clauses.

(a) If the solicitation or contract contains the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, the contracting officer shall insert the clause at 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts.

(b) The contracting officer shall insert the clause at 52.232-27, Prompt Payment for Construction Contracts, in all solicitations and contracts for construction (see Part 36).

(c) The contracting officer shall insert the clause at 52.232-25, Prompt Payment, in all other solicitations and contracts, except as indicated in 32.901 of this section.

(d) If payment may be made by electronic funds transfer, the contracting office shall use Alternative I with the clauses prescribed in paragraphs (a), (b), and (c) of this section.

8. Section 32.909 is amended by adding a fourth sentence to read as follows:

#### 32.909 Contractor inquiries.

\* \* \* Small business concerns may obtain additional assistance related to payment issues by contracting their local Office of Small and Disadvantaged Business Utilization.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Section 52.232-5 is amended by removing in the title of the clause the date "(AUG 1987)" and inserting in its place the date "(APR 1989)"; by revising the second sentence in paragraph (b); by redesignating paragraphs (c), (d), (e), (f), (g), as (e), (f), (g), (h), and (i), and removing in the second sentence of the new paragraph (g) the reference "paragraph (c)" and inserting in its place "paragraph (e)"; and by adding new paragraphs (c) and (d) to read as follows:

#### 52.232-5 Payments under Fixed-Price Construction Contracts

(b) \* \* \* The Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested by the Contracting Officer, to provide a basis for determining progress payments.

(c) Along with each request for progress payments, the contractor shall furnish the following certification, or payment shall not be made:

I hereby certify, to the best of my knowledge and belief, that—

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of chapter 39 of title 31, United States Code; and

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance

with the terms and conditions of the subcontract.

(Name)

(Title)

(Date)

(d) If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "unearned amount"), the Contractor shall—

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in 31 U.S.C. 3903(c)(1)) equal to interest on the unearned amount from the date of receipt of the unearned amount until—

(i) The date the Contractor notifies the Contracting Officer that the performance deficiency has been corrected; or

(ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

(g) In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment to the surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums.

10. Section 52.232-8 is amended by removing in the title of the clause the date "(JUL 1985)" and inserting in its place "(APR 1989)"; and by revising paragraph (b) of the clause to read as follows:

#### 52.232-8 Discounts for Prompt Payment.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(End of clause)

11. Section 52.232-25 is amended by revising the introductory text; by revising paragraph (a); by removing in the title of the clause the date "(FEB 1988)" and inserting in its place "(APR 1989)"; by revising paragraphs (a)(3) and (a)(3)(i); by redesignating the existing paragraph (a)(3)(iii) as (a)(iv) and adding a new (a)(3)(iii); by revising the fourth sentence in (a)(4); by revising the introductory text of paragraph (a)(5) and

the first sentence in paragraph (a)(6) and in (a)(6)(i); by revising paragraph (a)(6)(ii)(A) and paragraph (a)(7); by adding paragraph (a)(8), and paragraph (c); by redesignating existing Alternate I as new section 52.232-26 and revising; by redesignating Alternate II as Alternate I and revising the introductory text; and by removing in paragraph (d)(4) of new Alternate I the reference "paragraph (c)" to read "paragraph (d)" as follows:

#### 52.232-25 Prompt Payment.

As prescribed in 32.908(c), insert the following clause:

(a) As authorized in 32.905(a)(2)(ii), the Contracting Officer may modify the date in subdivision (a)(6)(i) of the clause to specify a period longer than 7 days for constructive acceptance, if considered appropriate due to the nature of the supplies or services to be received, inspected, tested, or accepted by the Government, except in the case of a contract for the procurement of a brand-name commercial item for authorized resale.

(3) The due date on contracts for meat and meat food products, contracts for perishable agricultural commodities, contracts for dairy products, edible fats or oils, and food products prepared from edible fats or oils, and contracts not requiring submission of an invoice shall be as follows:

(i) The due date for meat and meat food products, as defined in Section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 162(3)) and further defined in Pub. L. 98-181 to include any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, and any perishable egg product, will be as close as possible to, but not later than, the 7th day after product delivery.

(iii) The due date for dairy products, as defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or oils, will be as close as possible to, but not later than, the 10th day after the date on which a proper invoice has been received.

(4) \* \* \* If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office (3 days for meat and meat food products and 5 days for perishable agricultural commodities, edible fats or oils, and food products prepared from edible fats or oils).

(5) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made by the due date and the following conditions are met, if applicable:

(6) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance shall be deemed to have occurred constructively on the \_\_\_\_ day (7th day if blank) after the Contractor delivered the supplies or performed the services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract provision.

(ii) \* \* \*

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days (3 days for meat and meat food products and 5 days for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils).

(7) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated as described in subparagraph (a)(6) of this clause on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(8) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

- (i) Is owed an interest penalty;
- (ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and
- (iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(c) If this contract contains the clause at 52.213-1, Fast Payment Procedure, payments will be made within 15 days after the date of receipt of the invoice.

(End of clause)

Alternate I (APR 1989) If payment may be made by electronic funds transfer, add the following paragraph (d) to the clause:

(d) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but no later than 14 days before an invoice or contract financing request is submitted, the Contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:



(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages, provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3881, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (d) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

12. Section 52.232-28 is added to read as follows:

**52.232-26 Prompt Payment for Fixed-Price Architect-Engineer Contracts.**

As prescribed in 32.908(a), insert the following clause:

(a) As authorized in 32.905(b)(3), the Contracting Officer may modify the date in subdivision (a)(5)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval, if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(b) If applicable, as authorized in 32.906(a) and only as allowed under agency policies

and procedures, the Contracting Officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

**Prompt Payment For Fixed-Price Architect-Engineer Contracts (Apr. 1989)**

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) *Invoice Payments.* (1) For purposes of this clause, "invoice payment" means a Government disbursement of monies to a Contractor under a contract or other authorization for work or services accepted by the Government, payments for partial deliveries that have been accepted by the Government, and progress payments based on contacting officer approval of the estimated amount and value of work or services performed.

(2) The due date for making invoice payments shall be as described in this subparagraph (a)(2) of this clause.

(i) The due date for work or services completed by the Contractor shall be the later of the following two events:

(A) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(B) The 30th day after Government acceptance of the work or services completed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) The due date for progress payments shall be the 30th day after Government approval of Contractor estimates of work or services accomplished.

(3) An invoice is the Contractor's bill or written request for payment under the contract for work or services performed under the contract. An invoice shall be prepared and submitted to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(3)(i) through (a)(3)(vii) of this clause. If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in subparagraph (a)(5) of this clause:

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(viii) Any other information or documentation required by the contract.

(4) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the following conditions are met, if applicable:

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(5) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(3) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance or approval shall be deemed to have occurred constructively as shown in subdivisions (a)(5)(i)(A) and (B) of this clause. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, Contractor compliance with a contract provision, or requested progress payment

amounts. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(A) For work or services completed by the Contractor, Government acceptance shall be deemed to have occurred constructively on the \_\_\_\_ day [7th day if blank] after the Contractor has completed the work or services in accordance with the terms and conditions of the contract.

(B) For progress payments, Government approval shall be deemed to have occurred on the 7th day after Contractor estimates have been received by the designated billing office.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of a defect in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable will be resolved in accordance with the clause at 52.233-1, Disputes.

(6) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(7) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(b) *Contract Financing Payments.* (1) For purposes of this clause, if applicable, "contract financing payment," means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance

payments, progress payments based on a percentage or stage of completion (32.102(e)(1)) other than those made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, and interim payments on cost type contracts.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. For advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(End of clause)

*Alternate 1 (APR 1989).* If payment may be made by electronic funds transfer, add the following paragraph (c) to the clause:

(c) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but no later than 14 days before an invoice or contract financing request is submitted, the Contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages, provide the telegraphic abbreviation and American Bankers Association identifying number of the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3881, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (c) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

13. Section 52.232-27 is added to read as follows:

**52.232-27 Prompt Payment for Construction Contracts.**

As prescribed in 32.908(b), insert the following clause:

(a) As authorized in 32.905(c)(1), the Contracting Officer may modify the date in subdivision (a)(1)(i)(A) of the clause to specify a period longer than 14 days if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(b) As authorized in 32.905(c)(5), the Contracting Officer may modify the date in subdivision (a)(4)(i) of the clause to specify a period longer than 7 days for constructive acceptance or constructive approval if required to afford the Government a practicable opportunity to adequately inspect the work and to determine the adequacy of the Contractor's performance under the contract.

(c) If applicable, as authorized in 32.906(a) and only as allowed under agency policies and procedures, the Contracting Officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

**Prompt Payment For Construction Contracts (Apr 1989)**

Notwithstanding any other payment terms in this contract, the Government will make



invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) **Invoice Payments.** (1) For purposes of this clause, there are several types of invoice payments which may occur under this contract, as follows:

(i) **Progress payments,** if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project.

(A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be 30 days after approval for release to the Contractor by the Contracting Officer.

(ii) **Final payments** based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the Government (e.g., each separate building, public work, or other division of the contract for which the price is stated separately in the contract):

(A) The due date for making such payments shall be either the 30th day after receipt by the designated billing office of a proper invoice from the Contractor, or the 30th day after Government acceptance of the work or services completed by the Contractor, whichever is later.

(B) On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(2) An invoice is the Contractor's bill or written request for payment under the contract for work or services performed under the contract. An invoice shall be prepared and submitted to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(2)(i) through (a)(2)(ix) of this clause. If the invoice does not comply with these requirements, the Contractor will be notified of the defect within 7 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in paragraph (a)(4) of this clause:

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (e.g., prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(viii) For payments described in subdivision (a)(1)(i) of this clause, substantiation of the amounts requested and certification in accordance with the requirements of the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(ix) Any other information or documentation required by the contract.

(3) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the following conditions are met, if applicable:

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority. This part is referred to as the "Renegotiation Board Interest Rate," and it is published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(2) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in subdivision (a)(1)(i) of this clause, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. In the event that actual acceptance or

approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The periods taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

(5) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(b) **Contract Financing Payments.** (1) For purposes of this clause, if applicable, "contract financing payment" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments and interim payments under cost-type contracts.

approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The periods taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

(5) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) If this contract was awarded on or after October 1, 1989, a penalty amount, calculated in accordance with regulations issued by the Office of Management and Budget, shall be paid in addition to the interest penalty amount if the Contractor—

(i) Is owed an interest penalty;

(ii) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(iii) Makes a written demand, not later than 40 days after the date the invoice amount is paid, that the agency pay such a penalty.

(b) **Contract Financing Payments.** (1) For purposes of this clause, if applicable, "contract financing payment" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments and interim payments under cost-type contracts.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. For advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose of performing this contract the following:

(1) A payment clause which obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.

(2) An interest penalty clause which obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause—

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(3) A clause requiring each subcontractor to include a payment clause and an interest penalty clause conforming to the standards set forth in subparagraphs (c)(1) and (c)(2) of this clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) The clauses required by paragraph (c) of this clause shall not be construed to impair the right of Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions which—

(1) Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) Permit the Contractor or subcontractor to make a determination that part or all of the

subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) Permit such withholding without incurring any obligation to pay a late payment penalty if—

(i) A notice conforming to the standards of paragraph (g) of this clause has been previously furnished to the subcontractor, and

(ii) A copy of any notice issued by a Contractor pursuant to subdivision (d)(3)(i) of this clause has been furnished to the Contracting Officer.

(e) If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall—

(1) Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to subparagraph (e)(1) of this clause;

(3) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (e)(1) of this clause;

(4) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and—

(i) Make such payment within—

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under subdivision (e)(5)(i) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(ii) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) Notify the Contracting Officer upon—

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment, specifying—

(A) The amounts withheld under subparagraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) Be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in 31 U.S.C. 3903(c)(1)), from the 8th day after

receipt of the withheld amounts from the Government until—

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under subdivision (e)(5)(i) of this clause.

(f)(1) If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a "second-tier subcontractor") a written notice in accordance with section 2 of the Act of August 24, 1935 (40 U.S.C. 270b, Miller Act), asserting a deficiency in such first-tier subcontractor's performance under the contract for which the Contractor may be ultimately liable, and the Contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, then the Contractor may, without incurring an obligation to pay an interest penalty under subparagraph (e)(6) of this clause—

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subdivision (f)(1)(i) of this clause.

(2) As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall pay the amount withheld under subdivision (f)(1)(i) of this subparagraph to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the Federal Register, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) A written notice of any withholding shall be issued to a subcontractor (with a copy to the Contracting Officer of any such notice issued by the Contractor), specifying—

(1) The amount to be withheld;

(2) The specific causes for the withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

(i) A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a



clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

(j) Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) The Contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the United States for such interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such interest penalty.

(End of clause.)

*Alternate 1* (APR 1989) If payment may be made by electronic funds transfer, add the following paragraph (1) to the clause:

(1) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but

no later than 14 days before an invoice or contract financing request is submitted, the Contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages. Provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit number of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3861, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (1) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

[FR Doc. 88-30113 Filed 12-29-88; 8:45 am]  
BILLING CODE 6820-01-M

Friday  
December 30, 1988

## Part XVI

# Department of State

Bureau of Consular Affairs

22 CFR Part 41

Waiver by Secretary of State and  
Attorney General of Passport and/or  
Visa Requirements for Certain Categories  
of Nonimmigrants; Final Rule



## DEPARTMENT OF STATE

## Bureau of Consular Affairs

## 22 CFR Part 41

[DS-108.879]

**Waiver by Secretary of State and Attorney General of Passport and/or Visa Requirements for Certain Categories of Nonimmigrants**

AGENCY: Bureau of Consular Affairs, DOS.

ACTION: Final rule.

**SUMMARY:** This final rule adopts the proposed rule published in the Federal Register on December 2, 1988 (53 FR 48652). This rule adds paragraph (m) to 22 CFR 41.2 in order to implement Chapter 15, Annex 1502.1, Part B of the Free Trade Agreement (FTA) with Canada and the provisions of section 307(a) of Pub. L. 100-449, the "United States-Canada Free Trade Agreement Implementation Act of 1988". This final rule requires Canadian nationals who seek admission to the United States under the provisions of section 101(a)(15)(E) of the Immigration and Nationality Act (INA) to apply for visas.

**EFFECTIVE DATE:** These regulations take effect on the date the Free Trade Agreement enters into force. The Office of the United States Trade Representative will confirm the precise

date of the FTA's entry into force by publication of a notice in the Federal Register. The Department will publish notice of the effective date of these regulations in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Stephen K. Fischel, Chief, Legislation and Regulations Division, Visa Office, Department of State, Washington, DC 20520, (202) 663-1204.

**SUPPLEMENTARY INFORMATION:** A proposed rule was published on December 2, 1988 (53 FR 48652) which requires Canadian citizens who seek admission into the U.S. under section 101(a)(15)(E) of the INA to apply for treaty trader and investor visas. Presently Canadians are generally exempt from the visa requirement under the waiver provisions of § 41.2(a) which exempts them from seeking visa issuance to enter the United States. The public was given until December 16, 1988 to submit written comments. Since no comments have been received, the provisions of the proposed rule as published on December 2, 1988 are adopted in this final rule and will become effective upon publication in the Federal Register of a public notice by the Office of U.S. Trade Representative confirming the date of the FTA's entry into force. That date is anticipated to be January 1, 1989.

This rule is not considered to be a major rule for purposes of E.O. 12291 nor is it expected to have a significant

impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 22 CFR Part 41**

Aliens, Nonimmigrants, Passports, Visas, Waivers.

Accordingly, Title 22 of the CFR Part 41 is amended to read as follows:

**PART 41—[AMENDED]**

1. The authority citation for Part 41 continues to read as follows:

Authority: Sec. 104, 66 Stat. 174, 8 U.S.C. 1104; Sec. 109(b)(1), 91 Stat. 847; Sec. 313, 100 Stat. 3435, 8 U.S.C. 1182; Sec. 307, 102 Stat. 1878.

2. Paragraph (m) is added at the end of § 41.2 to read:

**§ 41.2 Waiver by the Secretary of State and Attorney General of passport and/or visa requirements for certain categories of nonimmigrants.**

(m) *Treaty Trader and Treaty Investor.* Notwithstanding the provisions of paragraph (a) of this section, a visa is required of a Canadian national who is classified, or who seeks classification, under INA 101(a)(15)(E).

Date: December 28, 1988.

Joan M. Clark,

Assistant Secretary for Consular Affairs.  
[FR Doc. 88-30254 Filed 12-29-88; 11:47 am]  
BILLING CODE 4710-06-M



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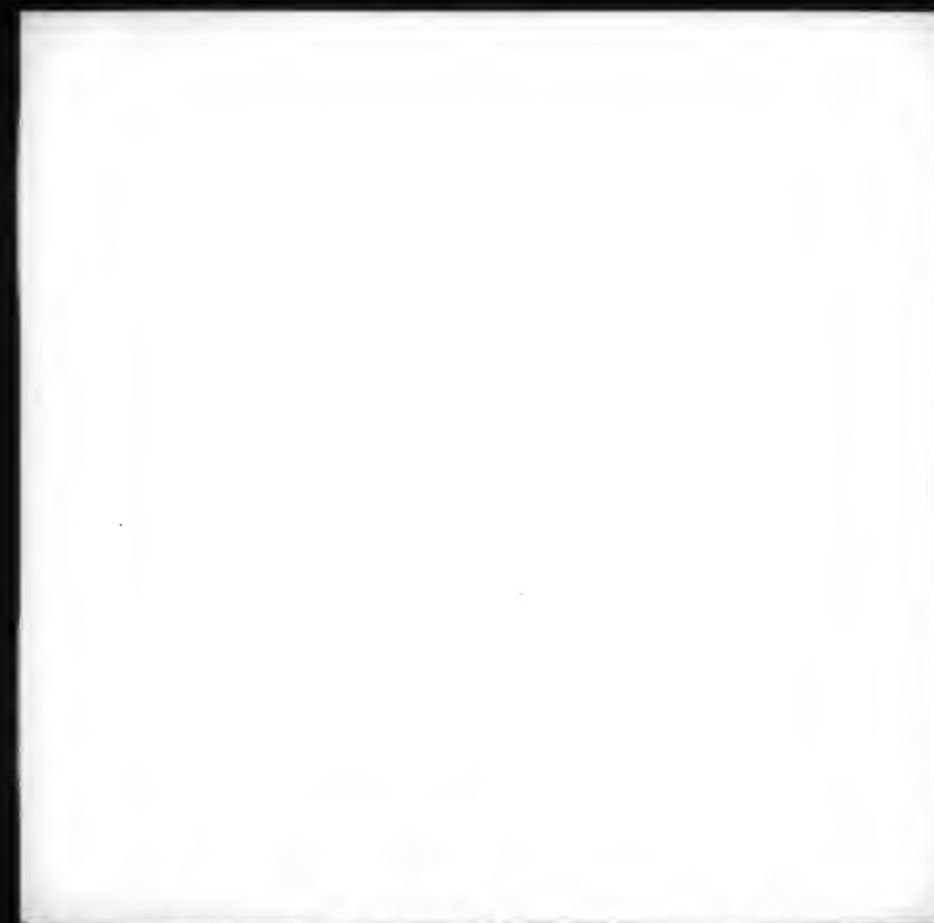
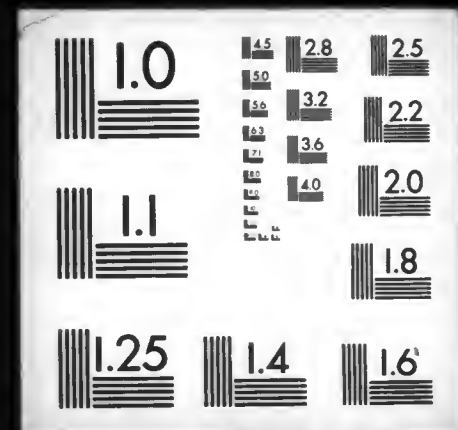
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SECOND CLASS NEWSPAPER

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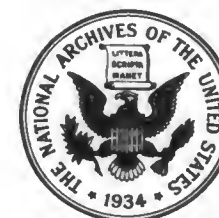
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## PARALLEL TABLE OF AUTHORITIES AND RULES

Following Title 50 is an update to Table I—Parallel Table of Authorities and Rules found in the CFR Index and Finding Aids. This table contains authority citations added to or removed from Table I as a result of documents published in the Federal Register since January 1, 1988.

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## INQUIRIES AND SUGGESTIONS

Loren S. Myers was Chief Editor of the LSA. The LSA was prepared under the direction of Richard L. Claypoole, assisted by Maxine L. Hill. INQUIRIES, telephone 202-523-5227.



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code of  
federal regulations

**LSA**

List of CFR Sections Affected

**November 1988**

United States  
Government  
Printing Office  
SUPERINTENDENT  
OF DOCUMENTS  
Washington, DC 20402

SECOND CLASS NEWSPAPER

Postage and Fees Paid  
U.S. Government Printing Office  
(ISSN 0097-6326)

OFFICIAL BUSINESS  
Penalty for private use, \$300

\*\*\*\*\*5-DIGIT 48106

FR SERIA300S NOV 89 R  
SERIALS PROCESSING  
UNIV MICROFILMS INTL  
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# LSA

List of CFR Sections Affected

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#### PARALLEL TABLE OF AUTHORITIES AND RULES

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#### INDEXES

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#### INQUIRIES AND SUGGESTIONS

Loren S. Myers was Chief Editor of the LSA. The LSA was prepared under the direction of Richard L. Claypoole, assisted by Maxine L. Hill. INQUIRIES, telephone 202-523-5227.



SUGGESTIONS concerning this and other publications of the Office are welcomed. Please send your suggestions to John E. Byrne, Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408.

(Comprising a complete CFR set)

<i>Title</i>	<i>Price</i>	<i>Revision Date</i>
1, 2 (2 Reserved) .....	\$10.00 .....	Jan. 1, 1988
3 (1987 Compilation and Parts 100 and 101) .....	11.00 .....	Jan. 1, 1988
4 .....	14.00 .....	Jan. 1, 1988
5 (Parts 1-699) .....	14.00 .....	Jan. 1, 1988
(Parts 700-1199) .....	15.00 .....	Jan. 1, 1988
(Parts 1200-End), 6 (6 Reserved) .....	11.00 .....	Jan. 1, 1988
7 (Parts 0-26) .....	15.00 .....	Jan. 1, 1988
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26 (Part 1 §§ 1.0-1-1.60).....	13.00	April 1, 1988
(§§ 1.61-1.169).....	23.00	April 1, 1988
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(Parts 400-424).....	22.00	July 1, 1987
(Parts 425-699).....	21.00	July 1, 1987
(Part 700-End).....	27.00	July 1, 1987
41 (Chapters 1-100).....	10.00	July 1, 1988
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Titles 1-16—as of Jan. 1  
17-27—as of April 1  
28-41—as of July 1  
42-50—as of Oct. 1

To bring these regulations up to date, consult the most recent LSA for any changes, additions, or removals published after the revision date of the volume you are using. Then check the CUMULATIVE LIST OF PARTS AFFECTED appearing in the Reader Aids of the latest Federal Register for less detailed but timely changes published after the final date included in this publication.

**Boldface** page numbers under a particular title indicate that the page numbers span 2 years. **Boldface** is used to distinguish the current year from the previous year.

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## PARALLEL TABLE OF AUTHORITIES AND RULES

Following Title 50 is an update to Table I—Parallel Table of Authorities and Rules found in the CFR Index and Finding Aids. This table contains authority citations added to or removed from Table I as a result of documents published in the Federal Register since January 1, 1988.

## TABLE OF FEDERAL REGISTER ISSUE PAGES AND DATES

A table is included at the end of this publication which identifies the inclusive page numbers and corresponding Federal Register issue dates for the period covered.

## INDEXES

An INDEX to the daily Federal Register is published monthly and is cumulated for 12 months. A separate volume, the CFR Index and Finding Aids to the entire Code of Federal Regulations, is revised as of January 1 each year.

## INQUIRIES AND SUGGESTIONS

LaJuana D. Caldwell was Chief Editor of the LSA. The LSA was prepared under the direction of Richard L. Claypoole, assisted by Maxine L. Hill. INQUIRIES, telephone 202-523-5227.



SUGGESTIONS concerning this and other publications of the Office are welcomed. Please send your suggestions to John E. Byrne, Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408.

## CHECKLIST OF CFR VOLUMES FOR THIS MONTH

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1, 2 (2 Reserved) .....	\$10.00 .....	Jan. 1, 1988
3 (1987 Compilation and Parts 100 and 101) .....	11.00 .....	Jan. 1, 1988
4 .....	14.00 .....	Jan. 1, 1988
5 (Parts 1-699) .....	14.00 .....	Jan. 1, 1988
(Parts 700-1199) .....	15.00 .....	Jan. 1, 1988
(Parts 1200-End), 6 (6 Reserved) .....	11.00 .....	Jan. 1, 1988
7 (Parts 0-26) .....	15.00 .....	Jan. 1, 1988
(Parts 27-45) .....	11.00 .....	Jan. 1, 1988
(Parts 46-51) .....	16.00 .....	Jan. 1, 1988
(Part 52) .....	23.00 .....	Jan. 1, 1988
(Parts 53-209) .....	18.00 .....	Jan. 1, 1988
(Parts 210-299) .....	22.00 .....	Jan. 1, 1988
(Parts 300-399) .....	11.00 .....	Jan. 1, 1988
(Parts 400-699) .....	17.00 .....	Jan. 1, 1988
(Parts 700-899) .....	22.00 .....	Jan. 1, 1988
(Parts 900-999) .....	26.00 .....	Jan. 1, 1988
(Parts 1000-1059) .....	15.00 .....	Jan. 1, 1988
(Parts 1060-1119) .....	12.00 .....	Jan. 1, 1988
(Parts 1120-1199) .....	11.00 .....	Jan. 1, 1988
(Parts 1200-1499) .....	17.00 .....	Jan. 1, 1988
(Parts 1500-1899) .....	9.50 .....	Jan. 1, 1988
(Parts 1900-1939) .....	11.00 .....	Jan. 1, 1988
(Parts 1940-1949) .....	21.00 .....	Jan. 1, 1988
(Parts 1950-1999) .....	18.00 .....	Jan. 1, 1988
(Part 2000-End) .....	6.50 .....	Jan. 1, 1988
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9 (Parts 1-199) .....	19.00 .....	Jan. 1, 1988
(Part 200-End) .....	17.00 .....	Jan. 1, 1988
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(Parts 51-199) .....	14.00 .....	Jan. 1, 1988
(Parts 200-399) .....	13.00 .....	*Jan. 1, 1987
(Parts 400-499) .....	13.00 .....	Jan. 1, 1988
(Part 500-End) .....	24.00 .....	Jan. 1, 1988
11 .....	10.00 .....	Jan. 1, 1988
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13 .....	20.00 .....	Jan. 1, 1988
14 (Parts 1-59) .....	21.00 .....	Jan. 1, 1988
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16 (Parts 0-149) .....	12.00 .....	Jan. 1, 1988
(Parts 150-999) .....	13.00 .....	Jan. 1, 1988
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(Parts 280-399).....	13.00	April 1, 1988
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(Parts 400-499).....	23.00	April 1, 1988
(Part 500-End).....	25.00	April 1, 1988
21 (Parts 1-99).....	12.00	April 1, 1988
(Parts 100-169).....	14.00	April 1, 1988
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(Parts 800-1299).....	18.00	April 1, 1988
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(Parts 800-End).....	16.00	July 1, 1988
33 (Parts 1-199).....	27.00	July 1, 1988
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34 (Parts 1-299).....	20.00	July 1, 1987
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(Part 400-End).....	23.00	July 1, 1987
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(Parts 61-80).....	12.00	July 1, 1988
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(Parts 400-424).....	21.00	July 1, 1988
(Parts 425-699).....	21.00	July 1, 1988
(Part 700-End).....	27.00	July 1, 1987
41 (Chapters 1-100).....	10.00	July 1, 1988
(Chapter 101).....	23.00	July 1, 1987
(Chapters 102-200).....	12.00	July 1, 1988
(Chapter 201-End).....	8.50	July 1, 1987
42 (Parts 1-60).....	15.00	Oct. 1, 1987
(Parts 61-399).....	5.50	Oct. 1, 1988
(Parts 400-429).....	21.00	Oct. 1, 1987
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